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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1954

OCTOBER 4, 1954, THROUGH APRIL 5, 1955

WALTER WYATT
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
ROBERT H. JACKSON, Associate Justice.[2]
HAROLD H. BURTON, Associate Justice.
TOM C. CLARK, Associate Justice.
SHERMAN MINTON, Associate Justice.
JOHN M. HARLAN, Associate Justice.[3]

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

Notes on p. IV.

NOTES.

[1] Proceedings in The Supreme Court on Monday, October 25, 1954, in memory of the late Mr. Chief Justice Vinson will be reported in 349 U. S.

[2] Mr. Justice Jackson died in Washington, D. C., on October 8, 1954. See *post*, p. VII. Services were held at the Cathedral Church of Saint Peter and Saint Paul, in Washington, D. C., on October 12, 1954, and at St. Luke's Protestant Episcopal Church in Jamestown, N. Y., on October 13, 1954. Interment was in Maple Grove Cemetery at Frewsburg, N. Y., on October 13, 1954. Proceedings in The Supreme Court on Monday, April 4, 1955, in memory of Mr. Justice Jackson will be reported in 349 U. S.

[3] The Honorable John Marshall Harlan, of New York, Judge of the United States Court of Appeals for the Second Circuit, was nominated by President Eisenhower on November 9, 1954, and on January 10, 1955, to be Associate Justice; the nomination was confirmed by the Senate on March 16, 1955; he was commissioned on March 17, 1955; and took the oaths and his seat on March 28, 1955. See *post*, p. IX.

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, JOHN M. HARLAN, 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.

April 4, 1955.

(For next previous allotment, see 347 U. S., p. v.)

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*By order of Nov. 22, 1954, the Court had temporarily assigned MR. JUSTICE FRANKFURTER to the Second Circuit. See *post*, p. 885.

DEATH OF MR. JUSTICE JACKSON.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 11, 1954.

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

THE CHIEF JUSTICE said:

One short week ago this Court convened for its 164th Term, its membership intact and cheerfully anticipating the work before us. Today the chair of our Brother Jackson is vacant, and we are sad indeed. He passed away last Saturday suddenly but by the Grace of God without suffering. For this we are all grateful, because he lived and died as was his great desire—active and useful to the end.

Able lawyer, statesman and jurist, his passing leaves a great void in this Court. We shall miss greatly his wise counsel, his clarity of expression and his genial companionship.

For 20 years, as General Counsel, as Solicitor General, as Attorney General of the United States, and as a member of this Court, he labored manfully with the complex and baffling problems of our time. His contributions were great. He has earned his rest.

Funeral services will be held tomorrow afternoon at three o'clock at the Washington Cathedral, this city. His body will then be taken tenderly to Jamestown, New York, the little city of his youth, where, in pleasant and familiar surroundings, it will abide in peace among his earliest friends.

In respect to his memory, this Court will now adjourn until Thursday, October 14, 1954, at twelve noon.

APPOINTMENT OF MR. JUSTICE HARLAN.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MARCH 28, 1955.

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

THE CHIEF JUSTICE said:

The President, with the advice and consent of the Senate, has appointed the Honorable John Marshall Harlan, Circuit Judge from New York, an Associate Justice of this Court to succeed Justice Jackson. Justice Harlan has taken the Constitutional Oath administered by the Chief Justice. He is now present in Court. The Clerk will read his commission. He will then take the Judicial Oath, to be administered by the Clerk, after which the Marshal will escort him to his seat on the bench.

The Clerk then read the commission as follows:

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 John Marshall Harlan of New York I have nominated, and, by and with the advice and consent of the Senate, do appoint him Associate Justice of the Supreme Court 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 John Marshall Harlan, 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 seventeenth day of March, in the year of our Lord one thousand nine hundred and fifty-five, and of the Independence of the United States of America the one hundred and seventy-ninth.

DWIGHT D. EISENHOWER

By the President:

HERBERT BROWNELL Jr.

Attorney General.

The oath of office was then administered by the Clerk, and MR. JUSTICE HARLAN was escorted by the Marshal to his seat on the bench.

TABLE OF CASES REPORTED

NOTE: Cases reported before page 801 are those decided with opinions of the Court. Those reported on pages 801 *et seq.* are memorandum decisions and orders.

318107 O - 55 - 2

318107 O - 55 - 3

318107 O - 55 - 4

TABLE OF CASES CITED

318107 O - 55 - 6

TABLE OF STATUTES CITED

(A) Statutes of the United States.

(B) STATUTES OF THE STATES AND TERRITORIES.

(C) TREATIES.

(D) FOREIGN STATUTES.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1954.

IN RE DISBARMENT OF ISSERMAN.

ON PETITION FOR REHEARING.

No. 5, Misc., October Term, 1952. Decided October 14, 1954.

Since a majority of the Justices participating do not find ground for disbarment as required by Rule 8 of the present Rules of this Court, the order of disbarment, 345 U. S. 286, is set aside and the rule to show cause is discharged.

Leonard B. Boudin for Isserman, respondent.

PER CURIAM.

April 6, 1953, an order was entered disbarring Isserman from the practice of law in this Court pursuant to Rule 2, par. 5, of this Court's Rules then in effect. See *In re Isserman,* 345 U. S. 286. The order of disbarment is now before us on a petition for rehearing. Rule 8 of our present Rules provides that "no order of disbarment will be entered except with the concurrence of a majority of the justices participating." The petition for rehearing is granted. A majority of the Justices participating do not find ground for disbarment of Isserman. Accordingly, the former order of disbarment is set aside and the rule against Isserman to show cause is discharged.

MR. JUSTICE BURTON, with whom MR. JUSTICE REED and MR. JUSTICE MINTON join, dissents for the reasons

stated in the opinion announced by Mr. Chief Justice Vinson, April 6, 1953, in *In re Isserman,* 345 U. S. 286.

MR. JUSTICE REED also calls attention to his dissent in *Sacher* v. *Association of the Bar,* 347 U. S. 388, 390.

THE CHIEF JUSTICE and MR. JUSTICE CLARK did not participate in the consideration or decision of this matter.

CHANDLER *v.* WARDEN FRETAG.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 39. Argued October 18, 1954.—Decided November 8, 1954.

Petitioner was indicted for housebreaking and larceny, which was punishable by imprisonment for three to ten years. At his trial in a state court, he was advised orally for the first time that, because of three prior convictions for felonies, he would be tried also as an habitual criminal and if convicted would be sentenced to life imprisonment. He asked for a continuance to enable him to obtain counsel on the habitual criminal accusation; but this was denied and he was forced to stand trial immediately and without counsel. He pleaded guilty to housebreaking and larceny, was convicted on both that charge and the habitual criminal accusation, and was sentenced to three years on the former charge and to life imprisonment on the latter. *Held:* By denying petitioner any opportunity to obtain counsel on the habitual criminal accusation, the trial court deprived him of the due process of law guaranteed by the Fourteenth Amendment. Pp. 4–10.

(a) By waiving counsel on the housebreaking and larceny charge, petitioner did not waive any right to counsel on the habitual criminal accusation. Pp. 6–9.

(b) Regardless of whether petitioner would have been entitled to have counsel appointed by the court, his right to be heard through his own counsel was unqualified. *Betts* v. *Brady*, 316 U. S. 455, distinguished. Pp. 9–10.

Reversed.

After serving a sentence of three years for housebreaking and larceny, petitioner applied to a Tennessee Circuit Court for release on a writ of habeas corpus from a life sentence as an habitual criminal. This was denied and the Supreme Court of Tennessee affirmed. This Court granted certiorari. 347 U. S. 933. *Reversed,* p. 10.

Earl E. Leming argued the cause for petitioner. With him on the brief were *Jas. P. Brown* and *Carl A. Cowan.*

Knox Bigham, Assistant Attorney General of Tennessee, argued the cause for respondent. With him on the brief were *Roy H. Beeler,* Attorney General, and *Nat Tipton,* Assistant Attorney General.

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

Petitioner is held in the custody of respondent, Warden of the Tennessee State Penitentiary, under a sentence of life imprisonment as an habitual criminal. Challenging the validity of that sentence under the Fourteenth Amendment, he commenced this action in the Tennessee courts to obtain his freedom. We granted certiorari, 347 U. S. 933, because of the substantial question presented by his constitutional claim.

The basic facts are undisputed. Petitioner is a middle-aged Negro of little education. He was indicted on March 10, 1949, for the offense of housebreaking and larceny, an offense punishable by a term of three to ten years. The indictment charged him with breaking and entering a business house and stealing therefrom sundry items of the aggregate value of $3. Following his arrest, petitioner was released on bond while awaiting trial set for May 17, 1949. On that day, without an attorney and without notice of any habitual criminal accusation against him, petitioner appeared in court intending to plead guilty to the indictment. He "felt that an attorney could do him no good on said charge [housebreaking and larceny]." When his case was called for trial, he was orally advised by the trial judge that he would also be tried as an habitual criminal because of three alleged prior felonies.[1] He

[1] The Tennessee Habitual Criminal Act, at the time of petitioner's trial, permitted an oral accusation. Williams' Tenn. Code, 1934 (1949 Supp.), § 11863.5. It was subsequently amended to require the inclusion of the accusation in the indictment on the substantive offense. Tenn. Code, 1932 (1950 Supp.), § 11863.5.

was informed that conviction under the Tennessee Habitual Criminal Act carries a mandatory sentence of life imprisonment with no possibility of parole.[2] Petitioner promptly asked for a continuance to enable him to obtain counsel on the habitual criminal accusation. His request was summarily denied, a jury was impaneled, and the case proceeded immediately to trial. Petitioner entered his plea of guilty to the housebreaking and larceny charge, and the prosecution introduced evidence in corroboration of the plea. At the conclusion of the trial, the judge instructed the jury to raise their right hands if they accepted petitioner's guilty plea on the housebreaking and larceny charge and if they approved of a three-year sentence on that charge. The jury responded by raising their right hands. The judge then instructed the jury to raise their right hands a second time if they found petitioner to be an habitual criminal. Once again the jury, without ever having left the jury box, raised their right hands. The entire proceeding—from the impaneling of the jury to the passing of sentence—consumed between five and ten minutes.

Three years later, having served his sentence on the housebreaking and larceny charge, petitioner applied to the Circuit Court of Knox County for habeas corpus relief.[3] He alleged that his sentence as an habitual criminal was invalid on the ground, among others, that he had been denied an opportunity to obtain counsel in his defense.[4]

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[2] Williams' Tenn. Code, 1934 (1949 Supp.), § 11863.2.

[3] Under Tennessee law, a defendant sentenced on both a felony charge and an habitual criminal accusation must serve his term on the felony charge before he can attack the validity of his habitual criminal sentence in habeas corpus proceedings. See *State ex rel. Grandstaff* v. *Gore,* 182 Tenn. 94, 98, 184 S. W. 2d 366, 367.

[4] Petitioner also alleged, wholly apart from his claim of denial of counsel, that he was deprived of due process by the failure of the trial court to give him any pretrial notice of the habitual criminal accusation. We find it unnecessary to pass on this contention in

At a hearing on the application, petitioner, his wife, his brother, a juror, and the prosecuting attorney testified as to their recollection of petitioner's trial.[5] All five witnesses were in full accord as to the above-stated facts. They differed only on whether petitioner had pleaded guilty to the habitual criminal accusation and whether the prosecution had introduced any evidence concerning petitioner's prior convictions. The prosecuting attorney, the only witness for the state, testified that petitioner had pleaded guilty to the habitual criminal accusation as well as the housebreaking and larceny charge, and that the record of petitioner's prior convictions had been read to the jury; the other four witnesses denied it. In all other respects, the testimony of the prosecuting attorney substantiated the testimony of the other four witnesses. Thus he conceded that petitioner had not been represented by counsel, that petitioner had not been given any pretrial notice of the habitual criminal accusation, that petitioner "said he wanted the case put off as he was advised by the Court that he was being tried as an habitual criminal in addition to house breaking and larceny. He asked that the case be put off so he could get a lawyer and [the trial judge] told him he had had since January up to May to get a lawyer."

The Circuit Court, after hearing the case on the merits, accepted—as does the respondent here—petitioner's factual allegations as to the denial of counsel. The Circuit Court nevertheless upheld the validity of peti-

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view of our disposition of the case. We also note that in 1950, subsequent to petitioner's trial, the Tennessee Habitual Criminal Act was amended to require pretrial notice. Tenn. Code, 1932 (1950 Supp.), § 11863.5.

[5] The record of petitioner's trial consists only of the indictment and the judgment of conviction. There was no stenographic transcript of the proceedings. The judgment recites that petitioner had "counsel present," but it is conceded that the recital is not true.

tioner's sentence and the Tennessee Supreme Court affirmed. Both courts emphasized that the Tennessee Habitual Criminal Act, like similar legislation in other states, does not create a separate offense but only enhances a defendant's punishment on being convicted of his fourth felony. *Tipton* v. *State,* 160 Tenn. 664, 672–678, 28 S. W. 2d 635, 637–639. See also *McDonald* v. *Massachusetts,* 180 U. S. 311, 313; *Graham* v. *West Virginia,* 224 U. S. 616, 623–624. From that premise, the courts below reasoned that petitioner had waived any right to counsel on the habitual criminal accusation by waiving counsel on the housebreaking and larceny charge. With this conclusion, we cannot agree.

Section 1 of the Act defines "habitual criminal" in considerable detail.[6] Section 7 prescribes standards for the admissibility of the record of the prior convictions of a defendant charged with being an habitual criminal.[7]

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[6] Williams' Tenn. Code, 1934 (1949 Supp.), § 11863.1:

"Any person who has either been three times convicted within this state of felonies, two of which, under section 11762 of the Code of Tennessee, rendered him infamous, or which were had under sections 10777, 10778, 10788, 10790 and 10797 of said Code, or which were for murder in the first degree, rape, kidnapping for ransom, treason or other crime punishable by death under existing laws, but for which the death penalty was not inflicted, or who has been three times convicted under the laws of any other state, government or country of crimes, two of which, if they had been committed in this state, would have rendered him infamous, or would have been punishable under said sections 10777, 10778, 10788, 10790 and 10797 of said Code, or would have been murder in the first degree, rape, kidnapping for ransom, treason or other crime punishable by death under existing laws, but for which the death penalty was not inflicted, shall be considered, for the purposes of this act, and is hereby declared to be an habitual criminal, provided that petit larceny shall not be counted as one of such three convictions, but is expressly excluded, and provided further that each of such three convictions shall be for separate offenses, committed at different times, and on separate occasions."

[7] Williams' Tenn. Code, 1934 (1949 Supp.), § 11863.7.

This section, the Tennessee Supreme Court has held, clearly authorizes "[a]n issue of fact as to the verity of such record, or as to the identity of the accused with the person named in such record . . . ." *Tipton* v. *State,* 160 Tenn. 664, 678, 28 S. W. 2d 635, 639. Proof of the defendant's prior convictions is ". . . a condition precedent to the imposition of the increased punishment provided." *Tipton* v. *State, supra.* Section 6 of the Act, moreover, provides that the increased punishment cannot be imposed unless the jury specially finds that the defendant is an habitual criminal as charged.[8] "Under section 6 of the Act," according to the Tennessee Supreme Court, "the question as to whether the defendant is an habitual criminal is one for the jury to decide." *McCummings* v. *State,* 175 Tenn. 309, 311, 134 S. W 2d 151, 152. In short, even though the Act does not create a separate offense, its applicability to any defendant charged with being an habitual criminal must be determined by a jury in a judicial hearing. Compare *Williams* v. *New York,* 337 U. S. 241. That hearing and the trial on the felony charge, although they may be conducted in a single proceeding, are essentially independent of each other.[9] Thus, for example, it is possible that the jury in the instant case might have found petitioner guilty on the housebreaking and larceny charge and yet found him innocent of being an habitual criminal. Apparently recognizing this possibility, petitioner at the earliest possible moment affirmatively sought an opportunity to obtain counsel on the habitual criminal accusation. Immediately on being informed of the accusation and suddenly finding himself in danger of life imprisonment, he re-

[8] Williams' Tenn. Code, 1934 (1949 Supp.), § 11863.6.

[9] Compare, *e. g.,* the West Virginia procedure which provides for a separate hearing on the habitual criminal issue. See *Graham* v. *West Virginia,* 224 U. S. 616.

quested a continuance so that he could engage the services of an attorney; but the trial court refused the request and forced him to stand immediate trial. On these undisputed facts, it is clear beyond question that petitioner did not waive counsel on the habitual criminal accusation. See *Rice* v. *Olson,* 324 U. S. 786, 788–789.

The Tennessee Attorney General denies, however, that petitioner had any federal constitutional right to counsel. He relies on the doctrine enunciated in *Betts* v. *Brady,* 316 U. S. 455. But that doctrine has no application here. Petitioner did not ask the trial judge to furnish him counsel; rather, he asked for a continuance so that he could obtain his own. The distinction is well established in this Court's decisions. *Powell* v. *Alabama,* 287 U. S. 45, 71; *Betts* v. *Brady,* 316 U. S. 455, 466, 468; *House* v. *Mayo,* 324 U. S. 42, 46. Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified.[10] See *Palko* v. *Connecticut,* 302 U. S. 319, 324–325. As this Court stated over 20 years ago in *Powell* v. *Alabama, supra,* at 68–69:

> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is in-

[10] Tennessee statutes appear to confer both rights on a defendant in a criminal case. Tenn. Code, 1932, §§ 11733, 11734, 11547, 11548. See also Art. I, § 9, of the Declaration of Rights in the Tennessee Constitution.

318107 O - 55 - 7

> capable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.*" (Italics added.)

A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth. *Avery* v. *Alabama,* 308 U. S. 444, 446; *House* v. *Mayo,* 324 U. S. 42, 46; *White* v. *Ragen,* 324 U. S. 760, 764; *Hawk* v. *Olson,* 326 U. S. 271, 277–278. By denying petitioner any opportunity whatever to obtain counsel on the habitual criminal accusation, the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment.

It follows that petitioner is being held by respondent under an invalid sentence. The judgment below, sustaining the denial of habeas corpus relief, is accordingly reversed.

Judgment reversed.

OFFUTT *v.* UNITED STATES.

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

No. 27. Argued October 22, 1954.—Decided November 8, 1954.

In a criminal trial in a Federal District Court, the judge became personally embroiled with the defense counsel in a protracted wrangle, during which the judge displayed personal animosity and a lack of proper judicial restraint. At the close of the trial, acting under Rule 42 (a) of the Federal Rules of Criminal Procedure, the judge summarily found the defense counsel guilty of criminal contempt for "contumacious, and unethical conduct . . . during the trial" and ordered him committed for ten days. The Court of Appeals, while agreeing that counsel was guilty of reprehensible misconduct, found that "appellant's conduct cannot fairly be considered apart from that of the trial judge," and reduced the punishment to 48 hours in affirming the conviction. *Held:* In the exercise of this Court's supervisory authority over the administration of criminal justice in the federal courts, the contempt conviction is set aside and the cause is remanded to the District Court with a direction that the contempt charges be retried before a different judge. *Cooke* v. *United States*, 267 U. S. 517. Pp. 11–18.

93 U. S. App. D. C. 148, 208 F. 2d 842, reversed.

Warren E. Magee argued the cause for petitioner. With him on the brief was *Charlotte Maskey.*

Gray Thoron argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case is here on review of a modified affirmance by the Court of Appeals of an order by the District Court summarily committing the petitioner for criminal contempt.

The proceeding grew out of the trial of one Peckham for abortion under D. C. Code, 1951, § 22–201, 31 Stat. 1322. The petitioner was Peckham's trial counsel. Almost from the outset, a clash between the presiding judge and petitioner became manifest, which, it is fair to say, colored the course of the trial throughout its 14 days, and with increasing personal overtones. The judge again and again admonished petitioner for what he deemed disregard of rulings and other behavior outside the allowable limits of aggressive advocacy, and warned him of the consequences by way of punishment for contempt which such conduct invited. On the other hand, these interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor. Such characterization of necessity derives from an abiding impression left from a reading of the entire record.

At the close of the trial, after the jury had retired for deliberation, the judge, acting under the procedure prescribed by Rule 42 (a) of the Federal Rules of Criminal Procedure [1] and invoking the authority of *Sacher* v. *United States,* 343 U. S. 1, found the petitioner guilty of criminal contempt on the basis of a certificate filed under the Rule, containing 12 findings of "contumacious, and unethical conduct in open court during the trial," and ordered him committed for 10 days to the custody of the United States Marshal for the District of Columbia.

The Court of Appeals found that four of the 12 findings amply supported the commitment, but reduced the punishment from 10 days to 48 hours. It concluded that "the

[1] "Rule 42. Criminal Contempt.

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

record does not support the penalty imposed. Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other. The judge's treatment of appellant, examples of which are included in an appendix to our opinion in Peckham v. United States, U. S. App. D. C., — F. 2d —, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand, leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours." 93 U. S. App. D. C. 148, 150, 208 F. 2d 842, 843–844. As indicated above, the Court of Appeals reversed Peckham's conviction because it found that the judge's behavior barred the court "from sustaining the judgment as the product of a fair and impartial trial." *Peckham* v. *United States,* 93 U. S. App. D. C. 136, 145, 210 F. 2d 693, 702.

In view of this Court's "supervisory authority over the administration of criminal justice in the federal courts," *McNabb* v. *United States,* 318 U. S. 332, 341, and the importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt, we brought the case here. 347 U. S. 932.

We shall not retrace the ground so recently covered in the *Sacher* case, *supra.* In enforcing Rule 42 (a), the Court in that case emphasized its duty to safeguard two indispensable conditions to the fair administration of criminal justice: (1) counsel must be protected in the right of an accused to "fearless, vigorous and effective" advocacy, no matter how unpopular the cause in which it is employed; (2) equally so will this Court "protect the processes of orderly trial, which is the supreme object of the lawyer's calling." 343 U. S., at 13–14. Rule 42 (a) was not an innovation. It did not confer power upon district judges not possessed prior to March 21, 1946. 327 U. S. 821. "This rule," the Advisory Committee on the rules of criminal procedure stated, "is substantially a

restatement of existing law, *Ex parte Terry,* 128 U. S. 289; *Cooke* v. *United States,* 267 U. S. 517, 534." The pith of this rather extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of federal crimes generally, is that the necessities of the administration of justice require such summary dealing with obstructions to it. It is a mode of vindicating the majesty of law, in its active manifestation, against obstruction and outrage. The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer.

Of course personal attacks or innuendoes by a lawyer against a judge, with a view to provoking him, only aggravate what may be an obstruction to the trial. The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.

Duly mindful of the fact that the exercise of the power of summary punishment for contempt "is a delicate one and care is needed to avoid arbitrary or oppressive conclusions," this Court in *Cooke* v. *United States, supra,* without in the slightest condoning contemptuous behavior on the part of a lawyer, deemed it desirable that "where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly

ask that one of his fellow judges take his place." 267 U. S., at 539.

The Government has vigorously pressed upon us the leeway that must be allowed to a trial judge in assessing the necessities of such a situation. We do not mean to imprison the discretion of judges within rigid mechanical rules. The nature of the problem precludes it. Nor are we unmindful of the fact that the ultimate finding of reprehensible misconduct by petitioner was sustained by the Court of Appeals. That great weight is to be given to the findings of fact by the two lower courts is a rule of wisdom in the exercise of the reviewing power of this Court. But in the enforcement of the rule it is important to discriminate between more or less subordinate facts leading to a judgment of their legal significance, and a conclusion—though concurred in by two courts—that may in fact imply a standard of law on which judgment on the case in its entirety is based. *Baumgartner* v. *United States,* 322 U. S. 665, 670–671; *United States* v. *Appalachian Elec. Power Co.,* 311 U. S. 377, 403–404. We are not intimating that the Court of Appeals was not justified in finding ample support for its conclusion that the trial judge was warranted in deeming petitioner's conduct as such contemptuous. The real issue is whether under the decision of the *Cooke* case such a ruling should have been made by the trial judge, or whether for the very purpose of vindicating justice for which the power of summary contempt is available, the determination of petitioner's guilt and the punishment properly to be meted out on a finding of guilt should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct.

The fact that the Court of Appeals reduced the sentence from 10 days to 48 hours because the petitioner's conduct "cannot fairly be considered apart from that of the trial judge," is compelling proof that the latter failed

to represent the impersonal authority of law. Plainly, the Court of Appeals thought that in the trial court's disposition of the misconduct of the petitioner there was an infusion of personal animosity. And indeed that court found that such was the fact on a full consideration of the record in the *Peckham* case and for that reason reversed Peckham's conviction. That court spoke of "the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation," which it concluded "demonstrated a bias and lack of impartiality." *Peckham* v. *United States, supra,* 93 U. S. App. D. C., at 145, 210 F. 2d, at 702.

It bears repeating that the whole record amply supports this characterization of the trial judge by the Court of Appeals.[2] And his feeling toward the lawyer on whom

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[2] For our purposes it will be sufficient to quote two specific instances:

"The Court: Motion denied. Proceed.

"Mr. Offutt: I object to Your Honor yelling at me and raising your voice like that.

"The Court: Just a moment. If you say another word I will have the Marshal stick a gag in your mouth." (R. 215.)

"The Court: Don't argue with the Court.

"Mr. Offutt: I am not arguing with the Court, Your Honor.

"The Court: Don't answer back to the Court, either.

"Mr. Offutt: Oh, I thought Your Honor—I am merely trying to present my point.

"The Court: Proceed with the next question.

"Mr. Offutt: Thank you, Your Honor.

"Your Honor, I object to your raising your voice like that and shouting at me, and I urge Your Honor not to do it.

"The Court: Well, you are misbehaving, Mr. Offutt.

"Mr. Offutt: And I have a right—

"The Court: And it is my function to hold the reins tight and preserve order and decorum in the courtroom.

"Mr. Offutt: But not to yell at me, Your Honor.

"And I submit I am entitled, and my duty is to make objections

he had to pass sentence is revealed by his statement to the jury in discharging them.[3]

The question with which we are concerned is not the reprehensibility of petitioner's conduct and the consequences which he should suffer. Our concern is with the fair administration of justice. The record discloses not a rare flare-up, not a show of evanescent irritation—a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two. For one reason or another the judge failed to impose his moral authority upon the proceedings. His behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury. Such an atmosphere will also make for dispatch insofar as is consonant with a fair trial. The manner in which this trial was conducted doubtless contributed to the wastefulness of 14 trial days for a case of such limited scope as was the *Peckham* prosecution.

We conclude that application of the rule pronounced in *Cooke* v. *United States* is called for. The fact that the Court of Appeals here reduced the sentence im-

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and to state for the record, and I am putting my objections on the record.

"The Court: You have forfeited your right to be treated with the courtesy that this Court extends to all members of the Bar." (R. 250.)

[3] "I also realize that you had a difficult and a disagreeable task in this case. You have been compelled to sit through a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst." (R. 260.)

posed by the trial judge does not take this situation out of the moral and judicial considerations expounded on behalf of the Court by Mr. Chief Justice Taft. To sanction such a course of procedure would give it encouragement. In the language of the *Cooke* case, with one appropriate change, "We think, therefore, that when this case again reaches the District Court to which it must be remanded, the judge who imposed the sentence herein should invite the Chief Judge of the District Court to assign another judge to sit in the second hearing of the charge against the petitioner." See 267 U. S., at 539.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join in the opinion of the Court and concur in the reversal and remand of the case for hearing before another judge. They would go further, however, and direct that petitioner be accorded a jury trial, for reasons set out in their dissents in *Sacher* v. *United States,* 343 U. S. 1, 14–23, and *Isserman* v. *Ethics Committee,* 345 U. S. 927.

MR. JUSTICE REED and MR. JUSTICE BURTON dissent. They would affirm the judgment of the Court of Appeals on the basis of its opinion.

MR. JUSTICE MINTON, dissenting.

This case goes back to the District Court for hearing by another judge on charges as to which, on the record, this Court admits petitioner is guilty. It is only a question of how much punishment he shall receive. Two days, under all the circumstances, did not seem too much to the Court of Appeals that reviewed the conduct of judge and counsel, nor does it to me. I would not, after *Sacher,* apply the *Cooke* case to the circumstances of this proceeding. The writ of certiorari should be dismissed as improvidently granted.

McALLISTER *v.* UNITED STATES.

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

No. 23. Argued October 19, 1954.—Decided November 8, 1954.

1. In reviewing a judgment of a Federal District Court, sitting without a jury in admiralty, an appellate court exercises no greater scope of review than it exercises under Rule 52 (a) of the Federal Rules of Civil Procedure. A reviewing court may not set aside the judgment below unless it is "clearly erroneous." Pp. 20–21.
2. On the record in this case under the Suits in Admiralty Act, the evidence was sufficient to sustain the finding of the District Court that petitioner contracted polio as a result of the negligence of the master of his ship in taking aboard, transporting and exposing the crew to contacts with, Chinese soldiers, truck drivers and mechanics from Shanghai, where the master knew polio to be prevalent; and the District Court's judgment for petitioner was not "clearly erroneous." Pp. 21–23.

207 F. 2d 952, reversed.

Jacob Rassner argued the cause for petitioner. With him on the brief was *Samuel Goldstein.*

Ralph S. Spritzer argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Morton Hollander.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The petitioner brought suit against the United States under the Suits in Admiralty Act, 46 U. S. C. § 741 *et seq.*, to recover damages for negligence in creating conditions aboard ship whereby he contracted polio and for negligence in the treatment thereof. The District Court, sitting without a jury, made findings of fact and stated its conclusions of law thereon (Admiralty Rules, No. 46½) in which it found the respondent not guilty of negligence in the treatment of the petitioner after he became ill, but found it guilty of negligence in permitting condi-

tions to exist on board ship which were conducive to the transmission of polio whereby the petitioner was unduly exposed and thereby contracted the disease. Judgment for damages was entered against respondent, and on appeal the Court of Appeals reversed on the ground that no proximate cause was shown between the negligence and the contraction of polio. 207 F. 2d 952. We granted certiorari. 347 U. S. 932.

The first question presented is whether the Court of Appeals in reviewing the District Court's findings applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52 (a) of the Federal Rules of Civil Procedure. *Boston Ins. Co.* v. *Dehydrating Process Co.*, 204 F. 2d 441, 444 (C. A. 1st Cir.); *C. J. Dick Towing Co.* v. *The Leo*, 202 F. 2d 850, 854 (C. A. 5th Cir.); *Union Carbide & Carbon Corp.* v. *United States*, 200 F. 2d 908, 910 (C. A. 2d Cir.); *Koehler* v. *United States*, 187 F. 2d 933, 936 (C. A. 7th Cir.); *Walter G. Hougland, Inc.* v. *Muscovalley*, 184 F. 2d 530, 531 (C. A. 6th Cir.), cert. denied, 340 U. S. 935; *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, 126 F. 2d 992, 994–995 (C. A. 2d Cir.). A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395. We do not find that the Court of Appeals departed from this standard, although we do disagree with the result reached under the application of the standard. In relation to the District Court's findings we stand in review in the same position as the Court of Appeals. The ques-

tion, therefore, is whether the findings of the District Court are clearly erroneous.

The petitioner was second assistant engineer on board the S. S. *Edward B. Haines* which was in Chinese waters from September 13, 1945, to December 3, 1945. During this time the master of the ship was informed that polio and other contagious diseases were prevalent in Shanghai, and a bulletin was posted on ship warning the crew thereof and directing them while ashore to exercise care in eating and drinking and to avoid association with the inhabitants ashore. So concerned was the master about this condition that he mustered the members of the crew on several occasions and warned them to the same effect. The District Court found that the petitioner obeyed these warnings, and there was no evidence in the record to the contrary. While the ship was in port at Shanghai, November 11, 1945, the record does not show that the petitioner went ashore. The last time he was ashore was November 1. On November 11, a number of Chinese stevedores came aboard to do some work, and there were also taken aboard at that time forty or fifty Chinese soldiers and fifty truck drivers and mechanics to be transported to Tsingtao. These soldiers, truck drivers and mechanics, fresh from Shanghai, the area infested by polio, were permitted wide use of the ship, including toilet facilities and the only drinking fountain, which was located on deck. To supplement the toilet facilities an open wooden trough was laid along the deck and discharged over the side of the ship. A hose was provided for flushing the trough, and on several occasions the petitioner had to go on deck to turn the water on to flush it. There was expert testimony by doctors that polio derives from a virus usually spread by people who are carriers of the disease to healthy persons who are susceptible. The virus is carried by human beings who have the organism in their intestinal tract or in their nose and throat. It enters

the respiratory or the intestinal tract of the susceptible person and is carried to the central nervous system where the disease produces injury.

The petitioner first reported his symptoms on November 24, 1945. The usual period of incubation for the virus causing polio is believed to be about two weeks, with a maximum of two and one-half weeks. There was expert testimony that the producing cause of polio in the petitioner was contact with the Chinese stevedores, soldiers, truck drivers and mechanics who came aboard the ship. According to the expert testimony, polio usually does not occur unless there have been previous cases of the disease or contact with persons who have it. The petitioner had an uneventful trip of months before reaching the Orient with individuals who had no polio; then suddenly he is thrown in contact with Chinese from the Shanghai area where polio is prevalent, and thereafter, within the normal period of incubation, he comes down with the disease.

On evidence showing these facts, including the opinion of the experts, we think there was substantial evidence from which the District Court could and did find that respondent was negligent in permitting these Chinese, from the infested area of Shanghai, to have the run of the ship and use of its facilities, and in furnishing the crude and exposed latrine provided on the deck of the ship, by reason whereof the petitioner contracted polio.

Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved, supported as they were by the best judgment medical experts have upon the subject today, that petitioner was contaminated by the Chinese who came aboard the ship November 11, 1945, at Shanghai. Certainly we cannot say on review

that a judgment based upon such evidence is clearly erroneous. *Myers* v. *Reading Co.*, 331 U. S. 477, 485–486; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29. We think it was an allowable judgment of the District Court, and the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE REED would affirm on the grounds stated by the Court of Appeals.

MR. JUSTICE FRANKFURTER.

The petition on the basis of which a writ of certiorari was sought in this case presented two questions of law claimed to have general importance. The course of the argument at the bar left no doubt that these were not the questions which were involved in the decision of the Court of Appeals under review. Neither is the question which this Court is now deciding. Both counsel and this Court have viewed the case as no more than an ordinary action for negligence, giving rise, as is frequently the case, to conflict in evaluation of the evidence. In short, the Court of Appeals read the evidence one way and this Court another. If there is any class of cases which plainly falls outside the professed considerations by which this Court exercises its discretionary jurisdiction, it is cases involving only interpretation of facts bearing on the issue of causation or negligence. The standards of judgment in this type of litigation are well settled. The significance of facts becomes the bone of contention. And the facts stir differences that derive from the very elusiveness of the meaning of the myriad unique sets of circumstances in negligence cases. One's deep sympathy is of course aroused by a victim of the hazards of negligence litigation in situations like the one before us. But the remedy for an obsolete and uncivilized system of compensation for loss of life or limb of crews on ships and trains is

not intermittent disregard of the considerations which led Congress to entrust this Court with the discretion of certiorari jurisdiction. The remedy is an adequate and effective system of workmen's compensation.

The present case is one of those instances when a full appreciation before the writ was granted of what the argument developed should have led to a denial of the writ. If this Court is to entertain a negligence case solely because we stand in review in the same position as the Court of Appeals with relation to the District Court and disagree with the result which the Court of Appeals reached in the application of the right standards, the opportunity that is afforded in this case for a review of the Court of Appeals is an opportunity that should generally be afforded when the Court of Appeals reverses a District Court. (Incidentally, this Court is not reviewing the District Court. It reviews the Court of Appeals' review of the District Court.*)

Again and again and again has it been authoritatively announced that controversies such as this are not for this Court. Nor does it follow that because the case in fact was brought here and has been argued, the merits should be decided. The short answer is that to entertain this kind of a case inevitably will encourage petitions for certiorari in other like cases tendering an issue of more general importance which close examination proves wanting. Thus will again begin demands on the Court which it wisely cannot discharge and for which legislative relief had to come, or a feeling of discrimination will be engendered in taking some cases that ought not to be taken and rejecting others.

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*See *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503: "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

These controlling considerations were thus put by Mr. Chief Justice Taft on behalf of the entire Court:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393.

With due regard to the Court's jurisdiction on writ of certiorari (Revised Rules of the Supreme Court, No. 19) and to the effective adjudication of those cases, inevitably abundant, for which the Court sits, the Court has again and again dismissed the writ as improvidently granted after a preliminary and necessarily tentative consideration of the petition. *United States* v. *Rimer*, 220 U. S. 547; *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430; *Tyrrell* v. *District of Columbia*, 243 U. S. 1; *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387; *Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508; *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314; *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U. S. 813; *Sanchez* v. *Borras*, 283 U. S. 798; *Franklin-American Trust Co.* v. *St. Louis Union Trust Co.*, 286 U. S. 533; *Moor* v. *Texas & N. O. R. Co.*, 297 U. S. 101; *Texas & New Orleans R. Co.* v. *Neill*, 302 U. S. 645; *Goodman* v. *United States*, 305 U. S. 578; *Goins* v. *United States*, 306 U. S. 622; *McCullough* v. *Kammerer Corp.*, 323 U. S. 327; *McCarthy* v. *Bruner*, 323 U. S. 673.

I would dismiss the writ as improvidently granted.

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BERMAN ET AL., EXECUTORS, *v.* PARKER ET AL.

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

No. 22. Argued October 19, 1954.—Decided November 22, 1954.

The District of Columbia Redevelopment Act of 1945 is constitutional, as applied to the taking of appellants' building and land (used solely for commercial purposes) under the power of eminent domain, pursuant to a comprehensive plan prepared by an administrative agency for the redevelopment of a large area of the District of Columbia so as to eliminate and prevent slum and substandard housing conditions—even though such property may later be sold or leased to other private interests subject to conditions designed to accomplish these purposes. Pp. 28–36.

(a) The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. Pp. 31–32.

(b) Subject to specific constitutional limitations, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation enacted in the exercise of the police power; and this principle admits of no exception merely because the power of eminent domain is involved. P. 32.

(c) This Court does not sit to determine whether or not a particular housing project is desirable. P. 33.

(d) If Congress decides that the Nation's Capital shall be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. P. 33.

(e) Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. P. 33.

(f) Once the public purpose has been established, the means of executing the project are for Congress and Congress alone to determine. P. 33.

(g) This Court cannot say that public ownership is the sole method of promoting the public purposes of a community redevelopment project; and it is not beyond the power of Congress to utilize an agency of private enterprise for this purpose or to authorize the taking of private property and its resale or lease to the same or other private parties as part of such a project. P. 34.

(h) It is not beyond the power of Congress or its authorized agencies to attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. Redevelopment of an entire area under a balanced integrated plan so as to include not only new homes but also schools, churches, parks, streets, and shopping centers is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power. Pp. 34–35.

(i) The standards contained in the Act are sufficiently definite to sustain the delegation of authority to administrative agencies to execute the plan to eliminate not only slums but also the blighted areas that tend to produce slums. P. 35.

(j) Once the public purpose is established, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislature. Pp. 35–36.

(k) If the Redevelopment Agency considers it necessary in carrying out a redevelopment project to take full title to the land, as distinguished from the objectionable buildings located thereon, it may do so. P. 36.

(l) The rights of these property owners are satisfied when they receive the just compensation which the Fifth Amendment exacts as the price of the taking. P. 36.

117 F. Supp. 705, modified and affirmed.

James C. Toomey and *Joseph H. Schneider* argued the cause for appellants. With them on the brief was *Albert Ginsberg.*

Solicitor General Sobeloff argued the cause for appellees. *Assistant Attorney General Morton, Oscar H. Davis, Roger P. Marquis, George F. Riseling* and *William S. Cheatham* were with him on a brief for the District of Columbia Redevelopment Land Agency and the National Capital Planning Commission, appellees.

Vernon E. West, Chester H. Gray, Milton D. Korman, Harry L. Walker and *J. Hampton Baumgartner, Jr.* filed a brief for Renah F. Camalier and Louis W. Prentiss, Commissioners of the District of Columbia, appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal (28 U. S. C. § 1253) from the judgment of a three-judge District Court which dismissed a complaint seeking to enjoin the condemnation of appellants' property under the District of Columbia Redevelopment Act of 1945, 60 Stat. 790, D. C. Code, 1951, §§ 5-701–5-719. The challenge was to the constitutionality of the Act, particularly as applied to the taking of appellants' property. The District Court sustained the constitutionality of the Act. 117 F. Supp. 705.

By § 2 of the Act, Congress made a "legislative determination" that "owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose." *

Section 2 goes on to declare that acquisition of property is necessary to eliminate these housing conditions.

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*The Act does not define either "slums" or "blighted areas." Section 3 (r), however, states:

" 'Substandard housing conditions' means the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia."

Congress further finds in § 2 that these ends cannot be attained "by the ordinary operations of private enterprise alone without public participation"; that "the sound replanning and redevelopment of an obsolescent or obsolescing portion" of the District "cannot be accomplished unless it be done in the light of comprehensive and coordinated planning of the whole of the territory of the District of Columbia and its environs"; and that "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use."

Section 4 creates the District of Columbia Redevelopment Land Agency (hereinafter called the Agency), composed of five members, which is granted power by § 5 (a) to acquire and assemble, by eminent domain and otherwise, real property for "the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight."

Section 6 (a) of the Act directs the National Capital Planning Commission (hereinafter called the Planning Commission) to make and develop "a comprehensive or general plan" of the District, including "a land-use plan" which designates land for use for "housing, business, industry, recreation, education, public buildings, public reservations, and other general categories of public and private uses of the land." Section 6 (b) authorizes the Planning Commission to adopt redevelopment plans for specific project areas. These plans are subject to the approval of the District Commissioners after a public hearing; and they prescribe the various public and private land uses for the respective areas, the "standards of population density and building intensity," and "the amount or character or class of any low-rent housing." § 6 (b).

Once the Planning Commission adopts a plan and that plan is approved by the Commissioners, the Planning Commission certifies it to the Agency. § 6 (d). At that point, the Agency is authorized to acquire and assemble the real property in the area. *Id.*

After the real estate has been assembled, the Agency is authorized to transfer to public agencies the land to be devoted to such public purposes as streets, utilities, recreational facilities, and schools, § 7 (a), and to lease or sell the remainder as an entirety or in parts to a redevelopment company, individual, or partnership. § 7 (b), (f). The leases or sales must provide that the lessees or purchasers will carry out the redevelopment plan and that "no use shall be made of any land or real property included in the lease or sale nor any building or structure erected thereon" which does not conform to the plan, §§ 7 (d), 11. Preference is to be given to private enterprise over public agencies in executing the redevelopment plan. § 7 (g).

The first project undertaken under the Act relates to Project Area B in Southwest Washington, D. C. In 1950 the Planning Commission prepared and published a comprehensive plan for the District. Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was necessary to redevelop Area B in the interests of public health. The population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes.

The plan for Area B specifies the boundaries and allocates the use of the land for various purposes. It makes detailed provisions for types of dwelling units and provides that at least one-third of them are to be low-rent

housing with a maximum rental of $17 per room per month.

After a public hearing, the Commissioners approved the plan and the Planning Commission certified it to the Agency for execution. The Agency undertook the preliminary steps for redevelopment of the area when this suit was brought.

Appellants own property in Area B at 712 Fourth Street, S. W. It is not used as a dwelling or place of habitation. A department store is located on it. Appellants object to the appropriation of this property for the purposes of the project. They claim that their property may not be taken constitutionally for this project. It is commercial, not residential property; it is not slum housing; it will be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use. That is the argument; and the contention is that appellants' private property is being taken contrary to two mandates of the Fifth Amendment—(1) "No person shall . . . be deprived of . . . property, without due process of law"; (2) "nor shall private property be taken for public use, without just compensation." To take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man's property merely to develop a better balanced, more attractive community. The District Court, while agreeing in general with that argument, saved the Act by construing it to mean that the Agency could condemn property only for the reasonable necessities of slum clearance and prevention, its concept of "slum" being the existence of conditions "injurious to the public health, safety, morals and welfare." 117 F. Supp. 705, 724–725.

The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. See *District of Columbia* v. *Thomp-*

son Co., 346 U. S. 100, 108. We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (see *Block* v. *Hirsh*, 256 U. S. 135) or the States legislating concerning local affairs. See *Olsen* v. *Nebraska*, 313 U. S. 236; *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525; *California State Association* v. *Maloney*, 341 U. S. 105. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. See *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66; *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 552.

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. See *Noble State Bank* v. *Haskell*, 219 U. S. 104, 111. Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm,

which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. See *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, 529–530; *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 679. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See *Luxton* v. *North River Bridge Co., supra;* cf. *Highland* v. *Russell Car Co.,* 279 U. S. 253. The public end may be as well or better served through an

agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the over-all plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose.

In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners. The particular uses to be made of the land in the project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes

but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented. Cf. *Gohld Realty Co.* v. *Hartford,* 141 Conn. 135, 141–144, 104 A. 2d 365, 368–370; *Hunter* v. *Redevelopment Authority,* 195 Va. 326, 338–339, 78 S. E. 2d 893, 900–901. Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power.

The District Court below suggested that, if such a broad scope were intended for the statute, the standards contained in the Act would not be sufficiently definite to sustain the delegation of authority. 117 F. Supp. 705, 721. We do not agree. We think the standards prescribed were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums. Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a par-

ticular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker* v. *United States,* 147 U. S. 282, 298; *United States ex rel. T. V. A.* v. *Welch, supra,* 554; *United States* v. *Carmack,* 329 U. S. 230, 247.

The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. 117 F. Supp. 705, 715–719. We do not share those doubts. If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

The judgment of the District Court, as modified by this opinion, is

Affirmed.

NATIONAL UNION OF MARINE COOKS AND STEWARDS *v.* ARNOLD ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 19. Argued October 15, 1954.—Decided November 22, 1954.

The dismissal of an appeal from a money judgment by a state appellate court as a reasonable measure for safeguarding the collectibility of that judgment does not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment; and, upon the facts in this case, the state appellate court's dismissal of petitioner's appeal was such a reasonable measure. Pp. 38–45.

1. No violation of the Equal Protection Clause has been shown in this case, because there has been no showing that anyone comparably situated has been treated differently from petitioner. P. 41.

2. Dismissal of the appeal in this case did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 41–45.

(a) *Hovey* v. *Elliott*, 167 U. S. 409, distinguished. Pp. 41–42.

(b) While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process. P. 43.

(c) Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration. Pp. 43–44.

3. Dismissal of petitioner's appeal is not regarded as a penalty imposed as a punishment for criminal contempt. It was a reasonable method of sustaining the effectiveness of the state's judicial process as against the rights of a judgment debtor who appealed without filing a supersedeas bond and refused to comply with reasonable orders designed to safeguard the value of the judgment pending a decision on his appeal. Pp. 44–45.

Judgment affirmed.

Norman Leonard argued the cause and filed a brief for petitioner.

John Geisness argued the cause for respondents. With him on the brief was *Samuel B. Bassett.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The question before us is whether a state appellate court violates either the Due Process or the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States when it dismisses an appeal from a money judgment as a reasonable measure for safeguarding the collectibility of that judgment. For the reasons hereafter stated, we hold that it does not and that the dismissal of the appeal in the instant case was such a reasonable measure.

This litigation resulted from a "blacklisting" letter written by Harris as an agent of petitioner, National Union of Marine Cooks and Stewards, in 1949, to persons able to affect the employment of the 95 respondents whose occupation was that of stewards in the Alaska trade.[1]

It took the following course:

1949—In the Superior Court of the State of Washington for King County, respondents' libel action against petitioner and Harris, seeking $20,000 damages for each respondent, was dismissed on demurrer.

June 9, 1950—On appeal to the Supreme Court of Washington, the letter was held libelous *per se*, the judg-

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[1] It stated:

"Enclosed is a list of former members of the National Union of Marine Cooks and Stewards, who deserted this union during the 1948 maritime strike and attempted to organize a dual organization under the leadership of the Sailors Union of the Pacific for the purpose of breaking our strike and destroying our union.

"While these renegades have been completely discredited and defeated, they may attempt to obtain employment in other sections of the industry, particularly when the fishing season opens.

"This information is only for your guidance and formulation to your membership as to the constructive ways and means of carrying on a progressive labor organization." *Arnold* v. *National Union*, 36 Wash. 2d 557, 559, 219 P. 2d 121, 122.

ment was reversed and the cause remanded for trial. 36 Wash. 2d 557, 219 P. 2d 121.

September 4, 1951—In the Superior Court, a total judgment of $475,000 was rendered against petitioner and Harris, awarding $5,000 to each respondent.

September 5, 1951—In the Superior Court, petitioner and Harris filed notices of appeal to the Supreme Court but offered no supersedeas bond and obtained no stay of proceedings.[2]

October 19, 1951—In the Superior Court, in the same case, respondents began a supplemental proceeding to discover petitioner's available assets.

February 15, 1952—In the Superior Court supplemental proceeding, the evidence disclosed no substantial assets of petitioner in Washington but showed $298,000 of United States bonds to be in its possession in California. The court ordered petitioner to deliver these bonds to the court's receiver, for safekeeping, pending disposition of petitioner's appeal.

April 4, 1952—In the Superior Court supplemental proceeding, upon petitioner's failure to deliver the bonds, the court adjudged it in contempt, stating "that said contemptuous conduct . . . frustrates the enforcement of the judgment herein . . . and frustrates the receivership created herein by order of this Court . . . ." 41 Wash. 2d 22, 24, 246 P. 2d 1107, 1108.

May 17, 1952—The Supreme Court struck from its calendar petitioner's appeal on the merits, pending its review of the adjudication of contempt "unless the said appellant Union sooner purges itself of the contempt . . . ."

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[2] To stay proceedings on appeal, a supersedeas bond for double the amount of the damages and costs would have been required. Wash. Rev. Code, 1951, § 4.88.060.

May 26, 1953—The Supreme Court held that the "adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring delivery of the bonds to the receiver." 42 Wash. 2d 648, 654, 257 P. 2d 629, 633.

May 27, 1953—In the Supreme Court, respondents filed an affidavit showing that petitioner's disbursements, in 1952, had been $633,391.10, as opposed to its receipts of $413,280.90, and that its total cash assets, at the end of that year, had shrunk to $90,389.84.

June 12, 1953—In the Supreme Court, respondents renewed their motion to dismiss petitioner's appeal in the main action. They filed a supporting affidavit stating that "All of . . . [petitioner's] assets of substantial value are in California and two California courts have refused to entertain suit on the Washington judgment while this appeal is pending."

July 3, 1953—The Supreme Court ordered dismissal of petitioner's appeal unless petitioner purged itself of contempt.

August 19, 1953—The Supreme Court denied petitioner a rehearing and entered judgment dismissing its appeal in the main action.

March 8, 1954—This Court granted certiorari because of the significant relation of the constitutional issue to the enforcement of state judgments. 347 U. S. 916.[3]

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[3] Two confirmatory rulings had intervened:

November 16, 1953—In this Court, petitioner's appeal from the adjudication of contempt in the supplemental proceeding was dismissed for want of a substantial federal question. 346 U. S. 881.

February 2, 1954—In the Supreme Court, Harris' separate appeal, raising largely the same issues on the merits as petitioner's appeal, was heard and the judgment against him affirmed. 44 Wash. 2d 183, 265 P. 2d 1051.

There is no question before us as to the power of the state courts of Washington, under its laws, (1) to order petitioner to deliver the specified bonds to the receiver, (2) to adjudicate petitioner in contempt for failure to do so, or (3) to dismiss petitioner's appeal upon failure to purge itself of contempt by delivery of the bonds. Those questions have been settled by the Supreme Court of Washington. The question before us is whether the procedure which has culminated in the dismissal of petitioner's appeal violates either the Due Process or the Equal Protection Clause of the Fourteenth Amendment.[4]

We have no difficulty with the Equal Protection Clause because no showing has been made that anyone comparably situated has been treated differently from petitioner. The significant issue is whether the action of the State violates due process of law. To decide this, we consider first whether, generally, the dismissal of an appeal from a money judgment amounts to due process of law where it constitutes a reasonable means of safeguarding the collectibility of that judgment. If so, we may then consider whether the dismissal in the instant case constituted such a means.

The constitutional objection raised by petitioner was long ago considered in *Hovey* v. *Elliott,* 167 U. S. 409. In that case, the Supreme Court of the District of Columbia went further and attempted to deprive a defendant of his right to answer the suit brought against him. Having stricken defendant's answer, the court entered judgment against him as a punishment for his refusal to deliver to a court-appointed receiver certain funds which were the subject matter of the litigation. When the State of New York later refused to honor that judgment, this Court, in

[4] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV, § 1.

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affirming the action of the Court of Appeals of New York, held that the District of Columbia had deprived defendant of his property without due process of law by denying him his constitutional right to a day in court.[5]

The instant case does not go so far. Here the petitioner has had its day in court. The dismissal has cut off only a statutory right of review after a full trial by judge and jury. In *Hovey* v. *Elliott, supra,* this distinction was anticipated and room was left open for a later consideration of cases like the one before us.[6]

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[5] The deprivation of a litigant's right to present a defense has been upheld, not as a punishment for contempt as prohibited in *Hovey* v. *Elliott, supra,* but rather as a result of the litigant's failure to produce evidence, his violation of a rule of procedure, or other action justifying a judgment of default against him. *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 349–354; *Peitzman* v. *Illmo,* 141 F. 2d 956, 960–961. See also, *Bennett* v. *Bennett,* 208 U. S. 505, 514; *Young & Holland Co.* v. *Brande Bros.,* 162 F. 663; *Lawson* v. *Black Diamond Coal Mining Co.,* 44 Wash. 26, 86 P. 1120.

[6] ". . . The difference between the want of power, on the one hand, to refuse to one in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to refuse to accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases.

. . . . . .

". . . In affirming the judgment of the Supreme Court of Georgia [*Allen* v. *Georgia,* 166 U. S. 138, 140], the court called attention to the distinction between the inherent right of defence secured by the due process of law clause of the Constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal.

. . . . . .

"Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defence, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit." 167 U. S., at 423–424, 443, 444.

While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process. *District of Columbia* v. *Clawans,* 300 U. S. 617, 627; *Ohio* v. *Akron Park District,* 281 U. S. 74, 80; *Reetz* v. *Michigan,* 188 U. S. 505, 508; *McKane* v. *Durston,* 153 U. S. 684, 687–688.

While this Court has not, until now, passed upon the constitutionality of a state court's dismissal of an appeal in a case like the present, it has decided somewhat comparable issues. Where the subject matter of litigation has been removed or has removed itself from the jurisdiction of a state court in violation of that court's orders, this Court has upheld a dismissal of the offending litigant's appeal. For example, where a prisoner has escaped from custody while his appeal is pending, this Court has upheld a dismissal of his appeal. Cf. *Eisler* v. *United States,* 338 U. S. 189, and 883. Similarly, after a state prisoner's recapture, this Court has sustained a state court's refusal to revive his appeal. *Allen* v. *Georgia,* 166 U. S. 138. See also, *Smith* v. *United States,* 94 U. S. 97; *Washington* v. *Handy,* 27 Wash. 469, 67 P. 1094; *People* v. *Genet,* 59 N. Y. 80; *Massachusetts* v. *Andrews,* 97 Mass. 543.[7]

The circumstances before us are, in some degree, comparable. The order here violated was issued in a supplemental proceeding to discover and safeguard property of petitioner, without which the judgment would have little or no value. Petitioner's failure to deliver the specified out-of-state property to the court's receiver frustrated

[7] For a similar rule in custody cases, see *Casebolt* v. *Butler,* 175 Ky. 381, 194 S. W. 305; *Lindsay* v. *Lindsay,* 255 Ill. 442, 99 N. E. 608; *Henderson* v. *Henderson,* 329 Mass. 257, 107 N. E. 2d 773. In civil actions, where the presence of a defendant within the jurisdiction of a court is essential to enforcement of its decree and he absents himself from that jurisdiction, dismissal of his appeal has been upheld. *Bronk* v. *Bronk,* 46 Fla. 474, 35 So. 870.

the state court much as the escape of a prisoner would frustrate it in attempting to review his conviction. Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration.

The dismissal here is not regarded by us as a penalty imposed as a punishment for criminal contempt. It is an exercise of a state court's inherent power to use its processes to induce compliance with a supplemental order reasonably issued in aid of execution. Furthermore, the appeal was not summarily dismissed. Petitioner was allowed 15 days, after being adjudged in contempt, within which to purge itself. The propriety of the dismissal and its remedial nature are demonstrated by the situation in California. Two proceedings brought there by respondents to reach petitioner's assets in California evidently were frustrated by the insistence of the California courts that they would not entertain any suit on the Washington judgment while an appeal from that judgment was pending in Washington.

The supplemental proceeding indicated that the $298,000 in bonds, to which the court directed its order, constituted the only substantial asset from which payment of respondents' judgment might be realized and that this asset might be dissipated unless placed in protective custody.

In appraising the reasonableness of the State's order, it is noteworthy that the court did not seek to apply the bonds to the satisfaction of respondents' judgment. It merely directed petitioner to deliver them to the court's receiver for safekeeping. Petitioner's appeal was not dismissed because of petitioner's failure to satisfy a judgment pending an appeal from it. It was dismissed because of petitioner's failure to comply with the court's order to safeguard petitioner's assets from dissipation pending such appeal.

Viewing the dismissal of petitioner's appeal in the light of its reasonableness in sustaining the effectiveness of a state's judicial process, as against the rights of a judgment debtor, without filing a supersedeas bond, to refuse to comply with orders safeguarding the value of that judgment, we find nothing that violates due process of law.

The judgment of the Supreme Court of the State of Washington, accordingly, is

Affirmed.

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

In *Hovey* v. *Elliott,* 167 U. S. 409, decided in 1897, this Court held that due process of law was denied by a trial court which had refused to permit a defendant to try his case on the merits merely because the defendant had disobeyed the court's order to pay into the court's registry money which was the subject matter of the controversy. This Court said that such a denial of all right to defend would convert the court into an instrument of wrong and oppression. The appeal here was dismissed by the Washington Supreme Court on the single ground that petitioner had disobeyed a court order to turn over certain bonds which were not even the subject matter of this lawsuit. I think the *Hovey* v. *Elliott* doctrine applies with equal force to this dismissal. True this Court has said that a state is not constitutionally required to provide a system of appellate court review. But since Washington has done so, proceedings in its supreme court are merely the final step in the judicial process in trying cases and therefore cannot be conducted so as to deny that "due process" which the Fourteenth Amendment requires. *Cole* v. *Arkansas,* 333 U. S. 196, 201–202, and cases there cited. And Washington also must abide by the Fourteenth Amendment's equal pro-

tection command in deciding who can and who cannot appeal. *Cochran* v. *Kansas,* 316 U. S. 255.

State legislatures have broad power to forbid varied types of conduct and to provide for punishment by courts. But the power to punish for violation of admittedly valid statutes is not unlimited. State punishments must not obliterate clearly granted federal rights. See, *e. g., Hill* v. *Florida,* 325 U. S. 538, 543. I suppose no one would contend that a defendant convicted of such conventional crimes as larceny or embezzlement could be punished by compelling him to give up his religious faith. The right of a person to be heard in his own defense stands on an equally firm constitutional base. In *McVeigh* v. *United States,* 11 Wall. 259, 267, this Court said that to deny an "alien enemy" a right to defend himself "would be a blot upon our jurisprudence and civilization." It was there said that a constitutional right to defend is inseparable from a liability to be sued. And I can see no reason why the same principle is not equally applicable in each court where rights are passed upon. The appeal here was but a continuation of petitioner's defense which began in the trial court. But petitioner was denied any opportunity to defend itself in the appellate court because it had disobeyed a court order. By whatever other name it may be called, the dismissal was punishment. I do not think the Washington legislature could provide this kind of punishment for disobedience of a court order or for any other crime, and certainly the state court's power to do so is no greater than that of the state's legislature. *Hovey* v. *Elliott, supra,* at 417–418.

In summary, petitioner having been haled into court as a defendant has been denied an opportunity to defend itself in a court that had power finally to decide whether petitioner should pay money to plaintiffs who sued. The purpose was punishment for an offense having no relation at all to the merits of the plaintiff's claim or to the peti-

tioner's defense. From the beginning, due process and equal protection have meant that every defendant must be permitted to defend himself in any court where his antagonist can appear and prosecute. This right of defense belongs to all—good or bad, one who has violated laws the same as one who has not. I would reverse this case.

LUMBERMEN'S MUTUAL CASUALTY CO. *v.* ELBERT.

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

No. 11. Argued October 14, 1954.—Decided December 6, 1954.

Under 28 U. S. C. § 1332 (a), a Federal District Court in Louisiana had jurisdiction over this suit for damages in excess of $3,000 brought under the Louisiana Direct Action Statute against the alleged wrongdoer's insurer alone, where diversity of citizenship existed between the complainant and the defendant insurer but not between the complainant and the alleged wrongdoer. Pp. 49–53.

(a) Since the Louisiana courts have construed the Direct Action Statute as creating a separate and distinct cause of action against the insurer which an injured party may elect *in lieu* of his action against the tortfeasor, the citizenship of the tortfeasor is disregarded for purposes of federal jurisdiction. Pp. 50–51.

(b) Neither under the Louisiana statute and practice nor by federal standards was the tortfeasor an indispensable party to this litigation, and failure to join her as a defendant did not deprive the federal court of jurisdiction. Pp. 51–52.

(c) Notwithstanding the differing standards of review on appeal of a jury verdict in the Louisiana and federal courts, the latter should not decline, as a matter of discretion, to exercise their jurisdiction over a suit such as this against the insurer alone. Pp. 52–53.

201 F. 2d 500, affirmed.

This suit in a Federal District Court against a foreign corporation, based on diversity of citizenship, was dismissed for want of jurisdiction, 107 F. Supp. 299, and a motion for a rehearing was overruled, 108 F. Supp. 157. The Court of Appeals reversed, 201 F. 2d 500, and denied rehearing, 202 F. 2d 744. This Court granted certiorari, 347 U. S. 965. *Affirmed*, p. 53.

Charles L. Mayer argued the cause for petitioner. With him on the brief was *Joseph H. Jackson.*

John M. Madison and *Whitfield Jack* argued the cause and filed a brief for respondent.

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

This case concerns the Louisiana direct action statute. This Court has today had occasion to test that statute against certain claims of unconstitutionality, *Watson* v. *Employers Liability Assurance Corp., post,* p. 66.[1] Questions are raised here involving the diversity jurisdiction of the federal courts in cases arising under the statute.

Respondent, a citizen of Louisiana, was injured in an automobile accident at Shreveport, Louisiana, allegedly because of the negligence of Mrs. S. W. Bowen, also a Louisiana citizen. Petitioner, an Illinois corporation, had issued a public liability policy to Mr. Bowen insuring him and members of his household against claims arising from their negligent operation of the family car. The policy was applied for, issued, and delivered within the State of Louisiana. Petitioner was certificated to do business in Louisiana and had, as a legal prerequisite thereto, consented in writing to be sued directly for damages sustained in Louisiana accidents involving its policyholders.

The pertinent portion of the direct action statute provides:

> "The injured person or his or her heirs, *at their option,* shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or

[1] See also *McDowell* v. *National Surety Corp.*, 68 So. 2d 189, appeal dismissed, 347 U. S. 995.

> in the parish where the insured has his domicile, and *said action may be brought against the insurer alone* or against both the insured and the insurer, jointly and in solido." La. Rev. Stat., Tit. 22, § 655. (Italics added.)

Pursuant to this provision, respondent brought this action against petitioner in the United States District Court for the Western District of Louisiana, alleging diversity of citizenship and damages in excess of $3,000. Mrs. Bowen, the alleged tortfeasor, was not made a codefendant. Petitioner moved to dismiss the complaint for lack of federal jurisdiction; the district judge granted the motion. 107 F. Supp. 299, 108 F. Supp. 157. The Court of Appeals reversed and remanded the case to the District Court for trial, 201 F. 2d 500, one judge dissenting from the denial of a petition for rehearing. 202 F. 2d 744. From that decision, this Court granted certiorari. 347 U. S. 965. Thus, the sole question to be decided is whether the United States District Court in Louisiana has jurisdiction over this suit for damages brought under the direct action statute against the wrongdoer's insurer alone, where diversity of citizenship exists between the complainant and the defendant insurer but not between the complainant and the wrongdoer.

Section 1332 (a) of the Judicial Code, 28 U. S. C. § 1332 (a), reads as follows:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> "(1) Citizens of different States . . . ."

It is petitioner's contention that the "matter in controversy" here is the underlying tort liability of the alleged wrongdoer. If this were true, of course, no diversity of citizenship would exist between respondent and Mrs.

Bowen, as the real party-defendant in interest. But the Louisiana courts have differentiated between actions brought by an injured party against the insurer alone and those brought against either the tortfeasor alone or together with the insurer. In the former action, the insurer is foreclosed from asserting defenses such as coverture, normally available to the tortfeasor. *Edwards* v. *Royalty Indemnity Co.,* 182 La. 171, 161 So. 191. Similarly, the insurer is severely restricted in advancing technical defenses based upon the terms of the policy, such as a failure of notice, when the injured party brings a direct action. *Jackson* v. *State Farm Mut. Automobile Ins. Co.,* 211 La. 19, 29 So. 2d 177. While either type of action encompasses proof of the tortfeasor's negligence, in the separate suit against the insurer a plaintiff must also establish liability under the policy. The Louisiana courts have characterized the statute as creating a separate and distinct cause of action against the insurer which an injured party may elect *in lieu* of his action against the tortfeasor. *West* v. *Monroe Bakery,* 217 La. 189, 46 So. 2d 122; *Jackson* v. *State Farm Mut. Automobile Ins. Co., supra.*

Petitioner is therefore not merely a nominal defendant but is the real party in interest here. This conclusion to disregard the tortfeasor's citizenship in the instant case for purposes of federal jurisdiction is fortified by cases honoring the states' characterization of a guardian or other fiduciary as determinative of the real party in interest in federal litigation. *New Orleans* v. *Gaines's Administrator,* 138 U. S. 595; *Mexican Central R. Co.* v. *Eckman,* 187 U. S. 429. There is even greater justification for disregarding the tortfeasor's citizenship here than for disregarding the citizenship of a beneficiary since the insurer—unlike a fiduciary—has a direct financial interest in the outcome of this litigation.

Petitioner next asserts that the tortfeasor is an indispensable party to this litigation, and that failure to join

her as a defendant deprives the federal court of jurisdiction. Clearly under the Louisiana statute and practice the argument has no merit.[2] And the circumstances which have led the federal courts to findings of indispensability are not present here. In *Shields* v. *Barrow*, 17 How. 130, 139, indispensable parties were defined as "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." [3] The tortfeasor in a Louisiana direct action against the insurer is not such a person. The state has created an optional right to proceed directly against the insurer; by bringing the action against petitioner, respondent has apparently abandoned her action against the tortfeasor.[4] See *Miller* v. *Commercial Standard Ins. Co.*, 199 La. 515, 526, 6 So. 2d 646, 649. Thus a complete disposition of the entire claim may be made in this one action, without injustice to any of the participants.

Finally, petitioner contends that the federal courts should decline, as a matter of discretion, to exercise their jurisdiction over suits against an insurer alone. This argument is based upon the differing standards of review on appeal of a jury verdict in the Louisiana and federal

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[2] Two proposals for compulsory joinder of insured and insurer as party-defendants have failed of passage in the Louisiana Legislature within recent years. See La. Senate Bill 73, 1952 Session; La. House Bill 600, 1954 Session.

[3] See also 3 Moore's Federal Practice (2d ed. 1948), ¶ 19.07 *et seq.*; Note, Indispensable Parties in the Federal Courts, 65 Harv. L. Rev. 1050 (1952).

[4] No case has been cited, although there has been nearly a quarter-century of experience under the direct action statute, where an injured party has attempted to bring suit against the tortfeasor following an unsuccessful suit against the insurer in either state or federal courts.

courts.[5] Petitioner relies upon *Burford* v. *Sun Oil Co.*, 319 U. S. 315, as authority for the suggested discretionary refusal to exercise jurisdiction.[6] But in *Burford*, jurisdiction was declined to avoid a potential interference with a state's administrative policy-making process, a consideration not present here. Moreover, traditional equitable authority, not available here, was relied upon to justify the holding.

The language of the congressional grant of jurisdiction to the lower courts, 28 U. S. C. § 1332 (a), is clear, and this case seems to us to fall squarely within the provision. In Louisiana the practice of bringing direct actions in the federal courts has long been recognized. See, *e. g.*, *New Amsterdam Casualty Co.* v. *Soileau*, 167 F. 2d 767 (C. A. 5th Cir.), cert. denied, 335 U. S. 822; *Bankers Indemnity Ins. Co.* v. *Green*, 181 F. 2d 1 (C. A. 5th Cir.); *Belanger* v. *Great American Ind. Co.*, 188 F. 2d 196 (C. A. 5th Cir.). Neither federal nor Louisiana law suggests any reason to disturb this practice. The decision of the Court of Appeals is

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

Not deeming it appropriate now to question *Meredith* v. *Winter Haven*, 320 U. S. 228, I join the Court's opinion. But our holding results in such a glaring perversion of the

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[5] Appellate review in the federal courts is, of course, limited ultimately by the Seventh Amendment. *Parsons* v. *Bedford, Breedlove & Robeson*, 3 Pet. 433. In Louisiana, appellate review in civil cases extends to both matters of law and fact. See La. Const., Art. 7, §§ 10, 29.

[6] See also *Pennsylvania* v. *Williams*, 294 U. S. 176; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293; *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U. S. 341, cited in the dissenting opinion below. See *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, 236, 237.

purpose to which the original grant of diversity jurisdiction was directed that it ought not to go without comment, as further proof of the mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction.

The stuff of diversity jurisdiction is state litigation. The availability of federal tribunals for controversies concerning matters which in themselves are outside federal power and exclusively within state authority, is the essence of a jurisdiction solely resting on the fact that a plaintiff and a defendant are citizens of different States. The power of Congress to confer such jurisdiction was based on the desire of the Framers to assure out-of-state litigants courts free from susceptibility to potential local bias. That the supposed justification for this fear was not rooted in weighty experience is attested by the fact that so ardent a nationalist as Marshall gave that proposal of the Philadelphia Convention only tepid support in the Virginia Convention. 3 Elliot's Debates 556 (1891). But in any event, whatever "fears and apprehensions" * were entertained by the Framers and ratifiers, there was fear that parochial prejudice by the citizens of one State toward those of another, as well as toward aliens, would lead to unjust treatment of citizens of other States and foreign countries.

Such was the reason for enabling a citizen of one State to press a claim or stand on a defense, wholly state-created, against a citizen of another in a federal court of the

* "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 87.

latter's State. The abuses to which this opportunity was put when, more than a hundred years ago, corporations began their transforming influence on American economic and social life are familiar history. Their classic exposition in Gerard C. Henderson's *Position of Foreign Corporations in American Constitutional Law* has lost neither its vividness nor force during the intervening decades. The short of the matter is that by resorting to the federal courts the out-of-state corporation sought to gain, and much too frequently did, an advantage as against the local citizen. Instead of protecting out-of-state litigants against discrimination by state courts, the effect of diversity jurisdiction was discrimination against citizens of the State in favor of litigants from without the State.

Diversity jurisdiction aroused opposition from its very inception, but the modern manifestation of these evils through corporate litigation gathered increasing hostility and led to repeated congressional attempts at restriction and eventually of abolition. The proliferation of the doctrine of *Swift* v. *Tyson,* 16 Pet. 1, brought into lurid light the discriminatory distortions to which diversity jurisdiction could be subverted by judicial sanction of professional astuteness. The growing sense of the injustice of these developments and its serious hurt to the prestige of the federal courts in the exercise of their essential jurisdiction, came to a head with the decision in *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518. The federal courts became the target of acrimonious political controversy. In the course of our history this was not the first time that diversity jurisdiction played the federal courts an ill turn. Again and again in the 60's and the 70's and the 80's such a conflict had flared up, but in the earlier periods it was by way of being a conflict between the financial East and the agrarian West. This time President Hoover's Attorney Gen-

eral and Senator George W. Norris of Nebraska united against the disclosed evils of diversity jurisdiction.

Attorney General Mitchell urged on Congress a measure whereby a corporation should be deemed, for diversity purposes, a citizen of any State in which it carries on business "as respect all suits brought within that State between itself and residents thereof and arising out of the business carried on in such State." Hearings before Subcommittee of Senate Committee on the Judiciary on S. 937, S. 939 and S. 3243, 72d Cong., 1st Sess. 4. At the same time, the Senate Judiciary Committee, under the leadership of Chairman Norris, went further. Twice it reported bills for the abolition of diversity jurisdiction. S. Rep. No. 691, 71st Cong., 2d Sess.; S. Rep. No. 530, 72d Cong., 1st Sess. Legislative attempts at correction have thus far failed. But by overruling the doctrine of *Swift* v. *Tyson,* despite its century-old credentials, this Court uprooted the most noxious weeds that had grown around diversity jurisdiction. What with the increasing permeation of national feeling and the mobility of modern life, little excuse is left for diversity jurisdiction, now that *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, has put a stop to the unwarranted freedom of federal courts to fashion rules of local law in defiance of local law.

A legal device like that of federal diversity jurisdiction which is inherently, as I believe it to be, not founded in reason, offers constant temptation to new abuses. This case is an instance. Here we have not an out-of-state litigant resorting to a federal court to be sure of obtaining for himself the same treatment which state courts mete out to their own citizens. Here we have a Louisiana citizen resorting to the federal court in Louisiana in order to avoid consequences of the Louisiana law by which every Louisiana citizen is bound when suing another Louisiana citizen. If Florence R. Elbert, the

present plaintiff, had to sue the owner of the offending automobile which caused her injury, or if she were suing an insurance company chartered by Louisiana, she would have no choice but to go, like every other Louisiana plaintiff who sues a fellow citizen of Louisiana, to a Louisiana state court and receive the law as administered by the Louisiana courts. But by the fortuitous circumstance that this Louisiana litigant could sue directly an out-of-state insurance company, she can avoid her amenability to Louisiana law. In concrete terms, she can cash in on the law governing jury trials in the federal courts, with its restrictive appellate review of jury verdicts, and escape the rooted jurisprudence of Louisiana law in reviewing jury verdicts. There is, to be sure, a kind of irony for corporate defendants to discover that two can play at the game of working, to use a colloquial term, the perverse potentialities of diversity jurisdiction. But it is not the less unreason and no greater fairness for a citizen of the forum to gain a discriminatory advantage over fellow citizens of his State, than it is for an out-of-state citizen to secure more than the same treatment given local citizens, by going to a federal court for the adjudication of state-created rights.

This case, however, stirs anew an issue that cuts deeper than the natural selfishness of litigants to exploit the law's weaknesses. My concern is with the bearing of diversity jurisdiction on the effective functioning of the federal judiciary. Circuit Judge Rives agreed with the district judge that this kind of action has no business in a federal court. In dissenting from denial of the petition for rehearing, he stated with impressive bluntness the effect on the work of the federal and state courts in allowing diversity jurisdiction to be put to such purposes:

> "On the original hearing, I had strong misgivings which were submitted to my brothers, but I was

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unable to crystallize my thinking clearly enough to justify a dissent. Continued consideration of the question has convinced me that there is something fundamentally wrong with our legal theories when they permit the great bulk of the casualty damage suit litigation in Louisiana to clog the dockets of the federal courts, while, I understand, some of the state judges actually do not have enough litigation to keep them busy." *Elbert* v. *Lumbermen's Mut. Cas. Co.*, 202 F. 2d 744.

In Louisiana, plaintiffs in negligence suits have suddenly found the federal courts their protectors and insurance companies have discovered the virtues of the state courts. In New York, insurance companies run to cover in the federal courts and plaintiffs feel outraged by the process of attrition in enforcing their claims, due to a delay of from three to four years before a case can come to trial. As to both situations, the vice is the availability of diversity jurisdiction. What is true of New York is true, in varying degrees, of every big center.

Diversity cases have long constituted a considerable portion of all civil cases filed in the federal courts. For the last ten years the proportion of diversity cases has greatly increased, so that it is safe to say that diversity cases are now taking at least half of the time that the District Courts are devoting to civil cases. (This is the conclusion of the Division of Procedural Studies and Statistics of the Administrative Office of the United States Courts.) The rise in motor-vehicle registration from 32 million in 1940 to 56 million in 1953 has inevitably been reflected in increasing resort to diversity jurisdiction in ordinary negligence suits. The consequences that this entails for the whole federal judicial system—for increase in the business of the District Courts means increase in the business of the Courts of Appeals and a swelling of

the petitions for certiorari here—cannot be met by a steady increase in the number of federal judges. The business of courts, particularly of the federal courts, is drastically unlike the business of factories. The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but far-reaching, which cannot be satisfied by enlarging the judicial plant. A recent report of the House Committee on the Judiciary proposed an increase of the required amount in controversy for jurisdiction of the federal courts from $3,000 to $10,000. Referring to the consequences of "a tremendous increase in the number of cases filed," it felt that appointment of additional judges "has done much to alleviate the problem" but recognized that merely multiplying judges is no solution. See H. R. Rep. No. 1506, 82d Cong., 2d Sess. 1. In the farthest reaches of the problem a steady increase in judges does not alleviate; in my judgment, it is bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system.

Since diversity jurisdiction is increasingly the biggest source of the civil business of the District Courts, the continuance of that jurisdiction will necessarily involve inflation of the number of the district judges. This in turn will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts. Madison believed that Congress would return to the state courts judicial power entrusted to the federal courts "when they find the tribunals of the states established on a good footing." 3 Elliot's Debates 536 (1891). Can it fairly be said that state tribunals are not now established on a sufficiently "good footing" to adjudicate state litigation that arises between citizens of different States, including the artificial corporate citizens, when they are the only

resort for the much larger volume of the same type of litigation between their own citizens? Can the state tribunals not yet be trusted to mete out justice to non-resident litigants; should resident litigants not be compelled to trust their own state tribunals? In any event, is it sound public policy to withdraw from the incentives and energies for reforming state tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid state courts?

Syllabus.

CASTLE, ATTORNEY GENERAL, ET AL. *v.* HAYES FREIGHT LINES, INC.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 44. Argued November 17, 1954.—Decided December 6, 1954.

When an interstate motor carrier holds a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act, a state may not suspend the carrier's right to use the State's highways in its interstate operations, as punishment for repeated violations of a state law regulating the weight of loads of freight that may be carried on the State's highways. Pp. 62–65.

(a) Punishment of the carrier for violations of the State's road regulations does not justify disruption of a federally authorized activity. P. 64.

(b) The provision of the Federal Act which leaves states free to regulate the sizes and weights of motor vehicles does not authorize the states to revoke or suspend the operating rights of interstate motor carriers for violations of such regulations. P. 64.

(c) The State's lack of power to suspend a motor carrier's interstate operations does not leave the State without appropriate remedies for the carrier's violations of state laws. Pp. 64–65.

2 Ill. 2d 58, 117 N. E. 2d 106, affirmed.

John L. Davidson, Jr., First Assistant Attorney General of Illinois, argued the cause for petitioners. With him on the brief were *Latham Castle*, Attorney General, *Mark O. Roberts*, Special Assistant Attorney General, and *William C. Wines* and *Lee D. Martin*, Assistant Attorneys General.

David Axelrod argued the cause for respondent. With him on the brief were *Jack Goodman* and *Carl L. Steiner*.

Briefs of *amici curiae* urging reversal were filed by *Edwin K. Steers*, Attorney General, and *J. D. Wright* and *Arthur H. Gemmer*, Deputy Attorneys General, for the

State of Indiana; and *Charles C. Collins* and *Ode L. Rankin* for the American Automobile Association, Inc.

Peter T. Beardsley filed a brief for the American Trucking Associations, Inc., as *amicus curiae*, urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises important questions concerning the power of states to bar interstate motor carriers from use of state roads as punishment for repeated violations of state highway regulations. The respondent Hayes Freight Lines, Inc. is such a carrier transporting goods to and from many points in Illinois and seven other states.[1] This extensive interstate business is done under a certificate of convenience and necessity issued by the Interstate Commerce Commission under authority of the Federal Motor Carrier Act.[2] Hayes also does an intrastate carrier business in Illinois under a certificate issued by state authorities. Illinois has a statute which limits the weight of freight that can be carried in commercial trucks over Illinois highways; the same statute also provides for a balanced distribution of freight loads in relation to the truck's axles.[3] Repeated violations of these provisions by trucks of a carrier are made punishable by total suspension of the carrier's right to use Illinois state highways for periods of ninety days and one year.[4] This action was brought in a state court to restrain

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[1] Indiana, Missouri, Michigan, Pennsylvania, Ohio, Kentucky, and Tennessee.

[2] 49 Stat. 543. Now Part II of the Interstate Commerce Act, 54 Stat. 919, 49 U. S. C. § 301 *et seq.*

[3] Ill. Rev. Stat., 1953, c. 95½, § 228.

[4] Ill. Rev. Stat., 1953, c. 95½, § 229b. This section provides for a 90-day suspension upon a finding of 10 or more violations. If thereafter the same carrier is found to have been guilty of 10 or more later violations the suspension is for one year.

Illinois officials from prosecuting Hayes as a repeated violator. The State Supreme Court held that the punishment of suspension provided by the state statute could not be imposed on the interstate operations of the respondent Hayes. Such a state suspension of interstate transportation, it was decided, would conflict with the Federal Motor Carrier Act which is the supreme law of the land.[5] We granted the State's petition for certiorari. 347 U. S. 1009.

Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by § 306 of 49 U. S. C. which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity. And § 312 of the same title provides that all certificates, permits or licenses issued by the Commission "shall remain in effect until suspended or terminated as herein provided." But in order to provide stability for operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate. No certificate is to be revoked, suspended or changed until after a hearing and a finding that a carrier has willfully failed to comply with the provisions of the Motor Carrier Act

[5] 2 Ill. 2d 58, 117 N. E. 2d 106. But the State Supreme Court held that Hayes' intrastate operations could be suspended. Hayes appealed to this Court. We dismissed for want of a substantial federal question. 347 U. S. 994.

or with regulations properly promulgated under it.[6] Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. Cf. *Hill* v. *Florida,* 325 U. S. 538. It cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate. The highways of Illinois are not only used by Hayes to transport interstate goods to and from that State but are also used as connecting links to points in other states which the Commission has authorized Hayes to serve. Consequently if the ninety-day or the one-year suspension should become effective, the carriage of interstate goods into Illinois and other states would be seriously disrupted.

That Illinois seeks to punish Hayes for violations of its road regulations does not justify this disruption of federally authorized activities. A state's regulation of weight and distribution of loads carried in interstate trucks does not itself conflict with the Federal Act. The reason for this as pointed out in *Maurer* v. *Hamilton,* 309 U. S. 598, is that the Federal Act has a provision designed to leave states free to regulate the sizes and weights of motor vehicles. But it would stretch this statutory provision too much to say that it also allowed states to revoke or suspend the right of interstate motor carriers for violation of state highway regulations.

It is urged that without power to impose punishment by suspension states will be without appropriate remedies to enforce their laws against recalcitrant motor carriers. We are not persuaded, however, that the conventional forms of punishment are inadequate to protect states from overweighted or improperly loaded motor trucks. More-

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[6] *Smith Bros., Revocation of Certificate,* 33 M. C. C. 465, 472. See *United States* v. *Seatrain Lines,* 329 U. S. 424.

over, a Commission regulation requires motor carriers to abide by valid state highway regulations.[7] And as previously pointed out, the Commission can revoke in whole or in part certificates of motor carriers which willfully refuse to comply with any lawful regulation of the Commission.[8] If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the state's interest, either on the Commission's own initiative or on complaint of the state.[9]

We agree with the Supreme Court of Illinois that the right of this carrier to use Illinois highways for interstate transportation of goods cannot be suspended by Illinois.

Affirmed.

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[7] 49 CFR, 1954 Cum. Supp., § 192.3. "Every motor vehicle shall be driven in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated, unless such laws, ordinances and regulations are at variance with specific regulations of this Commission which impose a greater affirmative obligation or restraint."

[8] 49 Stat. 555, 49 U. S. C. § 312.

[9] 49 Stat. 555, 49 U. S. C. § 312. For cases in which the Commission has considered violations of state law in passing on the fitness and ability of applicants to operate as carriers in interstate commerce see *Southwest Freight Lines, Inc., Extension—Glass Products,* 54 M. C. C. 205, 219; *Hayes Freight Lines, Inc., Extension—Alternate Routes,* 54 M. C. C. 643, 659.

WATSON ET UX. *v.* EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 6. Argued October 14, 1954.—Decided December 6, 1954.

1. A Louisiana statute which allows persons injured in Louisiana to bring direct actions against liability insurance companies insuring the tortfeasors, *held* constitutional, even when applied to a policy written and delivered in another state which recognizes as binding and enforceable a provision of the policy forbidding such direct actions. Pp. 67–74.

   (a) Since Louisiana's direct action provisions fall with equal force upon all liability insurance companies, foreign and domestic, and there is no evidence of any discriminatory application of them, they do not violate the Equal Protection Clause. P. 70.

   (b) Since the direct action provisions became effective before the insurance contract here sued on was made, they do not violate the Contract Clause of Art. I, § 10, of the Constitution. P. 70.

   (c) In view of Louisiana's legitimate interest in safeguarding the rights of persons injured there, the direct action provisions do not violate the Due Process Clause. *Home Ins. Co.* v. *Dick*, 281 U. S. 397, and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, distinguished. Pp. 70–73.

   (d) The Full Faith and Credit Clause does not compel Louisiana to subordinate its direct action provisions to the contract laws of Massachusetts, where this insurance policy was issued. P. 73.

   (e) Louisiana's law compelling foreign insurance companies to consent to direct actions does not violate the Due Process Clause of the Fourteenth Amendment. Pp. 73–74.

2. Provisions of Louisiana's statute having been held invalid as repugnant to the Federal Constitution, this case is properly here on appeal, and the writ of certiorari is dismissed. P. 70 and n. 7.

202 F. 2d 407, reversed.

Richard H. Switzer and *Cleve Burton* argued the cause for appellants-petitioners. With them on the brief was *Val Irion.*

Benjamin C. King argued the cause for the Employers Liability Assurance Corporation, Ltd., appellee-respondent. With him on the brief was *Charles D. Egan.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Louisiana has an insurance code which comprehensively regulates the business of insurance in all its phases.[1] This case brings to us challenges to the constitutionality of certain provisions of that code allowing injured persons to bring direct actions against liability insurance companies that have issued policies contracting to pay liabilities imposed on persons who inflict injury. Cf. *Lumbermen's Mutual Casualty Co.* v. *Elbert,* decided today, *ante,* p. 48. This is such a direct action brought by the appellants, Mr. and Mrs. Watson, in a Louisiana state court claiming damages against the appellee, Employers Liability Assurance Corporation, Ltd., on account of alleged personal injuries suffered by Mrs. Watson. The complaint charged that the injuries occurred in Louisiana when Mrs. Watson bought and used in that State "Toni Home Permanent" a hair-waving product alleged to have contained a highly dangerous latent ingredient put there by its manufacturer. The manufacturer is the Toni Company of Illinois, a subsidiary of the Gillette Safety Razor Company which has its headquarters in Massachusetts.

The particular problem presented with reference to enforcing the Louisiana statute in this case arises because the insurance policy sued on was negotiated and issued in Massachusetts and delivered in Massachusetts and Illinois.[2] This Massachusetts-negotiated contract con-

[1] Title 22, La. Rev. Stat., 1950.

[2] The insurance policy was issued to "The Toni Company, a Division of the Gillette Safety Razor Company . . . ." Gillette is a Delaware Corporation with headquarters in Boston where the contract was negotiated with the Boston office of Employers. The Toni Company manufactures the hair-waving product in Chicago, Illinois.

tains a clause, recognized as binding and enforceable under Massachusetts and Illinois law, which prohibits direct actions against the insurance company until *after* final determination of the Toni Company's obligation to pay personal injury damages either by judgment or agreement.[3] Contrary to this contractual "no action" clause, the challenged statutory provisions permit injured persons to sue an insurance company *before* such final determination. As to injuries occurring in Louisiana, one provision of the State's direct action statute makes it applicable, even though, as here, an insurance contract is made in another state and contains a clause forbidding such direct actions.[4] Another Louisiana statutory pro-

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[3] "12. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

"Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

"Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder."

[4] "The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action,

vision, with which Employers long ago complied, compels foreign insurance companies to consent to such direct suits in order to get a certificate to do business in the State.[5] The basic issue raised by the attack on both these provisions is whether the Federal Constitution forbids Louisiana to apply its own law and compels it to apply the law of Massachusetts or Illinois.

After the case was removed to the United States District Court because of diversity Employers moved to dismiss, contending that the two Louisiana statutory provisions contravened the Equal Protection, Contract, Due Process and Full Faith and Credit Clauses of the Federal Constitution. With emphasis on the due process contention, the District Court dismissed the case, holding both statutory provisions unconstitutional as to policies written and delivered outside the State of Louisiana. 107

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provided the accident or injury occurred within the State of Louisiana. . . . It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state." La. Rev. Stat., 1950, § 22:655, as amended by Act 541 of the Louisiana Legislature of 1950. As to the scope of this provision according to Louisiana courts, see *Rome* v. *London & Lancashire Indemnity Co. of America,* La. App., 169 So. 132.

[5] "No certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in Section 655 of this title, whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana. The said foreign or alien insurer shall deliver to the Secretary of State as a condition precedent to the issuance of such authority, an instrument evidencing such consent." La. Rev. Stat., 1950, § 22:983, as amended by Act 542 of the Louisiana Legislature of 1950.

F. Supp. 494.[6] The Court of Appeals agreed with the District Court and affirmed the dismissal. 202 F. 2d 407. Provisions of Louisiana's statutes having been held invalid as repugnant to the Federal Constitution, the case is properly here on appeal.[7]

The denial of equal protection and impairment of contract contentions are wholly void of merit. The State's direct action provisions fall with equal force upon all liability insurance companies, foreign and domestic. Employers points to no other provisions of the Louisiana law or to facts of any nature which give the slightest support to any charge of discriminatory application of the direct action statute. And since the direct action provisions became effective before this insurance contract was made, there is a similar lack of substantiality in the suggestion that Louisiana has violated Art. I, § 10, of the United States Constitution which forbids states to impair the obligation of contracts. *Munday* v. *Wisconsin Trust Co.,* 252 U. S. 499, 503.

Had the policy sued on been issued in Louisiana there would be no arguable due process question. See *Merchants Mutual Auto. Liability Ins. Co.* v. *Smart,* 267 U. S. 126, 129–130. But because the policy was bought, issued and delivered outside of Louisiana, Employers invokes the due process principle that a state is without power to exercise "extraterritorial jurisdiction," that is, to regulate and control activities wholly beyond its boundaries. Such a principle was recognized and applied in *Home Ins. Co.* v. *Dick,* 281 U. S. 397, a case strongly relied on by

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[6] The District Court relied in part on its prior opinions in *Mayo* v. *Zurich General Accident & Liability Ins. Co.,* 106 F. Supp. 579; *Bayard* v. *Traders & General Ins. Co.,* 99 F. Supp. 343; *Bish* v. *Employers' Liability Assurance Corp.,* 102 F. Supp. 343.

[7] 28 U. S. C. § 1254 (2). In addition to noting probable jurisdiction of this cause, we granted certiorari. 347 U. S. 958. Since the case is properly here on appeal, the certiorari is dismissed.

Employers. There Texas was denied power to alter the terms of an insurance contract made in Mexico between persons then in that country, covering a vessel only while in Mexican waters, and containing a provision that the contract was to be governed by the laws of Mexico. Thus, the subject matter of the contract related in no manner to anything that had been done or was to be done in Texas. For this reason, Texas was denied power to alter the obligations of the Mexican contract. But this Court carefully pointed out that its decision might have been different had activities relating to the contract taken place in Texas upon which the State could properly lay hold as a basis for regulation. *Home Ins. Co.* v. *Dick, supra,* at 408 n. 5. The extraterritorial due process doctrine was again applied in *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 292 U. S. 143. That case denied the power of Mississippi to alter terms of an insurance contract made in Tennessee. Mississippi activities in connection with the policy were found to be so "slight" and so "casual" that Mississippi could not apply its own law in such way as to enlarge the obligations of the Tennessee contract. Again, however, the Court carefully noted that there might be future cases in which the terms of out-of-state contracts would be so repugnant to the vital interests of the forum state as to justify nonenforcement. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co., supra,* at 150. See also *Griffin* v. *McCoach,* 313 U. S. 498, and cases there cited.

Some contracts made locally, affecting nothing but local affairs, may well justify a denial to other states of power to alter those contracts. But, as this case illustrates, a vast part of the business affairs of this Nation does not present such simple local situations. Although this insurance contract was issued in Massachusetts, it was to protect Gillette and its Illinois subsidiary against damages on account of personal injuries that might be

suffered by users of Toni Home Permanents anywhere in the United States, its territories, or in Canada. As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states. See, *e. g., Osborn* v. *Ozlin,* 310 U. S. 53; *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313; *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532.

Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases. But modern transportation and business methods have made it more difficult to serve process on wrongdoers who live or do business in other states. In this case efforts to serve the Gillette Company were answered by a motion to dismiss on the ground that Gillette had no Louisiana agent on whom process could be served. If this motion is granted, Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is for injuries from a product

bought and used there. What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. In view of that interest, the direct action provisions here challenged do not violate due process.

What we have said above goes far toward answering the Full Faith and Credit Clause contention. That clause does not automatically compel a state to subordinate its own contract laws to the laws of another state in which a contract happens to have been formally executed. Where, as here, a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies. *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532, 544–550. See *Griffin* v. *McCoach,* 313 U. S. 498, 506–507. We have already pointed to the vital interests of Louisiana in liability insurance that covers injuries to people in that State. Of course Massachusetts also has some interest in the policy sued on in this case. The insurance contract was formally executed in that State and Gillette has an office there. But plainly these interests cannot outweigh the interest of Louisiana in taking care of those injured in Louisiana. Since this is true, the Full Faith and Credit Clause does not compel Louisiana to subordinate its direct action provisions to Massachusetts contract rules. *Pacific Employers Ins. Co.* v. *Commission,* 306 U. S. 493, 503. But cf. *John Hancock Mut. Life Ins. Co.* v. *Yates,* 299 U. S. 178; *Hughes* v. *Fetter,* 341 U. S. 609.

What we have already said disposes of the contention that Louisiana's law compelling foreign insurance companies to consent to direct actions is unconstitutional. That contention is that the Due Process Clause of the Fourteenth Amendment forbids a state to compel a foreign corporation to surrender constitutional rights as a condition of being permitted to do business in the state. See *Terral* v. *Burke Construction Co.,* 257 U. S. 529. That

318107 O - 55 - 11

principle is inapplicable to this case because, as we have just decided, Louisiana has a constitutional right to subject foreign liability insurance companies to the direct action provisions of its laws whether they consent or not.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

While I agree with the Court's result, I find the course of reasoning by which it is reached not without serious obstacles. Since the difficulties involve constitutional issues, decision upon them should be avoided if a less doubtful ground is available. In my opinion there is a basis which readily invites today's decision. Whether Louisiana may rewrite a contract, whose obligations are determined by Massachusetts or Illinois, by deleting a substantial feature of that contract and thereby enlarging the obligation of the insurance company, surely raises a serious question affecting the constitutional relationships of the States one to another. Contrariwise, whether Louisiana, free as it was to exclude the insurance company from coming into the State to do business, was empowered to condition the company's entry by an undertaking to observe a public policy binding on all local insurance companies and strictly related to the protection of serious interests of its own citizens, seems to me a question easier of solution. Accordingly I would rest the decision on this ground.

This controversy arises out of a contract made between Employers' Liability Assurance Corp., a British corporation, and the Toni Company, a division of the Gillette Safety Razor Co., a Delaware corporation with principal offices in Boston, Massachusetts. The contract contained this provision:

> "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have

> fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

It was issued and delivered in Massachusetts to Gillette and a copy delivered in Illinois to Toni. Happily, it is not necessary to determine whether the obligations flowing from this contract are determined exclusively by the law of Massachusetts or by the law of Illinois. Concededly, both States recognize the right of an insurance company to safeguard its treasury by making its indirect liability to a third person contingent on a judgment against the insured or compromise settlement participated in by the insurer. Howsoever the fact may be phrased or explained away, to allow suits by a third-party claimant directly against the insurance company prior to a judgment against the insured is to subject the insurance company to an obligation which it had not undertaken and which indeed it had expressly refused to assume. In sanctioning the protection of insurance funds afforded by the "no-action" clause, Massachusetts and Illinois have expressed state policy of the same constitutional authority as Louisiana asserted in its legislation allowing direct actions. Massachusetts is deeply concerned with the fiscal well-being of insurance companies whose activities center in that State; this is of considerable importance to its citizens. In addition, both Massachusetts and Illinois share concern for the interest of the insured in the scope and nature of the obligations which bind as well as protect him. The premiums payable by the insured under this policy varied directly with the losses paid by the insurer and to that extent the insured had a stake in the "no-action" clause. To treat that clause as though it were a redundant or an insubstantial part of the

agreement is to flout familiar experience of the readiness of juries to amerce insurance companies.[1]

To resolve these conflicting policies solely on the basis of the public policy of Louisiana is to assume that there is only one principle involved in a problem when in fact there are conflicting principles of equal relevance. This Court has not heretofore disregarded the interests of States in the position of Massachusetts and Illinois by exclusive regard for the policy of a State in the position of Louisiana when regard for its interest necessarily tangles with the interests of sister States. To be sure, a State may refuse to give affirmative help in enforcing a contract valid in a sister State where the obligation was incurred, but against its own policy. At least it may do so insofar as the Full Faith and Credit Clause is no barrier. But to deny judicial enforcement of a contract through its courts when such contract sufficiently offends local policy is a very different thing from rewriting a contract and enforcing it in a manner contrary to the undertaking of the makers.

That Louisiana's attempt to change the terms of the contract of insurance in this case presents a serious question, apart from the power of Louisiana to exclude a foreign insurance company or admit it on condition, is emphatically shown by *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143. In that case an action was brought in Mississippi on a fidelity bond insuring against employee defalcations "in any position anywhere." The bond had been issued while the executive offices of the insured were temporarily in Tennessee,

[1] Additional protections to both insurer and insured are swept aside under the Louisiana direct action statute. The interest of the insured in the outcome of the litigation decreases, with concomitant reduction in the likelihood of his vigorous cooperation in the insurer's defense. The burden of this same obligation of cooperation becomes increasingly oppressive to a conscientious insured as service on far-flung agents of the insurer leads to remote judicial proceedings.

and was issued and delivered in that State. After the insured moved its main offices to Mississippi, the State of its incorporation, suit was brought there for its treasurer's thieving in Mississippi. The policy contained a provision that a claim under the contract must be made within 15 months after the termination of suretyship for the defaulting employee. The claim was not made within that period, but the Mississippi Supreme Court held that this condition was not enforceable because contrary to a Mississippi statute. This Court reversed the Mississippi court, holding that the Mississippi statute could not disregard the limiting provision of the contract. The principle was laid down that a State may not "in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen." 292 U. S., at 149. Joining in this unanimous decision were two members, Mr. Chief Justice Hughes and Mr. Justice Brandeis, who probably had more specialized knowledge to make them aware that "Government has always had a special relation to insurance," *Osborn* v. *Ozlin,* 310 U. S. 53, 65, than any other Justices ever to sit on this Court.

In the *Hartford Indemnity* case, as here, the policy covered transitory risks, without a defined situs, and the State of the forum had a foreseeable concern with the protection of assets within its jurisdiction at the time the policy was issued, for the policy issued listed 21 employees who were then working in Mississippi. Nevertheless, Mississippi, the State of the forum, was not allowed to enlarge the obligations of a contract elsewhere validly consummated.

Our more recent cases have not made inroad on the governing consideration in the *Hartford Indemnity* case, that the State which fixes the terms of insurance contracts has interests to be protected by the Constitution no less important than has a State which seeks to excise

provisions of such a contract. In both the *Osborn* case, *supra,* and *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313, the Court was concerned merely with the validity of legislation of a regulatory nature. In neither was the Court faced with the problem of applying to an existing valid contract made outside the State local law modifying such contract. Realization that the Louisiana statute, in the context of this case, raises the delicate problem of balancing interests—that refractory aspect of due process—admonishes its avoidance when an easier solution lies at hand.

These, then, are the formidable constitutional hurdles that would have to be cleared were this an action against an insurance company which, somehow or other, was duly served in Louisiana but which had not exercised the privilege of doing business there subject to the condition of amenability to Louisiana direct action statutes. I have no doubt, however, that Louisiana can exact from Employers', as it did, valid consent to direct action in the case of injuries inflicted in Louisiana upon its citizens by Employers' policyholders. It can do so as part of the fair bargain by which it gave hospitality to Employers' for doing business in Louisiana.

After the grain is winnowed from the chaff in some hundred opinions dealing with so-called "unconstitutional conditions," insofar as they relate to the power of a State to exclude a foreign corporation or condition its entry, the residuum is clear. In an early leading case the State's authority was asserted in absolute terms:

> "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may

> restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." *Paul* v. *Virginia,* 8 Wall. 168, 181.[2]

After a while, some obvious, strictly defined qualifications were made:

> "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits . . . or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority." *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania,* 125 U. S. 181, 190.

After considerable further judicial experience, the matter was thus summarized in our own day by Mr. Justice Holmes:

> ". . . we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming

[2] An earlier case expressed, in a jumble of loose generalizations, the assumption that there were some inherent restrictions on a State's power to deal with foreign corporations. *Lafayette Insurance Co.* v. *French,* 18 How. 404, 407. Phrases like "natural justice" or "natural reason" or "the principles of the social compact" were in fashion at that time for stating intrinsic limitations on the exercise of all political power. More recently, the power of this Court to strike down legislation has been more acutely analyzed and less loosely expressed. Rhetorical generalizations have not been deemed sufficient justification for invalidating legislation.

rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. *Frick* v. *Pennsylvania,* 268 U. S. 473. *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta,* 256 U. S. 350, 358. *Badders* v. *United States,* 240 U. S. 391, 394. *United States* v. *Reading Co.,* 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, *Terral* v. *Burke Construction Co.,* 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co.* v. *Cope,* 235 U. S. 107 [197], 203; *Looney* v. *Crane Co.,* 245 U. S. 178, 188. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company has tracks and does business in the State making the attempt. *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania,* 153 U. S. 628, 646." *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434–435.

This was a particularization of his earlier generalization in *Denver* v. *Denver Union Water Co.,* 246 U. S. 178:

> "The ordinance of the City could mean no more than that the Company must accept the City's rates or stop—and as it could be stopped by the City out and out, the general principle is that it could be stopped unless a certain price should be paid. . . . It is true that this principle has not been applied in cases where the condition tended to bring about a state of things that there was a predominant public interest

to prevent, but I see no ground for the application here of anything to be deduced from *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56, or *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co.,* 243 U. S. 502." *Id.,* at 197.

The upshot of our decisions was most recently thus summarized by Mr. Justice Roberts for the Court:

"It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its part to all the reasonable conditions imposed. *Lafayette Insurance Co.* v. *French, supra* [18 How. 404], 408; *St. Clair* v. *Cox, supra* [106 U. S. 350], 356; *Connecticut Mutual Life Insurance Co.* v. *Spratley,* 172 U. S. 602, 614; *Old Wayne Mut. Life Assn.* v. *McDonough,* 204 U. S. 8, 22; *Commercial Mutual Accident Co.* v. *Davis,* 213 U. S. 245, 254. It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights, as was attempted in the cases on which the appellant relies. *Terral* v. *Burke Construction Co.,* 257 U. S. 529; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426; *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583; *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494. And for this reason a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission, *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490. . . .

"The power of the State altogether to exclude the corporation, and the consequent ability to condition its entrance into the State, distinguishes this case from those involving substituted service upon individuals . . . ." *Washington* v. *Superior Court,* 289 U. S. 361, 364–365.

The standard of reasonableness, as expressed in the *Washington* case, imposed on the power of a State to admit a foreign corporation on conditions, embraces all prior instances of denial of state power. It gives a rational basis for the holdings that a State may not restrict federal judicial power or burdensomely regulate or tax interstate commerce, or, without justification of ample interests of its own, project its powers into the domain of another State.

What Louisiana has done here falls outside any of the specific instances or the guiding principles recognized by this Court from time to time as limitations upon what still remains the practically arbitrary power of a State in dealing with the desire of a foreign corporation, not privileged to do so by federal authority, to do business within its bounds.[3] Here we have no claim of interference with interstate commerce or with the operations of the Federal Government. There is no discrimination between foreign and domestic insurance companies. And there is no denial of due process because the Louisiana condition of admission meets the test of reasonableness, a standard to be applied in diverse contexts in the light of all relevant factors, including here the recognized power to exclude a foreign corporation. It meets the test of reasonableness because the conditions imposed are fairly related to the interests which Louisiana may appropriately protect in surrendering its right to exclude a foreign corporation. The interests of Massachusetts or Illinois do not so ob-

[3] Whatever the survival value of *Frost & Frost Trucking Co.* v. *Railroad Comm'n,* 271 U. S. 583, cf. *Stephenson* v. *Binford,* 287 U. S. 251, it is significant that, while it was there held that to subject a private carrier to a common carrier's liabilities as a condition of permitting a local trucking company to use the highways was violative of due process, the opinion did not even advert to the earlier case of *Pierce Oil Corp.* v. *Phoenix Rfg. Co.,* 259 U. S. 125, in which the imposition of a common carrier's liabilities on a private oil carrier was upheld as a condition on the entry of the foreign corporation.

viously subordinate those of Louisiana that the latter must constitutionally yield to the former.

Surely it was reasonable for Louisiana to adopt the method it did of meeting some of the difficulties in obtaining jurisdiction over out-of-state tortfeasors, typified in the present case by the dispute over the efficacy of attempted service upon Gillette, the insured. Even where that specific problem is not present, the State may justifiably have felt concern over the delays in satisfaction of judgments for injuries sustained in Louisiana by Louisiana citizens that are inherent under the traditional system which requires a separate action by the victim of an insured tortfeasor to reach the latter's insurance should he default in payment of a judgment against him. It cannot be said that Louisiana was extorting an unfair or unreasonable advantage for its citizens as the price of its permission to Employers' to tap the Louisiana insurance market.[4] Nor can it be said that in thus protecting its own serious interests it was selfishly or ruthlessly seeking to inject itself into matters that were the sole or predominant concern of sister States.[5]

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[4] Thus it has been held that a State may, as a condition of admission, require compliance with local antitrust policy, *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28, even as to the operations of foreign corporations in another State, *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322. It may require the assumption by a private carrier of some of the duties of a common carrier, *Pierce Oil Corp.* v. *Phoenix Rfg. Co.,* 259 U. S. 125; and it may impose methods of substituted service on foreign corporations which, if applied to individuals, would be violative of due process, *Washington* v. *Superior Court,* 289 U. S. 361.

[5] Such cases as *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346, and *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, invalidating state statutes which attempted to prevent or penalize acts outside of the forum State are not pertinent. In these cases a State was seeking to assert its power over the happenings in another State. And so, likewise, a State may not tax property within the taxing jurisdiction of another State.

OPPER *v.* UNITED STATES.

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

No. 49. Argued October 22, 1954.—Decided December 6, 1954.

Petitioner was convicted of violating 18 U. S. C. §§ 2 and 281, on charges that he had conspired with and induced a federal employee to accept outside compensation for services in a matter before a federal agency in which the United States had an interest. The Government relied upon voluntary oral and written statements made by petitioner to the Federal Bureau of Investigation and upon other independent evidence. The statements made by petitioner to the F. B. I. were exculpatory and were not confessions, but were admissions of fact essential to prove the charge against petitioner and of an element of the crime. *Held:*

1. An accused's extrajudicial admissions of essential facts or elements of the crime, made subsequent to the crime, are of the same character as confessions, and corroboration by independent evidence is required. Pp. 89–92.

(a) The requirement of corroboration applies to exculpatory statements to the same extent that it applies to incriminatory statements. Pp. 91–92.

2. The jury's finding in this case, from the admissions of essential facts together with all the other evidence, that the guilt of petitioner had been established beyond a reasonable doubt is supported by substantial evidence. Pp. 92–94.

(a) The corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. P. 93.

(b) It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth; but those facts plus the other evidence must be sufficient to find guilt beyond a reasonable doubt. P. 93.

3. There is nothing in the record in this case requiring reversal because of any confusion or injustice arising from the trial of petitioner jointly with a codefendant. Pp. 94–95.

211 F. 2d 719, affirmed.

Frederick Bernays Wiener argued the cause for petitioner. With him on the brief was *John M. Kelley, Jr.*

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney* and *J. F. Bishop.*

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner seeks review of a conviction under charges that he violated 18 U. S. C. § 281, a section which punishes employees of the United States who receive outside compensation for any services to be rendered in any matter before a federal department or agency in which the United States is a party. Petitioner was not himself an employee but was charged with inducing a federal employee to accept compensation for such services through conspiring with him for that purpose. Such inducement violates 18 U. S. C. §§ 2 and 281. The sections are set out in the margin.[1]

Count 1 of the indictment charged, in substance, that on or about October 1, 1950, Hollifield, an employee of the United States, agreed to receive $1,750 from the petitioner for services to be rendered by Hollifield in regard to purchase requests in which the United States had a

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[1] 18 U. S. C. § 281:

"Whoever, being . . . [an] officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

Id., § 2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

direct interest. The services consisted of Hollifield's recommending approval and procurement by the Department of the Air Force of certain types of sun goggles and ski goggles which were to be used in Air Force survival kits. Count 4 charged receipt by Hollifield of $200 on or about August 5, 1951. Each of these two counts charged that petitioner aided, abetted, induced and procured Hollifield to unlawfully receive the compensation.

The fifth count charged a conspiracy between Hollifield and the petitioner from October 1, 1950, until September 26, 1951, to perform the unlawful acts alleged. Convictions on other counts were reversed.

Hollifield and the petitioner were tried jointly after the petitioner's motion for severance was denied. The jury found petitioner guilty on all counts and sentence was duly imposed. On appeal the Court of Appeals for the Sixth Circuit affirmed the conviction as to the above counts now before us. 211 F. 2d 719.

Certiorari was granted, 347 U. S. 1010, because of asserted variance or conflict between the legal conclusion reached in this case—that an extrajudicial, exculpatory statement of an accused, subsequent to the alleged crime, needs no corroboration—and other cases to the contrary.[2] This Court, in granting certiorari, limited review to the three issues raised by the petitioner which were considered important to the administration of criminal law and upon which there appeared to be some divergence of opinion among the Courts of Appeals.[3]

Hollifield was employed by the United States Air Force at the Aero Medical Laboratory at Wright Field,

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[2] *Warszower* v. *United States,* 312 U. S. 342; *Calderon* v. *United States,* 207 F. 2d 377; *Pines* v. *United States,* 123 F. 2d 825; *Gulotta* v. *United States,* 113 F. 2d 683.

[3] The three questions as set out by the petitioner upon which certiorari was granted are: "3. Whether, where an admission is made to law enforcement officers after the date of the acts charged as crimes,

Dayton, Ohio. His job entailed, among other things, preparing the specifications of survival kits and determining whether goods submitted for those kits, including goggles, complied with the specifications. Petitioner resided in Chicago and was a subcontractor on various projects for equipping these kits. The petitioner supplied certain goggles to a prime contractor who submitted them for approval for use in the kits. The goggles were rejected on January 23, 1951, because of "marked deviations" from applicable specifications. A short time thereafter Hollifield arranged a conference with the project engineer who had made the rejection. At the conference Hollifield, accompanied by the petitioner, strongly urged acceptance of petitioner's goggles. It was concluded that Hollifield should prepare a written memorandum of his reasons for acceptance. A written memorandum dated January 25, 1951, was prepared.[4] Thereafter reconsideration was granted and on February 3, 1951, use of petitioner's goggles was recommended.

The Government further established by various records that on April 13, 1951, a long-distance call was made from Hollifield's residence in Dayton to petitioner in Chicago; that petitioner on April 16, 1951, cashed a check for $1,000, which check was dated April 13, 1951; and that a round-trip airline ticket was issued in Hollifield's name

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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." 347 U. S. 1010.

[4] The memorandum, although signed by another, bore Hollifield's initials and embodied the reasons he had orally urged at the conference.

for April 14, 1951, flights from Dayton to Chicago and return.

The evidence of the Government thus far summarized was established by independent proof. The remainder of the Government's case depended upon a written statement submitted by the petitioner to the Federal Bureau of Investigation and various oral statements made by the petitioner to the FBI in several interviews.

The substance of these statements was that the petitioner had first met Hollifield in October 1950, and had seen him some fifteen times thereafter at Wright Field and in Chicago and that he had discussed the rejection of the goggles with Hollifield. He further stated that Hollifield, pursuant to an earlier phone call, came to his office in Chicago on Saturday, April 14, 1951, and he had handed Hollifield $1,000 which he had taken from cash he had at home and which cash he had replenished on Monday, April 16, 1951, by cashing a check dated April 13, 1951, in that amount. Petitioner also admitted giving Hollifield another $200 some two weeks later.

In both his oral and written statements petitioner insisted that he had never requested anything of Hollifield in regard to the goggles; that the money was strictly a loan to Hollifield based upon Hollifield's request to him that he needed money in regard to a mortgage on his home; that no security was given for the loan; that he had no receipt or agreement for interest; that he had no personal knowledge as to whether Hollifield owned a home or not; and that none of the money had been repaid. Petitioner consistently and specifically denied any guilt of the offense charged.

The petitioner makes no claim that any of the extrajudicial statements were anything but voluntary. In fact the record discloses that petitioner was cooperative with the FBI in furnishing information and that petitioner had ample opportunity to consult counsel in reference to the

FBI interviews and statements he made. Petitioner's prime contention is that his statements made after the date of the offense charged are so analogous to a confession that the same rules applicable to confessions must be applied and that if such rules are applied the conviction cannot stand.

First. It is petitioner's contention that where extrajudicial admissions that point to guilt are made by the accused, after the date of the acts charged as crime, testimony by witnesses other than the accused as to such oral or written admissions cannot be accepted as evidence without corroboration of the facts stated. That conclusion derives from petitioner's position that admissions of essential facts to prove a crime or admissions of some of its elements are so analogous to confessions of guilt that the same rule as to corroboration should be applied.

In the United States our concept of justice that finds no man guilty until proven has led our state and federal courts generally to refuse conviction on testimony concerning confessions of the accused not made by him at the trial of his case. Wigmore, Evidence (3d ed.), § 2071. See *Warszower* v. *United States,* 312 U. S. 342, 345, note 2. We have gone further in that direction than has the common law of England. There the courts have been hesitant to lay down a rule that an uncorroborated extrajudicial confession may not send an accused to prison or to death.[5] In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an

[5] In some cases a person may be convicted on his own confession without any corroborating evidence. 9 Halsbury's Laws of England (2d ed.) § 291, p. 207; § 268, p. 183, note g; I Phillipps and Arnold, Evidence (5th Am. ed.), p. 441. In manslaughter this conclusion is cautiously applied. *Regina* v. *Burton,* Dearsly's Crown Cases (1852–1856) 282. Proof of the *corpus delicti* is required. Halsbury, *supra,* § 768; *R.* v. *Davidson,* 25 Cr. App. R. 21.

318107 O - 55 - 12

enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession. Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination.[6] They are competent as an admission against interest.

The admissions detailed above establish an acquaintance between petitioner and the employee, and a motive but not a purpose to have the federal employee agree to receive prohibited compensation for the services. More importantly they establish the receipt of money by the employee around the time of the alleged inducement by conspiracy to secure the employee's services before a federal agency concerning a contract in which the United States was interested. While the oral and verbal statements were not confessions of guilt, they were admissions of fact essential to prove the charge against petitioner and indeed of an element of the crime, inducement to receive the prohibited compensation or an illegal acceptance of a promise to pay.

In *Warszower* v. *United States,* 312 U. S. 342, 348, we held that although the only proof of an essential element of making a false statement was admissions to the contrary prior to the crime charged, sufficient to convict if found true, such an admission would take the case to the jury. We said such admissions "contain none of the inherent weaknesses of confessions or admissions after the fact." We think that an accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and that corroboration should be required. See I Greenleaf, Evi-

[6] See American Law Institute Model Code of Evidence, adopted May 15, 1942, Foreword, Professor Edmund M. Morgan, 36, Rule 501; Wigmore, Evidence (3d ed.), § 1048.

dence (16th ed.), § 216; *Smith* v. *United States, post,* p. 147, decided today.

The need for corroboration extends beyond complete and conscious admission of guilt—a strict confession.[7] Facts admitted that are immaterial as to guilt or innocence need no discussion. But statements of the accused out of court that show essential elements of the crime, here payment of money, necessary to supplement an otherwise inadequate basis for a verdict of conviction, stand differently. Such admissions have the same possibilities for error as confessions. They, too, must be corroborated. See *Wilson* v. *United States,* 162 U. S. 613, 621.

It is urged by the Government, however, that such requirement should not apply to exculpatory statements, that is, those that explain actions rather than admit guilt. It is thought that exculpatory statements do not have behind them the pressure of coercion or the inducement of escaping the consequences of crime. This accords

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[7] "A confession is *an acknowledgment in express words,* by the accused in a criminal case, *of the truth of the guilty fact charged* or *of some essential part of it.*" Professor Wigmore excludes from the rule of corroboration exculpatory statements: "*Exculpatory statements,* denying guilt, cannot be confessions. This ought to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed." Also, "acknowledgments of subordinate facts colorless with reference to actual guilt."

"An acknowledgment of a *subordinate fact, not directly involving guilt,* or, in other words, not essential to the crime charged, is not a confession; because the supposed ground of untrustworthiness of confessions . . . is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment; and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions." Wigmore, Evidence (3d ed.), § 821.

with Professor Wigmore's view. See note 7, *supra*. The statements here are exculpatory. See summary, *supra*. There is no opinion of this Court declaring or declining such an exception.[8] We conclude that exculpatory statements, however, may not differ from other admissions of incriminating facts. Given when the accused is under suspicion, they become questionable just as testimony by witnesses to other extrajudicial statements of the accused. They call for corroboration to the same extent as other statements.

Second. We next consider the extent of the corroboration of admissions necessary as a matter of law for a judgment of conviction. On this point the cases in the federal courts show divergence. One line of cases follows the rule set out in *Daeche* v. *United States,* 250 F. 566, that the corroborative evidence is sufficient if it touches the *corpus delicti* "in the sense of the injury against whose occurrence the law is directed," 250 F., at 571, and is of a type which goes to fortify the truthfulness of the confession.[9] Some cases would seem only to require the latter half of the *Daeche* rule; that is, proof of any corroborating circumstances is adequate which goes to fortify the truth of the confession or tends to prove facts embraced in the confession. There is no necessity that such proof touch the *corpus delicti* at all, though, of course, the facts of the admission plus the corroborating evidence must establish all elements of the crime.[10]

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[8] *Bram* v. *United States,* 168 U. S. 532, an important case in the field of admissions, excludes such a statement on the ground of coercion, not exculpation. P. 562.

[9] *E. g., Jordan* v. *United States,* 60 F. 2d 4; *United States* v. *Kertess,* 139 F. 2d 923; *Forlini* v. *United States,* 12 F. 2d 631, 634.

[10] Accord, *United States* v. *Williams,* 1 Cliff. 5, 28 Fed. Cas., No. 16,707, pp. 636, 644; *Pearlman* v. *United States,* 10 F. 2d 460; *Wynkoop* v. *United States,* 22 F. 2d 799; *Bolland* v. *United States,* 238 F. 529, 530.

Other decisions tend to follow the rule enunciated in *Forte* v. *United States,* 68 App. D. C. 111, 115, 119, 94 F. 2d 236, 240, 244, that the corroboration must consist of substantial evidence, independent of the accused's extrajudicial statements, which tends to establish the whole of the *corpus delicti.*[11]

Whether the differences in quantum and type of independent proof are in principle or of expression is difficult to determine. Each case has its own facts admitted and its own corroborative evidence, which leads to patent individualization of the opinions. However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti.* It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *Smith* v. *United States, post,* p. 147. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.

Turning to the instant case, it is clear that there was substantial independent evidence to establish directly the

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[11] *Ercoli* v. *United States,* 76 U. S. App. D. C. 360, 361, 362, 363, 131 F. 2d 354, 355, 356, 357, following and reaffirming *Forte,* states the rule to be that corroboration which merely tends to support the confession is insufficient, as it must also embrace substantial evidence touching and tending to prove each of the main elements or constituent parts of the *corpus delicti.* Also following this rule, *e. g., Pines* v. *United States,* 123 F. 2d 825; *Ryan* v. *United States,* 99 F. 2d 864; *United States* v. *Fenwick,* 177 F. 2d 488.

truthfulness of petitioner's admission that he paid the government employee money.[12] But this direct corroborative evidence tending to prove the truthfulness of petitioner's statements would not establish a *corpus delicti* of the offense charged. Rather it tends to establish only one element of the offense—payment of money. The Government therefore had to prove the other element of the *corpus delicti*—rendering of services by the government employee—entirely by independent evidence.[13] This independent evidence of services and of facts within the admissions seems adequate to constitute corroboration of petitioner's extrajudicial admissions and also establish the *corpus delicti*. The jury was free therefore to consider the admissions in connection with all the other evidence in the case and to decide whether the guilt of the petitioner had been established beyond a reasonable doubt. They found that it was and we feel that such finding is supported by substantial evidence.

Third. Petitioner's final complaint arises out of the fact that the conspirators were tried jointly. The petitioner feels that the jury might have become confused and improperly considered statements of codefendant Hollifield in reaching its verdict as to petitioner. Other than this general possibility of confusion, he points out nothing specifically prejudicial resulting from the joint trial. The fact that the Court of Appeals below reversed on two counts because of lack of evidence independent of statements of Hollifield is emphasized to bolster this claim of error as to the remaining counts.

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[12] (1) The long-distance call from Hollifield's home to petitioner's home on April 13, 1951. (2) Petitioner's $1,000 check dated April 13, 1951. (3) The airline tickets in Hollifield's name for a flight to Chicago on April 14, 1951.

[13] This was accomplished by introduction of substantially uncontroverted evidence of Hollifield's efforts in gaining acceptance by the Government of petitioner's previously rejected goggles.

It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled. The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner.[14] To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. The record contains substantial competent evidence upon which the jury could find petitioner guilty. The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE DOUGLAS, believing that *Forte* v. *United States,* 68 App. D. C. 111, 94 F. 2d 236, states the better rule on corroboration, would reverse the judgment below.

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[14] Rule 14, Federal Rules of Criminal Procedure; *United States* v. *Ball,* 163 U. S. 662, 672; *Waldeck* v. *United States,* 2 F. 2d 243; *Olmstead* v. *United States,* 19 F. 2d 842; *Metcalf* v. *United States,* 195 F. 2d 213, 217.

BROOKS *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 21. Argued October 18, 1954.—Decided December 6, 1954.

In a representation election conducted by the National Labor Relations Board at petitioner's place of business in April 1951, a particular union won by a vote of eight to five, and the Board certified it as the exclusive bargaining representative. A week after the election and the day before the certification, petitioner received a handwritten letter signed by nine of the 13 employees in the bargaining unit stating that they "are not in favor of being represented by" the union. Petitioner thereupon refused to bargain with the union. In an unfair labor practice proceeding under the amended National Labor Relations Act, the Board ordered petitioner to bargain. *Held:* The Board was entitled to an order of enforcement from the Court of Appeals. Pp. 97–104.

(a) An employer who is presented with evidence that his employees have deserted their certified union is not entitled forthwith to refuse to bargain with the union. P. 103.

(b) The fact that a bargaining agency may be ascertained by methods less formal than a supervised election does not warrant sanctioning informal repudiation where decertification by another election is precluded. Pp. 103–104.

(c) It is not within the power of this Court to require the Board to relieve a small employer, like the one involved in this case, of the duty that may be exacted from an enterprise with many employees. P. 104.

(d) It is within the Board's discretion in carrying out congressional policy to treat the one-year certification period as running from the date of certification rather than from the date of the election. P. 104.

(e) The Board's rule that one year after certification the employer may ask for an election, or, if he has fair doubts about the union's continuing majority, he may refuse to bargain further with it, is within the Board's administrative authority. P. 104.

204 F. 2d 899, affirmed.

Erwin Lerten argued the cause for petitioner. With him on the brief were *Frederick A. Potruch* and *Henry S. Fraser.*

David P. Findling argued the cause for respondent. With him on the brief were *Solicitor General Sobeloff, George J. Bott, Dominick L. Manoli, Fannie M. Boyls* and *William J. Avrutis.*

Henry S. Fraser filed a brief for the Genesee Foundry Co., Inc., as *amicus curiae,* urging reversal.

A brief of *amici curiae* urging affirmance was filed by *J. Albert Woll* and *Herbert S. Thatcher* for the American Federation of Labor, and *Arthur J. Goldberg* and *David E. Feller* for the Congress of Industrial Organizations.

Mr. Justice Frankfurter delivered the opinion of the Court.

The National Labor Relations Board conducted a representation election in petitioner's Chrysler-Plymouth agency on April 12, 1951. District Lodge No. 727, International Association of Machinists, won by a vote of eight to five, and the Labor Board certified it as the exclusive bargaining representative on April 20. A week after the election and the day before the certification, petitioner received a handwritten letter signed by nine of the 13 employees in the bargaining unit stating: "We, the undersigned majority of the employees . . . are not in favor of being represented by Union Local No. 727 as a bargaining agent."

Relying on this letter and the decision of the Court of Appeals for the Sixth Circuit in *Labor Board* v. *Vulcan Forging Co.,* 188 F. 2d 927, petitioner refused to bargain with the union. The Labor Board found, 98 N. L. R. B. 976, that petitioner had thereby committed an unfair labor practice in violation of §§ 8 (a)(1) and 8 (a)(5) of

the amended National Labor Relations Act, 61 Stat. 140–141, 29 U. S. C. §§ 158 (a)(1), (a)(5), and the Court of Appeals for the Ninth Circuit enforced the Board's order to bargain, 204 F. 2d 899. In view of the conflict between the Circuits, we granted certiorari, 347 U. S. 916.

The issue before us is the duty of an employer toward a duly certified bargaining agent if, shortly after the election which resulted in the certification, the union has lost, without the employer's fault, a majority of the employees from its membership.

Under the original Wagner Act, the Labor Board was given the power to certify a union as the exclusive representative of the employees in a bargaining unit when it had determined, by election or "any other suitable method," that the union commanded majority support. § 9 (c), 49 Stat. 453. In exercising this authority the Board evolved a number of working rules, of which the following are relevant to our purpose:

(a) A certification, if based on a Board-conducted election, must be honored for a "reasonable" period, ordinarily "one year," in the absence of "unusual circumstances." [1]

(b) "Unusual circumstances" were found in at least three situations: [2] (1) the certified union dissolved or became defunct; [3] (2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international; [4]

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[1] *E. g., Kimberly-Clark Corp.*, 61 N. L. R. B. 90. But see *Trackson Co.*, 56 N. L. R. B. 917.

[2] The cases in which the Board found the "unusual circumstances" were all representation cases in which a rival union sought a new election less than a year after certification.

[3] *Public Service Electric & Gas Co.*, 59 N. L. R. B. 325; cf. *Nashville Bridge Co.*, 49 N. L. R. B. 629.

[4] *Brightwater Paper Co.*, 54 N. L. R. B. 1102; *Carson Pirie Scott & Co.*, 69 N. L. R. B. 935; cf. *Great Lakes Carbon Corp.*, 44 N. L. R. B. 70.

(3) the size of the bargaining unit fluctuated radically within a short time.[5]

(c) Loss of majority support after the "reasonable" period could be questioned in two ways: (1) employer's refusal to bargain, or (2) petition by a rival union for a new election.[6]

(d) If the initial election resulted in a majority for "no union," the election—unlike a certification—did not bar a second election within a year.

The Board uniformly found an unfair labor practice where, during the so-called "certification year," an employer refused to bargain on the ground that the certified union no longer possessed a majority. While the courts in the main enforced the Board's decisions,[7] they did not commit themselves to one year as the determinate content of reasonableness. The Board and the courts proceeded along this line of reasoning:

(a) In the political and business spheres, the choice of the voters in an election binds them for a fixed time. This promotes a sense of responsibility in the electorate and needed coherence in administration. These considerations are equally relevant to healthy labor relations.

(b) Since an election is a solemn and costly occasion, conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation. A petition or a public meeting—in which those voting for and against unionism are disclosed to management, and in

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[5] See *Westinghouse Electric & Mfg. Co.*, 38 N. L. R. B. 404, 409.

[6] In *Tabardrey Mfg. Co.*, 51 N. L. R. B. 246, the Board refused to conduct an election where there was no rival union and the employees were dissatisfied with their certified agent.

[7] *E. g., Labor Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541 (C. A. 2d Cir.) (six weeks); *Labor Board* v. *Botany Worsted Mills*, 133 F. 2d 876 (C. A. 3d Cir.) (repudiation one week after election, refusal to bargain three months after certification). Contra: *Labor Board* v. *Inter-City Advertising Co.*, 154 F. 2d 244 (C. A. 4th Cir.).

which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth.

(c) A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out.

(d) It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.

(e) In situations, not wholly rare, where unions are competing, raiding and strife will be minimized if elections are not at the hazard of informal and short-term recall.

Certain aspects of the Labor Board's representation procedures came under scrutiny in the Congress that enacted the Taft-Hartley Act in 1947, 61 Stat. 136. Congress was mindful that, once employees had chosen a union, they could not vote to revoke its authority and refrain from union activities, while if they voted against having a union in the first place, the union could begin at once to agitate for a new election.[8] The National Labor Relations Act was amended to provide that (a) employees could petition the Board for a decertification election, at which they would have an opportunity to choose no

[8] Committee reports and controlling floor statements show an awareness of the Board's prior practice but afford no guidance for solution of our problem. The Senate Report declared: "In order to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot, the bill also provides that elections in any given unit may not be held more frequently than once a year." S. Rep. No. 105, 80th Cong., 1st Sess. 12. And further, "At present, if the union loses, it may on presentation of additional membership cards secure another elec-

longer to be represented by a union, 61 Stat. 144, 29 U. S. C. § 159 (c)(1)(A)(ii); (b) an employer, if in doubt as to the majority claimed by a union without formal election or beset by the conflicting claims of rival unions, could likewise petition the Board for an election, 61 Stat. 144, 29 U. S. C. § 159 (c)(1)(B); (c) after a valid certification or decertification election had been conducted, the Board could not hold a second election in the same bargaining unit until a year had elapsed, 61 Stat. 144, 29 U. S. C. § 159 (c)(3); (d) Board certification could only be granted as the result of an election, 61 Stat. 144, 29 U. S. C. § 159 (c)(1), though an employer would presumably still be under a duty to bargain with an uncertified union that had a clear majority, see *Labor Board* v. *Kobritz,* 193 F. 2d 8 (C. A. 1st Cir.).

The Board continued to apply its "one-year certification" rule after the Taft-Hartley Act came into force,[9]

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tion within a short time, but if it wins its majority cannot be challenged for a year." *Id.,* at 25.

And Senator Taft, the authoritative expounder of his measure, does not give us much more help: "The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. The men choose a bargaining agent for 1 year. He remains the bargaining agent until the end of that year." 93 Cong. Rec. 3838.

The House decided to reverse the practice under the Wagner Act by inserting a provision which would have limited representation elections to 12-month intervals but permitted decertification elections at any time. It did so as an expression of the prevailing congressional mood to assure to workers freedom from union affiliation as well as the right to join one. This provision was rejected in Conference.

[9] *E. g., Globe Automatic Sprinkler Co.,* 95 N. L. R. B. 253; see *Celanese Corp. of America,* 95 N. L. R. B. 664, 672–674. Both before and after the Taft-Hartley Act, the Board and the courts did not apply the rule to a collective bargaining relationship established other than as the result of a certification election. *E. g., Joe Hearin,* 66 N. L. R. B. 1276 (card-check); *Labor Board* v. *Mayer,* 196 F. 2d 286 (C. A. 5th Cir.) (card-check); *Squirrel Brand Co.,* 104 N. L. R. B. 289 (order to bargain).

except that even "unusual circumstances" no longer left the Board free to order an election where one had taken place within the preceding 12 months.[10] Conflicting views became manifest in the Courts of Appeals when the Board sought to enforce orders based on refusal to bargain in violation of its rule. Some Circuits sanctioned the Board's position.[11] The Court of Appeals for the Sixth Circuit denied enforcement.[12] The Court of Appeals for the Third Circuit held that a "reasonable" period depended on the facts of the particular case.[13]

The issue is open here. No case touching the problem has directly presented it. In *Franks Bros. Co.* v. *Labor Board*, 321 U. S. 702, we held that where a union's majority was dissipated after an employer's unfair labor practice in refusing to bargain, the Board could appropriately find that such conduct had undermined the prestige of the union and require the employer to bargain with it for a reasonable period despite the loss of majority. And in *Labor Board* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563, we held that a claim of an intervening loss of majority was no defense to a proceeding for enforcement of an order to cease and desist from certain unfair labor practices.

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[10] For example, in *Swift & Co.*, 94 N. L. R. B. 917, the Board, while applying the exception to a schism that occurred within 7 months of certification, did not in fact direct an election until 17 months had passed. See also *Fedders-Quigan Corp.*, 88 N. L. R. B. 512.

[11] *E. g., Labor Board* v. *Brooks*, 204 F. 2d 899 (C. A. 9th Cir.); cf. *Labor Board* v. *Sanson Hosiery Mills, Inc.*, 195 F. 2d 350 (C. A. 5th Cir.); see *Labor Board* v. *Geraldine Novelty Co.*, 173 F. 2d 14, 16–17 (C. A. 2d Cir.).

[12] *Labor Board* v. *Vulcan Forging Co.*, 188 F. 2d 927 (five weeks); *Mid-Continent Petroleum Corp.* v. *Labor Board*, 204 F. 2d 613 (two months).

[13] *Labor Board* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64 (refusal to bargain after 49 weeks not an unfair labor practice).

Petitioner contends that whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain. In effect, he seeks to vindicate the rights of his employees to select their bargaining representative. If the employees are dissatisfied with their chosen union, they may submit their own grievance to the Board.[14] If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit.[15] Although the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge of an unfair labor practice, these are matters for the Board; they do not justify employer self-help or judicial intervention. The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence.

We find wanting the arguments against these controlling considerations. In placing a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers, Congress has discarded common-law doctrines of agency. It is contended that since a bargaining agency may be ascertained by methods less formal than a supervised election, informal repudiation should also be sanctioned where decertification by another

[14] See *Hughes Tool Co.*, 104 N. L. R. B. 318; cf. *Labor Board* v. *Clarostat Mfg. Co.*, 216 F. 2d 525 (C. A. 1st Cir.).

[15] See *Henry Heide, Inc.*, 107 N. L. R. B., No. 258 (claim of loss of majority but no actual evidence); cf. *Borden Co.*, 108 N. L. R. B., No. 116; *Telegraph Publishing Co.*, 102 N. L. R. B. 1173.

election is precluded. This is to make situations that are different appear the same. Finally, it is not within the power of this Court to require the Board, as is suggested, to relieve a small employer, like the one involved in this case, of the duty that may be exacted from an enterprise with many employees.[16]

To be sure, what we have said has special pertinence only to the period during which a second election is impossible. But the Board's view that the one-year period should run from the date of certification rather than the date of election seems within the allowable area of the Board's discretion in carrying out congressional policy. See *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 192–197; *Labor Board* v. *Seven-Up Bottling Co.,* 344 U. S. 344. Otherwise, encouragement would be given to management or a rival union to delay certification by spurious objections to the conduct of an election and thereby diminish the duration of the duty to bargain. Furthermore, the Board has ruled that one year after certification the employer can ask for an election [17] or, if he has fair doubts about the union's continuing majority, he may refuse to bargain further with it.[18] This, too, is a matter appropriately determined by the Board's administrative authority.

We conclude that the judgment of the Court of Appeals enforcing the Board's order must be

Affirmed.

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[16] In *Wilson-Oldsmobile,* 110 N. L. R. B., No. 74, the Board has applied new jurisdictional yardsticks which would place this case, if now brought, outside them.

[17] See *Whitney's,* 81 N. L. R. B. 75; cf. *Ny-Lint Tool & Mfg. Co.,* 77 N. L. R. B. 642.

[18] *Celanese Corp. of America,* 95 N. L. R. B. 664. The Board has on several occasions intimated that even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief. *Id.,* at 674; *United States Gypsum Co.,* 90 N. L. R. B. 964, 966–968; see also *J. P. O'Neil Lumber Co.,* 94 N. L. R. B. 1299.

MASSEY *v.* MOORE, WARDEN.

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

No. 119. Argued November 8, 1954.—Decided December 6, 1954.

In a habeas corpus proceeding in a federal court, petitioner sought release from life imprisonment for a noncapital offense of which he had been convicted in a state court. He alleged that he was tried and convicted without counsel while he was insane and unable to defend himself. The state courts had denied him relief because under state law the question whether he was insane and thus unable to defend himself could be raised only at the trial or on appeal, not collaterally. The question whether, at the time of the trial, he was mentally competent to defend himself without counsel has never been determined. *Held:* Petitioner is entitled to a hearing on this question, since it would be a denial of the due process required by the Fourteenth Amendment to require an insane man to stand trial in a state court without counsel. Pp. 106–109.

(a) One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel. P. 108.

(b) An insane man tried without counsel cannot be held to the requirement of tendering the issue of his insanity at the trial. Pp. 108–109.

(c) Failure of an insane man without counsel to raise the question of his insanity on appeal does not waive his constitutional right. P. 109.

205 F. 2d 665, reversed.

Dean Acheson argued the cause and filed a brief for petitioner.

By special leave of Court, *pro hac vice, James N. Castleberry, Jr.,* 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,* Assistant Attorney General.

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MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, who is in a Texas prison under a life sentence imposed by a Texas court, brought this petition for writ of habeas corpus in the Federal District Court. His claim is that he was denied the due process of law guaranteed by the Fourteenth Amendment because he was tried and convicted of robbery at a time when he was of unsound mind and unassisted by counsel. The District Court denied the petition without a hearing. The Court of Appeals affirmed by a divided vote. 205 F. 2d 665. The case is here on certiorari. 347 U. S. 1011.

Petitioner's trial on the robbery charge started and ended the same day. He had been confined to the psychopathic hospital of the state prison for several months prior to the trial; and for part of that time he was kept in a cell block reserved for the most violent inmates. He was removed from a strait jacket March 7, 1941, and tried March 11, 1941. He stood trial without benefit of counsel, though the crime with which he was charged carried a mandatory life sentence because petitioner had suffered two prior felony convictions. See Tex. Pen. Code, Art. 63.

Petitioner declined to plead guilty; hence a plea of not guilty was entered. So far as we are advised, petitioner took no part in the proceedings and made no attempt to conduct any defense. Petitioner was convicted and immediately sentenced. Shortly thereafter, he tried to commit suicide; and then he was recommitted to the psychopathic ward where he was confined for several months more. While he was so confined, the time for appeal from his judgment of conviction expired.

Since his conviction, petitioner has tried repeatedly to obtain relief by way of habeas corpus both in the state and federal courts. He repeatedly claimed that he was tried and convicted without counsel while he was insane and

unable to defend himself. Until 1952, he failed,* because the record of his trial erroneously stated that he was represented by counsel. The error in that record was corrected by affidavits of both the trial judge and the prosecuting attorney. Thereupon petitioner renewed his efforts to get a hearing on his claim. Finally the Texas courts denied him relief because under Texas law the question whether he was insane and thus unable to defend could be raised only on appeal, not collaterally. *Ex parte Massey,* 157 Tex. Cr. R. 491, 249 S. W. 2d 599. Petitioner, having exhausted his state remedies, sought the present relief in the District Court, which ruled against him. The Court of Appeals affirmed on the grounds (1) that petitioner now tenders an issue which could and should have been raised during the trial; (2) that the question of petitioner's insanity was determined against him in 1948 by the District Court; and (3) that the allegations of insanity and lack of counsel do not present a substantial federal question.

We disagree with the Court of Appeals and conclude that petitioner is entitled to a hearing on the question whether he was insane at the time of the trial. He has not had such a hearing. In 1948, the District Court, acting on the erroneous assumption that petitioner had counsel, held that he was competent to stand trial.

In the present case the District Court merely ruled, "On this question of whether, since he was not represented by counsel at his trial, he is in custody in violation of the Constitution, etc. of the United States, I have examined again all the proceedings in this Court and in the State Courts and have reached the conclusion that his contention that his trial was not in accordance with the

*For the chapters, which are reported, in petitioner's unsuccessful attempts to obtain a hearing on the question, see *In re Massey,* 327 U. S. 770; *Ex parte Massey,* 149 Tex. Cr. R. 172, 191 S. W. 2d 877; *Massey* v. *Moore,* 173 F. 2d 980.

Constitution is without merit." That may mean that the evidence to support the finding that petitioner was competent to stand trial with a lawyer was also sufficient to sustain the conclusion that he was competent to stand trial without a lawyer. It may mean that in the view of the District Court the two issues are the same. The present record leaves us in doubt. One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel. The difference in those issues and the importance of that difference to the petitioner make manifest that grave injustice might be done, if the finding in the earlier proceedings were allowed to do service here. On this record the question of petitioner's ability to represent himself without counsel remains undetermined.

On the present pleadings we must take as true the allegation of mental incapacity at the time of the trial. See *Smith* v. *O'Grady,* 312 U. S. 329; *White* v. *Ragen,* 324 U. S. 760, 763. Yet if he were then insane as claimed, he was effectively foreclosed from defending himself. We cannot hold an insane man tried without counsel to the requirement of tendering the issue of his insanity at the trial. If he is insane, his need of a lawyer to tender the defense is too plain for argument. We have not allowed convictions to stand if the accused stood trial without benefit of counsel and yet was so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense. See *Williams* v. *Kaiser,* 323 U. S. 471; *Wade* v. *Mayo,* 334 U. S. 672; *Palmer* v. *Ashe,* 342 U. S. 134. The requirement of the Fourteenth Amendment is for a fair trial. See *Betts* v. *Brady,* 316 U. S. 455, 462. No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court. Even the sane layman may have difficulty discovering

in a particular case the defenses which the law allows. See *Gibbs* v. *Burke,* 337 U. S. 773. Yet problems difficult for him are impossible for the insane. Any defense is hopelessly beyond reach for an accused who is insane. He stands convicted on a charge which he could not contest and yet for which he may well have had a complete defense.

For the same reasons, the failure of an insane man to raise the question of his insanity on appeal emphasizes only his need for counsel, not his waiver or loss of his constitutional right. Cf. *Smith* v. *O'Grady, supra.*

We do not intimate an opinion on the merits, for we do not know what facts the hearing will produce. We only rule that if the allegations charged are proven, petitioner has been deprived of his liberty without due process of law.

Reversed.

UNITED STATES *v.* BROWN.

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

No. 38. Argued November 15, 1954.—Decided December 6, 1954.

A discharged veteran may maintain an action against the United States under the Tort Claims Act for an injury suffered, after his discharge, in a Veterans Administration hospital as a result of negligent treatment of a service-connected disability, although his compensation under the Veterans Act has already been increased because of such injury. *Brooks* v. *United States*, 337 U. S. 49, followed; *Feres* v. *United States*, 340 U. S. 135, distinguished. Pp. 110–113.

209 F. 2d 463, affirmed.

Samuel D. Slade argued the cause for the United States. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney, Morton Hollander* and *David A. Turner* were on the brief.

Lee S. Kreindler argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit under the Federal Tort Claims Act, 28 U. S. C. § 1346 (b), brought by respondent, a discharged veteran, for damages for negligence in the treatment of his left knee in a Veterans Administration hospital. The injury to the knee occurred while respondent was on active duty in the Armed Services. The injury led to his honorable discharge in 1944. In 1950, the Veterans Administration performed an operation on the knee; but the knee continued to dislocate frequently. So another operation was performed by the Veterans Administration in 1951. It was during the latter operation that an allegedly defective tourniquet was used, as a result of which the nerves

in respondent's leg were seriously and permanently injured.

The Independent Offices Appropriation Act, 1935, 48 Stat. 526, 38 U. S. C. § 501a, allows compensation both where the veteran suffers injury during hospitalization and where an existing injury is aggravated during the treatment. Each is considered as though it were "service connected." Respondent received a compensation award for his knee injury when he was honorably discharged; and that award was increased after the 1951 operation.

The District Court agreed with the contention of petitioner that respondent's sole relief was under the Veterans Act and dismissed his complaint under the Tort Claims Act. The Court of Appeals reversed. 209 F. 2d 463. The case is here on a petition for certiorari which we granted, 347 U. S. 951, because of doubts as to whether *Brooks* v. *United States,* 337 U. S. 49, or *Feres* v. *United States,* 340 U. S. 135, controlled this case.

The *Brooks* case held that servicemen were covered by the Tort Claims Act where the injury was not incident to or caused by their military service. 337 U. S. 49, 52. In that case, servicemen on leave were negligently injured on a public highway by a government employee driving a truck of the United States. The fact that compensation was sought and paid under the Veterans Act* was held not to bar recovery under the Tort Claims Act. We refused to "pronounce a doctrine of election of remedies, when Congress has not done so." *Id.,* at 53.

The *Feres* decision involved three cases, in each of which the injury, for which compensation was sought under the Tort Claims Act, occurred while the serviceman was on active duty and not on furlough; and the

*We indicated that recovery under the Tort Claims Act should be reduced by the amounts paid by the United States as disability payments under the Veterans Act. 337 U. S. 52, 53–54. See the case on remand, *United States* v. *Brooks,* 176 F. 2d 482, 484.

negligence alleged in each case was on the part of other members of the Armed Forces. The *Feres* decision did not disapprove of the *Brooks* case. It merely distinguished it, holding that the Tort Claims Act does not cover "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U. S. 135, 146. The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character. *Id.*, at 141–143.

The present case is, in our view, governed by *Brooks*, not by *Feres*. The injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status. The damages resulted from a defective tourniquet applied in a veterans' hospital. Respondent was there, of course, because he had been in the service and because he had received an injury in the service. And the causal relation of the injury to the service was sufficient to bring the claim under the Veterans Act. But, unlike the claims in the *Feres* case, this one is not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act.

That Act provides that, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U. S. C. § 2674. The *Feres* case emphasized how sharp would be the break in tradition if the claims there asserted were allowed against the United States, the Court noting that the effect of the Tort Claims Act is "to waive immunity from recognized causes of action," "not to visit

the Government with novel and unprecedented liabilities." 340 U. S. 135, 142. But that cannot be said here. Certainly this claim is one which might be cognizable under local law, if the defendant were a private party. Responsibility of hospitals to patients for negligence may not be as notorious as the liability of the owners of automobiles. But the doctrine is not novel or without support. See, for example, *Sheehan* v. *North Country Community Hosp.,* 273 N. Y. 163, 7 N. E. 2d 28, and the cases collected in 25 A. L. R. 2d 29.

Congress could, of course, make the compensation system the exclusive remedy. The Court held in *Johansen* v. *United States,* 343 U. S. 427, that Congress had done so in the case of the Federal Employees Compensation Act, with the result that a civilian employee could not sue the United States under the Public Vessels Act. We noted in the *Brooks* case, 337 U. S. 49, 53, that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act. We adhere to that result. We adhere also to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty. Since the negligent act giving rise to the injury in the present case was not incident to the military service, the *Brooks* case governs and the judgment must be

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE REED and MR. JUSTICE MINTON join, dissenting.

In *Brooks* v. *United States,* 337 U. S. 49, we held that actions for damages could be brought against the Govern-

ment for injuries to one soldier and the death of another due to negligent operation of an army truck. But we pointed out that the accident there had nothing to do with the "army careers" of the soldiers and was neither caused by nor incident to their military service. When injured the two soldiers were off duty and were riding along a state highway in their own car on their own business which bore no relationship of any kind to any past, present or future connection with the army. Thus, the two soldiers would have been injured had they never worn a uniform at all. In this case, however, the injury is inseparably related to military service and the *Brooks* case should not be held controlling. But for his army service this veteran could not have been injured in the veterans hospital as he was eligible and admitted for treatment there solely because of war service which gave him veteran status. Moreover, he was actually being treated for an army service injury.

For a hospital injury a veteran is entitled to precisely the same disability benefits as if the injury had been inflicted while he was a soldier.* We have previously held, I think correctly, that a soldier injured in a hospital cannot also sue for damages under the Tort Claims Act. *Feres* v. *United States,* 340 U. S. 135. But the Court now holds that a veteran can. To permit a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require.

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* "Where any veteran suffers . . . an injury, or an aggravation of any existing injury, as the result of hospitalization or medical or surgical treatment . . . benefits . . . shall be awarded in the same manner as if such disability, aggravation, or death were service connected . . . ." 48 Stat. 526, 38 U. S. C. § 501a.

MOORE *v.* MEAD'S FINE BREAD CO.

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

No. 121. Argued November 17, 1954.—Decided December 6, 1954.

Petitioner sued respondent for treble damages for violations of § 2 of the Clayton Act and § 3 of the Robinson-Patman Act. Petitioner was engaged in a purely intrastate bakery business. Respondent sold bread both locally and interstate, and, in the course of such business, maintained prices in *interstate* transactions but cut prices in *intrastate* transactions in petitioner's locality, thus driving petitioner out of business. There was ample evidence to support a finding of a purpose to eliminate a competitor. *Held:* Such practices are included in the scope of § 2 of the Clayton Act and § 3 of the Robinson-Patman Act, and a judgment for petitioner is sustained. Pp. 115–120.

(a) Congress has power under the Commerce Clause to prevent the opportunities afforded by interstate commerce from being employed to injure local trade. Pp. 119–120.

(b) By the Clayton Act and the Robinson-Patman Act, Congress barred the use of interstate business to destroy local business and outlawed the price cutting employed by respondent. P. 120.

208 F. 2d 777, reversed and judgment of District Court affirmed.

Lynell G. Skarda and *Dee C. Blythe* argued the cause and filed a brief for petitioner.

Edward W. Napier argued the cause for respondent. With him on the brief was *Howard F. Houk.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit for treble damages, 38 Stat. 731, 15 U. S. C. § 15, brought for violations of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (a), and of § 3 of the Robinson-Patman Act, 15 U. S. C. § 13a. The jury found for petitioner; the Court of Appeals reversed, 208 F. 2d 777; and we

granted certiorari, 347 U. S. 1012, because of the importance of the question of law presented.[1]

Petitioner was engaged in the bakery business at Santa Rosa, New Mexico, none of his activities being interstate in character. Respondent is a corporation in the baking business at Clovis, New Mexico. It is one of several corporations having interlocking ownership and management, all in the Mead family and associates. These corporations maintain plants at Lubbock and Big Spring, Texas, and at Hobbs, Roswell, and Clovis, New Mexico. They all market their bread under the name "Mead's Fine Bread" and promote the product through a common advertising program. These corporations purchase their flour and bread wrappers as a unit. Respondent sells bread in Farwell, Texas, a town which it serves with a bread truck operating out of Clovis, New Mexico.

For some months, petitioner and respondent were in competition in Santa Rosa. There is evidence that, on the threat of petitioner to move his bakery to another town, the local Santa Rosa merchants agreed to purchase petitioner's products exclusively. Respondent, labeling that action a boycott, cut the wholesale price of bread in Santa Rosa from 14 cents to 7 cents for a pound loaf and from 21 cents to 11 cents for a pound-and-a-half loaf. The Mead companies did not cut the prices of bread in

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[1] The case first reached the Court of Appeals on appeal from a dismissal of the action at the close of plaintiff's case. The Court of Appeals affirmed, holding that the suit was precluded by petitioner's own illegal acts which initiated the alleged price discrimination. 184 F. 2d 338. We granted a petition for certiorari, vacated that judgment, and remanded the case to the Court of Appeals for further consideration in light of *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211. See *Moore* v. *Mead Service Co.*, 340 U. S. 944. On reconsideration, the Court of Appeals receded from its former position, reversed the judgment dismissing the complaint, and remanded the case for trial. 190 F. 2d 540.

any other town; and respondent did not cut its prices of bread in Farwell, Texas.

The price war continued from September 1948 to April 1949, and as a result petitioner was forced to close his business.

The Court of Appeals reversed the judgment for petitioner on the ground that the injury resulting from the price cutting was to a purely local competitor whose business was in no way related to interstate commerce. "If competition was lessened or a monopoly created," said the Court of Appeals, "it was purely local in its scope and effect and in no way related to or affected interstate commerce." 208 F. 2d 777, 780.

Section 2 (a) of the Clayton Act, as amended, 15 U. S. C. § 13 (a), provides in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

Section 3 of the Robinson-Patman Act, 15 U. S. C. § 13a, provides in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell . . . goods in any part of the United States at prices lower than those exacted by said person else-

> where in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell . . . goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Those sections on their face seem to cover the instant case. Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales. The destruction of a competitor was plainly established, as required by the amended § 2 (a) of the Clayton Act; and the evidence to support a finding of purpose to eliminate a competitor, as required by § 3 of the Robinson-Patman Act, was ample.[2]

The Court of Appeals read the antitrust laws as reaching local transactions only where: (1) the local restraint has an effect on the free flow of interstate trade or commerce (*e. g., Wickard* v. *Filburn,* 317 U. S. 111); or (2) the restraint on or the monopoly of local trade is effected through the utilization of interstate mechanisms (*e. g., Lorain Journal Co.* v. *United States,* 342 U. S.

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[2] Respondent contends that the so-called boycott justified its price cutting. In *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, 214, we said, "If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured." We need not pursue the matter, for respondent obtained a charge on this phase of the case as to which it cannot complain. The District Court charged the jury that respondent would not be liable if the price cutting was "for the purpose of regaining its own market or of reestablishing competition and not to destroy competition or to eliminate a competitor."

143); or (3) local prices are fixed by the use of interstate commercial transactions (*e. g., United States* v. *Frankfort Distilleries,* 324 U. S. 293); or (4) the discriminatory sales are to purchasers who compete in interstate commerce (*e. g., Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726); or (5) interstate commerce is in some other way used to destroy competition or is injured or impaired as a result of unlawful acts.

We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly

has power to say that those advantages shall not attach to the privilege of doing an interstate business.

This type of price cutting was held to be "foreign to any legitimate commercial competition" even prior to the Robinson-Patman Act. See *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237. It seems plain to us that Congress went at least that far in the Robinson-Patman Act. As we have shown, the facts charged and found read upon the words of the statute. And the history of the Act shows it was designed to have the reach now claimed for it by petitioner. Congressman Utterback, manager of the bill in the House, included this type of case in the price cutting that he claimed was outlawed:

> "Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. The Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influences within the State." 80 Cong. Rec. 9417.

It is, we think, clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent.

Other points are pressed on us by respondent in support of the judgment of the Court of Appeals. But we have examined them and found them not substantial. We therefore reverse the judgment of the Court of Appeals and affirm the judgment of the District Court.

So ordered.

HOLLAND ET UX. *v.* UNITED STATES.

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

No. 37. Argued October 20–21, 1954.—Decided December 6, 1954.

With the Government using the "net worth" method of proof, petitioners were convicted under § 145 of the Internal Revenue Code of a willful attempt to evade their income taxes for the year 1948. The Government's computation showed an increase of $32,000 in their net worth during 1948, for which they reported only $10,211 as taxable income. Petitioners claimed that the Government failed to include in its opening net worth figure $104,000 of currency accumulated before 1933. The Government introduced no direct evidence to dispute this claim but relied on the inference that anyone who had $104,000 in cash would not have undergone the hardships and privations shown to have been endured by petitioners during the 1926–1940 period. The evidence further indicated that improvements to a hotel and other assets acquired during the 1946–1948 period were bought in installments, as if out of earnings rather than accumulated cash; and petitioners' income tax returns as far back as 1913 showed that their income was insufficient to enable them to save any appreciable amount of money. There was independent evidence of a likely source of unreported taxable income which the jury could reasonably find to be the source of the increase in petitioners' net worth and independent evidence from which the jury could reasonably infer willfulness. *Held:* The judgment is affirmed. Pp. 124–141.

1. While it cannot be said that the dangers for the innocent inherent in the net worth method of proof (which are summarized in the opinion) foreclose its use, they do require the exercise of great care and restraint. Pp. 125–129.

2. Trial courts should approach such cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. P. 129.

3. Charges to the jury should be especially clear and should include, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. P. 129.

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4. In reviewing such cases, appellate courts should bear constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation. P. 129.

5. Section 41 of the Internal Revenue Code, expressly limiting the authority of the Government to deviate from the taxpayer's method of accounting, does not confine the net worth method of proof to situations where the taxpayer has no books or where his books are inadequate. Pp. 130–132.

6. The net worth technique used in this case was not a method of accounting different from the one employed by petitioners, and its use did not violate § 41 of the Internal Revenue Code. Pp. 131–132.

7. An essential condition in such cases is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. P. 132.

8. In this case, the Government's evidence fully justified the jury's conclusion that petitioners did not have the $113,000 in currency and stocks which they claimed to have had at the beginning of 1946. Pp. 132–135.

9. When the taxpayer offers relevant explanations inconsistent with guilt, failure of the Government to investigate them might result in serious injustice; its failure to offer proof negating them would adversely affect the cogency of proof based on the circumstantial inferences of the net worth computation; and the trial judge may consider the taxpayer's explanations as true and the Government's case insufficient to go to the jury. Pp. 135–136.

10. In this case, the distant incidents relied on by petitioners and not investigated by the Government were so remote in time and in their connection with subsequent events proved by the Government that, whatever petitioners' net worth in 1933, it appeared by convincing evidence that, on January 1, 1946, they had only such assets as the Government credited to them in its opening net worth statement. P. 136.

11. A requisite to the use of the net worth method of proof is evidence supporting the inference that the increases in the defendant's net worth are attributable to currently taxable income. P. 137.

12. Where the taxpayer offers no relevant explanation of the increases in his net worth, however, the Government is not re-

quired to negate every possible source of nontaxable income—a matter peculiarly within the knowledge of the taxpayer. P. 138.

13. In this case, there was proof of a likely source of unreported taxable income, which was adequate to support the inference that the increase in net worth was attributable to currently taxable income—even though the Government's proof did not negate all possible nontaxable sources of the alleged net worth increase, such as gifts, loans, inheritances, etc. Pp. 137–138.

14. The settled standards regarding the burden of proof in criminal cases are applicable to net worth cases. The Government must prove every element of the offense beyond a reasonable doubt, though not to a mathematical certainty. Once the Government has established its case, the defendant remains quiet at his peril. Pp. 138–139.

15. In net worth cases, willfulness is a necessary element for conviction. It must be proven by independent evidence and it cannot be inferred from a mere understatement of income. P. 139.

16. In this case, the Government's evidence of a consistent pattern of underreporting large amounts of income, and of petitioners' failure to include all their income in their books and records, was sufficient, on proper submission, to support the jury's inference of willfulness. P. 139.

17. In this case, the instructions to the jury were not so erroneous and misleading as to constitute grounds for reversal. Pp. 139–141.

209 F. 2d 516, affirmed.

Petitioners were convicted under § 145 of the Internal Revenue Code of an attempt to evade their income taxes. The Court of Appeals affirmed. 209 F. 2d 516. This Court granted certiorari. 347 U. S. 1008. *Affirmed,* p. 141.

Sumner M. Redstone and *Peyton Ford* argued the cause for petitioners. With them on the brief were *H. D. Reed* and *Frank A. Bruno.*

Marvin E. Frankel argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph F. Goetten.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioners, husband and wife, stand convicted under § 145 of the Internal Revenue Code [1] of an attempt to evade and defeat their income taxes for the year 1948. The prosecution was based on the net worth method of proof, also in issue in three companion cases [2] and a number of other decisions here from the Courts of Appeals of nine circuits. During the past two decades this Court has been asked to review an increasing number of criminal cases in which proof of tax evasion rested on this theory. We have denied certiorari because the cases involved only questions of evidence and, in isolation, presented no important questions of law. In 1943 the Court did have occasion to pass upon an application of the net worth theory where the taxpayer had no records. *United States* v. *Johnson,* 319 U. S. 503.

In recent years, however, tax-evasion convictions obtained under the net worth theory have come here with increasing frequency and left impressions beyond those of the previously unrelated petitions. We concluded that the method involved something more than the ordinary use of circumstantial evidence in the usual criminal case. Its bearing, therefore, on the safeguards traditionally

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[1] 26 U. S. C. § 145. Penalties. "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony . . . ."

[2] *Friedberg* v. *United States, post,* p. 142; *United States* v. *Calderon, post,* p. 160; *Smith* v. *United States, post,* p. 147. Because of the extensive factual backgrounds they require, and the significant differences in the problems they present, the cases are treated in separate opinions.

provided in the administration of criminal justice called for a consideration of the entire theory. At our last Term a number of cases arising from the Courts of Appeals brought to our attention the serious doubts of those courts regarding the implications of the net worth method. Accordingly, we granted certiorari in these four cases and have held others to await their decision.

In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an "opening net worth" or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of "conduct, the likely effect of which would be to mislead or to conceal." *Spies* v. *United States,* 317 U. S. 492, 499.

Before proceeding with a discussion of these cases, we believe it important to outline the general problems implicit in this type of litigation. In this consideration we assume, as we must in view of its widespread use, that the Government deems the net worth method useful in the enforcement of the criminal sanctions of our income tax laws. Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use.

One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assumption raises serious legal problems in the administration of the criminal law. Unlike civil actions for the recovery of deficiencies, where the determinations of the Commissioner have *prima facie* validity, the prosecution must always prove the criminal charge beyond a reasonable doubt. This has led many of our courts to be disturbed by the use of the net worth method, particularly in its scope and the latitude which it allows prosecutors. *E. g., Demetree* v. *United States,* 207 F. 2d 892, 894 (1953); *United States* v. *Caserta,* 199 F. 2d 905, 907 (1952); *United States* v. *Fenwick,* 177 F. 2d 488.

But the net worth method has not grown up overnight. It was first utilized in such cases as *Capone* v. *United States,* 51 F. 2d 609 (1931) and *Guzik* v. *United States,* 54 F. 2d 618 (1931), to corroborate direct proof of specific unreported income. In *United States* v. *Johnson, supra,* this Court approved of its use to support the inference that the taxpayer, owner of a vast and elaborately concealed network of gambling houses upon which he declared no income, had indeed received unreported income in a "substantial amount." It was a potent weapon in establishing taxable income from undisclosed sources when all other efforts failed. Since the *Johnson* case, however, its horizons have been widened until now it is used in run-of-the-mine cases, regardless of the amount of tax deficiency involved. In each of the four cases decided today the allegedly unreported income comes from the same disclosed sources as produced the taxpayer's reported income and in none is the tax deficiency anything like the deficiencies in *Johnson, Capone* or *Guzik*. The net worth method, it seems, has evolved from the final volley to the first shot in the Government's

battle for revenue, and its use in the ordinary income-bracket cases greatly increases the chances for error. This leads us to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases.

1. Among the defenses often asserted is the taxpayer's claim that the net worth increase shown by the Government's statement is in reality not an increase at all because of the existence of substantial cash on hand at the starting point. This favorite defense asserts that the cache is made up of many years' savings which for various reasons were hidden and not expended until the prosecution period. Obviously, the Government has great difficulty in refuting such a contention. However, taxpayers too encounter many obstacles in convincing the jury of the existence of such hoards. This is particularly so when the emergence of the hidden savings also uncovers a fraud on the taxpayer's creditors.

In this connection, the taxpayer frequently gives "leads" to the Government agents indicating the specific sources from which his cash on hand has come, such as prior earnings, stock transactions, real estate profits, inheritances, gifts, etc. Sometimes these "leads" point back to old transactions far removed from the prosecution period. Were the Government required to run down all such leads it would face grave investigative difficulties; still its failure to do so might jeopardize the position of the taxpayer.

2. As we have said, the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the Government has established the figures in its net worth computations,

the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.

3. Although it may sound fair to say that the taxpayer can explain the "bulge" in his net worth, he may be entirely honest and yet unable to recount his financial history. In addition, such a rule would tend to shift the burden of proof. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Government's case by showing loose business methods or losing the jury through his apparent evasiveness. Of course, in other criminal prosecutions juries may disbelieve and convict the innocent. But the courts must minimize this danger.

4. When there are no books and records, willfulness may be inferred by the jury from that fact coupled with proof of an understatement of income. But when the Government uses the net worth method, and the books and records of the taxpayer appear correct on their face, an inference of willfulness from net worth increases alone might be unjustified, especially where the circumstances surrounding the deficiency are as consistent with innocent mistake as with willful violation. On the other hand, the very failure of the books to disclose a proved deficiency might indicate deliberate falsification.

5. In many cases of this type, the prosecution relies on the taxpayer's statements, made to revenue agents in the course of their investigation, to establish vital links in the Government's proof. But when a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth. Moreover, the prosecution may pick and choose from the taxpayer's statement,

relying on the favorable portion and throwing aside that which does not bolster its position. The problem of corroboration, dealt with in the companion cases of *Smith* v. *United States, post,* p. 147, and *United States* v. *Calderon, post,* p. 160, therefore becomes crucial.

6. The statute defines the offense here involved by individual years. While the Government may be able to prove with reasonable accuracy an increase in net worth over a period of years, it often has great difficulty in relating that income sufficiently to any specific prosecution year. While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the appropriate tax year the taxpayer may be convicted on counts of which he is innocent.

While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. Cf. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 489. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.

With these considerations as a guide, we turn to the facts.

The indictment returned against the Hollands embraced three counts. The first two charged Marion L. Holland, the husband, with attempted evasion of his income tax for the years 1946 and 1947. He was found not guilty by the jury on both of these counts. The third count charged Holland and his wife with attempted evasion in 1948 of the tax on $19,736.74 not reported by them in their joint return. The jury found both of them guilty. Mrs. Holland was fined $5,000, while her husband was sentenced to two years' imprisonment and fined $10,000.

The Government's opening net worth computation shows defendants with a net worth of $19,152.59 at the beginning of the indictment period. Shortly thereafter, defendants purchased a hotel, bar and restaurant, and began operating them as the Holland House. Within three years, during which they reported $31,265.92 in taxable income, their apparent net worth increased by $113,185.32.[3] The Government's evidence indicated that, during 1948, the year for which defendants were convicted, their net worth increased by some $32,000, while the amount of taxable income reported by them totaled less than one-third that sum.

Use of Net Worth Method Where Books Are Apparently Adequate.

As we have previously noted, this is not the first net worth case to reach this Court. In *United States* v. *Johnson, supra,* the Court affirmed a tax-evasion conviction on evidence showing that the taxpayer's expenditures had exceeded his "available declared resources." Since Johnson and his concealed establishments had destroyed

[3] This is a corrected figure taking into account certain nontaxable income and nondeductible expenses of defendants.

the few records they had, the Government was forced to resort to the net worth method of proof. This Court approved on the ground that "to require more . . . would be tantamount to holding that skilful concealment is an invincible barrier to proof," 319 U. S., at 517–518. Petitioners ask that we restrict the *Johnson* case to situations where the taxpayer has kept no books. They claim that § 41 of the Internal Revenue Code,[4] expressly limiting the authority of the Government to deviate from the taxpayer's method of accounting, confines the net worth method to situations where the taxpayer has no books or where his books are inadequate. Despite some support for this view among the lower courts (see *United States* v. *Riganto,* 121 F. Supp. 158, 161, 162; *United States* v. *Williams,* 208 F. 2d 437, 437–438; *Remmer* v. *United States,* 205 F. 2d 277, 286, judgment vacated on other grounds, 347 U. S. 227), we conclude that this argument must fail. The provision that the "net income shall be computed . . . in accordance with the method of accounting regularly employed in keeping the books of such taxpayer," refers to methods such as the cash receipts or the accrual method, which allocate income and expenses between years. *United States* v. *American Can Co.,* 280 U. S. 412, 419. The net worth technique, as used in this case, is not a method of accounting different from the one employed by defendants. It is not a method of accounting at all, except insofar as it calls upon taxpayers to account for their unexplained income. Petitioners' accounting system was appropriate

[4] 26 U. S. C. "Part IV.—Accounting Periods and Methods of Accounting. § 41. General rule.

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; . . . ."

for their business purposes; and, admittedly, the Government did not detect any specific false entries therein. Nevertheless, if we believe the Government's evidence, as the jury did, we must conclude that the defendants' books were more consistent than truthful, and that many items of income had disappeared before they had even reached the recording stage. Certainly Congress never intended to make § 41 a set of blinders which prevents the Government from looking beyond the self-serving declarations in a taxpayer's books. "The United States has relied for the collection of its income tax largely upon the taxpayer's own disclosures . . . . This system can function successfully only if those within and near taxable income keep and render true accounts." *Spies* v. *United States,* 317 U. S., at 495. To protect the revenue from those who do not "render true accounts," the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history.

Establishing a Definite Opening Net Worth.

We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset. The Government's net worth statement included as assets at the starting point stock costing $29,650 and $2,153.09 in cash.[5] The Hollands claim that the Government failed to include in its opening net worth figure an accumulation of $113,-

[5] As of this time, petitioners' liabilities were listed as $12,650.50.

000 in currency and "hundreds and possibly thousands of shares of stock" which they owned at the beginning of the prosecution period. They asserted that the cash had been accumulated prior to the opening date, $104,000 of it before 1933, and the balance between 1933 and 1945. They had kept the money, they claimed, mostly in $100 bills and at various times in a canvas bag, a suitcase, and a metal box. They had never dipped into it until 1946, when it became the source of the apparent increase in wealth which the Government later found in the form of a home, a ranch, a hotel and other properties. This was the main issue presented to the jury. The Government did not introduce any direct evidence to dispute this claim. Rather it relied on the inference that anyone who had had $104,000 in cash would not have undergone the hardship and privation endured by the Hollands all during the late 20's and throughout the 30's. During this period they lost their café business; accumulated $35,000 in debts which were never paid; lost their household furniture because of an unpaid balance of $92.20; suffered a default judgment for $506.66; and were forced to separate for some eight years because it was to their "economical advantage." During the latter part of this period, Mrs. Holland was obliged to support herself and their son by working at a motion picture house in Denver while her husband was in Wyoming. The evidence further indicated that improvements to the hotel, and other assets acquired during the prosecution years, were bought in installments and with bills of small denominations, as if out of earnings rather than from an accumulation of $100 bills. The Government also negatived the possibility of petitioners' accumulating such a sum by checking Mr. Holland's income tax returns as far back as 1913, showing that the income declared in previous years was insufficient to enable defendants to save any appreci-

able amount of money. The jury resolved this question of the existence of a cache of cash against the Hollands, and we believe the verdict was fully supported.

As to the stock, Mr. Holland began dabbling in the stock market in a small way in 1937 and 1938. His purchases appear to have been negligible and on borrowed money. His only reported income from stocks was in his tax returns for 1944 and 1945 when he disclosed dividends of $1,600 and $1,850 respectively. While the record is unclear on this point, it appears that during the period from 1942 to 1945 he pledged considerable stock as collateral for loans. There is no evidence, however, showing what portions of this stock Mr. Holland actually owned at any one time, since he was trading in shares from day to day. And, even if we assume that he owned all the stock, some 4,550 shares, there is evidence that Mr. Holland's stock transactions were usually in "stock selling for only a few dollars per share." In this light, the Government's figure of approximately $30,000 is not out of line. In 1946 Holland reported the sale of about $50,000 in stock, but no receipt of dividends; nor were dividends reported in subsequent years. It is reasonable to assume that he sold all of his stock in 1946. In fact, Holland stated to the revenue agents that he had not "fooled with the stock market" since the beginning of 1946; that he had not owned any stocks for two or three years prior to 1949; that he had saved about $50,000 from 1933 to 1946, and that in 1946 he had $9,000 in cash with the balance of his savings in stocks.[6] The Government's evidence, bolstered by the admissions of petitioners, pro-

[6] "Q. In other words, to summarize this whole thing: you had a net worth of $157,000 at January 1, 1946, which consisted of $104,000 which you had since December 22, 1933, and the balance of $9,000 in currency, and your investment in securities—or the value of your securities.

"A. Yes." [R. 303.]

vided convincing proof that they had no stock other than the amount included in the opening net worth statement. By the same token, the petitioners' argument that the Government failed to account for the proceeds of stock sold by them before the starting date must also fail. The Government's evidence fully justified the jury's conclusion that there were no proceeds over and above the amount credited to petitioners.

The Government's Investigation of Leads.

So overwhelming, indeed, was the Government's proof on the issue of cash on hand that the Government agents did not bother to check petitioners' story that some of the cash represented proceeds from the sales of two cafés in the 20's; and that in 1933 an additional portion of this $113,000 in currency was obtained by exchanging some $12,000 in gold at a named bank. While sound administration of the criminal law requires that the net worth approach—a powerful method of proving otherwise undetectable offenses—should not be denied the Government, its failure to investigate leads furnished by the taxpayer might result in serious injustice. It is, of course, not for us to prescribe investigative procedures,[7] but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the

[7] This Court will formulate rules of evidence and procedure to be applied in federal prosecutions where it appears necessary to maintain "proper standards for the enforcement of the federal criminal law in the federal courts." *McNabb* v. *United States,* 318 U. S. 332, 341.

taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done.

In this case, the Government's detailed investigation was a complete answer to the petitioners' explanations. Admitting that in cases of this kind it "would be desirable to track to its conclusion every conceivable line of inquiry," the Government centered its inquiry on the explanations of the Hollands and entered upon a detailed investigation of their lives covering several states and over a score of years. The jury could have believed that Mr. Holland had received moneys from the sale of cafés in the twenties and that he had turned in gold in 1933 and still it could reasonably have concluded that the Hollands lacked the claimed cache of currency in 1946, the crucial year. Even if these leads were assumed to be true, the Government's evidence was sufficient to convict. The distant incidents relied on by petitioners were so remote in time and in their connection with subsequent events proved by the Government that, whatever petitioners' net worth in 1933, it appears by convincing evidence that on January 1, 1946, they had only such assets as the Government credited to them in its opening net worth statement.

Net Worth Increases Must be Attributable to Taxable Income.

Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income.

The Government introduced evidence tending to show that although the business of the hotel apparently increased during the years in question, the reported profits fell to approximately one-quarter of the amount declared by the previous management in a comparable period; [8] that the cash register tapes, on which the books were based, were destroyed by the petitioners; and that the books did not reflect the receipt of money later withdrawn from the hotel's cash register for the personal living expenses of the petitioners and for payments made for restaurant supplies. The unrecorded items in this latter category totaled over $12,500 for 1948. Thus there was ample evidence that not all the income from the hotel had been included in its books and records. In fact, the net worth increase claimed by the Government for 1948 could have come entirely from the unreported income of the hotel and still the hotel's total earnings for the year would have been only 73% of the sum reported by the previous owner for the comparable period in 1945.

But petitioners claim the Government failed to adduce adequate proof because it did not negative all the possible nontaxable sources of the alleged net worth increases—gifts, loans, inheritances, etc. We cannot agree. The Government's proof, in our view, carried with it the negations the petitioners urge. Increases in net

[8] The record indicates that the income of the hotel as reported for 1946 was approximately 12½% of that reported by the previous owner in 1945; in 1947 the ratio was 12%; and in 1948 it was 26%.

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worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient. In the *Johnson* case, where there was no direct evidence of the source of the taxpayer's income, this Court's conclusion that the taxpayer "had large, unreported income was reinforced by proof . . . that [for certain years his] private expenditures . . . exceeded his available declared resources." This was sufficient to support "the finding that he had some unreported income which was properly attributable to his earnings . . . ." *United States* v. *Johnson,* 319 U. S., at 517. There the taxpayer was the owner of an undisclosed business capable of producing taxable income; here the disclosed business of the petitioners was proven to be capable of producing much more income than was reported and in a quantity sufficient to account for the net worth increases. Any other rule would burden the Government with investigating the many possible nontaxable sources of income, each of which is as unlikely as it is difficult to disprove. This is not to say that the Government may disregard explanations of the defendant reasonably susceptible of being checked. But where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant. See *Rossi* v. *United States,* 289 U. S. 89, 91–92.

The Burden of Proof Remains on the Government.

Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes. Once the Government has established its

case, the defendant remains quiet at his peril. Cf. *Yee Hem* v. *United States,* 268 U. S. 178, 185. The practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads.

Willfulness Must be Present.

A final element necessary for conviction is willfulness. The petitioners contend that willfulness "involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income." This is a fair statement of the rule. Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records. Since, on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand. *Spies* v. *United States, supra,* at 499–500.

The Charge to the Jury.

Petitioners press upon us, finally, the contention that the instructions of the trial court were so erroneous and misleading as to constitute grounds for reversal. We have carefully reviewed the instructions and cannot agree. But some require comment. The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, *Garst* v. *United States,* 180 F. 339, 343; *Anderson* v. *United States,* 30 F. 2d 485–487; *Stutz* v. *United States,* 47 F. 2d 1029, 1030; *Hanson* v. *United States,* 208 F. 2d 914, 916, but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction

on circumstantial evidence is confusing and incorrect, *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 234, cert. denied, 279 U. S. 863; *United States* v. *Becker,* 62 F. 2d 1007, 1010; 1 Wigmore, Evidence (3d ed.), §§ 25–26.

Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Even more insistent is the petitioners' attack, not made below, on the charge of the trial judge as to reasonable doubt. He defined it as "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see *Bishop* v. *United States,* 71 App. D. C. 132, 137–138, 107 F. 2d 297, 303, rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. A definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension. "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Miles* v. *United States,* 103 U. S. 304, 312, and we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.

Petitioners also assign as error the refusal of the trial judge to give instructions on the wording of the criminal statute under which they were indicted, even though the judge fully and correctly instructed the jury on every element of the crime. The impossibility of pointing to any way in which defendants' rights were prejudiced by this, assuming it was error, is enough to indicate that the trial judge was correct, see *United States* v. *Center Veal & Beef Co.,* 162 F. 2d 766, 771. There is here no question of the jury's duty to apply the law to the facts. That operation implies the application of a general standard to the specific physical facts as found by the jury. The meanings of standards such as willfulness were properly explained by the trial judge in no greater particularity than necessary, and thus the jury's function was not invaded.

In the light of these considerations the judgment is

Affirmed.

FRIEDBERG *v.* UNITED STATES.

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

No. 18. Argued October 20, 1954.—Decided December 6, 1954.

Petitioner was convicted under § 145 of the Internal Revenue Code of willfully attempting to evade his income taxes for 1945, 1946 and 1947. The Government relied on the net worth method of proof considered in *Holland* v. *United States, ante*, p. 121. Petitioner contended that, at the opening of the computation period, he had cash on hand "far in excess" of $60,000, which was not included in the Government's computation. The Government's evidence did not directly dispute this; but it did trace petitioner's finances from 1922 through 1947 and presented detailed evidence of petitioner's financial difficulties, from which the jury could readily conclude that petitioner had accumulated no such financial reserve. *Held:* The conviction is affirmed. Pp. 143–146.

(a) The Government's detailed evidence of petitioner's financial difficulties prior to the beginning of the computation period amply justified the jury's conclusion that he had accumulated no such cash reserve as he claimed. Pp. 143–144.

(b) Testimony of a government witness, on cross-examination, that he had not included any cash on hand in computing petitioner's net worth at the beginning of the computation period, because he found no evidence that petitioner had any cash on hand, was not a mere conclusion which invaded the province of the jury. Pp. 144–145.

(c) There was no reversible error in the trial judge's supplemental instruction to the jury. Pp. 145–146.

207 F. 2d 777, affirmed.

Petitioner was convicted of an attempt to evade his federal income taxes. The Court of Appeals affirmed. 207 F. 2d 777. This Court granted certiorari. 347 U. S. 1006. *Affirmed*, p. 146.

Robert N. Gorman argued the cause for petitioner. With him on the brief was *Stanley A. Silversteen*. *Jas. W. Hengelbrok* entered an appearance for petitioner.

Assistant Attorney General Holland argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Marvin E. Frankel, Ellis N. Slack* and *David L. Luce.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is the second in the group of four cases involving income tax prosecutions under the net worth method of proof. In this case petitioner was indicted for the years 1944 through 1947, and convicted on all counts except the first, covering the year 1944.

While the discussion in *Holland* v. *United States, ante,* p. 121, is dispositive of some of the more general problems raised by this type of prosecution, petitioner here directs his fire specifically at the sufficiency of the evidence as to his opening net worth. To highlight his contention that the Government had not properly accounted for an alleged hoard of cash and bonds on hand at the beginning of the indictment period, petitioner has stipulated virtually every other net worth issue out of the case.

Although petitioner's testimony as to this cash on hand vacillated,[1] we conclude from a careful examination of the testimony that the largest amount claimed at the starting point was "far in excess" of $60,000. The Government's evidence, as in *Holland,* did not directly dispute this, but it did painstakingly trace the Friedbergs' finances from 1922 through the prosecution years. It pointed unmistakably to the conclusion that petitioner had no such hoard of cash at the starting point.

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[1] Both Friedberg and his wife testified that he had "far in excess" of $50,000 by 1936; at another point he swore he had between $50,000 and $100,000 by that time; by 1938 he claimed "far in excess" of $60,000; and finally, he stated that he had "substantially" $100,000 by 1947.

This evidence, briefly outlined, was as follows: Petitioner filed no tax return for 1922, paid nominal taxes for 1923, 1924 and 1925, and, except for 1926, 1927, 1930 and 1937, when he filed nontaxable returns, he filed no returns from 1926 through 1937. He borrowed small sums of money on three occasions in 1931. In 1934, when he failed to pay $30 a month on a real estate mortgage, the mortgagee brought a foreclosure suit and petitioner was unable to meet the modest compromise terms offered him by the court. In 1936 and 1940, levies on a judgment for $13.76 were returned *nulla bona.* A mortgage on his former home was foreclosed in 1937, and a deficiency judgment entered for over $3,500. The writ of execution was returned "nothing found" in 1939, and petitioner then settled the judgment by paying $100 to the mortgagee in return for release from liability. In 1939, petitioner stated in an application for a loan that his total assets were $9,200, including $150 cash on hand, while his liabilities were $500. The tailoring business in which petitioner had worked since 1922 for an average pay of $50 a week was dissolved in 1941 because it could not meet its bills, and petitioner bought its assets for $650.

Yet it was during these years, from the 1920's until 1941, that petitioner claimed to have accumulated "far in excess" of $60,000. We think the jury could readily have concluded that petitioner had saved no such reserve.

Petitioner's other objections can be disposed of quickly. First, he contends it was error for the special agent, a witness for the Government, to give his "personal opinion" that petitioner had no cash on hand at the starting point. But this distorts what actually happened. The agent was asked on cross-examination to give a "yes or no" answer to whether in his net worth statement he had credited petitioner with any cash on hand for 1941. The agent said "there was no evidence available to show there was cash." After defense counsel's insistence that the

witness answer "did you or didn't you" give credit for any cash, the court allowed the agent to explain his answer. He explained that his investigation disclosed no evidence which would permit him to credit petitioner with cash on hand in 1941 and on redirect examination he elaborated, pointing out the foreclosures and the other evidence which has been detailed above. From this, he said, he "could see no reason why [he] should . . . include" any cash on hand at the starting point.

This was hardly a "conclusion of the witness," which is an "ultimate issue to be decided by the jury," as petitioner claims. The agent, upon petitioner's insistence, was testifying to a negative fact: he had not included cash because he had found no evidence of cash. The evidence which he then summarized on redirect was only that which had already been introduced at the trial. It is difficult to see how he invaded the province of the jury; nor do we see how petitioner's question could have been answered otherwise.

Finally, error is asserted in the trial judge's final instruction to the jury, which was given some three to four hours after it had begun its deliberations. Petitioner contends that the instruction called upon the jury to compromise the issues.[2] It may be that "compromise" in its literal sense, if used alone, would leave improper connotations. Though its use here was unfortunate, we do not think it misled the jury. We note that no objection was made

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[2] The instruction was:

"The Court will stand in recess until one-thirty. The Court may say to the jury at this time that I want you to make an honest and sincere effort to reach an agreement as to the merits of this case. I do not want you to shirk your duty. I want you to be fair to the Government, the United States, and the defendant. Nevertheless, this case has taken many days to try, and I hope you will make a sincere effort to compromise and adjust your differences and reach a verdict, if possible."

to any of the instructions, nor was any of petitioner's oral argument devoted to them a week later on motion for a new trial. In fact, petitioner specifically disclaimed any intent to make the instruction now attacked a ground for a new trial. This is persuasive evidence that he did not originally consider this section of the charge prejudicial; and since the remaining instructions were fair and negatived any inference that a compromise verdict was permissible, we are inclined to agree. In the face of this record, we can hardly conclude that this error is sufficient ground for reversal.

Affirmed.

SMITH *v.* UNITED STATES.

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

No. 52. Argued October 21–22, 1954.—Decided December 6, 1954.

Petitioner was convicted under § 145 of the Internal Revenue Code of willful attempts to evade his income taxes for 1946 through 1949. In addition to the net worth method of proof considered in *Holland* v. *United States, ante,* p. 121, the Government relied on an extrajudicial written net worth statement signed by petitioner and delivered to government agents, plus independent evidence of petitioner's expenditures, savings and investments. Petitioner contended (a) that his extrajudicial statement was not sufficiently corroborated by other evidence, and (b) that it should not have been admitted in evidence because it was procured pursuant to an understanding with a government agent that the case would be closed and petitioner granted immunity. At a pretrial hearing, the trial judge denied a motion to suppress this statement as evidence. At the trial, he refused to hold a hearing outside the presence of the jury to determine preliminarily the admissibility of the statement, and he submitted the issue to the jury with instructions that they should reject the statement and all evidence obtained through it, if "trickery, fraud or deceit" were practiced on petitioner or his accountant. *Held:* The conviction is affirmed. Pp. 149–159.

1. The issue of fraud or deceit on the part of the government agent was properly submitted to the jury, and the jury, in arriving at its general verdict, could have found from the conflicting evidence that no fraudulent inducements had been offered petitioner or his accountant. Pp. 150–151.

2. Denial of a *voir dire* during the trial, on the issue of fraud or deceit on the part of the government agent, did not deprive petitioner of any substantial right. The trial judge had already held a hearing on this issue in passing on the pretrial motion to suppress evidence, the only evidence offered in seeking a *voir dire* during the trial was that which had been heard in the pretrial hearing, and that evidence was narrated again to judge and jury after the *voir dire* had been denied. P. 151.

3. There was sufficient independent evidence to corroborate petitioner's extrajudicial admission that he did not have sufficient assets

at the beginning of the computation period to account for the increases in net worth attributed to him. Pp. 151–159.

(a) The requirement of corroboration of extrajudicial confessions is applicable to the crime of tax evasion. Pp. 153–154.

(b) The rule requiring corroboration of extrajudicial confessions is applicable to the statement involved in this case, which, though not a confession admitting all of the elements of the offense, was made after the fact to an official charged with investigating the possibility of wrongdoing and which embraced an element vital to the Government's case. Pp. 154–156.

(c) Corroboration is necessary for all elements of the offense established by admissions alone; but it is sufficient if the corroboration merely fortifies the truth of the admission, without independently establishing the crime charged. P. 156.

(d) All elements of the offense must be established by independent evidence or corroborated admissions; but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense through the statements of the accused. P. 156.

(e) The Government may provide the necessary corroboration by introducing substantial evidence, apart from the taxpayer's admissions, tending to show that he willfully understated his taxable income. P. 157.

(f) This may be accomplished by substantiating the opening net worth computation directly, since that figure, together with the remainder of the net worth computation, amply establishes a consistent understatement by petitioner of his taxable income; and from this the jury could infer willfulness. P. 157.

(g) In this case, petitioner's tax returns adequately corroborated his extrajudicial statements as to his financial history, and the two together corroborated the Government's computation of his net worth. Pp. 157–158.

(h) Petitioner's extrajudicial statements were further corroborated by independent evidence showing substantial expenditures, savings and investments during the period involved. Pp. 158–159.

210 F. 2d 496, affirmed.

W. Arthur Garrity, Jr. argued the cause for petitioner. With him on the brief were *Richard Maguire* and *Paul G. Counihan.*

Marvin E. Frankel argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph F. Goetten.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is the third of the net worth cases and the first dealing with the Government's use of extrajudicial statements made by the accused. Petitioner and his wife were jointly tried on five counts charging them with willful attempts to evade and defeat their income taxes for the years 1946 through 1950. A motion for acquittal was granted as to the wife on all five counts, and as to petitioner on the fifth count (for the year 1950). The jury found petitioner guilty on the first four counts, and the conviction was affirmed by the Court of Appeals. 210 F. 2d 496. We granted certiorari in order to pass on the issues raised by the prosecution's use of defendant's extrajudicial statements. 347 U. S. 1010.

The Government's theory was that the increases in the net worth of petitioner and his wife exceeded their reported income for each of the prosecution years, and that these increments represented taxable income. The evidence tended to show that petitioner and his wife were persons of moderate means prior to 1945, and that toward the end of that year petitioner acquired a racing-news service. In the four succeeding years, the prosecution years here in issue, petitioner and his wife acquired a large amount of visible wealth in the form of bank accounts, real estate, securities, and other assets. The evidence, taken as a whole, tended to prove that petitioner and his wife had understated their income for the four-year period by over $190,000.

The issues in this case stem from a statement signed by the petitioner and delivered to the Government agents

along with a check, the latter supposedly representing the amount of tax he thought due and owing.[1] The statement, a five-page document, included tables on petitioner's securities, prior tax returns, living expenses, and a listing of petitioner's assets for each of the years 1945 through 1949, showing changes in his net worth over the prosecution period. While each of the pages was headed by the names of petitioner and his wife, the statement was signed only by the petitioner. His signature appeared after a clause describing the listing of assets as "my true net worth for the period covered herein."

Admissibility of the Statement.

Petitioner contends that his net worth statement should not have been admitted in evidence because it was procured pursuant to an understanding between petitioner and a Government agent that the case would be closed and the petitioner granted immunity. See *Wan* v. *United States,* 266 U. S. 1, 14; *Bram* v. *United States,* 168 U. S. 532, 542–543; *Wilson* v. *United States,* 162 U. S. 613, 622–623; *Sparf and Hansen* v. *United States,* 156 U. S. 51, 55. Petitioner's accountant, who carried on negotiations with this Government agent, testified that the agent had promised to close the case if the net worth statement and a check to cover the tax deficiency were forthcoming, and that he, the accountant, would never have submitted the statement had he not believed that the case would be closed on this basis. The Government agent testified that he was aware of no such understanding and that he had made no promises to close the case. After a pretrial hearing on petitioner's motion to suppress evidence, the trial judge refused to suppress the net worth statement.

[1] Although there had previously been discussion of a civil fraud penalty, this check was apparently meant to cover only the tax liability proper.

During the course of the trial, he refused to hold a hearing outside the presence of the jury to determine preliminarily the statement's admissibility. He submitted the issue to the jury with the instruction that they were to reject the statement, and all evidence obtained through it, if "trickery, fraud or deceit" were practiced on petitioner or his accountant.

The issue of fraud or deceit on the part of the Government agent was properly submitted to the jury, and the jury, in arriving at its general verdict, could have found from the conflicting evidence that no fraudulent inducement had been offered petitioner or his accountant. Petitioner cannot complain that he was denied a *voir dire,* cf. *United States* v. *Carignan,* 342 U. S. 36, since the trial judge had already held a hearing on this issue in passing on the pretrial motion to suppress evidence. Moreover, the only evidence offered by petitioner in seeking this hearing during the trial was the testimony of petitioner's accountant, evidence which had been heard in the pretrial hearing and was narrated again to judge and jury after the *voir dire* had been denied. Under these circumstances, it cannot be said that the refusal to hold a preliminary hearing deprived petitioner of any substantial right.

Corroboration of Petitioner's Statement.

Petitioner's second major objection is that his net worth statement, as it related to his opening net worth, was not corroborated—or was insufficiently corroborated—by independent evidence. Petitioner's statement listed his opening net worth as follows:

Bank account	$1,079.60
Residence	12,000.00
Automobile	2,000.00
Total assets	$15,079.60

The Government agents credited petitioner with a higher opening net worth:

Cash in banks	$8,058.58
Drug store partnership	5,618.39
Real estate	18,600.00
Furniture	2,000.00
Automobile	2,000.00
Total	$36,276.97

In determining these opening net worth figures, the Government agents relied in part on figures furnished by petitioner in his net worth statement and in other of his extrajudicial admissions—for the autos, the furniture, and one parcel of real estate. Any variation in these figures would not materially affect the result.[2] But petitioner further complains that the Government did not corroborate the negative implications of his net worth statement, that he did not have at the end of 1945 any substantial assets—for example, cash on hand—which were not reflected in his or the Government's net worth computation. The question presented, therefore, is whether there is sufficient independent evidence to corroborate petitioner's extrajudicial admission that he did not have sufficient assets at the starting point to account for the increases in net worth attributed to him in the prosecution years.

The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court, *Warszower* v. *United States,* 312 U. S. 342; *Isaacs* v. *United States,* 159 U. S. 487; cf. *Miles* v. *United States,* 103 U. S. 304, 311–312, and has been consistently applied in the lower federal courts and

[2] The Government also relied on petitioner's admissions in establishing his living expenses during the prosecution years. But these do not bear on opening net worth and are therefore not fairly within the question presented. Moreover, the variation possible in these figures is too slight to affect the result in any significant respect.

in the overwhelming majority of state courts, 127 A. L. R. 1130; 7 Wigmore, Evidence, §§ 2070–2072. Its purpose is to prevent "errors in convictions based upon untrue confessions alone," *Warszower* v. *United States, supra,* at 347; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, *Bram* v. *United States, supra; Wilson* v. *United States, supra,* further caution is warranted because the accused may be unable to establish the involuntary nature of his statements. Moreover, though a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past. Finally, the experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made, Note, 28 Ind. L. J. 374. These are the considerations which justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror. Nevertheless, because this rule does infringe on the province of the primary finder of facts, its application should be scrutinized lest the restrictions it imposes surpass the dangers which gave rise to them.

The first issue is whether the requirement of corroboration may properly be applied to the crime of tax evasion. The corroboration rule, at its inception, served an extremely limited function. In order to convict of serious crimes of violence, then capital offenses, independent proof was required that *someone* had indeed inflicted the

318107 O - 55 - 16

violence, the so-called *corpus delicti.* Once the existence of the crime was established, however, the guilt of the accused could be based on his own otherwise uncorroborated confession. But in a crime such as tax evasion there is no tangible injury which can be isolated as a *corpus delicti.* As to this crime, it cannot be shown that the crime has been committed without identifying the accused. Thus we are faced with the choice either of applying the corroboration rule to this offense and according the accused even greater protection than the rule affords to a defendant in a homicide prosecution, *Evans* v. *United States,* 122 F. 2d 461; *Murray* v. *United States,* 53 App. D. C. 119, 288 F. 1008, or of finding the rule wholly inapplicable because of the nature of the offense, stripping the accused of this guarantee altogether. We choose to apply the rule, with its broader guarantee, to crimes in which there is no tangible *corpus delicti,* where the corroborative evidence must implicate the accused in order to show that a crime has been committed. See, *e. g., Tabor* v. *United States,* 152 F. 2d 254; *United States* v. *Kertess,* 139 F. 2d 923; *Ercoli* v. *United States,* 76 U. S. App. D. C. 360, 131 F. 2d 354; *Pines* v. *United States,* 123 F. 2d 825; *Forte* v. *United States,* 68 App. D. C. 111, 94 F. 2d 236; *Tingle* v. *United States,* 38 F. 2d 573; *Wynkoop* v. *United States,* 22 F. 2d 799; *Daeche* v. *United States,* 250 F. 566.

The next problem presented is whether the statement here involved—the opening net worth—must be corroborated. Although this statement was part of a document which may have admitted an understatement of taxable income, one of the elements of the crime of tax evasion, still it is clear that the statement is not a confession admitting to all the elements of the offense. There is some uncertainty in the lower court opinions as to whether the corroboration requirement applies to mere admissions, see *United States* v. *Kertess, supra,* at 929; *Ercoli* v. *United*

States, supra, 76 U. S. App. D. C., at 362, 131 F. 2d, at 356. But see *Warszower* v. *United States, supra,* at 347. We hold the rule applicable to such statements, at least where, as in this case, the admission is made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces an element vital to the Government's case.[3] Cf. *Gulotta* v. *United States,* 113 F. 2d 683, assimilating admissions to confessions but failing to distinguish between admissions before and after the fact as required by the *Warszower* case. Accord, *Duncan* v. *United States,* 68 F. 2d 136; *Gordnier* v. *United States,* 261 F. 910.

The negative implications of petitioner's opening net worth admission formed the cornerstone of the Government's theory of guilt. Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed. *Holland* v. *United States, ante,* p. 121. An admission which assumes this importance in the presentation of the prosecution's case should not go uncorroborated, and this is true whether we consider the statement an admission of one of the formal "elements" of the crime or of a fact subsidiary to the proof of these "elements." It is the practical relation of the statement to the Government's case which is crucial, not its theoretical relation to the definition of the offense.

Although we are unable to hold on this record that petitioner's statement was inadmissible, the evidence is sufficient to cast doubt on the accuracy of his admissions. The unreliability of the statement is illustrated by the great variance between its net worth calculation and the Government's computation, although petitioner's consist-

[3] Admissions given under special circumstances, providing grounds for a strong inference of reliability, may not have to be corroborated. Cf. *Miles* v. *United States, supra; State* v. *Saltzman,* 241 Iowa 1373, 44 N. W. 2d 24.

ent erring in his own favor made it not unreasonable for the Government to hold him to his word where it was to the Government's advantage. On the whole, the statement is one which should be carefully scrutinized in the light of the available independent evidence.

There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. *Gregg* v. *United States,* 113 F. 2d 687; *Jordan* v. *United States,* 60 F. 2d 4; *Forte* v. *United States, supra; Daeche* v. *United States, supra.* But cf. *United States* v. *Fenwick,* 177 F. 2d 488. In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone, compare *Ercoli* v. *United States, supra,* and *Pines* v. *United States, supra,* with *Wynkoop* v. *United States, supra,* and *Pearlman* v. *United States,* 10 F. 2d 460, and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged, compare *Pearlman* v. *United States, supra,* and *Daeche* v. *United States, supra,* with *Pines* v. *United States, supra,* and *Forte* v. *United States, supra.* We answer both in the affirmative. All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused. Cf. *Parker* v. *State,* 228 Ind. 1, 88 N. E. 2d 556.

Under the above standard the Government may provide the necessary corroboration by introducing substantial evidence, apart from petitioner's admissions, tending to show that petitioner willfully understated his taxable income. This may be accomplished by substantiating the opening net worth directly, since that figure, taken together with the remainder of the net worth computation, amply establishes a consistent understatement by petitioner of his taxable income; and from this the jury could infer willfulness. Two significant items of evidence tend to show that petitioner owned no assets at the starting point in excess of those attributed to him in the Government's statement. First, a Government official testified that petitioner had filed no income tax returns in the years 1936 through 1939, nontaxable returns for 1940 and 1942, a nonassessable return for 1943, a refundable return for 1944, and a taxable return for 1941. Second, the testimony of a Government agent, touching upon the economic activities of the petitioner in the years immediately preceding the prosecution period, disclosed that prior to 1941 petitioner had been employed as a manager of a racing-news service; that from 1941 to 1945 he worked in a package store for $40 a week; and that for a short time during this latter period his wife worked as a hairdresser. The agent's testimony, however, was based solely on the extrajudicial statements of the petitioner, and under the standard we have adopted these admissions must be corroborated by substantial independent evidence.[4] The

[4] They were made to officials after the offense had been committed. It may be questioned, though, whether these admissions were as basic to the Government's case as the statements concerning opening net worth, and whether they should therefore be exempted from the requirement of corroboration. But where a fact is sufficiently important that the Government adduces extrajudicial statements of the accused bearing on its existence, and then relies on its existence to sustain the defendant's conviction, there is need for corroboration. Cf. *United States* v. *Kertess, supra,* at 930.

tax returns adequately corroborate petitioner's statements as to his financial history, and we hold that the two together corroborate the opening net worth. The jury could find from this evidence that petitioner's resources prior to the prosecution years were such that he could not have amassed a greater store of wealth than the amount credited to him in the Government's net worth statement. This proof is buttressed somewhat by independent evidence that petitioner had bought a modest home in 1943 for $9,600, paying less than one-third in cash and the balance in installments, and by the fact that petitioner's wife, who held the bulk of the family's assets in her name, was a housewife through almost all of the preprosecution years with no significant independent sources of income.

But substantiating the opening net worth is just one method of corroborating these extrajudicial statements. Petitioner's admissions may also be corroborated by an entirely different line of proof—by independent evidence concerning petitioner's conduct during the prosecution period, which tends to establish the crime of tax evasion without resort to the net worth computations. The Government's evidence showed that coincident with petitioner's opening of the racing-news service, in which he kept no records, petitioner and his wife opened 9 new bank accounts, making their over-all total 14 accounts in 12 banks; that the money in these accounts, which amounted to only $8,000 at the beginning of the prosecution period, varied between $42,000 and $80,000 during the prosecution years; that brokerage accounts, opened by petitioner and his wife in 1947 and 1948 respectively, were worth $9,000 in 1947 and over $41,000 in 1948 and 1949; that petitioner and his wife made new investments in realty during the prosecution period, about $2,000 in 1946, over $14,000 in 1948, and $35,000 in 1949; that other substantial expenditures were made during the

prosecution years, $3,750 in U. S. Savings Bonds in 1946, a total investment of $4,768 in new cars in 1947 and 1948, and a $37,000 annuity payment and $3,750 mink coat in 1949. During these same years petitioner's declared income exceeded his living expenses by less than $3,000. These substantial expenditures, savings and investments might not, of themselves, suffice to support a conviction of tax evasion without evidence of a starting point indicating a lack of funds from which these payments might have come. But this conduct does corroborate the net worth statement by *tending* to show that the petitioner was understating his income during the prosecution years. We cannot say that there is so little relation between expenditures and income that the Government's proof of expenditures far in excess of reported income, coupled with proof of a business producing unrecorded amounts of income, fails to corroborate the charge that petitioner's earnings during the prosecution years exceeded his declared income.

We hold that under either of these two lines of proof sufficient corroboration was shown to permit the case to go to the jury. The circumstances leading up to petitioner's statement, and the failure of the facts shown therein to mesh with the other evidence adduced by the Government, imposed on the trial judge and the reviewing courts a duty of careful scrutiny. Nevertheless, the independent evidence was strong enough, we believe, to overcome these indicia of unreliability, and we accordingly

Affirm.

UNITED STATES *v.* CALDERON.

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

No. 25. Argued October 21, 1954.—Decided December 6, 1954.

Respondent was convicted under § 145 of the Internal Revenue Code of willful attempts to evade federal income taxes for 1946 through 1949. The Government relied primarily upon a "net worth" computation. (See *Holland* v. *United States, ante,* p. 121.) As to the "cash on hand" in the opening net worth computation, the Government credited respondent with $500 on the basis of oral and written extrajudicial statements made by respondent. Contending that independent evidence of the *corpus delicti* was lacking, respondent challenged the validity of his conviction. *Held:* The conviction is affirmed. Pp. 161–169.

(a) The jury could have concluded, from the evidence, that respondent's oral statement as to the $500 referred to his total cash on hand at the starting point. Pp. 162–163.

(b) Respondent's signed statement as to the amount of "cash on hand" was not inadmissible as a matter of law; the weight to be given it was for the jury to determine in the light of all the circumstances. P. 163.

(c) Where the circumstances surrounding a defendant's admissions cast doubt on their reliability, the trial judge and reviewing courts should exercise great care in determining whether the admissions were corroborated. Pp. 163–164.

(d) When a defendant's motion for acquittal has been overruled and he introduces evidence in his own behalf, the reviewing courts may seek corroborative evidence in the proof of both parties. P. 164.

(e) In this case, there was not sufficient evidence of the taxpayer's financial history to substantiate directly the Government's opening net worth computation. Pp. 164–165.

(f) Uncorroborated admissions of a taxpayer regarding his tax returns for earlier years cannot serve to corroborate his other admissions. P. 165.

(g) The financial history of respondent and his business during the prosecution years provided sufficient independent evidence of the crime of tax evasion to corroborate his statements concerning cash on hand. Pp. 165–167.

(h) Respondent's extrajudicial statements concerning cash on hand were corroborated also by his testimony at the trial, which, taken together with that part of the net worth statement that was stipulated or independently proved, established a $30,000 deficiency in reported income. P. 167.

(i) While the evidence as a whole must show a deficiency for each of the prosecution years, the corroborative evidence suffices if it shows a substantial deficiency for the over-all prosecution period. P. 168.

(j) Independent evidence that respondent understated his income by $30,000 in the same four-year period for which his extrajudicial admissions tended to show a $46,000 deficiency is adequate corroboration. P. 168.

(k) The corroboration rule requires no more than substantial evidence that the crime of tax evasion has been committed. P. 168.

(l) Although the evidence in this case was insufficient to corroborate the opening net worth directly, there was adequate independent evidence of tax evasion. Pp. 168–169.

207 F. 2d 377, reversed.

Assistant Attorney General Holland argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Marvin E. Frankel, Ellis N. Slack, David L. Luce, Joseph M. Howard, Fred G. Folsom* and *Dickinson Thatcher.*

Joseph W. Burns and *Norman Herring* argued the cause and filed a brief for respondent.

Mr. Justice Clark delivered the opinion of the Court.

The issue in this case is similar to the question presented in *Smith* v. *United States, ante,* p. 147, on the corroboration of respondent's extrajudicial statements concerning his "opening net worth." The admissibility of these statements is not questioned.

Respondent, an operator of a legitimate coin-machine business, was tried and convicted on four counts charging him with willful attempts to evade and defeat his own and his wife's income taxes for the years 1946 through 1949. The Government's case rested primarily on a net

worth computation, which showed net worth increases and nondeductible expenditures of $62,993.47 for the prosecution period; during these same four years respondent declared only $16,775.14 income. It was stipulated that the computation was correct except as to the items "cash on hand" and "cash in bank." Respondent's bank balances were proved by introducing the bank records, and, with some minor adjustments, the Government's net worth computation was amply verified in this respect. As to "cash on hand," particularly the amount credited to the taxpayer as of the beginning of the prosecution period, respondent contends that the only evidence tending to substantiate the Government's figures is the uncorroborated admissions of the accused. He argues that lacking independent evidence of the *corpus delicti,* the conviction cannot stand. The Court of Appeals agreed and reversed the judgment of conviction, observing that, absent a starting item such as cash on hand, "the remainder of the statement proves nothing." 207 F. 2d 377. We granted the Government's petition for certiorari. 347 U. S. 1008.

The Government credited the respondent with $500 cash on hand at the starting point. One of the Government agents testified that the $500 figure was an approximation based on respondent's oral answer to a request that he estimate his year-end balances of cash on hand. According to the agent's notes, respondent replied that he had "approximately $500.00 cash in his pocket. He believes that because it is his habit to carry about that much money in his pocket at all times." It was admitted that the taxpayer might have had more than this amount on hand at certain times, since he had frequently made deposits in his bank accounts in sums of $1,000 and $2,000. It appears that the agent did not inquire into how much money respondent had in his safe or his business, as opposed to the funds in his pocket, maintaining

that he was justified in treating the taxpayer's statement regarding the $500 as covering his total cash on hand. Respondent contended that this figure failed to embrace a substantial sum in currency in his safe at the starting date. Both the Government and the respondent adduced a number of circumstances in support of their respective positions, and in interpreting the meaning of respondent's statement the jury could readily have found the Government's circumstantial proof more persuasive. In our view, it could have concluded from the evidence that respondent's statement as to the $500 referred to his total cash on hand at the starting point.

Respondent also signed a written statement admitting to the same opening cash on hand. This document contained the over-all net worth computation relied on by the Government at the trial. The Government's evidence tended to show that it had been signed by the respondent after the usual warning and after he and the agents had worked over the statement, item by item, for some eight hours. Though admitting that both he and his accountant had read the statement, the respondent sought to prove that he had not understood the net worth computation as a whole or the individual item of "cash on hand"; that before signing the statement he had asked his accountant whether it was correct, intending to rely on the latter's judgment; and that the accountant, in giving defendant the go-ahead, had merely approved the method employed in compiling the statement without passing on the accuracy of the particular figures. Again it was for the jury to consider all these circumstances in determining the weight to be given the signed statement; we cannot say that the document should have been rejected as a matter of law.

But all these factors are relevant in determining whether the independent evidence provided adequate corroboration. As in *Smith* v. *United States,* the circum-

stances surrounding defendant's admissions cast some doubt on their reliability. The statements were made by a taxpayer anxious to cooperate with the Government in the hope of limiting civil liability and avoiding criminal prosecution. The oral statement, with its "in the pocket" terminology, is certainly not clear. And the Government's own witness, the respondent's accountant, testified that he had not verified the particular figures in the written statement when it was referred to him by respondent. Under these circumstances, the trial judge and reviewing courts should exercise great care in determining whether the statements of the accused were corroborated. The reviewing courts, however, can seek corroborative evidence in the proof of both parties where, as in this case, the defendant introduces evidence in his own behalf after his motion for acquittal has been overruled. Cf. *Bogk* v. *Gassert,* 149 U. S. 17.[1]

Unlike *Smith,* there is not sufficient evidence here of the taxpayer's financial history to substantiate directly the opening net worth. Proof that the taxpayer was impoverished by the depression, that he was working for his meals and $8 a week in 1935, is too remote, absent proof of the taxpayer's financial circumstances in the intervening years. The respondent entered the coin-machine business in a modest way in 1935; he discon-

[1] By introducing evidence, the defendant waives his objections to the denial of his motion to acquit. *Lii* v. *United States,* 198 F. 2d 109; *Leeby* v. *United States,* 192 F. 2d 331; *Gaunt* v. *United States,* 184 F. 2d 284; *Mosca* v. *United States,* 174 F. 2d 448; *Hall* v. *United States,* 83 U. S. App. D. C. 166, 168 F. 2d 161. His proof may lay the foundation for otherwise inadmissible evidence in the Government's initial presentation, *Ladrey* v. *United States,* 81 U. S. App. D. C. 127, 155 F. 2d 417, or provide corroboration for essential elements of the Government's case, *United States* v. *Goldstein,* 168 F. 2d 666; *Ercoli* v. *United States,* 76 U. S. App. D. C. 360, 131 F. 2d 354.

tinued his low-paying job in 1939; and, except for a short period during the war, he devoted his entire efforts to his coin-machine business until 1945, when he began to operate a café as well. The only evidence of defendant's fortunes between 1935 and 1946, the first prosecution year, consists of his tax returns for 1944 and 1945 and some meager evidence with regard to his tax returns for 1941, 1942 and 1943. The latter apparently was obtained from the respondent, and, standing uncorroborated, cannot serve to corroborate respondent's other admissions. The 1944 and 1945 returns show net taxable income of $4,162 and $7,328 respectively, with gross receipts from the coin machines of $9,266 and $10,302. This sketchy background can hardly give rise to an inference that defendant had no more cash at the starting date than the Government gave him credit for.

Accordingly, we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method. There are several evidentiary strands which merit inspection, the first of which is very similar to one employed in *Smith*. We held there that an inference of tax evasion could be based on the fact that the taxpayer's visible assets greatly increased at a time when he was receiving unrecorded amounts of taxable income. In *Smith* v. *United States*, the taxpayer kept no records. Here the records were shown to be incomplete. Receipts from the coin machines were tabulated from a number of receipt books covering various locations. The receipt books were not numbered; the taxpayer was unsure of how many machines he had in operation; and there was considerable concern about receipt books being lost or misplaced. The loss of one receipt book would make a difference of from $1,000 to $1,500 in income. Eventually, on the advice of his accountant, respondent began to number the

books.[2] But, even after this safeguard was employed, unnumbered books continued to appear—and then disappear; two were lost, and subsequently recovered, in a period of three or four months. A system of recording receipts which rests on so unfirm a foundation hardly places the respondent in a very different class—for this purpose—than the taxpayer who keeps no books at all. Both are receiving unrecorded amounts of income.

The increase in respondent's visible assets is considerably less than the increase presented in the *Smith* case. There the increment over a four-year period amounted to more than $196,000; the taxpayer's declared income was less than $17,000; and his average personal living expenses were $3,500 a year. In this case, also over a four-year span, the figures are: increase in visible assets (excluding the cash item), $47,594; declared income, $16,775; living expenses, $3,000 yearly (plus some $1,900 in other nondeductible expenditures). The increase, though less than in *Smith,* is far from insubstantial. While reporting income only $4,775 in excess of his living expenses, the taxpayer increased his bank balances by over $16,000; added $1,000 to his holdings of United States Savings Bonds; increased his investments in land and buildings by over $9,000; and poured some $22,000 net additional capital into his business. These increments, when considered in the light of respondent's receipt of unrecorded amounts of taxable income, are sufficiently at variance with his reported income to support an inference of tax evasion. The inference is buttressed in this case by the peculiar relation between the reported gains from respondent's coin-machine business and his investments in new equipment. In three of the four prosecution years the respondent reported a net loss on his coin-machine

[2] It is not clear from the record whether this numbering began during or after the prosecution period. Compare R. 130–131 with R. 177–178.

operation, and in the fourth a net gain of only $1,330. During the same period he made gross investments in new equipment totaling $37,555. The jury could readily find defendant's investment policy inconsistent with his claimed losses. Furthermore, although respondent contends that the war years marked the peak of his business activity and that his apparent postwar increases came from profits accumulated during that period, it was not until 1947, the middle of the prosecution period, that his business became sufficiently large to require the full time of his accountant. We hold that the financial history of respondent and his business during the prosecution years provides sufficient independent evidence of the crime of tax evasion to corroborate his statements concerning cash on hand.

Even more conclusive corroboration, however, is respondent's testimony at the trial that he had $16,000 or $17,000 cash on hand at the starting point. This conflicted with the statements being corroborated ($500) and respondent's testimony at a prior trial ($2,000 to $9,000), but for the purpose of independently establishing the crime charged the jury could accept this testimony. Respondent further testified that he had $3,000 or $4,000 in cash at the end of the prosecution period. Taken together with the remainder of the net worth statement, which was stipulated or independently established, this testimony establishes a deficiency in reported income of more than $30,000.[3] There could hardly be more conclusive independent evidence of the crime.

[3] The Government's net worth computation, based on $500 cash on hand at the outset and $1,971.50 on hand at the conclusion of the prosecution period, yields a four-year net worth increase (with expenditures) of $62,993—$46,218 in excess of declared income. Eliminating the cash items from the net worth statement, the deficiency is reduced by $1,471—to $44,747. If the defendant's testimony is accepted, of $17,000 cash on hand at the beginning and $3,000 at the end, the deficiency must be reduced by another $14,000, leaving $30,747.

But one problem remains. The $17,000 hoard of cash could have absorbed the computed income deficiency for one or more of the prosecution years,[4] and respondent was convicted on all four counts. It might be argued that independent evidence showing a $30,000 deficiency is not enough—that there must be evidence that this sum resulted in a deficiency for *each* of the years here in issue. There is no merit in this contention. In the first place, this evidence is merely *corroborating* respondent's cash-on-hand admissions and need not comply with the niceties of the annual accounting concept. While the evidence as a whole must show a deficiency for each of the prosecution years, the corroborative evidence suffices if it shows a substantial deficiency for the over-all prosecution period. Independent evidence that respondent understated his income by $30,000 in the same four-year period for which respondent's extrajudicial admissions tended to show a $46,000 deficiency is adequate corroboration. It provides substantial evidence that the crime or crimes of tax evasion have been committed; the corroboration rule requires no more. Second, there is evidence in this case which tends to negate the possibility that the alleged $17,000 hoard could have absorbed the deficiency for *any* of the prosecution years. This money supposedly went toward the purchase of equipment in 1946 and early 1947. Almost $16,000 in equipment was purchased in 1946; this accounts for nearly all of the cash hoard and still leaves a deficiency in 1946 of over $5,000 in unreported income.[5] The funds which remain are insufficient to absorb the income deficiencies of any subsequent prosecution years.[6]

As we said, the circumstances surrounding respondent's admissions create considerable doubt as to their reliabil-

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[4] The computed deficiency for 1947 was $7,393, and for 1948, $3,284.

[5] The computed deficiency for 1946 was $21,019.

[6] See notes 3 and 4. The computed deficiency for 1949 was $14,523.

ity. We have therefore examined the independent evidence with great care to insure that the accused will not be convicted on the basis of a false admission alone. Although the evidence was insufficient to corroborate the opening net worth directly, we find the independent proof of tax evasion entirely adequate. Accordingly, the decision of the Court of Appeals setting aside the conviction is

Reversed.

MR. JUSTICE DOUGLAS dissents.

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SULLIVAN *v.* UNITED STATES.

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

No. 64. Argued November 8, 1954.—Decided December 6, 1954.

1. The provision of 26 U. S. C. § 3740 barring suits for the recovery of taxes unless the Attorney General directs that the suit be commenced applies only to civil suits and not to criminal proceedings, and does not vitiate indictments based on evidence which a United States Attorney presented to the grand jury without the authorization of the Attorney General. Pp. 171–172.
2. Section 5 of Executive Order No. 6166, and Circular Letter No. 2431 of the Department of Justice, did not limit the action of the grand jury in respect to cases concerning violations of the internal revenue laws, and the grand jury in this case was free to consider the evidence which was presented to it by the United States Attorney without authorization of the Attorney General. Pp. 172–174.
3. The District Court did not abuse its discretion in denying petitioner's motion, after sentence, for leave to withdraw his pleas of *nolo contendere,* since petitioner failed to show the "manifest injustice" which, under Rule 32 (d) of the Federal Rules of Criminal Procedure, would warrant permitting him to withdraw his pleas. Pp. 174–175.

212 F. 2d 125, affirmed.

Llewellyn A. Luce argued the cause for petitioner. With him on the brief was *Walter H. Maloney.*

Charles F. Barber argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce, Joseph M. Howard* and *Harold S. Larsen.*

MR. JUSTICE MINTON delivered the opinion of the Court.

Upon pleas of *nolo contendere,* the petitioner was found guilty of violating the income tax laws by making and filing false and fraudulent returns. The District Court

sentenced him to three years' imprisonment and fined him $13,000. The Court of Appeals affirmed, 212 F. 2d 125, and we granted certiorari, 347 U. S. 1010.

On February 28, 1952, a duly constituted grand jury for the District of Kansas indicted the petitioner on four counts for false and fraudulent statements in his individual tax returns and on two counts in another indictment for false and fraudulent returns of the Central Theatre Co., a corporation of which he was president. To these indictments the petitioner entered pleas of not guilty. He later withdrew these pleas, and to two counts of the indictment on his individual returns and to one count on the corporation returns, he entered pleas of *nolo contendere*. The other counts were dismissed.

Before the pleas of *nolo contendere* were entered, petitioner had filed motions to dismiss the indictments because the evidence upon which they were based was presented to the grand jury by the District Attorney without direction to do so by the Attorney General's office. These motions were overruled after argument and time for briefing. This presents the first question, namely, were the indictments faulty because, without sanction by the Attorney General's office, the District Attorney offered evidence to the grand jury upon which the indictments were returned? It is first contended by petitioner that, pursuant to 26 U. S. C. § 3740,[1] the indictments could not be returned without authorization by that office. We agree with the Court of Appeals that this section applies only to civil suits and not to criminal proceedings. In the absence of words in their context requiring a different conclusion, the phrase "suits for recovery" ordinarily means civil suits and not criminal

[1] "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced."

prosecutions. *Hepner* v. *United States,* 213 U. S. 103, 105–109; *Stockwell* v. *United States,* 13 Wall. 531, 542–543. One "recovers" in a civil action but prosecutes and punishes in a criminal proceeding.

The further contention is made that § 5 of Executive Order No. 6166,[2] and Circular Letter No. 2431 of the Department of Justice,[3] required approval from the Attorney General's office before any evidence could be presented to the grand jury and that such direction was not given. It is admitted that no authorization was received from the Attorney General's office to present the evidence to the grand jury in the instant case; nor does the record reveal clearly that an emergency existed. Apparently none was reported to the Department of Justice as required by Circular Letter No. 2431.

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[2] "The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

"For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

"Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense." Promulgated June 10, 1933, 5 U. S. C. §§ 124–132.

[3] "In accordance therewith, all United States Attorneys are directed to present evidence to a grand jury concerning violations of revenue laws of the United States only when authorized to do so by this office, unless an emergency calls for immediate action, in which event a full report should promptly be submitted." August 10, 1933.

Prior to Executive Order No. 6166, prosecutions for the violation of internal revenue laws were often referred directly to United States District Attorneys for presentation to grand juries. The purpose of § 5 of Executive Order No. 6166, among other things, was to transfer responsibility for the prosecution of criminal proceedings and suits by or against the United States in civil matters to the Department of Justice.

It was not the purpose of the Executive Order to direct how the responsibility should be exercised but to fix it in the Department of Justice. How that responsibility was to be discharged was a matter for the Department. To make the system uniform, Circular Letter No. 2431 was sent to all District Attorneys. It was never promulgated as a regulation of the Department and published in the Federal Register. It was simply a housekeeping provision of the Department and was not intended to curtail or limit the well-recognized power of the grand jury to consider and investigate any alleged crime within its jurisdiction. See *United States* v. *Thompson,* 251 U. S. 407, 413–415; *Blair* v. *United States,* 250 U. S. 273, 282; *Hale* v. *Henkel,* 201 U. S. 43, 61–66; *Frisbie* v. *United States,* 157 U. S. 160, 163.

Therefore, it is not contended that, aside from the Executive Order and the departmental letter, a grand jury may not consider evidence of crime known to the grand jurors or revealed by their investigation. It is only urged that the Executive Order and the departmental letter limited the action of the grand jury in respect to cases concerning violations of internal revenue laws. We hold that the Order and the letter had no such restrictive effect, and that the grand jury in this case was free to consider the evidence put before it by Government counsel without authorization from the Attorney General's office in Washington. The evidence was presented by the District Attorney, who was a representative of the Depart-

ment of Justice, notwithstanding that he failed to comply with the departmental directive. For this he is answerable to the Department, but his action before the grand jury was not subject to attack by one indicted by the grand jury on such evidence. The motions to dismiss were properly overruled.

Three days after judgment had been pronounced finding the petitioner guilty under his pleas of *nolo contendere* and sentences passed, the petitioner filed a motion asking for leave to withdraw his pleas. Later he filed an amended motion to withdraw the pleas and a petition for probation. In his motion to withdraw the pleas, he gave the following reasons, (1) because of manifest injustice, (2) because he had entered his pleas under the mistaken belief, induced by the acts and statements of Government counsel, that he would be placed on probation, and (3) because of misconduct of the District Attorney. The District Court, after hearing argument, denied the motion and the petition for probation and filed its findings of fact, although there apparently was no request for them.[4] Under Rule 32 (d) [5] a defendant may, after sentence, withdraw a plea of *nolo contendere* to correct manifest injustice. It is this provision that petitioner relies upon. He claims he was somehow misled by Government counsel to believe that if he entered the pleas of *nolo contendere* he would receive probation. By the court's findings, which, in light of the evidence, raise not a doubt, it is settled that the court in no way

[4] See Rule 23 (c), Fed. Rules Crim. Proc.

[5] "Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." Rule 32 (d), Fed. Rules Crim. Proc.

misled the petitioner and that Government counsel made no promises of leniency or probation.[6]

Petitioner argues that the United States Attorney misled him because his statement to the court during the hearing for probation was stronger than petitioner and his counsel expected. No exception was taken to anything the District Attorney said, nor was any complaint made about such statement until after sentence was pronounced. We have read this statement and the affidavits of both counsel. The statement was factual, dispassionate and fair. The petitioner has failed to show any "manifest injustice" as required by Rule 32 (d). During all of the proceedings from arraignment to denial of petition for probation, petitioner was represented by able and experienced counsel. In our opinion they were not and could not have been misled by the action and statements of Government counsel. The judgment is

Affirmed.

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[6] "At the June 23 hearing, the court specifically inquired of defendant's counsel as to whether any remark or statement made by the court to defendant's counsel had influenced them in advising the defendant to enter the pleas above mentioned. The court was assured by defendant's counsel and now finds that no statement of the court made to defendant's counsel or in the presence of defendant influenced the defendant's entrance of his pleas of nolo contendere.

"The court further finds that no promise of probation or lenience was made, either to the defendant personally or to his counsel by the United States Attorney or his assistant who handled the prosecution for the Government." Findings 9 and 10, R. 91–92.

BALTIMORE CONTRACTORS, INC. *v.* BODINGER.

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

No. 31. Argued November 9, 1954.—Decided January 10, 1955.

In an action for an accounting, a federal district court denied a stay under § 3 of the United States Arbitration Act, pending arbitration. *Held:* An appeal to a federal court of appeals could not be taken. Pp. 176–185.

(a) The order denying a stay was not a "final decision" within the meaning of 28 U. S. C. § 1291. P. 179.

(b) The order denying a stay was a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction within the meaning of 28 U. S. C. § 1292 (1). Pp. 180–185.

(c) *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, followed. *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; *Ettelson* v. *Metropolitan Ins. Co.*, 317 U. S. 188; and *Shanferoke Corp.* v. *Westchester Corp.*, 293 U. S. 449, distinguished. Pp. 182–185.

Affirmed.

Morris Rosenberg argued the cause for petitioner. With him on the brief was *George Brussel, Jr.*

Charles Wilson argued the cause and filed a brief for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

The question in this case is whether an appeal may be taken to a court of appeals from a district court order refusing to stay an action for an accounting pending arbitration.

This equitable action was brought in a state court for an accounting of the profits of a joint venture in construction under the National Housing Act, and was removed to a federal district court on the basis of diversity of citizenship. Under the joint venture agreement, Baltimore

Contractors agreed to pay the respondent twenty-five percent of the net profits on its construction contracts. The provision under which arbitration was sought reads as follows:

> "In the event of any dispute in the calculation of the net profits under this Paragraph, Frenkil shall select either Wooden and Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute."

The complaint alleged a number of improper practices on the part of Contractors: the use of "dummy" corporations to inflate costs; charges for machinery and material purchases without credits for value or surpluses after completion of the job; receipt of undisclosed rebates; excessive charges and rental for equipment; padded insurance costs, etc.

The petitioner moved for a stay of the action pursuant to § 3 of the United States Arbitration Act, 9 U. S. C. § 3, which authorizes a stay by a federal court when an issue is "referable to arbitration under an agreement in writing for such arbitration." The District Court refused the stay on the ground that the agreement between the parties did not constitute an agreement to arbitrate. The court apparently construed the quoted provision as limited to mathematical disputes. Petitioner appealed to the Court of Appeals for the Second Circuit. On respondent's motion the Court of Appeals dismissed the appeal, citing *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254. Certiorari was sought on the following question:

> "Whether in an action for an *accounting* an interlocutory order denying a stay under Section 3 of the United States Arbitration Act should be regarded as a denial of an injunction from which an appeal lies."

In view of the conflict between the decision below and *Hudson Lumber Co.* v. *United States Plywood Corp.*, 181 F. 2d 929, we granted the petition, 347 U. S. 942.[1]

Congress has long expressed a policy against piecemeal appeals. The reasons for such a policy were stated as follows:

> "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error, (with the single exception of a provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887,) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal." *McLish* v. *Roff*, 141 U. S. 661, 665–666.[2]

Section 22 of the Judiciary Act of 1789, 1 Stat. 73, 84, provided that appeals in civil actions could be taken to the circuit courts only from final decrees and judgments.[3] That requirement of finality has remained a part of our

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[1] The *Hudson Lumber Co.* case was a suit for a declaratory judgment as to the meaning of certain contract provisions with a prayer for incidental injunctive relief. Appeal was allowed by the Court of Appeals from the District Court order staying the trial pending resort to arbitration as required by the contract.

[2] See *Catlin* v. *United States*, 324 U. S. 229, 233–234; *United States* v. *Bailey*, 9 Pet. 238, 273.

[3] This enlarged the English rule for there interlocutory appeals were allowed in equity, although not at common law. 1 Holdsworth's History of English Law 214; Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539, 540–548, 551. Section 22 was rigorously enforced. *Rutherford* v. *Fisher*, 4 Dall. 22; *Young* v. *Grundy*, 6 Cranch 51. Fragmentary appeals were denounced. *Canter* v. *American Ins. Co.*, 3 Pet. 307, 318; *United States* v. *Bailey*, 9 Pet. 238, 273.

law ever since, and now appears as § 1291 of the Judicial Code.[4]

The trial court's interpretation of the quoted contract clause and its order denying a stay could not be called a final decision under § 1291. It was as surely an interlocutory order as the District Court's order in *Shanferoke Corp.* v. *Westchester Corp.*, 293 U. S. 449, 451.[5]

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[4] 28 U. S. C. § 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The statutory limitation of appeals to final decisions, *i. e.*, judgments and decrees, *Ex parte Tiffany*, 252 U. S. 32, 36, has called for determinations of the characteristics of finality. *Stack* v. *Boyle*, 342 U. S. 1, 6; *Roberts* v. *U. S. District Court*, 339 U. S. 844, 845; *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 688; *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546; *Cogen* v. *United States*, 278 U. S. 221. Cf. *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 14–15; *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 124; *Montgomery Union* v. *Ledbetter Co.*, 344 U. S. 178. See Underwood, Appeals in the Federal Practice from Collateral Orders, 36 Va. L. Rev. 731.

The concept of finality does not require a judgment completely disposing of every matter or issue that arises in the litigation. Some collateral issues may become "so severed . . . as to permit an appeal." *Cobbledick* v. *United States*, 309 U. S. 323, 328.

[5] *Shanferoke Corp.* v. *Westchester Corp.*, 293 U. S. 449, was a suit at common law to recover damages for breach of a contract containing an arbitration clause. A motion was made to stay the suit until arbitration. The motion was denied because the trial court thought the arbitration clause applicable only to New York litigation. This Court held that the order was interlocutory and was appealable under § 129 of the Judicial Code of 1911, the predecessor of 28 U. S. C. § 1292 (1). The ruling followed *Enelow* v. *New York Life Ins. Co.*, *infra*, p. 182.

Wilko v. *Swan*, 201 F. 2d 439, reversed on issues not pertinent here, 346 U. S. 427, was a suit for statutory damages. It allowed an

The question here presented involves the interpretation of 28 U. S. C. § 1292 (1) which makes an exception to the requirement of finality, permitting appeals from "interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." Appealability here turns on whether the District Court's refusal to stay this trial for arbitration was the refusal of an "injunction" under § 1292.

The provision for interlocutory appeals was first introduced in 1891 when the circuit courts of appeals were established as intermediate appellate courts. 26 Stat. 826. Section 7 of that Act allowed appeals from interlocutory orders in equity "granting or continuing" injunctions, but from those only. Additions to the class of appealable interlocutory orders were made from time to time until the enactment of § 1292 in its present form.[6]

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appeal under 28 U. S. C. § 1292 to the Court of Appeals from a District Court interlocutory order refusing a stay sought pursuant to the United States Arbitration Act, 9 U. S. C. § 3. The *Shanferoke* case was cited.

[6] In 1895, § 7 was amended to permit an appeal from interlocutory orders refusing or dissolving injunctions, or refusing to dissolve an injunction. 28 Stat. 666. A further amendment was made in 1900 to include certain orders in receiverships. 31 Stat. 660. This amendment had the effect of repealing the 1895 provision which was restored in § 129 of the Judicial Code of 1911. 36 Stat. 1087, 1134. See Frankfurter and Landis, The Business of the Supreme Court, 124–127. The amendment of 1925, 43 Stat. 937, made two changes: First, it embraced orders modifying or refusing to modify injunctions and expanded the number of orders in receiverships which were appealable. Second, it dropped the words "in equity" from the phrase "where upon a hearing in equity in a district court" which had been employed since the initial enactment of § 7 in 1891. No change was intended by that omission. *Schoenamsgruber* v. *Hamburg Line*, 294 U. S. 454, 457, n. 3. In 1927, provision was made for interlocutory appeals in patent cases which are final save for an accounting, 44

No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.[7] When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction.[8] This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. *Shanferoke Corp.* v. *Westchester Corp.*, 293 U. S. 449, 451. Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The

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Stat. 1261. Interlocutory appeals in bankruptcy cases are covered by § 24 of the Bankruptcy Act, 11 U. S. C. § 47.

Compare Fed. Rules Civ. Proc., 54 (b), and see *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507.

[7] Statutory provisions for interlocutory appeals have been enacted in Great Britain. See the Judicature Act of 1925, Law Reports 1925 (2), 15 & 16 Geo. V, c. 49, § 31; 19 Halsbury's Laws of England (2d ed.) 209.

[8] See Hart and Wechsler, The Federal Courts and the Federal System, Note on Rule 54 (b) and Review of Interlocutory Orders, 1344; Proposals for Interlocutory Appeals, 58 Yale L. J. 1186. See Report of the Proceedings of the Annual Meeting of the Judicial Conference of the United States for Sept. 24–25, 1953, p. 27, Report of Committee on Enlargement of Scope of Appeals from Interlocutory Orders, with proposed amendment to § 1292. This was transmitted to Congress, 100 Cong. Rec. 1079 and 1168.

choices fall in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent or approval of the appellate court.

A series of decisions of this Court has developed the rationale for determining the appealability of such an interlocutory order as this under § 1292 and its predecessors. The appealability of routine interlocutory injunctive orders raised few questions. See *George* v. *Victor Co.*, 293 U. S. 377. There the statute was clear. It was when stays of proceedings, in distinction to injunctions, were appealed that the issue of jurisdiction became sharp. In *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, a case arising when federal courts had actions at law and proceedings in equity, a complaint at common law on a life insurance policy was met by an answer alleging fraud in the policy's procurement with a prayer for its cancellation and a motion to try the equitable issue first. The motion was granted, and jurisdiction on appeal from that order was approved on this reasoning:

> "The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of § 129 [§ 1292]. And, in this aspect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity in the

> national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity.' Per Van Devanter, J., in *Griesa* v. *Mutual Life Ins. Co.,* 165 Fed. 48, 50, 51." 293 U. S., at 382.[9]

After the adoption of the one form of action by the Fed. Rules Civ. Proc., 2, we reiterated this ruling in a like case. *Ettelson* v. *Metropolitan Ins. Co.,* 317 U. S. 188. We said a stay of the complaint until disposition of the fraud issue "is as effective . . . as an injunction . . . . The statute looks to the substantial effect of the order made."

The point was made in the *Enelow* case that power to stay mere steps within the framework of the litigation before a court differs as to appealability from an injunction prohibiting proceedings in another court. This distinction was applied in *Morgantown* v. *Royal Ins. Co.,* 337 U. S. 254. There the insurance company brought a suit for reformation of the contract. The insured counterclaimed, seeking to enforce the contract as written, and demanded a jury trial; the company moved to strike the demand; the court granted the motion and set the case for trial to the court without a jury. The insured appealed and the Court of Appeals dismissed the appeal. We affirmed, holding that the *Enelow* rule did not apply; that since this was an equitable proceeding with a counterclaim to enforce the policy, the decision to hear the reformation issue first without a jury was only a decision as to how to try the case, and therefore was not an interlocutory order in the nature of an injunction. To the argument that the importance of a jury trial justified

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[9] Cf. *Schoenamsgruber* v. *Hamburg Line,* 294 U. S. 454, 457, where a stay in admiralty for arbitration was held not appealable as an injunction but only an order as to the course of trial.

treating the order of trial as an interlocutory injunction, we answered:

> "Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions." 337 U. S., at 258.

The *Morgantown* case controls here.[10] Whether the District Court was right or wrong in its ruling that the contract provision did not require arbitration proceedings, it was simply a ruling in the only suit pending, actual or fictional. It was a mere order and not an injunction as that word is understood through the *Enelow* and the *Ettelson* cases as a stay through equitable principles of a common-law action. This present case is to be distinguished from the *Shanferoke* case, *supra,* note 5, in the same way. There in a common-law action a motion for an interlocutory injunction on an equitable defense was refused. The order was appealable under Judicial Code § 129. This Court said:

> "For the reasons stated in *Enelow* v. *New York Life Ins. Co.,* decided this day, *ante,* p. 379, an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274b, is appealable under § 129." 293 U. S., at 452.

The reliance on the analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action The incongruity of taking jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations. Some simplification would follow from an assumption or denial of jurisdiction in both. The distinction has been

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[10] Cf. Moore's Commentary on the U. S. Judicial Code, 492.

applied for years, however, and we conclude that it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper.

It is difficult to generalize as to whether interlocutory appeals are or are not advantageous to an efficient administration of justice. A compromise has been worked out by Congress through § 1292. But that compromise does not authorize appeals to simplify litigation. This ruling was a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction.

Affirmed.

MR. JUSTICE BURTON concurs in the judgment of the Court.

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

I think the District Court's order denying a stay is appealable because it is (1) "final" within the meaning of 28 U. S. C. § 1291 and (2) a refusal to grant an interlocutory injunction within the meaning of § 1292. As the Court admits, a collateral issue may be so severable and unrelated to central trial issues that a judgment on the collateral issue is considered "final" and appealable under § 1291, even though other important issues are left undecided. Given this common sense meaning § 1291 authorizes the present appeal. For certainly decision of whether a judicial rather than an arbitration tribunal shall hear and determine this accounting controversy is logically and practically severable from the factual and legal issues crucial to determination of the merits of the controversy. And this Court has held that § 1292 makes all stay orders appealable that have the substantial effect of interlocutory injunction orders. *Ettelson* v. *Metropoli-*

318107 O - 55 - 18

tan Ins. Co., 317 U. S. 188. The refusal to stay here had that effect. Indeed, the Court seems to admit that this order refusing a stay would be appealable had it been entered by another judge not presiding in this particular case. I agree with the Court that this jurisdictional "incongruity . . . springs from the persistence of outmoded procedural differentiations" that have "elements of fiction" in this modern day. I do not agree that the Court's obeisance to these incongruous fictions is required by congressional enactments.

The Court relies on a purpose of Congress to avoid a waste of time and money incident to repeated "piecemeal" appeals in the same suit. But, as pointed out, Congress, in §§ 1291 and 1292, has left the way open for the appeal of many judgments finally deciding collateral and severable issues separately adjudicated in a case. Any rigid rule to the contrary would itself guarantee useless delays and expenses. For two trials, one unnecessary, may take longer and cost more than two appeals where one would do. Take this case for example. It must now go back for a court accounting trial which could be time-consuming and expensive to litigants and to the Government. And should petitioner lose on the merits it could undoubtedly appeal. On that review the first question for the appellate court would be whether the order denying arbitration, which the Court now refuses to consider, was right or wrong. If found wrong, the trial court's judgment on the merits would have to be vacated and the case again sent back for determination on the merits—this time by arbitration. In that event the trial the Court now orders will have been wholly futile—not even the litigant who now appears to be successful will have gained anything from it, unless perchance he stands to profit from delay. There is some difficulty, at least, in laying this wasteful procedure at the door of Congress.

COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF STERNBERGER, CHASE NATIONAL BANK OF NEW YORK, EXECUTOR.

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

No. 24. Argued October 19–20, 1954.—Decided January 10, 1955.

In determining a net estate for federal estate tax purposes, a deduction may not be made under § 812 (d) of the Internal Revenue Code on account of a charitable bequest that is to take effect only if decedent's childless 27-year-old daughter dies without descendants surviving her and her mother. *Humes* v. *United States*, 276 U. S. 487. Pp. 187–200.

(a) Section 81.44 of Treasury Regulations 105 does not authorize the deduction here claimed, and § 81.46 prohibits it. Pp. 190–199.

(b) There is no statutory authority for the deduction from a gross estate of any percentage of a conditional bequest to charity where there is no assurance that charity will receive the bequest or some determinable part of it. P. 199.

207 F. 2d 600, reversed.

Melva M. Graney argued the cause for petitioner. With her on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Robert N. Anderson.*

Edward S. Greenbaum argued the cause for respondent. With him on the brief were *Maurice C. Greenbaum* and *Charles E. Heming.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The issue here is whether, in determining a net estate for federal estate tax purposes, a deduction may be made on account of a charitable bequest that is to take effect

only if decedent's childless 27-year-old daughter dies without descendants surviving her and her mother. For the reasons hereafter stated, we hold that it may not.

Louis Sternberger died testate June 25, 1947. His federal estate tax return discloses a gross estate of $2,406,541.71 and, for the additional estate tax, a net estate of $2,064,346.55. It includes assets owned by him at his death and others held by the Chase National Bank, respondent herein, under a revocable trust created by him. As the revocable trust makes provisions for charity that are, for our purposes, identical with those in the will, this opinion applies to both dispositions.

The will places the residuary estate in trust during the joint lives of decedent's wife and daughter and for the life of the survivor of them. Upon the death of such survivor, the principal of the trust fund is payable to the then living descendants of the daughter. However, if there are no such descendants, one-half of the residue goes to certain collateral relatives of decedent and the other half to certain charitable corporations. If none of the designated relatives are living, the entire residue goes to the charitable corporations.[1]

At decedent's death, his wife and daughter survived him. His wife was then 62 and his daughter 27. The latter married in 1942, was divorced in 1944, had not remarried and had not had a child.

In the estate tax return, decedent's executor, respondent herein, deducted $179,154.19 from the gross estate as the present value of the conditional bequest to charity of one-half of the residue. Respondent claimed no deduction for the more remote charitable bequest of the other half of the residue. The Commissioner of Internal Revenue disallowed the deduction and determined a tax

[1] These provisions appear more fully in *Estate of Sternberger* v. *Commissioner*, 18 T. C. 836, 837–838.

deficiency on that ground. The Tax Court reversed the Commissioner. 18 T. C. 836. The Court of Appeals for the Second Circuit affirmed the Tax Court, 207 F. 2d 600, on the authority of *Meierhof* v. *Higgins,* 129 F. 2d 1002. To resolve the resulting conflict with the Court of Appeals for the First Circuit in *Newton Trust Co.* v. *Commissioner,* 160 F. 2d 175, we granted certiorari, 347 U. S. 932.

The controlling provisions of the Revenue Code are in substantially the same terms as when they were first enacted in 1919 [2] and are as follows:

> "SEC. 812. NET ESTATE.
>
> "For the purpose of the tax the value of the net estate shall be determined . . . by deducting from the value of the gross estate—
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> . . . . .
>
> "(d) TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.—The amount of all bequests, legacies, devises, or transfers . . . to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ." I. R. C.

The Commissioner concedes that the corporations named in the will qualify as charitable corporations under the statute. There is no doubt, therefore, that if the bequest to them had been immediate and unconditional, its value would be deductible. The question before us is what, if any, charitable deduction may be made despite (1) the deferment of the effective date of the charitable bequest until the deaths of both decedent's wife and daughter and (2) the conditioning of the bequest upon a lack of descendants of decedent's daughter surviv-

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[2] Originally § 403 (a) (3) of the Revenue Act of 1918, 40 Stat. 1098. See also, Griswold, Cases and Materials on Federal Taxation (3d ed.), 679 *et seq.;* 1 Paul, Federal Estate and Gift Taxation, 638 *et seq.*

ing at that time. We find the answer in the Treasury Regulations, which are of long standing and strengthened by reenactments of I. R. C., § 812 (d), since their promulgation.[3]

1. *Section 81.44 of Treasury Regulations 105 would permit the deduction of the present value of the bequest if it were an outright bequest, merely deferred until the deaths of decedent's wife and daughter.*

In their earliest form, the predecessors of these regulations, in 1919, recognized, in plain language, the propriety of the deduction of the present value of a deferred, but assured, bequest to charity.[4] Section 81.44 (d) of Treasury Regulations 105 does so with inescapable specificity:

> "§ 81.44 *Transfers for public, charitable, religious, etc., uses.* . . .
>
> . . . . . .
>
> "(d) If a trust is created for both a charitable and a private purpose, deduction may be taken of the

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[3] Its latest reenactment is in § 2055 (a) of the Internal Revenue Code of 1954, 68A Stat. 390. The purpose of the deduction is to encourage gifts to the named uses. *Edwards* v. *Slocum*, 264 U. S. 61, 63; 13 Geo. Wash. L. Rev. 198, 201; 28 Va. L. Rev. 387–388. Like other tax deductions, however, it must rest on more than a doubt or ambiguity. See *United States* v. *Stewart*, 311 U. S. 60, 71, and also *Commissioner* v. *Jacobson*, 336 U. S. 28, 49.

Section 408 (a) of the Revenue Act of 1942, 56 Stat. 949, added to I. R. C., § 812 (d), the so-called "disclaimer provision," whereby, under certain conditions, the renunciation of a private bequest which effectuates a gift to charity earns a charitable deduction from the decedent's gross estate.

[4] "ART. 53. Public, charitable, and similar bequests.—. . . It does not prevent deduction . . . that the property placed in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable

value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. § 81.10 indicates the principles to be applied in the computation of the present worth of deferred uses, but such computation will not be made by the Commissioner on behalf of the executor. *Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to the charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible.* To determine the present value of such remainder, use the appropriate factor in column 3 of Table A or B of § 81.10. *If the present worth of a remainder bequeathed for a charitable use is dependent upon the termination of more than one life, or in any other manner rendering inapplicable Table A or B of § 81.10, the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principle set forth in § 81.10, by one skilled in actuarial computations.*" (Emphasis supplied.) 26 CFR.

The very explicitness of the above provisions emphasizes their restriction to "the computation of the present worth" of *assured* bequests such as are the subject of each of the illustrations and cross references in the section.

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bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20." 21 T. D. 783–784.

Article 20 prescribed methods of determining the present worth of a remainder subject to a single life interest.

The statute restricts charitable deductions to bequests to corporations "organized and *operated exclusively* for . . . charitable . . . purposes." [5] (Emphasis supplied.) Likewise, the above section of the regulations requires that the deductible value of "the beneficial interest in favor of" the designated charitable purpose be "severable from the interest in favor of the private use." There is no suggestion in the statute or in § 81.44 of a deduction of funds other than those later to be used exclusively for charitable purposes.

2. *Section 81.46 of Treasury Regulations 105 permits no deduction for a conditional bequest to charity "unless the possibility that charity will not take is so remote as to be negligible."*

Here, also, the regulations in their earliest form, in 1919, were unequivocally restrictive.[6] It was only after court

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[5] Congressional insistence upon the actual use of the funds *exclusively* for charitable purposes appears in the following provisions describing the bequests that are deductible:

"The amount of all bequests . . . to or for the use of any corporation organized and *operated exclusively* for religious, charitable, scientific, literary, or educational purposes . . . *no part of the net earnings of which inures to the benefit of any private stockholder or individual* . . . or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but *only if* such contributions or gifts are to be *used* . . . *exclusively* for religious, charitable, scientific, literary, or educational purposes . . . ." (Emphasis supplied.) I. R. C., § 812 (d).

[6] "ART. 56. Conditional bequests.—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed." 21 T. D. 785.

decisions had demonstrated the need for doing so [7] that the restrictions were restated so as expressly to permit deductions of bequests assured in fact but conditional in form.

Section 81.46 now provides expressly that no deduction is allowable for a conditional bequest to charity "unless the possibility that charity will not take is so remote as to be negligible." The whole section is significant:

> "§ 81.46 *Conditional bequests.* (a) *If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible.* If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.
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> "(b) If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." (Emphasis supplied.) 26 CFR.

Sections 81.44 and 81.46 fully implement § 812 (d) of the code. In their early forms they were obviously mu-

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[7] *United States* v. *Provident Trust Co.*, 291 U. S. 272. See also, *Hoagland* v. *Kavanagh*, 36 F. Supp. 875; *Ninth Bank & Trust Co.* v. *United States*, 15 F. Supp. 951.

tually exclusive and easily reconcilable. The predecessor of § 81.46 confined charitable deductions to outright, unconditional bequests to charity. It expressly excluded deductions for charitable bequests that were subject to conditions, either precedent or subsequent. While it encouraged assured bequests to charity, it offered no deductions for bequests that might never reach charity. Subsequent amendments have clarified and not changed that principle. Section 81.46 (a) today yields to no condition unless the possibility that charity will not take is "negligible" or "highly improbable." Section 81.46 (b) is equally strict. It relates to provisions whereby funds may be diverted in whole or in part to non-charitable uses, and it limits the tax deduction to that portion of each fund that cannot be so diverted. Where the principal of a bequest to charity thus may be invaded for private purposes, it is only the ascertainable and assured balance of the bequest to charity that is recognized for a tax deduction.

Respondent concedes that the chance that charity will not take is much more than negligible. Therefore, if § 81.46 (a) applies to the instant case, no charitable deduction is permissible.

Respondent claims, however, that § 81.44 covers this case. In doing so, it reads §§ 81.44 and 81.46 together and, instead of confining them to their mutually exclusive subjects, makes them overlap. It applies § 81.44 to some deferred *conditional* bequests. It does so in any case where it can compute, on approved actuarial standards, the degree of possibility that charity will receive the conditional bequest. Respondent then computes the present value of a corresponding percentage of the entire deferred bequest. In short, respondent claims an immediate tax deduction equal to the present value of whatever fraction of the bequest corresponds, actuarially, to the chance that charity may benefit from it.

This Court considered a somewhat comparable proposal in 1928. In *Humes* v. *United States,* 276 U. S. 487, a taxpayer sought a charitable deduction based on a bequest to charity that was conditional upon the death of decedent's 15-year-old niece, without issue, before reaching the age of 40. To sustain the proposal, the taxpayer sought to establish actuarially a measure of the chance that charity would receive the bequest and to find authority in the Revenue Code for the deduction of the present value of a corresponding percentage of the bequest. Speaking through Mr. Justice Brandeis, this Court found the actuarial computation inadequate. It, however, did not drop the matter there. It made the following statement:

> "One may guess, or gamble on, or even insure against, any future event. The Solicitor General tells us that Lloyds of London will insure against having twins. But the fundamental question in the case at bar, is not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given to a statute. Did Congress in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency, the *actual* value of which cannot be determined from any known data? Neither taxpayer, nor revenue officer—*even if equipped with all the aid which the actuarial art can supply*—could do more than guess at the value of this contingency. *It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character.*" (Emphasis supplied.) *Id.,* at 494.

Since the above was written, there have been advances in the actuarial art. Today, actuarial estimates are employed more widely than they were then. The computa-

tions now before us illustrate that advance. They do not, however, lessen the necessity for statutory authorization for such a tax deduction. The scope of the authority required by respondent can best be appreciated if examined in the revealing light of the specific circumstances of the present case.

The Tax Court and the Court of Appeals have approved respondent's actuarial computations as fairly reflecting the present value of one-half of a two-million-dollar residue, reduced in proportion to the chance that charity will receive it. In making this estimate, respondent has computed the present value of the deferred bequest on the basis of 4% interest compounded annually and has used the following actuarial tables:

1. To determine the joint life expectancy of decedent's wife and daughter, the Combined Experience Mortality Table prescribed in § 81.10 of the estate tax regulations.

2. To estimate the probability of remarriage of the daughter, the American Remarriage Table, published by the Casualty Actuarial Society.

3. To estimate the chance of a first child being born to decedent's daughter, a specially devised table which has been found by the Tax Court to have been prepared in accordance with accepted actuarial principles upon data derived from statistics published by the Bureau of the Census.[8]

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[8] Despite the conclusions of the Tax Court and the Court of Appeals to the contrary, the Government contends here that the proposed actuarial value of the conditional remainder to charity does not support the deduction. We do not reach that issue, but the facts material to it are as follows: The Remarriage Table is based on a study of American experience conducted by a Committee of the Casualty Actuarial Society, 19 Proceedings of the Casualty Actuarial Society (1933), 279–349. The table is based solely upon the remarriage experience of widows who, through the deaths of their husbands, become beneficiaries under workmen's compensation laws in states

On the basis of these tables, the Tax Court finds that the present value of the charitable remainder at the death of decedent is .18384 on the dollar if computed solely on the chances of his daughter's remarriage; .24094 on the dollar if computed on the chance that a legitimate descendant of his daughter will survive her; and .24058 on the dollar if computed on the chance that any legitimate or illegitimate descendant of his daughter will survive her. It is this last estimate that respondent seeks to apply here.

If respondent is successful, it means the allowance of an immediate and irrevocable deduction of over $175,000 from the gross estate of decedent, although respondent admits there is a real possibility that charity will receive nothing. The bequest, in fact, offers to the daughter an inducement of about $2,000,000 to remarry and leave a descendant. To the extent that this inducement reduces the actuarially computed average probability that charity will receive this bequest, it further demonstrates the inappropriateness of authorizing charitable tax deductions based upon highly conditional bequests to charity.

An even clearer illustration of the effect of respondent's interpretation of the code readily suggests itself. If

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where they lose compensation benefits upon remarriage. The reports relied upon cover experience for policy years 1921 to 1929, inclusive. See *id.*, at 286–288, 298. See also, Myers, Further Remarriage Experience, 36 Proceedings of the Casualty Actuarial Society (1949), 73 *et seq.* The specially devised table as to the probability of issue is based upon statistics, for white women in 47 states and the District of Columbia, indicating the degree of probability that such women, after they are 27 years old, will marry and have first-born children. See the following Bureau of the Census publications for 1940; Vital Statistics of the United States, Pt. II, 89; Nativity and Parentage of the White Population—General Characteristics 110; Types of Families 9. The instant computation assumes that such a child will survive its mother. 18 T. C. 836, 837–838.

decedent had here conditioned his bequest to charity solely on the death of his daughter before remarriage, the Remarriage Table would then fix the present value of the charitable remainder at .18384 on the dollar. The taxpayer would at once receive a substantial charitable deduction on that basis. The daughter, however, would have a $2,000,000 inducement to remarry. If she did so, her action would cancel the possibility that charity would receive anything from the bequest, but it would not cancel the tax deduction already allowed to the estate. To whatever extent any person can defeat the fulfillment of any condition upon which a benefit to charity depends, to that extent the actuarial estimate that such benefit will reach charity is less dependable. The allowance of such a tax reduction as is here sought would open a door to easy abuse. The result might well be not so much to encourage gifts inuring to the benefit of charity as to encourage the writing of conditions into bequests which would assure charitable tax deductions without assuring benefits to charity.

We find no suggestion of authority for such a deduction in § 812 (d). That section remains substantially the same as it was when *Humes* v. *United States, supra,* 276 U. S. 487, was decided. We also find no authorization for the deduction either in § 81.46 or § 81.44 of the regulations, as thus far discussed. This relegates respondent to the following words now in § 81.44 (d):

> "If the present worth of a remainder bequeathed for a charitable use is dependent upon the termination of more than one life, or *in any other manner rendering inapplicable Table A or B of § 81.10,* the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principle set forth in § 81.10, by one skilled in actuarial computations." (Emphasis supplied.)

In view of the statutory emphasis upon outright bequests and the long-standing exclusion of conditional bequests by § 81.46 of the regulations (and its predecessors), we do not regard the above sentence as now invading the domain of § 81.46 by extending the deduction to conditional bequests in a manner readily open to abuse. We regard the sentence as restricted to computations of deferred, but assured, bequests. Section 81.10 (i) now deals at length with the valuation of remainders and reversionary interests and gives many examples of such computations. Every example, however, is one of the valuation of an assured bequest. The additional language in § 81.44 (d), quoted above, does not authorize the deduction, and § 81.46 prohibits it. Such specific and established administrative interpretation of the statute is valid and "should not be overruled except for weighty reasons." *Commissioner* v. *South Texas Co.,* 333 U. S. 496, 501.

This Court has not specifically faced the issue now before us since *Humes* v. *United States, supra,* but we see no reason to retreat from the views there stated. This Court finds no statutory authority for the deduction from a gross estate of any percentage of a conditional bequest to charity where there is no assurance that charity will receive the bequest or some determinable part of it. Where the amount of a bequest to charity has not been determinable, the deduction properly has been denied. *Henslee* v. *Union Planters Bank,* 335 U. S. 595, 598–600; *Merchants Bank* v. *Commissioner,* 320 U. S. 256, 259–263; and see *Robinette* v. *Helvering,* 318 U. S. 184, 189. Where the amount has been determinable, the deduction has, with equal propriety, been allowed where the designated charity has been sure to benefit from it. *United States* v. *Provident Trust Co.,* 291 U. S. 272; *Ithaca Trust Co.* v. *United States,* 279 U. S. 151.

Some of the lower courts have squarely met the instant problem and denied the deduction. For example, the de-

duction was denied in the First Circuit where the court found that "it is not certain that the charity will take 50% of the corpus; only that it has a 50–50 chance of getting all or nothing." *Newton Trust Co.* v. *Commissioner,* 160 F. 2d 175, 181. See also, *Graff* v. *Smith,* 100 F. Supp. 42; *Hoagland* v. *Kavanagh,* 36 F. Supp. 875; *Wood* v. *United States,* 20 F. Supp. 197. The administrative practice, as evidenced here by the action of the Commissioner, has been to deny the deduction. See further, Paul, Federal Estate and Gift Taxation (1946 Supp.), 426–427.

The judgment of the Court of Appeals, accordingly, is reversed and the cause remanded for action in conformity with this opinion.

Reversed.

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

The facts are fully and fairly stated in the Court's opinion. Its statement of the legal issues accords with our understanding of the case, to wit:

> "The question before us is what, if any, charitable deduction may be made despite (1) the deferment of the effective date of the charitable bequest until the deaths of both decedent's wife and daughter and (2) the conditioning of the bequest upon a lack of descendants of decedent's daughter surviving at that time."

The reason for dissenting, at some length, is that the Court's conclusion seems to disregard the words of the statute in question and to subvert the purpose of Congress in its enactment, that purpose admittedly being to encourage testamentary gifts to corporations organized for certain objects considered highly desirable for the good of our people.[1] There is a certain hesitation in dissent-

[1] See note 3 of the Court's opinion.

ing from an interpretation of a tax statute remediable by Congress, but as the Court's decision springs, we think, from an overemphasis on regulations, a protest may have usefulness as a counterweight against future extensions of such treatment to statutory language.

First. The statute, 26 U. S. C. § 812 (d), allows as deductions from the gross estate the "amount of all bequests, legacies, devises, or transfers . . . to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ." There is no legislative history explanatory of its meaning.[2] If we read the quoted portion of § 812 alone, could there be any doubt that the Sternberger bequest is deductible? We think not. It says "all bequests"—whatever the charity takes under the will. There is not a word that limits the deduction of bequests to what assuredly goes to the institution. It is the "amount" of the bequest that is deductible—its presently ascertainable value. The statute plainly allows deferred charitable bequests. It does not require assured enjoyment.

Under the Court's interpretation, if a child were bequeathed his father's estate for life with remainder in default of issue to the recognized institutions, the full estate tax would have to be paid. On the other hand, if the estate were left simply to the child for life and then to the same institutions, the estate would be free from the tax on the present value of the remainder. Such a differentiation is not found in the statute. The Congress said that charitable bequests should be deductible. The valuation of the charitable interest in one instance would be greater than in the other; the tax less. But in each case the net estate would be reduced only by the present actuarial value of the charitable bequest. While particu-

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[2] See note 2 of the Court's opinion.

318107 O - 55 - 19

lar estates would secure tax advantages under our interpretation, in the aggregate the charitable deductions should substantially equal the amount received by the tax-recognized institutions. This would surely fairly carry out the congressional purpose. To view respondent's contention as urging a possible over-all tax windfall for estates is to deny the mathematical law of averages.[3]

Our interpretation of the statute has support in the language of Treasury Regulation 105, § 81.44. After referring to the valuation of bequests whose value is presently ascertainable, the regulation adds:

> "If the present worth of a remainder bequeathed for a charitable use is dependent upon the termination of more than one life, or in any other manner rendering inapplicable Table A or B of § 81.10, the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principle set forth in § 81.10, by one skilled in actuarial computations."

The tables refer to a remainder contingent on the termination of one life only. Section 81.44 alone would allow, in the light of the statutory language, a deduction for a contingent bequest, uncertain as to ultimate receipt. See the Court's opinion, *ante,* pp. 198 and 199. The Court does not follow this language of the Regulations because of § 81.46 and because of "statutory emphasis upon

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[3] As the Court states the actuarial method and assumes by not reaching it, note 8 of the opinion, the correctness of the computation of the value of the conditional remainder to charity, we will merely add that this position accords with the conclusion of the Tax Court, 18 T. C. 836, and the Court of Appeals, 207 F. 2d 600, through its reliance on *Meierhof* v. *Higgins,* 129 F. 2d 1002, 1003, a case also involving the multiple-decrement theory. See Jordan, Life Contingencies, 251.

outright bequests." We find no such emphasis. The purpose of the statute leads us to the contrary result.[4]

The Court agrees, however, with the Government's contention that "it is immaterial whether the charity's contingent possibility of receipt can be valued as of the decedent's death." It holds that it is only when ultimate receipt must follow that § 812 (d) allows a deduction. Although the Government asserts its conclusion is upheld by our decisions, we do not think they so hold. In this Court five cases have touched upon the problem. Three of them were disposed of because of the failure to introduce, or the impossibility of making, a valuation upon sound actuarial principles.[5] None of them held that bequests are not deductible although the ultimate taking by the charitable beneficiary was uncertain.

Two—*Ithaca Trust Co.* v. *United States,* 279 U. S. 151, and *United States* v. *Provident Trust Co.,* 291 U. S. 272—allowed a deduction for conditional charitable bequests. The former because a right to invade the corpus was fixed by a standard capable of being stated in money and, as the income of the estate was ample for the needs of the

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[4] See *Meierhof* v. *Higgins,* 129 F. 2d 1002, holding that the predecessors to §§ 81.44 and 81.46 are to be read together.

[5] *Humes* v. *United States,* 276 U. S. 487. It was there said:

"The Court of Claims did not find that the present value of the contingent bequests to the charities can be determined by the calculations of actuaries based upon experience tables. . . .

"If all the facts stated had been embodied in findings, no legal basis would be laid for the deduction claimed. The volume and character of the experience upon which the conclusions drawn from these two tables are based, differ from the volume and character of the experience embodied in standard mortality tables, almost as widely as possibility from certainty." 276 U. S., at 492–493.

The tables were based on the limited experience of male and female members of the Scotch peerage. *Merchants Bank* v. *Commissioner,* 320 U. S. 256; *Henslee* v. *Union Planters Bank,* 335 U. S. 595. Compare *Robinette* v. *Helvering,* 318 U. S. 184.

life beneficiary, there was no uncertainty sufficient to justify a refusal of the deduction for the charitable remainder. The latter is, on its face, a decision that would decide the issue, simpliciter, of the deductibility of contingent bequests. Neither is here controlling, however, since in both the charity was held to be assured of taking. The *Provident Trust* case is worth a moment's examination. Property was left by will in trust for the deceased's daughter for life; upon her death the corpus was to pass to her lawful issue; but should she die without issue, the estate was to be distributed among various charitable organizations. Prior to the death of the testator, an operation had rendered the daughter incapable of childbearing, assuring the vesting of the charitable remainder. This Court did not apply the then existing regulation (the predecessor to § 81.46 (d)) [6] which would have denied a deduction. It ignored the regulation, apparently believing it in conflict with the purpose of the statute, and allowed the deduction, thus requiring the amendment of the regulation to its present form. The Court stated the relevant inquiry to be as follows:

> "The sole question to be considered is—What is the value of the interest to be saved from the tax? That is a practical question, not concluded by the presumption invoked but to be determined by ascertaining in terms of money what the property constituting that interest would bring in the market,

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[6] "Conditional bequests.—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed." Treas. Reg. 37, Art. 56.

> subject to such uncertainty as ordinarily attaches to such an inquiry. See *Ithaca Trust Co.* v. *United States* . . . ." 291 U. S., at 286.

Our conclusion is that the purpose of § 812 was to allow a deduction for charitable bequests that are capable of valuation at the time of death, although it is not certain that the gift will ultimately fall to the contingent beneficiary. See in accord *Meierhof* v. *Higgins,* 129 F. 2d 1002, a case in conflict with *Newton Trust Co.* v. *Commissioner,* 160 F. 2d 175, which ultimately led to the allowance of this certiorari. The purpose of § 812 and its background forbid, we think, a conclusion that Congress intended to exclude a deduction in those cases.

Second. The Government asserts and this Court agrees that although it is clear that § 812 allows a deduction for some contingent bequests, § 81.46 of the regulations limits those contingencies to instances where the "possibility that charity will not take is so remote as to be negligible." Clearly the possibility here is not "remote." The chances are against the charity taking. It is quite true that § 81.46 has survived reenactment of I. R. C., § 812, and that it can be interpreted as a limitation upon the deductibility of contingent remainders. However, we do not think such a ruling would be consistent with the purpose of Congress, manifested by I. R. C., § 812.

Whether the Regulations are written into the Estate Tax law by reenactment or are merely indicative of congressional purpose,[7] the deduction section and the regulations are to be interpreted in the light of the congressional purpose. Whatever may be the varying views as to the desirability of testamentary gifts of moneys or businesses

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[7] Compare *Helvering* v. *Reynolds Co.,* 306 U. S. 110, 115; *Crane* v. *Commissioner,* 331 U. S. 1, 8, with *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90. See 54 Harv. L. Rev. 377, 398, 1311.

to public or private charitable foundations, Congress has sanctioned such provisions, vested or with certain degrees of contingency, by the deduction section of the Estate Tax.[8] The policy has brought munificent gifts to the chosen institutions.

If it were not for the reenactment of § 812 after the promulgation of § 81.46, we would have no hesitation in declaring it in conflict with the statute. Even in interpreting statutes when isolated provisions would produce results "plainly at variance with the policy of the legislation as a whole," we follow the purpose rather than the literal words. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543. That rule is applicable here. Regulations do not have the safeguards of federal statutory enactments. Interested parties outside the Internal Revenue Service perhaps may not be heard. Reports explaining the action are not available. Public discussion, such as happens in Congress, does not take place. In short, we think that reenactment of a statute after the due adoption of a regulation does not make the regulation a part of the statute. It is only an indication of congressional purpose to be weighed in the context and circumstances of the statutory language. In this instance the congressional purpose to encourage gifts to charity should not be frustrated by the issuance of a regulation.

For the foregoing reasons we would affirm the judgment of the Second Circuit.

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[8] Griswold, Cases and Materials on Federal Taxation (3d ed.), 679, setting out the legislative history of the section with brief reference to the differing views on the merit of the charitable deduction; Paul, Federal Estate and Gift Taxation, Vol. I, c. 12.

COX ET AL., ADMINISTRATORS, ET AL. *v.* ROTH, ADMINISTRATOR.

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

No. 40. Argued November 16, 1954.—Decided January 10, 1955.

1. An action under the Jones Act, 46 U. S. C. § 688, for damages for the death of a seaman employed on a vessel owned by individuals, survives the deaths of the tortfeasors. Pp. 207–210.
   (a) Congress, having provided that railroad employees could recover under the Federal Employers' Liability Act regardless of the "survival" of the tortfeasor railroad, and having granted seamen under the Jones Act the same rights granted to railroad employees under the Federal Employers' Liability Act, intended that the death of the tortfeasor should not defeat recovery under the Jones Act. Pp. 208–209.
   (b) The Jones Act, as welfare legislation, is entitled to a liberal construction to accomplish its beneficent purposes. P. 210.
2. The 3-year period of limitations applicable to actions under the Jones Act cannot be diminished by state statute. P. 210.

210 F. 2d 76, affirmed.

Douglas D. Batchelor argued the cause for petitioners. With him on the brief was *David W. Dyer*.

Jacob Rassner argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

The main question presented in this case is whether an action under the Jones Act survives the death of the tortfeasor. In *Nordquist* v. *United States Trust Co.*, 188 F. 2d 776, the Court of Appeals for the Second Circuit answered this question in the affirmative. In the instant case the Court of Appeals for the Fifth Circuit answered it in the negative, but allowed recovery on the basis of state law, 210 F. 2d 76. We granted certiorari in order to resolve this conflict. 347 U. S. 1009.

Jim Dean was employed as a seaman on the M. V. *Wingate,* owned and operated by Captain H. C. Farrington and Sid Cox, citizens of the United States and residents of Florida. The *Wingate* sailed on or about December 22, 1949, from Matanzas, Cuba, and while on the high seas foundered and was lost. Captain Farrington's body was washed ashore on the Cuban coast, but no trace was found of Dean or the vessel. Sid Cox died in January 1951 of causes bearing no relation to the disaster.

In October 1952, the respondent, as the administrator of the estate of Jim Dean, brought this action against the petitioners in the United States District Court for the Southern District of Florida. The complaint, brought under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, alleged that Dean was a member of the crew of the *Wingate* and had lost his life through the negligence of its owners. The petitioners Cox and Thompson are the administrators of the estate of Sid Cox, while Henrietta and Howard Farrington are the distributees of H. C. Farrington. The estates of Cox and Farrington had been probated and that of Farrington closed before this action was filed. Respondent filed no notice of claim in either estate proceeding within the 8-month period required by § 733.16 of the Florida statutes.

The primary difficulty in this case stems from the fact that Congress, in passing the Jones Act, did not specifically enumerate the rights of seamen, but merely extended to them the same rights granted to railway employees by the Federal Employers' Liability Act. While the latter Act contained no clause specifically providing for the survival of actions against deceased tortfeasors, it did provide that the claim of the employee could be prosecuted against "the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." 35 Stat. 66, 45 U. S. C. § 57. Since railroads are rarely, if ever,

owned by individuals, and since they are subject to various regulations which prevent their discontinuing business, a clause permitting suit against the personal representative of the individual owner of a railroad was unnecessary. See 41 Stat. 477, 49 U. S. C. § 1 (18). Congress fully provided for the corporate analogues of death when it provided that suit might continue against the receiver or successor corporation of the railroad. But where seamen covered by the Jones Act work aboard vessels owned by individuals, literal application of the words of the FELA would result in the denial of recovery against the personal representative of the tortfeasor. This, we feel, would frustrate the congressional purpose of "the benefit and protection of seamen who are peculiarly the wards of admiralty," *The Arizona* v. *Anelich,* 298 U. S. 110, 123. The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting. Applying such a rule here, we conclude that Congress, having provided that railroad employees could recover regardless of the "survival" of the tortfeasor railroad, intended that the death of the tortfeasor should not defeat recovery under the Jones Act. As the Court said in *Markham* v. *Cabell,* 326 U. S. 404, 409, "The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes . . . . The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

The extreme harshness of the old common-law rule abating actions on the death of the tortfeasor flies in the face of the expressed congressional purpose to provide for "the welfare of seamen." The Jones Act "As welfare legislation . . . is entitled to a liberal construction to accomplish its beneficent purposes." *Cosmopolitan Co.* v. *McAllister,* 337 U. S. 783, 790. Since the decision here is confined to an interpretation of the Jones Act, there is no need to consider the "slender basis" for the general admiralty rule against such survivorship of actions. See *Just* v. *Chambers,* 312 U. S. 383, 387, n. 4. Nevertheless, in considering the harshness of the rule sought to be imposed under the Jones Act, we do note that advancing civilization and social progress have brought 43 of our States to include in their general law the principle of the survival of causes of action against deceased tortfeasors, and that such recovery, rather than being exceptional, has now become the rule in almost every common-law jurisdiction. See the discussion by Roscoe Pound on death statutes as part of the general law, 13 NACCA L. J. 188–189 (May 1954).

Petitioners make the further claim that even if the Jones Act is interpreted to allow an action to proceed against the personal representatives of the tortfeasors, this suit must fail because respondent did not comply with the Florida statute governing the distribution of decedents' estates. The short answer to this is that Congress, within its constitutional power, decreed a 3-year statute of limitations uniformly throughout the Nation, *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 392, and no state statute can diminish this period.

Affirmed.

UNITED STATES *v.* ACRI ET AL.

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

No. 33. Argued November 16, 1954.—Decided January 10, 1955.

A tax lien of the United States is entitled to priority over an Ohio attachment lien, where the federal tax lien was recorded subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment. *United States* v. *Security Trust Co.*, 340 U. S. 47, followed. Pp. 211–214.

(a) The relative priority as between a tax lien of the United States and a lien under state law is a federal question to be determined finally by the federal courts. P. 213.

(b) That the Ohio courts designate an attachment lien "an execution in advance," and treat it as a perfected lien at the time of attachment, is not binding upon this Court. P. 213.

(c) For federal tax purposes, the Ohio attachment lien was inchoate because, at the time the attachment issued, the fact and the amount of the lien were contingent upon the outcome of the suit for damages. P. 214.

(d) This case is not to be distinguished from *United States* v. *Security Trust Co.*, 340 U. S. 47. P. 214.

209 F. 2d 258, reversed.

Charles K. Rice argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Fred E. Youngman.*

Francis B. Kavanagh argued the cause and filed a brief for Oravitz, respondent. With him on the brief was *Israel Freeman.*

MR. JUSTICE MINTON delivered the opinion of the Court.

This case involves the relative priority between an attachment lien and the liens of the United States for unpaid taxes. The District Court found the attachment

lien prior to the liens of the United States, and the Court of Appeals affirmed without opinion. We granted certiorari, 347 U. S. 973.

On August 11, 1948, the United States filed suit in the District Court for the Northern District of Ohio to collect unpaid income taxes for the years 1942–1946 against one Acri and his wife. Acri was at the time in the penitentiary for the murder of one Oravec, whose personal representative, Oravitz, had, on August 6, 1947, in Mahoning County, Ohio, filed an action against Acri for wrongful death. On the same date, certain cash and bonds of Acri, which were in his safety deposit box in the Dollar Savings and Trust Company, were attached by Oravitz. The box was not opened until September 11, 1948, after the bank had been made guardian of Acri, at which time an inventory was filed. The personal representative, Oravitz, and the bank, as guardian of Acri, were made parties to the Government's suit.

On January 19, 1949, the personal representative of the murdered man recovered judgment against Acri in the sum of $18,500. In the meantime, on November 18, 1947, after the issuance of the writ of attachment, but more than a year before the judgment in the main action for wrongful death, the assessment lists for unpaid income taxes of Acri and his wife for the years 1942–1946 were received in the office of the Collector of Internal Revenue. On November 19, 1947, demand for payment was mailed to Acri. On November 21, 1947, a notice of the tax liens was filed in the office of the Recorder in Mahoning County, Ohio, which is the residence of the defendants and the location of the Acris' property, and the place where the action for wrongful death was begun. Notice and levy of the tax liens were served upon the Dollar Bank. It was stipulated that the only question involved was the relative priority of the attachment lien of the

personal representative and the tax liens of the United States.

The issue here is identical with that in *United States* v. *Security Trust Co.,* 340 U. S. 47. There the question was stated as follows:

> "The question presented here is whether a tax lien of the United States is prior in right to an attachment lien where the federal tax lien was recorded subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment." 340 U. S., at 48.

Our answer here is the same as in the *Security Trust Company* case and for the same reasons.

The relative priority of the lien of the United States for unpaid taxes is, as we said in *United States* v. *Waddill Co.,* 323 U. S. 353, 356, 357; *Illinois* v. *Campbell,* 329 U. S. 362, 371; *United States* v. *Security Trust Co.,* 340 U. S. 47, 49, always a federal question to be determined finally by the federal courts. The state's characterization of its liens, while good for all state purposes, does not necessarily bind this Court. *United States* v. *Waddill Co.,* 323 U. S. 353, at 357; *United States* v. *Gilbert Associates,* 345 U. S. 361. Therefore, the fact that the Ohio courts had designated an attachment lien "an execution in advance," *Rempe & Son* v. *Ravens,* 68 Ohio St. 113, 67 N. E. 282, and treated it as a perfected lien at the time of attachment, does not bind this Court. We must look at the circumstances as we did in the *Waddill* case, where the Virginia court had held a landlord's lien was fixed, specific, and not inchoate. This Court, after examining the facts, found otherwise. In *Gilbert Associates,* the New Hampshire court had held that the assessment of a tax was a judgment and the United States' lien for taxes was not valid against the tax assessment made by the

town within the meaning of § 3672 of the Internal Revenue Code.* We held that although New Hampshire might treat its tax assessments as judgments for state purposes, the assessment of the tax was not a judgment within the meaning of § 3672. We hold here that the attachment lien in Ohio is for federal tax purposes an inchoate lien because, at the time the attachment issued, the fact and the amount of the lien were contingent upon the outcome of the suit for damages.

In argument it was pointed out that the statute of California involved in the *Security Trust* case was different because California courts had held an attachment lien to be inchoate and a mere notice of a more perfect lien to come, while Ohio courts had held it to be an execution in advance and a lien perfected as of the time of attachment. This distinction is immaterial for purposes of federal law. This case is not to be distinguished from *United States* v. *Security Trust Co.*, 340 U. S. 47, and the judgment is

Reversed.

* "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector . . ." etc.

UNITED STATES *v.* LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD. ET AL.

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

No. 34. Argued November 16, 1954.—Decided January 10, 1955.

1. Tax liens of the United States are entitled to priority over a Texas garnishment lien, where the federal tax liens were recorded subsequent to the date of the garnishment lien but prior to the date the garnisher obtained judgment. *United States* v. *Acri*, *ante*, p. 211; *United States* v. *Security Trust Co.*, 340 U. S. 47. Pp. 215–217.
2. The garnishment lien in this case not being prior to the federal tax liens, attorney's fees allowed to the garnishee under Texas law were not prior to the federal tax liens, and authorization of their payment prior to the federal tax liens was error. P. 217.

209 F. 2d 684, reversed.

Charles K. Rice argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Holland*, *Ellis N. Slack*, *A. F. Prescott* and *Fred E. Youngman*.

Searcy L. Johnson for the Liverpool & London & Globe Insurance Co., Ltd., and *Arthur S. Goldberg* for the Sunnyland Wholesale Furniture Co., respondents, submitted on briefs.

MR. JUSTICE MINTON delivered the opinion of the Court.

This is a case involving priority of federal tax liens and a lien of garnishment.

On March 8, 1952, fire destroyed certain property of Adams, engaged in a furniture business in Temple, Bell County, Texas. Respondent insurance company and another were the insurers. The insurance companies agreed on the amount of the loss, and they were to share

the payment equally. Before the insurance money was paid, a creditor of Adams, the Sunnyland Wholesale Furniture Company, on April 8, 1952, sued Adams on an open account. At the same time, a writ of garnishment was issued and served upon the Liverpool & London & Globe Insurance Company, attaching the insurance funds due and owing Adams. On April 21, 1952, the assessment lists covering the unpaid federal taxes of Adams and his wife for 1948 and 1950 were received in the office of the Collector of Internal Revenue for Texas. On April 26, 1952, notice of tax liens was filed in the office of the county clerk of Bell County, Texas, in favor of the United States for $10,417.57, with interest. Notice of the tax liens with warrants of distraint and notice of levy were served on the respondent insurance company. On June 20, 1952, judgment was entered against Adams in favor of Sunnyland for $2,516.70, with interest and costs. When the garnishee, the respondent insurance company, answered, it named the United States an additional party defendant and requested a determination of priorities of the garnisher and the United States, and asked for reasonable attorney's fees. The amendment was allowed, and the United States was served with process to appear in the state court. On petition of the United States the interpleader action was removed to the Northern District of Texas, and the United States was dismissed as a party defendant and permitted to file its complaint for foreclosure of its tax liens. The respondent insurance company paid $7,500.39 into the registry of the court and asked for an attorney's fee of $500. The District Court held the lien of the garnisher superior to the liens of the United States for taxes and allowed the garnishee $500 for attorney's fees. 107 F. Supp. 405. The Court of Appeals affirmed, one judge dissenting. 209 F. 2d 684. We granted certiorari, 347 U. S. 973.

The question of priorities is identical with that of *United States* v. *Acri, ante,* p. 211, and *United States* v. *Security Trust Co.,* 340 U. S. 47. On the authority of those cases we hold the tax liens of the United States superior to the lien of the garnisher.

As to the attorney's fee allowed the garnishee insurance company, Rule 677, Vernon's Texas Rules of Civil Procedure, provides:

> "Where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the plaintiff; where the answer of the garnishee has not been controverted and the garnishee is held thereon, such costs shall be taxed against the defendant and included in the execution provided for in this section; where the answer is contested, the costs shall abide the issue of such contest."

The District Court evidently found there was no contest between the insurance company and the other parties, and that the insurance company should be discharged with costs and allowance of a reasonable attorney's fee of $500. It, therefore, ordered the clerk to issue a check to the insurance company, payable out of the funds paid into the court by it.

If the garnishment lien is not prior to the Government liens, and we have held that it is not, certainly fees allowed in that proceeding are not prior to the Government liens, and the authorization of the payment of the attorney's fees prior to the Government liens was error. The costs and fees should be adjudged against the defendant, as provided by Rule 677.

The judgment is

Reversed.

318107 O - 55 - 20

UNITED STATES *v.* SCOVIL ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 35. Argued November 16, 1954.—Decided January 10, 1955.

A tax lien of the United States under § 3670 of the Internal Revenue Code *held* entitled to priority over a landlord's distress lien under South Carolina law, where the distress lien was obtained (but not perfected) after the federal tax lien had attached but before notice thereof had been filed. Pp. 218–221.

(a) Section 3672 affords no protection to the holder of a distress lien, such as that here involved. P. 220.

(b) Whether the distress lien was perfected at the time the lien of the United States was filed is a question of federal law. P. 220.

(c) The distress lien in this case was not perfected in the federal sense at the time the liens of the United States were filed. P. 220.

(d) The landlord in this case was not a "purchaser" within the meaning of § 3672 of the Internal Revenue Code, and the tax lien of the United States was not invalid as to him under that section. Pp. 220–221.

224 S. C. 233, 78 S. E. 2d 277, reversed.

John R. Benney argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Fred E. Youngman.*

J. D. Todd, Jr. argued the cause and filed a brief for respondents.

MR. JUSTICE MINTON delivered the opinion of the Court.

This case involves the relative priority of a landlord's distress for rent under the laws of South Carolina and a lien for unpaid taxes due the United States. The landlord, herein referred to as respondent, on April 7, 1952, filed in the Court of Common Pleas for Greenville County,

South Carolina, an affidavit setting forth that Dan Tassey, Inc., was indebted to him for rent and requesting a distress warrant which issued. The master's report shows only that the landlord for past due rent "proceeded on the 7th day of April, 1952 to distress upon the assets of said corporation for said rent in arrears." The record does not disclose what was actually done in the distress proceedings. South Carolina Code Annotated, 1952, § 41–151, provides when the affidavit of a landlord is filed the magistrate may issue his distress warrant naming the amount due with costs and deliver the warrant to an officer for service. The officer shall forthwith demand payment (§ 41–153), and if not paid, he shall distrain sufficient property on the rented premises to pay the amount, giving a list of property distrained together with a copy of the distress warrant to the tenant. The distress must be reasonable as to amount of property distrained, on penalty of action for damages (§§ 41–158, 41–159). The tenant has five days in which to put up bond and free the property from the lien of distraint (§ 41–160).

The next day, April 8, 1952, a receiver was appointed for the corporate taxpayer-tenant as an insolvent. All of the assets of the corporation passed to the receiver, who sold them and realized therefrom the fund over which this contest is waged.

For nonpayment of taxes due, the Collector of Internal Revenue received the proper assessment lists in his office on March 19, 1951, May 24, 1951, August 29, 1951, December 3, 1951, February 23, 1952, and February 28, 1952, and notice of these liens thereafter was filed in the proper office in Greenville County, South Carolina, on April 10, 1952. Section 3671 of the Internal Revenue Code provides that the lien for such unpaid taxes attaches when the assessment lists are received by the Collector.

Therefore, long before the landlord obtained a distress warrant the Government's liens for taxes had attached.

The Supreme Court of South Carolina held that, since the distress warrant was perfected before the receiver was appointed, the landlord's distress lien was superior to the United States' priority created by § 3466, Revised Statutes, 31 U. S. C. § 191. 224 S. C. 233, 78 S. E. 2d 277. We granted certiorari. 347 U. S. 974. However, we find it unnecessary to pass upon the effect of that section. We hold that the Government must prevail because of its liens under § 3670, Internal Revenue Code.

The landlord had a lien other than a mortgage, pledge, or judgment lien. As to all other liens, such as the distress lien in the instant case, § 3672 of the Internal Revenue Code affords no protection. *United States* v. *Security Trust Co.*, 340 U. S. 47, 51 (concurring opinion). Cf. *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 362–365. Moreover, the distress lien was not perfected in the federal sense at the time the Government's liens were filed. Such perfection is, of course, a matter of federal law. *United States* v. *Waddill Co.*, 323 U. S. 353; *Illinois* v. *Campbell*, 329 U. S. 362, 371. The five-day period specified by § 41–160 of the South Carolina Code had not elapsed. During this time the tenant-taxpayer could have reacquired any interest the landlord may have had in his property by posting bond as provided by the Code. Therefore, such a lien was only a caveat of a more perfect lien to come, as we have so often held in other cases. *United States* v. *Security Trust Co., supra; United States* v. *Gilbert Associates, Inc., supra; United States* v. *Waddill Co., supra,* at 357–359; *New York* v. *Maclay,* 288 U. S. 290.

It was decided in the trial court and argued here that the landlord was a purchaser within the meaning of § 3672 of the Internal Revenue Code and, therefore, that

the Government lien was invalid as to him. A purchaser within the meaning of § 3672 usually means one who acquires title for a valuable consideration in the manner of vendor and vendee. Obviously, the landlord was not a purchaser.

The judgment is

Reversed.

UNITED STATES *v.* SHUBERT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 36. Argued November 9–10, 1954.—Decided January 31, 1955.

In a civil antitrust action brought by the Government to restrain alleged violations of §§ 1 and 2 of the Sherman Act, the complaint alleged, *inter alia*, that the defendants are engaged in the business of producing, booking and presenting legitimate theatrical attractions on a multistate basis; that this business requires a constant, continuous stream of interstate trade and commerce; and that the defendants have restrained this trade and commerce and have monopolized certain phases of it. *Held:* The complaint states a cause of action, and the Government is entitled to an opportunity to prove its allegations. Pp. 223–231.

(a) As described in the complaint, defendants' business of producing, booking and presenting legitimate theatrical attractions on a multistate basis constitutes "trade or commerce" that is "among the several States" within the meaning of the Sherman Act. Pp. 225–227.

(b) *Hart* v. *Keith Vaudeville Exchange*, 262 U. S. 271, followed. *Federal Baseball Club* v. *National League*, 259 U. S. 200, and *Toolson* v. *New York Yankees*, 346 U. S. 356, distinguished. Pp. 227–230.

(c) The *Federal Baseball* and *Toolson* decisions afford no basis for a conclusion that all businesses built around the performance of local exhibitions are exempt from the Sherman Act. Pp. 227–230.

120 F. Supp. 15, reversed.

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Barnes* and *Daniel M. Friedman*.

Alfred McCormack argued the cause and filed a brief for appellees. With him on the brief were *William Klein*, *Adolph Lund* and *Gerald Schoenfeld* for Shubert et al., and *John J. O'Connell* for Heiman, appellees.

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

This is a civil antitrust action brought by the Government in the United States District Court for the Southern District of New York. Named as defendants are Lee Shubert,[1] Jacob J. Shubert, Marcus Heiman, and three corporations controlled by them.[2] The defendants are principally engaged in the business of producing legitimate theatrical attractions,[3] booking legitimate attractions in theatres throughout the United States,[4] and operating approximately 40 theatres in eight states for the presentation of legitimate attractions.[5] The Govern-

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[1] Lee Shubert died prior to entry of the District Court's judgment. His executors have not been substituted as parties.

[2] The corporations are the United Booking Office, Inc. ("UBO"), Select Theatres Corporation ("Select"), and L. A. B. Amusement Corporation ("L. A. B."). Since the filing of the complaint, L. A. B. has been dissolved and its assets vested in Marcus Heiman personally.

[3] The complaint defines "legitimate attractions" as "stage attractions performed in person by professional actors" including "plays, musicals, and operettas" but not ordinarily including "stock company attractions, vaudeville, burlesque, bands, individual dancers, dance groups, concerts, and vocal or instrumental presentations." The complaint alleges that a play costs approximately $60,000 to $100,000 to produce, whereas a musical generally requires from $200,000 to $300,000. As much as one-third of the cost, according to the complaint, may be attributable to expenditures for scenery, props, and related items and services.

[4] "Booking" is defined in the complaint as "the arrangements, generally made through a booking office, between producers and operators for the routing and presentation of legitimate attractions and the fixing of playing dates." The complaint alleges that UBO, apart from Select and a subsidiary thereof, is the only concern in the country that books legitimate attractions throughout the United States.

[5] The complaint defines "presentation" as "the operation of a theatre or theatres and the exhibition of legitimate attractions therein." The defendants, according to the complaint, operate or control all the theatres in virtually all key "try-out" cities (including

ment's complaint charges that the defendants, in the course of this business, have violated §§ 1 and 2 of the Sherman Act.[6] On the defendants' motion, after this Court's decision in *Toolson* v. *New York Yankees,* 346 U. S. 356, the District Court dismissed the Government's complaint on the authority of the *Toolson* decision, and *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200.[7] The case is here on direct appeal under the Expediting Act, 15 U. S. C. § 29.

Boston, Philadelphia, and Baltimore), all the theatres in several important "road-show" cities (including Baltimore, Boston, Cincinnati, Los Angeles, and Philadelphia), almost all the theatres in other important "road-show" cities (Chicago and Detroit), and approximately half of the theatres in New York City.

[6] 15 U. S. C. §§ 1 and 2. These sections provide:

"§ 1. . . . Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this title to be illegal shall be deemed guilty of a misdemeanor . . . .

"§ 2. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

Section 4 confers jurisdiction on the district courts "to prevent and restrain violations of sections 1–7 of this title" in equity proceedings instituted under the direction of the Attorney General.

[7] The court issued the following order:

"In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U. S. 200, 42 S. Ct. 465, 66 L. Ed. 898, and Toolson v. New York Yankees, 346 U. S. 356, 74 S. Ct. 78.

"Upon the authority of these adjudications the complaint in the above-entitled action will be dismissed." 120 F. Supp. 15, 16.

The Government's complaint, which is summarized in an appendix to this opinion, describes the interstate phases of the defendants' theatrical business in considerable detail. It concludes that the business of producing, booking, and presenting legitimate attractions requires

> "a constant, continuous stream of trade and commerce between the States of the United States, consisting of the assemblage of personnel and property for rehearsals, the transportation of said personnel and property to various cities throughout the United States, the making and performing of contracts under which attractions are routed and presented in various States of the United States, and the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines."

The complaint alleges that the defendants have restrained this trade and commerce, and have monopolized certain phases of it, through a conspiracy (a) to compel other producers to book their legitimate attractions exclusively through the defendants, (b) to exclude others from booking legitimate attractions, (c) to prevent competition in the presentation of legitimate attractions, (d) to discriminate in favor of their own productions with respect to booking and presentation, and (e) to combine their power in booking and presentation in order to maintain and strengthen their domination in each of these fields. The main relief sought by the Government is the divorcement of the booking and presentation branches of the business.

The allegations of the complaint, on a motion to dismiss, must of course be taken as true. And the defendants do not deny that the allegations state a cause of

action if their business is subject to the Sherman Act. The question presented is thus a narrow one: whether the business of producing, booking, and presenting legitimate attractions on a multistate basis constitutes "trade or commerce" that is "among the several States" within the meaning of those terms in the Sherman Act.

Both terms have been interpreted broadly in the decisions of this Court. "[T]rade or commerce" has been held to include the production, distribution, and exhibition of motion pictures (*United States* v. *Paramount Pictures,* 334 U. S. 131; *Schine Theatres* v. *United States,* 334 U. S. 110; *United States* v. *Griffith,* 334 U. S. 100; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173; *Interstate Circuit* v. *United States,* 306 U. S. 208; *Binderup* v. *Pathe Exchange,* 263 U. S. 291); real estate brokerage (*United States* v. *National Association of Real Estate Boards,* 339 U. S. 485); the gathering and distribution of news (*Associated Press* v. *United States,* 326 U. S. 1); medical services to members of a health cooperative (*American Medical Association* v. *United States,* 317 U. S. 519); and insurance underwriting (*United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533). A similarly liberal construction has been given the requirement of §§ 1 and 2 that the "trade or commerce" be "among the several States." Thus, in the *South-Eastern Underwriters* case, the requirement was satisfied by a "continuous and indivisible stream of intercourse among the states" involving the transmission of large sums of money and communications by mail, telephone, and telegraph. Cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 432–433; *North American Co.* v. *Securities and Exchange Commission,* 327 U. S. 686, 694–695. In the *Associated Press* case, the requirement was satisfied by the interstate dissemination of news. See also *Lorain Journal Co.* v. *United States,* 342

U. S. 143. And in the motion picture cases, the requirement was satisfied by the interstate transportation of films, *Binderup* v. *Pathe Exchange, supra,* even though the actual "showing of motion pictures is of course a local affair." *United States* v. *Crescent Amusement Co., supra,* at 183. See also *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271.[8]

These decisions, apart from *Federal Baseball* and *Toolson,* make it clear beyond question that the allegations of the Government's complaint bring the defendants within the scope of the Sherman Act, even though the actual performance of a legitimate stage attraction "is of course a local affair." The defendants contend, however, that *Federal Baseball* and *Toolson* have already established their immunity under the Act. While conceding, as they must, that the motion picture industry is subject to the antitrust laws, they insist that all other businesses built around the performance of local exhibitions are exempt.[9] We believe that *Federal Baseball* and *Toolson* afford no basis for such a conclusion.

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[8] Moreover, once interstate commerce is established, the Sherman Act may be applied even to "local" restraints on that commerce. *E. g., Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219; *United States* v. *Women's Sportswear Mfrs. Assn.,* 336 U. S. 460; *United States* v. *Employing Plasterers Association,* 347 U. S. 186. Cf. *Moore* v. *Mead's Fine Bread Co.,* 348 U. S. 115, 118–119.

[9] The defendants seek to distinguish the motion picture cases on the ground that the product of the motion picture industry is "an article of trade . . . an inanimate *thing*—a reel of photographic film in a metal box—which moves into interstate commerce like any other manufactured product"; on the other hand, according to this argument, a legitimate theatrical attraction is "intangible and evanescent, unique and individual . . . an experience of living people." Compare *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, 546: ". . . Congress can regulate traffic though it consist

In *Federal Baseball,* the Court, speaking through Mr. Justice Holmes, was dealing with the business of baseball and nothing else. The Court considered the nature of the game, its history and league organization, the necessity of arranging games between cities in different states, and the resulting travel across state lines. The travel, the Court concluded, was "a mere incident, not the essential thing." On that basis, the Court held that "the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." 259 U. S., at 209.

At the very next Term, in *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271, the Court was directly concerned with the effect of the *Federal Baseball* decision on the status of the theatrical business under the Sherman Act. The complaint in the *Hart* case, much like the complaint here under review, alleged a conspiracy to control the booking and presentation of vaudeville acts in theatres throughout the country. The district court, like the district court in the instant case, dismissed the complaint on the authority of *Federal Baseball.* This Court, again speaking through Mr. Justice Holmes, unanimously reversed.[10] The Court took note of the

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of intangibles." And see *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271.

That other segments of the entertainment business, besides the motion picture industry, may constitute interstate commerce is well established. See, *e. g., Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266, 279 (radio).

[10] On remand, the trial court understood the Holmes opinion as authorizing a later dismissal if the plaintiff's evidence failed to establish that the transportation was more than "incidental." On that basis, the trial court dismissed the action and the Court of Appeals affirmed. 12 F. 2d 341. This Court denied certiorari. 273 U. S. 703. But, as the defendants admit, a denial of certiorari does not constitute

plaintiff's argument "that in the transportation of vaudeville acts the apparatus sometimes is more important than the performers" and concluded that the complaint, at least to that extent, sufficiently alleged a violation of the Act to permit the case to go to trial. The Court distinguished *Federal Baseball* on the ground that "what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently." The Court thus established, contrary to the defendants' argument here, that *Federal Baseball* did not automatically immunize the theatrical business from the antitrust laws.

In *Toolson,* where the issue was the same as in *Federal Baseball,* the Court was confronted with a unique combination of circumstances. For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called "reserve clause." During this period, in reliance on the *Federal Baseball* precedent, the baseball business had grown and developed. Compare *Helvering* v. *Hallock,* 309 U. S. 106, 110. And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation. Against this background, the Court in *Toolson* was asked to overrule *Federal Baseball* on the ground that it was

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an expression on the merits. *Brown* v. *Allen,* 344 U. S. 443, 489–497. That rule is particularly appropriate where the decision sought to be reviewed is essentially a factual determination. Compare *Graver Tank & Mfg. Co.* v. *Linde Co.,* 336 U. S. 271, 274–275.

For lower court decisions holding the theatrical business to be subject to the Sherman Act, see Judge Learned Hand in *Marienelli* v. *United Booking Offices of America,* 227 F. 165 (D. C. S. D. N. Y.), and Judge Charles Clark in *Ring* v. *Spina,* 148 F. 2d 647 (C. A. 2d Cir.), modified in 186 F. 2d 637 (C. A. 2d Cir.), cert. denied, 341 U. S. 935. But cf. *San Carlo Opera Co.* v. *Conley,* 72 F. Supp. 825 (D. C. S. D. N. Y.), affirmed, 163 F. 2d 310 (C. A. 2d Cir.), involving a personal employment contract under the Federal Arbitration Act.

out of step with subsequent decisions reflecting present-day concepts of interstate commerce. The Court, in view of the circumstances of the case, declined to do so. But neither did the Court necessarily reaffirm all that was said in *Federal Baseball*. Instead, "[w]ithout re-examination of the underlying issues," the Court adhered to *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U. S., at 357. In short, *Toolson* was a narrow application of the rule of *stare decisis*.

The defendants would have us convert this narrow application of the rule into a sweeping grant of immunity to every business based on the live presentation of local exhibitions, regardless of how extensive its interstate phases may be. We cannot do so. If the *Toolson* holding is to be expanded—or contracted—the appropriate remedy lies with Congress. See *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 561. Moreover, none of the considerations which led to the decision in *Toolson* are present here. This Court has never held that the theatrical business is not subject to the Sherman Act. On the contrary, less than a year after the *Federal Baseball* decision, the Court in the *Hart* case put the theatrical business on notice that *Federal Baseball* could not be relied upon as a basis for exemption from the antitrust laws. The rule of *stare decisis* undoubtedly embodies a policy of basic importance, but the rule cannot help the defendants here. If it is to be applied, *Hart* and the motion picture cases—not *Federal Baseball* and *Toolson*—are the controlling decisions.

We are not yet called upon to determine whether the defendants have in fact violated the Sherman Act or if they have what relief would be appropriate. We hold only that the allegations of the complaint state a cause

of action and that the Government is entitled to an opportunity to prove those allegations. The judgment of the court below is

Reversed.

MR. JUSTICE BURTON, retaining the views expressed in his dissent in the *Toolson* case, 346 U. S. 356, 357, joins the opinion and judgment of the Court in this case. MR. JUSTICE REED joins in this concurrence.

MR. JUSTICE MINTON agrees with the judgment in this case because, as it comes here on the pleadings, it is controlled by the *Hart* case. Whether the Government can prove its case now to the satisfaction of present courts, which the plaintiff could not do in the *Hart* case, 12 F. 2d 341, remains to be seen.

APPENDIX TO OPINION OF THE COURT.

The defendants state at page 3 of their brief: "The allegations of the complaint are summarized adequately at pages 5 to 11 of the Government's brief." That portion of the Government's brief is set out below:

Production of a legitimate theatrical attraction involves (1) assembling of its component elements, including a script, financial backing, actors, stage hands, designers, advertising agents, scenery, costumes, lighting, and music; (2) rehearsals to weld the parts into an attraction suitable for presentation; (3) arranging for the booking and presentation of the attraction in a try-out town or towns, in New York City, and in road-show towns; and (4) transporting the entire cast and scenery to try-out towns, to New York City, and to road-show towns throughout the United States to fulfill these bookings and presentation arrangements (par. 24, R. 4). At the present time the cost of producing a play runs from $60,000 to $100,000, and of a musical from $200,000 to $300,000

(par. 25, R. 4). Persons other than the producer usually supply the necessary financing (*ibid.*). Frequently the production is incorporated and shares of stock are sold to investors, or the producer organizes a limited partnership (*ibid.*). All the appellees invest in legitimate attractions (pars. 3–7, R. 1–3).

After the production has been assembled and rehearsals have been completed, the attraction is presented in one or more "try-out" towns for the purpose of judging audience reaction and correcting observed deficiencies (pars. 20, 26, R. 4, 5). Audience reaction in try-out towns is important in gauging subsequent financial success in New York City and on the road (par. 26, R. 5). The attraction is then presented in New York City (par. 27, R. 5). If the run there is successful, the attraction is sent on tour to "road-show" towns throughout the United States (*ibid.*). This road-show tour is an "integral part of the exploitation of the attraction" and is the source of a "substantial part" of its profits (*ibid.*).

With the exception of a few cities, a legitimate attraction ordinarily cannot profitably play in a road-show town for more than a limited period of time, seldom exceeding two weeks. The producer of a play must therefore obtain playing dates in a number of suitable road-show towns, arranged so as to minimize lay-offs and travel between engagements. Successful operation of a theatre in a road-show town requires scheduling legitimate attractions so as to keep the theatre as continuously occupied as possible during the theatrical season. Playing dates of a road-show town must therefore be arranged so as to meet the needs of both the producer and the theatre operator. (Par. 29, R. 5.)

UBO acts as middleman between producers and operators of theatres in try-out and road-show towns, but is regarded as the agent of the theatre operators and usually receives, as compensation for its services, five per cent of the operator's share of the theatre's gross receipts (par. 28, R. 5). Each year UBO enters into or renews agreements with theatre operators to act as their booking agent (par. 30, R. 5). After negotiation with the producer of an attraction, UBO tentatively schedules it at

various theatres throughout the United States, and contracts covering presentation at these theatres are subsequently executed (*id.*, R. 5–6). The booking of legitimate attractions involves the cross-country routing of attractions in a constant stream to and from theatres in various cities throughout the United States (par. 28, R. 5).

The individual appellees control the booking of legitimate attractions in try-out and road-show towns in the United States (par. 37, R. 7). Apart from Select and a subsidiary thereof, UBO is the only concern in the country which books legitimate attractions throughout the United States (par. 5, R. 2). From 1932 to 1946, UBO followed a policy of entering into franchise agreements with theatre operators making UBO the exclusive booking agent for their theatres (par. 40, R. 8–9). About 1946, UBO discontinued formal franchise agreements and adopted in lieu thereof a system of listings which, as tacitly understood by the parties, continued the previous contract arrangements (*id.*, R. 9).

The appellees operate or participate in the operation of approximately forty theatres in eight states (par. 42, R. 9). They operate or control all the theatres in "virtually all" key try-out towns, and in several important road-show towns (par. 41, R. 9).* Approximately fifty per cent of all the theatres in New York City are owned or operated by the Shubert appellees (pars. 15, 41, R. 3, 9).

In producing, booking, and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the various states, consisting of

*The appellees control or operate the only theatre in Baltimore, the six theatres in Boston, seven of the nine theatres in Chicago, the only theatre in Cincinnati, the only theatre in Los Angeles, and the four theatres in Philadelphia (par. 42, R. 9–10). They have an interest in two of the three theatres in Detroit (par. 42 E, R. 10). The only theatre in New Haven is operated under a five-year agreement with a subsidiary of Select, which provides that the operator will accept only attractions booked through this subsidiary (par. 43, R. 11). UBO has exclusive booking rights for the only theatre in Toledo, Ohio (par. 45, R. 11).

The "key" try-out towns are Boston, Philadelphia, Baltimore, and New Haven (par. 26, R. 4). [Footnote in original.]

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assemblage of personnel and property for rehearsals, transportation of such personnel and property to various cities, making and performing contracts under which attractions are routed and presented in various states, and transmission of applications, letters, memoranda, communications, contracts, money, checks, drafts, and other media of exchange across state lines (par. 49, R. 12).

The substantial elements of appellees' conspiracy to restrain and monopolize, attempted monopolization, and monopolization have been that the appellees, by concert of action: (a) compel producers to book their legitimate attractions exclusively through appellees; (b) exclude others from booking legitimate attractions; (c) prevent competition in presentation of these attractions; (d) discriminate in favor of their own productions with respect to booking and presentation; and (e) combine their power in booking and presentation in order to maintain and strengthen their domination in each of these fields (par. 51, R. 13).

The means which the appellees have used in carrying out the foregoing acts have included the following:

(1) Conditioning their investments in legitimate attractions produced by others, and conditioning the booking of legitimate attractions in try-out towns and in New York City, upon agreement by the producers to book these attractions exclusively through appellees (pars. 52 (a), (d), (e), R. 13).

(2) Forcing producers to book their legitimate attractions for an entire theatrical season exclusively through appellees (par. 52 (c), R. 13).

(3) Coercing producers who had booked through others to pay penalties or to accept discriminatory booking terms, as a condition of obtaining booking through them (par. 52 (f), R. 13).

(4) Entering into agreements with theatre operators whereby the operators agree to present only attractions booked through appellees, and appellees agree not to book for competing theatre operators (par. 52 (g), R. 13).

(5) Excluding legitimate attractions booked by others from theatres operated by appellees (par. 52 (h), R. 13).

(6) Coercing and intimidating independent theatre operators in towns where appellees operate theatres to relinquish control of their theatres by threatening to deprive them, by virtue of appellees' control of booking, of access to legitimate attractions (par. 52 (k), R. 14).

Some of the effects of appellees' concerted actions have been that producers have been forced to book exclusively with appellees on non-competitive terms; persons have been denied the right to engage in the business of operating a booking office; operators of independent theatres competing with those of appellees have been systematically excluded from obtaining legitimate attractions and, in many cities, have been forced out of business; in cities in which the appellees operate theatres, persons have been denied the right to engage in the business of presenting legitimate attractions, and the public has been deprived of access to legitimate attractions and the benefits which flow from open competition; and interstate commerce in production, booking, and presentation has been unreasonably restrained, and in booking and presentation has been monopolized (par. 53, R. 14).

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.

No. 53. Argued November 10, 1954.—Decided January 31, 1955.

In a civil antitrust action brought by the Government to restrain alleged violations of §§ 1 and 2 of the Sherman Act, the complaint alleged, *inter alia*, that the defendants are engaged in the business of promoting professional championship boxing contests on a multistate basis and selling rights to televise, broadcast and film such contests for interstate transmission; that their receipts from the sale of television, radio and motion picture rights represent over 25% of their total revenue and in some instances exceed the revenue from the sale of admission tickets; and that the defendants have restrained and monopolized trade and commerce through a conspiracy to exclude competition in their line of business. *Held:* The complaint states a cause of action, and the Government is entitled to an opportunity to prove its allegations. Pp. 237–245.

(a) As described in the complaint, defendants' business of promoting professional championship boxing contests on a multistate basis and selling rights to televise, broadcast and film such contests for interstate transmission constitutes "trade or commerce among the several States" within the meaning of the Sherman Act. Pp. 240–243.

(b) That a boxing match is "a local affair" does not alone bar application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce. P. 241.

(c) *Federal Baseball Club* v. *National League*, 259 U. S. 200, and *Toolson* v. *New York Yankees*, 346 U. S. 356, did not immunize from application of the Sherman Act all businesses based on professional sports. Pp. 241–243.

(d) Whether such a broad exemption should be granted is an issue to be resolved by Congress, not this Court. Pp. 243–245.

Reversed.

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Daniel M. Friedman.*

Manuel Lee Robbins, Special Assistant Attorney General of New York, argued the cause for the New York State Athletic Commission, as *amicus curiae,* urging reversal. With him on the brief was *Nathaniel L. Goldstein,* Attorney General, for the State of New York and the New York State Athletic Commission, as *amici curiae.*

Whitney North Seymour and *Charles H. Watson* argued the cause for appellees. On the brief were *Mr. Seymour, Benjamin C. Milner* and *Armand F. Macmanus* for the International Boxing Club of New York, Inc. et al., and *Mr. Watson* for the International Boxing Club, Inc. et al., appellees.

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

This is a civil antitrust action brought by the Government in the United States District Court for the Southern District of New York. The defendants—three corporations and two individuals—are engaged in the business of promoting professional championship boxing contests.[1] The Government's complaint charges that the defendants, in the course of this business, have violated §§ 1 and 2

[1] The corporate defendants are International Boxing Club of New York, Inc., International Boxing Club, and Madison Square Garden Corporation. The individual defendants are James D. Norris and Arthur M. Wirtz. The individual defendants, together with Madison Square Garden Corporation, own 80% of the stock of International Boxing Club of New York, Inc., and International Boxing Club. The nature of the business involved is described in an appendix to this opinion.

of the Sherman Act.[2] After this Court's decision in *Toolson* v. *New York Yankees,* 346 U. S. 356, the defendants moved to dismiss the complaint. The District Court granted the motion in reliance upon the *Toolson* decision and *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200.[3] The case, together with *United States* v. *Shubert, ante,* p. 222, is here on direct appeal under the Expediting Act, 15 U. S. C. § 29.

The Government's complaint alleges that promoters of professional championship boxing contests

> "make a substantial utilization of the channels of interstate trade and commerce to:
>
> "(a) negotiate contracts with boxers, advertising agencies, seconds, referees, judges, announcers, and other personnel living in states other than those in which the promoters reside;
>
> "(b) arrange and maintain training quarters in states other than those in which the promoters reside;

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[2] 15 U. S. C. §§ 1 and 2. These sections provide:

"§ 1. . . . Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this title to be illegal shall be deemed guilty of a misdemeanor . . . .

"§ 2. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

Section 4 confers jurisdiction on the district courts "to prevent and restrain violations of sections 1–7 of this title" in equity proceedings instituted under the direction of the Attorney General.

[3] The District Court's opinion was oral and not transcribed. All the parties agree, however, that the dismissal was based on *Federal Baseball* and *Toolson.*

"(c) lease suitable arenas, and arrange other details for boxing contests, particularly when the contests are held in states other than those in which the promoters reside;

"(d) sell tickets to contests across state lines;

"(e) negotiate for the sale of and sell rights to make and distribute motion pictures of boxing contests to the 18,000 theatres in the United States;

"(f) negotiate for the sale of and sell rights to broadcast and telecast boxing contests to homes through more than 3,000 radio stations and 100 television stations in the United States; and

"(g) negotiate for the sale of and sell rights to telecast boxing contests to some 200 motion picture theatres in various states of the United States for display by large-screen television."

The promoter's receipts from the sale of television, radio, and motion picture rights to championship matches, according to the complaint, represent on the average over 25% of the promoter's total revenue and in some instances exceed the revenue derived from the sale of admission tickets.[4] The complaint alleges that the defendants have restrained and monopolized this trade and commerce—"the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests in the United States"—through a conspiracy to exclude competition in their line of business. The conspiracy, it is claimed, began in 1949 with an agreement among the defendants and Joe Louis, then heavyweight champion of the world, that Louis would resign his title, that he would procure exclusive

[4] The complaint further alleges that "With the progressive and continuing expansion of television facilities, the proportion of the promoter's total revenue derived from television, radio and motion pictures, has been on an ascending curve . . . ."

rights to the services of the four leading title contenders in a series of elimination contests which would result in the recognition of a new heavyweight champion, that he would also obtain exclusive rights to broadcast, televise, and film these contests, and that he would assign all such exclusive rights to the defendants. The defendants have allegedly sought to maintain and effectuate this conspiracy by the following means: by eliminating the "leading competing promoter" of championship matches; by acquiring the exclusive right to promote professional boxing contests in all the "principal arenas" where championship matches can be successfully presented; and by requiring each title contender to agree, as a condition of fighting for the championship, that if he wins he would, for a period of three (and sometimes five) years, take part only in title contests promoted by the defendants. As a consequence of these acts, the complaint alleges, the defendants have promoted, or participated in the promotion of, all but two of the 21 championship matches held in the United States between June 1949 and the filing of the complaint in March 1952.

These allegations must of course be taken as true at this stage of the proceeding. And the defendants do not deny that the allegations state a cause of action if their business is subject to the Sherman Act. The question thus presented is whether the defendants' business as described in the complaint—the promotion of professional championship boxing contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission—constitutes "trade or commerce among the several States" within the meaning of the Sherman Act.

The question is perhaps a novel one in that this Court has never before considered the antitrust status of the boxing business. Yet, if it were not for *Federal Baseball* and *Toolson,* we think that it would be too clear for dis-

pute that the Government's allegations bring the defendants within the scope of the Act. A boxing match—like the showing of a motion picture (*United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 183) or the performance of a vaudeville act (*Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271) or the performance of a legitimate stage attraction (*United States* v. *Shubert, ante,* p. 222)—"is of course a local affair." But that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce. Apart from *Federal Baseball* and *Toolson,* it would be sufficient, we believe, to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television, and motion picture rights.[5] Compare *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 225–226; *Times-Picayune Co.* v. *United States,* 345 U. S. 594, 602, n. 11; *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219, 227–235; *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 297–298; *United States* v. *Women's Sportswear Mfrs. Assn.,* 336 U. S. 460, 464; *United States* v. *Employing Plasterers Assn.,* 347 U. S. 186, 189; and cases collected in the *Shubert* opinion. See also *Currin* v. *Wallace,* 306 U. S. 1, 10; *Wickard* v. *Filburn,* 317 U. S. 111, 127–128.

Notwithstanding these decisions, the defendants contend that they are exempt from the Sherman Act under the rule of *stare decisis.* They, like the defendants in the *Shubert* case, base this contention on *Federal Baseball* and *Toolson.* But they would be content with a more

[5] All three media are concededly engaged in interstate commerce. *E. g., Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 279 (radio); *Dumont Laboratories* v. *Carroll,* 184 F. 2d 153, 154 (C. A. 3d Cir.), cert. denied, 340 U. S. 929 (television); *United States* v. *Paramount Pictures,* 334 U. S. 131 (motion pictures).

restrictive interpretation of *Federal Baseball* and *Toolson* than the defendants in the *Shubert* case. The *Shubert* defendants argue that *Federal Baseball* and *Toolson* immunized all businesses built around the live presentation of local exhibitions. The defendants in the instant case argue that *Federal Baseball* and *Toolson* immunized only such businesses as involve exhibitions of an athletic nature. We cannot accept either argument.

For the reasons stated in the *Toolson* opinion and restated in *United States* v. *Shubert, ante,* p. 222, *Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball.* Instead, "[w]ithout re-examination of the underlying issues," the Court adhered to *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U. S., at 357. We have held today in the *Shubert* case that *Toolson* is not authority for exempting other businesses merely because of the circumstance that they are also based on the performance of local exhibitions. That ruling is fully applicable here.

Moreover, none of the factors underlying the *Toolson* decision are present in the instant case. At the time the Government's complaint was filed, no court had ever held that the boxing business was not subject to the antitrust laws.[6] Indeed, this Court's decision in the *Hart* case, less than a year after the *Federal Baseball* decision, clearly established that *Federal Baseball* could not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise. Surely there is

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[6] *Shall* v. *Henry,* 211 F. 2d 226 (C. A. 7th Cir.), was decided subsequent to the decision below. So also was *Peller* v. *International Boxing Club,* unreported, Civil 52 C 813, April 23, 1954 (D. C. N. D. Ill.). The unreported decision (D. C. N. D. Ill.) which *Shall* v. *Henry* affirmed was decided prior to the decision below but after the filing of the Government's complaint.

nothing in the Holmes opinion in the *Hart* case to suggest, even remotely, that the Court was drawing a line between athletic and nonathletic entertainment. Nor do we see the relevance of such a distinction for the purpose of determining what constitutes "trade or commerce among the several States." The controlling consideration in *Federal Baseball* and *Hart* was, instead, a very practical one—the degree of interstate activity involved in the particular business under review. It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court. See *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 561.

The issue was, in fact, before Congress only recently. In 1951, four identical bills were introduced in Congress—three in the House and one in the Senate—forbidding the application of the antitrust laws "to organized professional sports enterprises or to acts in the conduct of such enterprises." [7] Extensive hearings on the three House bills were conducted by the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary; no hearings were held on the Senate bill.[8] At the conclusion

[7] H. R. 4229, 4230, 4231, and S. 1526, 82d Cong., 1st Sess. These bills were introduced "by friends of baseball because they feared that the continued existence of organized baseball as America's national pastime was in substantial danger by the threat of impending litigation." H. R. Rep. No. 2002, 82d Cong., 2d Sess., p. 1.

[8] The House hearings were stated to be on "the problem of whether or not organized baseball should be exempted from the operation of the antitrust laws." Hearings on "Organized Baseball" before the House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, 82d Cong., 1st Sess., p. 1.

of its hearings, the House Subcommittee unanimously declared its opposition to the four bills. Its report states: [9]

> "The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise. Thus *the sale of radio and television rights, the management of stadia,* the purchase and sale of advertising, the concession industry, and many other business activities, as well as the aspects of baseball which are solely related to the promotion of competition on the playing field, would be immune and untouchable. *Such a broad exemption could not be granted without substantially repealing the antitrust laws.*" (Italics added.)

With respect to baseball, the Subcommittee recommended a postponement of any legislation until the status of *Federal Baseball* was clarified in the courts.[10] No further action was taken on any of the bills; Congress thus left intact the then-existing coverage of the antitrust laws. Yet the defendants in the instant case are now asking this Court for precisely the same exemption which enactment of those bills would have afforded. Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated. For we agree that "Such a broad exemption could not be granted without substantially repealing the antitrust laws."

As in the *Shubert* case, we are concerned here only with the sufficiency of the Government's complaint. We hold

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[9] H. R. Rep. No. 2002 (entitled "Organized Baseball"), 82d Cong., 2d Sess., p. 230. Between the hearings and the report, the Subcommittee on Study of Monopoly Power was reconstituted as the Antitrust Subcommittee. The report was submitted directly to the full House pursuant to H. Res. 95, 82d Cong., 1st Sess.

[10] *Id.*, at 134–136, 231–232.

that the complaint states a cause of action and that the Government is entitled to an opportunity to prove its allegations. The judgment of the court below is

Reversed.

MR. JUSTICE BURTON, retaining the views expressed in his dissent in the *Toolson* case, 346 U. S. 356, 357, joins the opinion and judgment of the Court in this case. MR. JUSTICE REED joins in this concurrence.

[For dissenting opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE MINTON, see *post,* p. 248.]

[For dissenting opinion of MR. JUSTICE MINTON, see *post,* p. 251.]

APPENDIX TO OPINION OF THE COURT.

The complaint describes the "Nature of Trade and Commerce Involved" as follows:

10. Boxers usually compete in amateur tournaments as a preliminary to becoming professionals. As amateurs they receive no pay and box under the sponsorship of local independent boxing clubs, associations or other organizations. When they become professionals, they contract to box an opponent on a per bout basis for local promoters and receive a fee. If their skill as professional boxers results in an increasing willingness of the public to pay to view their contests, they can demand higher fees and a greater percentage of receipts from the sale of tickets and other rights. If their skill increases, they engage in preliminary and other bouts throughout the United States and eventually participate in major bouts. The fee for a major bout is usually a sum guaranteed by the promoter or a predetermined percentage of the net receipts from the sale of tickets and motion picture, radio and television rights.

11. The most lucrative asset to a professional boxer is recognition and designation by the various state athletic

commissions and others as "world champion" in the division in which he competes. These divisions are:

flyweight	112 lbs.
bantamweight	118 "
featherweight	126 "
lightweight	135 "
welterweight	147 "
middleweight	160 "
light heavyweight	175 "
heavyweight	All above 175 lbs.

A "world champion" gains his title by defeating the existing champion or by eliminating all contenders, and remains world champion in his division until he is, in turn, defeated by a contender or resigns the title. Such a title affords to its holder financial returns from personal appearances and exhibitions throughout the United States, from endorsements and other activities, as well as a greater percentage of the receipts from his bouts. The promotion of professional championship boxing contests is also more lucrative than the promotion of other boxing contests.

12. Of the various "world championships," the heavyweight division is the most important to boxers and promoters, as it returns the greatest financial benefits. The flyweight and bantamweight divisions are not of substantial importance in the United States because very few American boxers are of such light weights. No championship contest has been held in the flyweight division in the United States since 1935; none in the bantamweight division since 1947.

13. The promotion of professional championship boxing contests, in which the winners achieve "world champion" titles, includes negotiating and executing contracts with boxers for the main and preliminary bouts, arranging and maintaining training quarters, leasing suitable arenas, such as stadia or ball parks where substantial numbers of the public may be seated to view the contest, negotiating and executing contracts for the employment of matchmakers, advertising agencies, press agents, seconds, referees, judges, announcers and other personnel; organizing, assembling, and arranging other details necessary to the

exhibition of the contests; selling tickets and rights to make motion pictures of the contests and to distribute them throughout the United States and in foreign countries; and selling rights to transmit the contests by radio or television throughout the United States and foreign countries.

14. Promoters of professional championship boxing contests make a substantial utilization of the channels of interstate trade and commerce to:

(a) negotiate contracts with boxers, advertising agencies, seconds, referees, judges, announcers, and other personnel living in states other than those in which the promoters reside;

(b) arrange and maintain training quarters in states other than those in which the promoters reside;

(c) lease suitable arenas, and arrange other details for boxing contests, particularly when the contests are held in states other than those in which the promoters reside;

(d) sell tickets to contests across state lines;

(e) negotiate for the sale of and sell rights to make and distribute motion pictures of boxing contests to the 18,000 theatres in the United States;

(f) negotiate for the sale of and sell rights to broadcast and telecast boxing contests to homes through more than 3,000 radio stations and 100 television stations in the United States; and

(g) negotiate for the sale of and sell rights to telecast boxing contests to some 200 motion picture theatres in various states of the United States for display by large-screen television.

15. Motion picture films of professional championship boxing contests are distributed and exhibited in theatres throughout the United States and in foreign countries. Similarly, radio and television broadcasts of such contests are transmitted throughout the United States and radio broadcasts of them are also transmitted to foreign countries.

16. The 21 major professional championship boxing contests promoted in the United States since June 1949

have produced a gross income from admissions and the sale of motion picture, radio and television rights of approximately $4,500,000.00. The total such gross income for all professional boxing contests in the United States during this period, including the championship contests, has been approximately $15,000,000.00.

16 (a). A promoter of a professional championship fight usually derives substantially all of his revenue from two sources: (a) sale of tickets of admission and (b) sale of rights to telecast, broadcast and produce and distribute motion pictures of the fight. In such fights, sale of television, radio and motion picture rights account for a substantial proportion of the promoter's total revenue. Since 1949 sale of these rights has represented, on the average, over 25% of the total revenue derived from championship fights, and has exceeded, in some instances, the revenue received from sale of tickets of admission. With the progressive and continuing expansion of television facilities, the proportion of the promoter's total revenue derived from television, radio and motion pictures, has been on an ascending curve, in relation to revenue derived from sale of tickets of admission. In the Marciano-Walcott heavyweight championship fight of May 15, 1953, at Chicago, Illinois, promoted by defendants IBC (N. Y.), IBC (Ill.), James D. Norris and Arthur M. Wirtz, the promoters' receipts from sale of tickets of admission were, after federal admission taxes, $253,462.37, while their television, radio and motion picture revenue was approximately $300,000.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE MINTON joins, dissenting.

It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a "trade or commerce." § 1, 26 Stat. 209, 15 U. S. C. § 1. Indeed, the interstate aspects of baseball

and the extent of the exploitation of baseball through mass media are far more extensive than is true of boxing.* If the intrinsic applicability of the Sherman Law were the issue, no attempt would be made to differentiate the two sports.

In 1922, the Court found commercialized baseball outside the scope of the Sherman Law. *Federal Baseball Club* v. *National League,* 259 U. S. 200. Last Term the Court refused to re-examine "the underlying issues" of this adjudication and adhered to it. *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356. What were the "underlying issues"? They were the constituents of baseball in relation to the Sherman Law. By adhering to that decision, the Court refused to depart from a judgment necessarily based on these constituent elements. To my understanding, that is what is meant by "[w]ithout re-examination of the underlying issues." The Court decided as it did in the *Toolson* case as an application of the doctrine of *stare decisis.* That doctrine is not, to be sure, an imprisonment of reason. But neither is it a whimsy. It can hardly be that this Court gave a preferred position to baseball because it is the great American sport. I do not suppose that the Court would treat the national anthem differently from other songs if the nature of a song became relevant to adjudication. If *stare decisis* be one aspect of law, as it is, to disregard it in identic situations is mere caprice.

Congress, on the other hand, may yield to sentiment and be capricious, subject only to due process. As a matter of fact, one of the explicit factors that led to the result in *Toolson* was the recognition of congressional refusal to up-

*This opinion is concerned only with the sport as such, and not with the arrangements by which mass media show or report bouts. Such arrangements clearly are beyond the scope of the *Toolson* case, *infra.*

318107 O - 55 - 22

set the *Federal Baseball* decision. But as the Government with commendable candor recognizes, Congress was not asked to avert the threat of litigation against baseball by providing a specific exemption of that sport from the provisions of the Sherman Law. The sponsors of this relief did not ask immunity for baseball as such. The "legislation" to which reference was made in the *Toolson* case consisted of bills which sought exemption for "organized professional sports enterprises [and] acts in the conduct of such enterprises." (H. R. 4229, 4230, 4231, and S. 1526, 82d Cong., 1st Sess.) Since, in the light of all the circumstances, *Federal Baseball* was left undisturbed by *Toolson,* I cannot bring myself to construe the respect that was thus accorded to *stare decisis* to be narrower than that all situations identic with what was passed on in the *Federal Baseball* case should be covered by it. I cannot translate even the narrowest conception of *stare decisis* into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it.

Between them, this case and *Shubert* illustrate that nice but rational distinctions are inevitable in adjudication. I agree with the Court's opinion in *Shubert* for precisely the reason that constrains me to dissent in this case. Within a year after *Federal Baseball* the Court, again unanimously and through the same writer, found that a bill against the show business based on the Sherman Law was not so frivolous as to call for dismissal. *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271. For more than 30 years, therefore, these two decisions stood as the law. The *Shubert* case plainly falls within the adjudication of *Hart.* By the same process of reasoning, boxing falls within *Federal Baseball,* which this Court revitalized in *Toolson* despite all the new factors on which the dissent in *Toolson* relied.

Whatever unsavory elements there be in boxing contests is quite beside the mark. The States to which these exhibitions are distasteful are possessed of the honorable and effective remedy of self-help. They need not sanction pugilistic exhibitions, or may sanction them only under conditions that safeguard their notions of the public welfare.

MR. JUSTICE MINTON, dissenting.

To make a case under the Sherman Act, two things among others are essential: (1) there must be trade or commerce; (2) such trade or commerce must be among the States.

In the *Federal Baseball* case, 259 U. S. 200, this Court held that baseball was not trade or commerce. It said, "personal effort, not related to production, is not a subject of commerce," and since the baseball game was an exhibition wholly intrastate, there could be no trade or commerce among the States. 259 U. S. 200, 209.

In the *Baseball* case, this Court held that traveling from State to State to play the game and all the details of arrangements were incident to the exhibition. In *Toolson* v. *New York Yankees*, 346 U. S. 356, we did not overrule the *Federal Baseball* decision; in fact, we reaffirmed the holding of that case.

When boxers travel from State to State, carrying their shorts and fancy dressing robes in a ditty bag in order to participate in a boxing bout, which is wholly intrastate, it is now held by this Court that the boxing bout becomes interstate commerce. What this Court held in the *Federal Baseball* case to be incident to the exhibition now becomes more important than the exhibition. This is as fine an example of the tail wagging the dog as can be conjured up.

We are not dealing here with the question of whether the appellees have restrained trade in or monopolized the radio and television industries. That is a separate consideration. What others do with pictures they are allowed to take of a wholly local spectacle or exhibition by thereafter using the channels of interstate commerce to exhibit them does not make a package deal. The appellees have nothing to do with the transmission of sound or the pictures. Because these incidents are not directly involved, no effort was made to bring the radio and television companies and the sponsors into the case.

The Court says: "The conspiracy, it is claimed, began in 1949 with an agreement among the defendants and Joe Louis, then heavyweight champion of the world, that Louis would resign his title, . . . procure exclusive rights to the services of the four leading title contenders in a series of elimination contests which would result in the recognition of a new heavyweight champion, . . . and . . . assign all such exclusive rights to the defendants." Of course, there was at the time only one champion, Joe Louis. He had a monopoly on that, and while he got it by competition, he did not get it in trade or commerce. I do not suppose that Joe Louis had to go back into the ring and be walloped to a knockout or a decision before he could surrender his championship. And if he arranged with four other fellows to fight it out in elimination contests for the championship and no one else was restrained from doing the same, it is difficult for me to see how there was any conspiracy. If other promoters wanted to start an elimination contest, they were free to do so. Whether they received public acceptance depended upon something other than trade or commerce. What does a boxer or athlete have for sale but "personal effort, not related to production," which, as Justice Holmes said, is not commerce? Such services they may contract about free from any control of the Sherman Act. Suppose the

appellee did, as the Court states, control what the parties called all but two of twenty-one championship contests, what trade or commerce have they restrained?

As I see it, boxing is not trade or commerce. There can be no monopoly or restraint of nonexistent commerce or trade. Whether Congress can control baseball and boxing I need not speculate. What I am saying is that Congress has not attempted to do so. If there is a conspiracy, it is not one to control commerce between the States.

UNITED STATES *v.* KOPPERS COMPANY, INC.

NO. 29. CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.*

Argued November 10, 1954.—Decided January 31, 1955.

For the years 1940 through 1945, abatements of federal excess profits taxes, through application of § 722 of the Internal Revenue Code, are not retroactive; and they relieve taxpayers from the payment of interest on deficiencies in such taxes only from the time of the abatements, rather than from the original due dates of the taxes abated. Pp. 255–271.

1. This conclusion is supported by a consideration of the statutory scheme as a whole. Pp. 261–263.

2. The interest here involved is attributable to I. R. C., § 292 (a), and ran from the original due date of the tax. Pp. 263–264.

3. I. R. C., § 710 (a)(5), added in 1942, permits a taxpayer, seeking relief under § 722, to defer a part of its existing excess profits taxes where its adjusted excess profits net income exceeds 50% of its normal tax net income. This 1942 amendment, by its restrictions, fairly means that, under all other circumstances, the existing taxes were to be paid when due, or be subjected to interest during their delinquency under § 292 (a). Pp. 264–265.

4. The denial of interest on refunds is prescribed by I. R. C., § 3771 (g); and equity demands a comparable result in the case of underpayments. Pp. 266–267.

5. The conclusion here reached is supported by the legislative history and administrative interpretation of § 722 and is consistent in principle with *Manning* v. *Seely Tube & Box Co.*, 338 U. S. 561. Pp. 267–271.

126 Ct. Cl. 847, 117 F. Supp. 181, reversed.

209 F. 2d 692, affirmed.

In No. 29, the Court of Claims awarded a taxpayer a judgment for a refund of interest paid on those portions of deficiencies in excess profits taxes for the years 1940 and 1941 which were abated under § 722 of the Internal

*Together with No. 41, *Premier Oil Refining Company of Texas* v. *United States*, on certiorari to the United States Court of Appeals for the Fifth Circuit, argued November 12, 1954.

Revenue Code. 126 Ct. Cl. 847, 117 F. Supp. 181. This Court granted certiorari. 347 U. S. 965. *Reversed,* p. 271.

In No. 41, the Federal District Court awarded a taxpayer a judgment for a refund of interest paid on deficiencies in federal excess profits taxes for the years 1943, 1944 and 1945 which were abated under § 722 of the Internal Revenue Code. 107 F. Supp. 837. The Court of Appeals reversed. 209 F. 2d 692. This Court granted certiorari. 347 U. S. 987. *Affirmed,* p. 271.

Hilbert P. Zarky argued the causes for the United States. With him on the briefs were *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Harry Baum. Ralph S. Spritzer* was also with them on the brief in No. 41.

David W. Richmond argued the cause for respondent in No. 29. With him on the brief were *Robert N. Miller, Frederick O. Graves, John M. Crimmins, E. S. Ruffin, Jr.* and *C. M. Crick.*

William A. Sutherland argued the cause for petitioner in No. 41. With him on the brief were *Eugene M. Locke, Harold B. Pressley, Jr.* and *Mac Asbill, Jr.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The issue in these cases is whether, for the years 1940 through 1945, abatements of federal excess profits taxes, through application of I. R. C., § 722,[1] are retroactive.

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[1] "SEC. 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

"(a) GENERAL RULE.—*In any case in which the taxpayer establishes that the tax computed under this subchapter* [as to excess profits tax, § 710 *et seq.*] (*without the benefit of this section*) *results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income* for the purposes of

For the reasons hereafter stated, we hold that they are not and that they relieve taxpayers from the payment of interest on deficiencies in such taxes from the time of the abatements, rather than from the original due dates of the taxes abated.

In No. 29, *United States* v. *Koppers Co.*, the taxpayer, respondent therein,[2] reported and paid excess profits taxes of $6,512.76 for 1940, and $1,781,288.14 for 1941.[3] In

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an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, *the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income* otherwise determined under this subchapter. . . .

. . . . . .

"(d) APPLICATION FOR RELIEF UNDER THIS SECTION.—*The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a)(5).* The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter *for a subsequent taxable year.*" (Emphasis supplied.) 56 Stat. 914–915, as amended, 57 Stat. 601–602, 26 U. S. C. § 722 (a)(d).

The above provisions of § 722 (d) apply to taxable years beginning after December 31, 1939. 57 Stat. 602.

[2] Koppers Company, Inc., is, in fact, the successor to Koppers United Company and its subsidiaries, which filed consolidated excess profits tax returns for the years in question. For convenience, all of such corporations are referred to as the taxpayer.

[3] This tax was computed and paid pursuant to the Excess Profits Tax Act of 1940, 54 Stat. 975, as amended. See I. R. C., § 710 *et seq.* On November 8, 1945, these provisions became inapplicable to any calendar year beginning after 1945. 59 Stat. 568.

computing these taxes, it used excess profits credits based upon invested capital.[4] In 1943 and 1945, it applied under § 722 for relief from all or part of these taxes, claiming that they were "excessive and discriminatory."[5] In accordance with the usual administrative practice, the Commissioner determined the amount of the excess profits taxes due without regard to the application for relief under § 722. In doing so, he found it necessary to proceed under I. R. C., § 713, using excess profits credits based upon the taxpayer's income, rather than upon its invested capital. As a result he found that the above taxes, as returned and paid by the taxpayer without reference to § 722, had been understated and that the following deficiencies existed as of their original due dates, March 15, 1941, and 1942:

	1940	*1941*
Excess profits tax under §§ 710 (a) and 713	$466,921.67	$2,208,019.09
Payments	6,512.76	1,781,288.14
Deficiencies	460,408.91	426,730.95

The Commissioner computed interest, at 6%, on the above deficiencies, amounting to $217,376.07 for 1940, and $230,504.86 for 1941.[6]

After extended investigations and negotiations conducted under authority of § 722, the Commissioner and

[4] Two methods of computation of the excess profits credit were authorized: the invested capital method under I. R. C., § 714, or the base period income method under I. R. C., § 713.

[5] By timely consents, the Commissioner and the taxpayer agreed that the amount of any income, excess profits, or war profits tax due for 1940 and 1941 could be assessed at any time on or before June 30, 1951.

[6] The interest on the 1940 tax ran from March 15, 1941, to January 28, 1949, which was treated as the date of its payment; that on the 1941 tax ran from March 15, 1942, to March 16, 1951, which was 30 days after the filing of a waiver consenting to the assessment and collection of the deficiencies finally determined. See I. R. C., § 292 (a), *infra,* note 12.

the taxpayer agreed upon a "constructive average base period net income" which fixed the excess profits credits for the years in question and, as a result, the relief available under § 722. After this agreement was approved by the Excess Profits Tax Council of the Bureau of Internal Revenue, the Commissioner determined that the above-stated deficiencies, with the benefit of § 722, should be reduced to $260,554.39 for 1940, and to $95,749.33 for 1941. The taxpayer consented to the assessment of these deficiencies, with interest as provided by law. Whereupon, the Commissioner issued a formal determination of them and assessed them against the taxpayer. He also assessed the above-stated interest charges, based upon the full amount of the original deficiencies.

The taxpayer paid the deficiencies and interest so assessed but claimed refunds of $94,358.71 for 1940, and $178,784.48 for 1941. Those sums represented the interest on the abatements in its excess profits taxes made under § 722. When the Commissioner disallowed the claims, the taxpayer sued in the Court of Claims to recover their amounts. With one judge dissenting, that court deducted a setoff and rendered judgment in favor of the taxpayer for $270,216.34. 126 Ct. Cl. 847, 117 F. Supp. 181. To resolve the resulting conflict with *United States* v. *Premier Oil Co.*, 209 F. 2d 692, we granted certiorari, 347 U. S. 965.

In No. 41, *Premier Oil Co.* v. *United States*, the taxpayer, petitioner therein, paid the excess profits taxes shown on its original returns in the following amounts: for 1943, $564,167.70 (adjusted to $560,484.84); for 1944, $353,292.15 (adjusted to $313,639.13); and for 1945, $45,679.67. Thereafter, several deductions which the taxpayer had made from its income were disallowed, resulting, in 1948, in the following deficiencies in its payment of its excess profits and income taxes as of their original due dates:

DEFICIENCIES WITHOUT THE APPLICATION OF § 722.

	1943	*1944*	*1945*
Deficiencies in excess profits tax, under §§ 710 (a) and 713	$78,359.80	$55,529.92	$190,785.32
Deficiencies in income tax...	9,060.07	9,178.01	(90.00)
Total deficiencies	87,419.87	64,707.93	190,695.32

The Commissioner computed interest, at 6%, on the above excess profits tax deficiencies as follows:

For 1943—on $78,359.80, March 15, 1944, to June 23, 1948	$20,084.79
For 1944—on $55,529.92, March 15, 1945, to June 23, 1948	10,901.36
For 1945—on $190,785.32, March 15, 1946, to June 19, 1948	25,869.26
Total	56,855.41

In the meantime, the taxpayer had applied for relief under § 722, seeking acceptance of a "constructive average base period net income" of $357,000 for each of the years at issue. The Excess Profits Tax Council approved that figure as a credit in lieu of $93,150.36 for each of the years 1943 and 1944, and of $116,437.95 for 1945. This credit so far reduced the taxpayer's taxable excess profits as to abate its excess profits tax deficiencies for 1943 and 1944 entirely, and that for 1945 to $366.52.[7] Accordingly, the

[7] ABATEMENT OF EXCESS PROFITS TAX DEFICIENCIES UNDER § 722.

	1943	*1944*	*1945*
Deficiencies without application of § 722.....	$78,359.80	$55,529.92	$190,785.32
(Decreases) under § 722.	(175,307.78)	(175,174.49)	(190,418.80)
Resulting (credits) and deficiency	(96,947.98)	(119,644.57)	366.52

By reducing that part of the taxpayer's income that was subject to excess profits taxes, this application of § 722 automatically left more of the taxpayer's income subject to the normal tax and surtax. Those increases in the taxpayer's income taxes and their consequences are not before us.

Commissioner's assessment of the remainder of the taxpayer's deficiencies in excess profits taxes was for only $366.52. However, as in the *Koppers* case, *supra,* he assessed against the taxpayer the full amount of the interest charges based upon the original deficiencies.

The taxpayer paid the deficiency and interest so assessed but claimed refunds totaling $56,855.41. That sum represented the interest on the abatements in its excess profits taxes made under § 722. When the Commissioner disallowed those claims, the taxpayer brought the instant action to recover their amounts, in the United States District Court for the Northern District of Texas, under 28 U. S. C. § 1346 (a)(1). That court rendered judgment for the taxpayer.[8] 107 F. Supp. 837. The Court of Appeals reversed. 209 F. 2d 692. We granted certiorari to resolve the conflict with *United States* v. *Koppers Co., supra.* 347 U. S. 987.[9]

As the underlying issue is the same in each case and for each year, we shall discuss it in relation to the 1940 taxes in the *Koppers* case. There, the taxpayer, under the usual procedure, computed and paid the excess profits tax of $6,512.76 shown on its return for 1940. In due course the Commissioner, without the application of § 722, determined that the payment should have been $466,921.67,

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[8] The original judgment for $56,855.41 was modified to $52,292.40 to reflect several adjustments, including the deduction of $49.72, representing interest on the unabated deficiency of $366.52 upon which the taxpayer conceded that interest was chargeable.

[9] The grant was limited to the following question stated in the petition:

"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?" 347 U. S., at 988.

and, therefore, that a deficiency of $460,408.91 was due the United States, with interest from March 15, 1941. I. R. C., §§ 53 (a), 56 (a). If the taxpayer had made no application for relief under § 722, there is no doubt that such interest would have remained due the United States until paid and that, when paid, it would not have been refundable. The same would have been true if the taxpayer's application for relief under § 722 had been finally denied. The taxpayer contends, however, that, because the Commissioner has abated the taxpayer's deficiency from $460,408.91 to $260,554.39 under § 722, such reduction is necessarily retroactive to March 15, 1941, and that the taxpayer, accordingly, is entitled to a refund of the interest on the sum abated. The Commissioner, on the other hand, contends that the determination under § 722 is not retroactive but is a current abatement effective when made.

Congress could have prescribed either treatment but did not expressly specify either. Our answer is determined from our consideration of the statutory scheme as a whole, the related provisions of the statute, the legislative history of § 722 and the administrative interpretation that has been given the statute.

1. *The statutory scheme as a whole.*

The excess profits tax was a device initiated by Congress, late in 1940, in great part for the quick collection of large sums needed by the Government in a national emergency. Congress sought to obtain those funds from abnormally high corporate profits while such profits were available. To that end, it prescribed computations of unusual profits and required prompt payment of the taxes on them.[10]

[10] I. R. C., § 713—on the basis of income, or I. R. C., § 714—on the basis of invested capital. I. R. C., § 721, authorized standard allowances for specified abnormalities. No return by the taxpayer under I. R. C., § 722, was permissible.

From the beginning, the statute also provided, in § 722, a means of subsequent adjustment of the tax in special instances where the normal computation of the tax was found to result in inequity. The adjustment could be made only after administrative action and, pending its consideration, it did not eliminate the tax return or the tax payment otherwise required. Until 1942, it did not permit even the postponement of the payment of any part of the standard tax. Indeed, the full payment of that tax soon was made an express condition of the application for adjustment. I. R. C., § 722 (d). In 1943, Congress stated that if overpayments for either of the taxable years 1940 or 1941 were found to be attributable to § 722, no interest on such overpayments was to be paid the taxpayer.[11] At least to that extent, Congress expressly recognized that the funds paid as excess profits taxes, when due and without the benefit of § 722, were funds owed to and usable by the Government.

The significance of this statutory scheme further appears when it is applied to the instant case. If the instant taxpayer had paid its required tax in 1941, the Government would have received an additional $460,408.91 at that time. Accordingly, it would have had the use of that money, without charge, during the crucial war years. Correspondingly, the taxpayer would have been without that money during the same period. Instead, the taxpayer, in fact, retained the funds for its own use and now contends that it need not compensate the Government for such use of a substantial part of it.

While in the instant case the taxpayer did not underpay any amount actually shown on its return, as contemplated by I. R. C., § 294 (a), it understated its tax and thus withheld the amount in question. The detriment to the Government and benefit to the taxpayer was the same—the use of $460,408.91 for eight years. The above

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[11] I. R. C., § 3771 (g), *infra*, note 15, discussed at 266–267, *infra*.

distinction, emphasized by the taxpayer, may have helped it in initiating its application for relief under § 722 (d) because it could establish that, at least, it had paid "the tax shown on its return." The distinction, however, supplies no ground for different results once the deficiencies have been determined. We find no implication that a self-serving error in the understatement of its tax on its tax return entitles the taxpayer to a greater ultimate tax advantage than does a self-serving error of the same size in the underpayment of the same tax. *A fortiori* we find nothing to justify a greater tax advantage to any taxpayer that underpays its correct tax, over one that pays such tax in full when due.

2. *The interest here in controversy is attributable to I. R. C., § 292 (a).*[12]

The interest here in controversy was due under § 292 (a) from March 15, 1941, until paid. Accordingly, to obtain a refund of it, the taxpayer must sustain the proposition that the tax relief granted under § 722 is necessarily retroactive, extinguishing the deficiency as of the original due date of the tax and thus eliminating the interest charges for the corresponding period. To that end, the taxpayer emphasizes the statement in § 722 (a) that, as a condition of securing the application of § 722, a taxpayer must establish that the usual procedure "re-

[12] "SEC. 292. INTEREST ON DEFICIENCIES.

"(a) GENERAL RULE.—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier." 53 Stat. 88, as amended, 57 Stat. 602, 26 U. S. C. § 292 (a).

sults in an excessive and discriminatory tax" and also must establish "what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income." Once the taxpayer has done that, "the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter." Standing alone, this directive language is elastic. It can be read consistently either with the interpretation that the new computation replaces and abates the old one currently, when the new one is determined and assessed, or that it retroactively replaces the old tax from its original due date. It leaves the issue open for disposition by the effect of other clauses relating more specifically to the issue. For the reasons hereafter stated, we read it as looking forward, rather than backward.[13]

3. *I. R. C., § 710 (a)(5),*[14] *permits a taxpayer, seeking relief under § 722, to defer a part of its existing excess profits taxes where its adjusted excess profits net income exceeds 50% of its normal tax net income.*

In 1942, Congress added § 710 (a)(5), conditionally authorizing partial deferment of the tax in cases where a

[13] Section 722 (d) looks forward when it provides that if a constructive base period net income has been determined under § 722 for any taxable year, the Commissioner may, by regulations approved by the Secretary, permit waivers of the section's limitations for the purpose of determining excess profits taxes for a subsequent taxable year. Even this effect is not automatic, whereas it might have been expected to be so if the adjustment were a retroactive correction of the standard excess profits credit.

[14] "SEC. 710. IMPOSITION OF TAX.

"(a) . . .

. . . . . .

"(5) DEFERMENT OF PAYMENT IN CASE OF ABNORMALITY.—If the adjusted excess profits net income (computed without reference to

taxpayer claimed benefits under § 722. The condition was that the taxpayer's "adjusted excess profits net income (computed without reference to section 722)" must exceed 50% of the taxpayer's normal tax net income for the year. Even then, deferment was limited to 33% of the benefit claimed under § 722. If a taxpayer, without this amendment, could have successfully deferred payment and avoided interest charges by following the course taken in the instant cases, it could, by understatement of its tax, have deferred, without incurring interest charges, the payment of a corresponding part of its tax pending relief. If so, there would have been little need for § 710 (a)(5). The 1942 amendment, by its restrictions, fairly meant that, under all other circumstances, the existing taxes were to be paid when due, or be subjected to interest during their delinquency under § 292 (a).

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section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26 (e) (relating to adjusted excess profits net income), the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return." 54 Stat. 975, as amended, 56 Stat. 917, but see also, later amendment indicated by 26 U. S. C. § 710 (a)(5).

The Senate Committee on Finance Report accompanying the Revenue Act of 1942, 56 Stat. 798, stated:

"Although it is believed advisable to require a taxpayer seeking relief under section 722 to compute and pay its tax without the benefit of such section, there are some cases in which it would be inequitable to compel the taxpayer to pay the entire amount of such tax. Section 710 (a) is therefore amended to provide . . . [as above quoted]." S. Rep. No. 1631, 77th Cong., 2d Sess. 205.

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4. *The denial of interest on refunds is prescribed by I. R. C., § 3771 (g).*[15]

Although § 3771 (g) was not enacted until 1943, it was then made applicable to taxable years before, as well as after, January 1, 1942. It denied all interest on refunds attributable to § 722 where the refunds related to the taxable years 1940 or 1941. It also denied interest on refunds relating to taxable years beginning after January 1, 1942, but limited such denials to the first year after the filing of an application for relief under § 722, or to periods prior to September 16, 1945 (two years after the effective date of the amendment), whichever was the later.[16]

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[15] "SEC. 3771. INTEREST ON OVERPAYMENTS.

. . . . . .

"(g) CLAIMS BASED UPON RELIEF UNDER SECTION 722.—If any part of an overpayment for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment. If any part of an overpayment for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later." 53 Stat. 465, as amended, 57 Stat. 602, 26 U. S. C. § 3771 (g).

[16] The same Act added I. R. C., § 292 (b), containing comparable provisions prohibiting the assessment of interest upon deficiencies attributable to the final determination of an application for relief under § 722. 53 Stat. 88, as amended, 57 Stat. 602, 26 U. S. C. § 292 (b). This applied, for example, to deficiencies in the payment of ordinary income taxes resulting from an abatement under § 722 of excess profits taxes. Such an abatement automatically would leave a larger portion of a corporation's taxable income subject to the

In cases where the Government has authorized refunds of excess profits taxes overpaid to it by reason of the abatement of taxes attributable to § 722, § 3771 (g) expressly precludes the payment of interest by the Government upon the amounts abated. This treats the Government as entitled to the use of the abated amounts between the time of their overpayment and that of their abatement. Equity demands a comparable result in the case of underpayments. Where unpaid taxes are abated by reason of § 722, the taxpayer then receives a release from its existing obligation to pay the amount abated. However, the Government having been entitled, up to that time, to collect and use the sum abated, the Government should receive interest, on the abated sum, for the period during which the Government was entitled to have its use. This is the natural counterpart of the Government's freedom from paying interest on refunded overpayments.

5. *The legislative history of § 722.*

The excess profits tax was initiated in 1940. 54 Stat. 975 *et seq.* It provided for prompt payment of large taxes computed on income reflecting unusual profits. Computation of the tax on the basis of the taxpayer's prior income or invested capital was prescribed in §§ 713 and 714. A standardized treatment of abnormalities was provided in § 721. In addition, § 722 authorized the Commissioner "to make such adjustments as may be necessary to adjust abnormalities affecting income or capital." 54 Stat. 986. The procedure under § 722 was formalized by the Excess Profits Tax Amendments of 1941, 55 Stat.

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normal income tax and surtax. This increase, however, was not made retroactive any more than the decrease in the excess profits tax which caused it was made retroactive. Congress thus appropriately charged no interest on the resulting deficiency just as it had allowed none on the related overpayment.

23–25, and put in its final form by the Revenue Act of 1942, 56 Stat. 914–917, as amended, 57 Stat. 601–602. The technical and discretionary nature of the adjustment was emphasized by the provision that the determination of most computations under § 722 was reviewable only by a special division of the Tax Court constituted for the occasion and by no other court or agency. 55 Stat. 26, as amended, 56 Stat. 917, 59 Stat. 295, 673, 26 U. S. C. § 732. A taxpayer never was permitted to file a return of its own under § 722. S. Rep. No. 75, 77th Cong., 1st Sess. 13; H. R. Rep. No. 146, 77th Cong., 1st Sess. 13.

The statute has been interpreted as authorizing a procedure that is in the nature of a claim for a refund preceded by long investigations of complicated special circumstances, and followed by extended negotiations between the Commissioner and taxpayer to develop a mutually satisfactory "constructive average base period net income." This interpretation leaves the usual procedure under § 710 *et seq.* complete in itself but subject, upon application, to ultimate adjustment in instances accepted by the Commissioner under § 722.[17] We find no statement of a purpose that § 722 shall relieve taxpayers from penalties or interest charges due either to their defaults in paying, or their errors in computing, their taxes. On the contrary, it has been suggested that Congress considered relief under § 722 to be in the nature

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[17] When Congress, in a later Act, authorized deferment of payments of comparable taxes pending determinations of applications for relief, it did so unequivocally. The relief provisions in the Excess Profits Tax Act of 1950, 64 Stat. 1137, adding I. R. C., §§ 430–472, prescribed formulas for determining a substitute average base period net income, §§ 442–446, and permitted the taxpayer to adjust its base period net income at the time the return was filed, § 447 (e). See S. Rep. No. 2679, 81st Cong., 2d Sess. 17–21, discussing the general relationship between these provisions and the experience gained under § 722 now before us.

of a favor and as not relieving the taxpayer of its duty to pay the original tax when due.[18]

The regulations do not deal specifically with the issue before us but, from their beginning, in Treasury Regulations 109, they have been consistent with the interpretation given the Act by the Government. See § 30.722–5, as added by T. D. 5264, 1943 Cum. Bull. 761, as amended, T. D. 5393, 1944 Cum. Bull. 415. In addition to the practice of the Commissioner in the instant cases, there is in the record of the *Premier Oil Co.* case an undisputed affidavit by a Treasury Department reviewer to the effect that the policy followed was the administrative policy of the Bureau:

> "It is the policy of the Bureau of Internal Revenue in those cases where all or any part of a tax defi-

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[18] See legislative history outlined in *American Coast Line* v. *Commissioner,* 159 F. 2d 665, and *Pohatcong Hosiery Mills* v. *Commissioner,* 162 F. 2d 146.

". . . there is no doubt a difference between a tax, conceded to be due in the corporation's own return, and a tax assessed against it in invitum. This argument might perhaps be persuasive, if the denial of 'benefits' under § 722 were regarded as a constituent factor of the tax itself, as for example are the conditions detailed in § 721. We do not so regard § 722; on the contrary it was a favor; it presupposed that, even after taking into account the ameliatory conditions of § 721, the tax was due unless ex gratia the blow was softened; it was a tempering of the wind to the shorn lamb." Circuit Judge Learned Hand, for the court, 159 F. 2d, at 668. See also, *Ideal Packing Co.* v. *Commissioner,* 9 T. C. 346, 349; *Uni-Term Stevedoring Co.* v. *Commissioner,* 3 T. C. 917, 918.

"In each instance the section [722] provided that a hypothetical base period earnings credit be 'tailor made' for the particular taxpayer and that certain assumptions be made in connection with the case. Each case was a problem in research, and the legal or tax result generally was intertwined with complicated accounting and economic problems. Almost every factor which had any influence on the particular business was pertinent to the case and the time and expense involved in reconstructing the average base period earnings credit were tremendous." S. Rep. No. 2679, 81st Cong., 2d Sess. 17.

ciency has been extinguished by application of the relief provisions of Section 722 of the Internal Revenue Code not to assess the extinguished portion of such deficiency. *However, interest has been computed and assessed on the extinguished portion of the deficiency* from the due date of the return to the thirtieth day after the agreement, Form 874, is filed or date of assessment, whichever is the earlier." (Emphasis supplied.)

While *Manning* v. *Seeley Tube & Box Co.*, 338 U. S. 561, relates to the carry-back provisions of the Internal Revenue Code, it is thoroughly consistent in principle with the above discussion. There the Court upheld the collection of interest on a deficiency which later was extinguished by carrying back a loss which occurred in a subsequent year. It treated the carry-back as a current adjustment of the tax previously determined, characterizing it as an "abatement" at 565. It recognized I. R. C., § 3771 (e), as a help to the interpretation of the statute, much as we recognize I. R. C., § 3771 (g), as a help here. See 567–568. The Court also there announced that "In the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government." *Id.*, at 566.[19]

While the deficiency for 1940 in the amount of $460,408.91 was properly determined without reference to § 722 and treated as a deficiency for that year by the Commissioner, it was not separately assessed as such. This was not necessary because, at the time of its deter-

[19] See also, *Standard Roofing & Matericl Co.* v. *United States,* 199 F. 2d 607; *Rodgers* v. *United States,* 123 Ct. Cl. 779, 108 F. Supp. 727; *Cumberland Portland Cement Co.* v. *United States,* 101 F. Supp. 577, aff'd, 202 F. 2d 152.

mination and before its assessment, it was abated to $260,554.39. The latter sum, with interest in the amount of $217,376.07 computed on the whole deficiency of $460,408.91, was correctly and adequately assessed and paid.[20]

For the foregoing reasons, we conclude that the Government, in each case, is entitled to retain the interest now in controversy. Therefore, in No. 29, the judgment of the Court of Claims is reversed and, in No. 41, the judgment of the Court of Appeals is affirmed.

No. 29—Reversed.
No. 41—Affirmed.

MR. JUSTICE REED and MR. JUSTICE DOUGLAS dissent.

[20] See *Rodgers* v. *United States, supra; Cumberland Portland Cement Co.* v. *United States, supra.*

TEE-HIT-TON INDIANS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 43. Argued November 12, 1954.—Decided February 7, 1955.

The Tee-Hit-Ton Indians, an identifiable group of American Indians belonging to the Tlingit Tribe of Alaskan Indians, *held* not entitled to compensation under the Fifth Amendment for the taking by the United States of certain timber from Alaskan lands in and near the Tongass National Forest allegedly belonging to the Tee-Hit-Ton Indians. Pp. 273–291.

1. Neither § 8 of the Organic Act for Alaska of May 17, 1884, nor § 27 of the Act of June 6, 1900, providing for a civil government for Alaska, constituted a recognition by Congress of any permanent rights of Indians in Alaskan lands occupied by them; and this policy of nonrecognition was maintained and reflected by Congress in the Joint Resolution of August 8, 1947, authorizing the sale of such timber without recognizing or denying the validity of any claims of possessory rights to land or timber. Pp. 277–279.

2. Permissive Indian occupancy may be extinguished by Congress in its own discretion without compensation. *Johnson* v. *McIntosh*, 8 Wheat. 543; *Beecher* v. *Wetherby*, 95 U. S. 517; *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339. Pp. 279–282.

3. The recovery in *United States* v. *Tillamooks*, 329 U. S. 40, 341 U. S. 48, was based upon statutory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with the neighboring tribes, rather than upon a holding that there had been a compensable taking under the Fifth Amendment. Pp. 282–285.

4. The record does not sustain petitioners' contention that their stage of civilization, their concept of ownership of property and their treatment by Russia take them out of the rule applicable to the Indians of the States. On the contrary, it sustains the finding that their use of their lands was like the use of the nomadic tribes of the States Indians, and there was no evidence that the Russian handling of the Indian land problem was different from ours. Pp. 285–288.

5. Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Pp. 288–291.

128 Ct. Cl. 82, 120 F. Supp. 202, affirmed.

James Craig Peacock argued the cause for petitioner. With him on the brief were *Martin W. Meyer, William L. Paul, Jr., John E. Skilling* and *John H. Myers.*

Ralph A. Barney argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Morton* and *John C. Harrington.*

Briefs of *amici curiae* were filed on behalf of the States of Idaho, by *Robert E. Smylie,* Attorney General, and *J. Clinton Peterson,* Assistant Attorney General; New Mexico, by *Richard H. Robinson,* Attorney General, and *Fred E. Wilson,* Special Assistant Attorney General; and Utah, by *E. R. Callister,* Attorney General.

Mr. Justice Reed delivered the opinion of the Court.

This case rests upon a claim under the Fifth Amendment by petitioner, an identifiable group of American Indians of between 60 and 70 individuals residing in Alaska, for compensation for a taking by the United States of certain timber from Alaskan lands allegedly belonging to the group.[1] The area claimed is said to contain over 350,000 acres of land and 150 square miles of water. The Tee-Hit-Tons, a clan of the Tlingit Tribe, brought this suit in the Court of Claims under 28 U. S. C. § 1505. The compensation claimed does not arise from any statutory direction to pay. Payment, if it can be compelled, must be based upon a constitutional right of the Indians to recover. This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force, and to grant payments

[1] A partial taking is compensable. *United States* v. *Kansas City Life Ins. Co.,* 339 U. S. 799, 809; *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 739; *United States* v. *General Motors Corp.,* 323 U. S. 373; *United States* v. *Shoshone Tribe,* 304 U. S. 111, 118.

from the public purse to needy descendants of exploited Indians. The legislation in support of that policy has received consistent interpretation from this Court in sympathy with its compassionate purpose.[2]

Upon petitioner's motion, the Court of Claims under its Rule 38 (b) [3] directed a separate trial with respect to certain specific issues of law and any related issues of fact essential to the proper adjudication of the legal issues.[4] Only those pertinent to the nature of the petitioner's interest, if any, in the lands are here for review. Substan-

[2] See Indian Claims Commission Act, 60 Stat. 1049; *Worcester* v. *Georgia*, 6 Pet. 515, 582; *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 87, 89; *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 354.

[3] "Separate Trials: The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, counterclaim, or of any separate issues or of any number of claims, counterclaims, or issues; and may enter appropriate orders or judgments with respect to any of such issues, claims, or counterclaims that are tried separately."

[4] "1. Is the plaintiff an 'identifiable group of American Indians residing within the territorial limits of . . . Alaska' within the meaning of 28 U. S. C. § 1505?"

"2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?"

"3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

"4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?"

"5. In the event a decision of an affirmative nature on any of issues 2, 3, or 4, is followed by evidence indicating specific property rights on the part of plaintiff at any of those times, then would the testimony of plaintiff's witness Paul as to recent less intensive use of the

tial evidence, largely documentary, relevant to these legal issues was introduced by both parties before a Commissioner who thereupon made findings of fact. The Court of Claims adopted these findings and held that petitioner was an identifiable group of American Indians residing in Alaska; that its interest in the lands prior to purchase of Alaska by the United States in 1867 was "original Indian title" or "Indian right of occupancy." *Tee-Hit-Ton Indians* v. *United States,* 128 Ct. Cl. 82, 85, 87, 120 F. Supp. 202, 203–204, 205. It was further held that if such original Indian title survived the Treaty of 1867, 15 Stat. 539, Arts. III and VI, by which Russia conveyed Alaska to the United States, such title was not sufficient basis to maintain this suit as there had been no recognition by Congress of any legal rights in petitioner to the land in question. 128 Ct. Cl., at 92, 120 F. Supp., at 208. The court said that no rights inured to plaintiff by virtue of legislation by Congress. As a result of these conclusions, no answer was necessary to questions 2, 5 and 6. The Tee-Hit-Tons' petition was thereafter dismissed.

Because of general agreement as to the importance of the question of compensation for congressionally approved taking of lands occupied in Alaska under aboriginal Indian use and claim of ownership,[5] and the conflict concerning the effect of federal legislation protecting

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areas claimed by plaintiff [Tr. 13–14, 29–30, 44–45, 96–97] constitute prima facie evidence of termination or loss of such rights?"

"6. If any such property rights are established, and had not meanwhile been terminated or lost, then would the execution of the Timber Sale Agreement of August 20, 1951 (as admitted in paragraph 10 of defendant's Answer), constitute a compensable taking of such rights, or would it give rise to a right to an accounting within the jurisdiction of this Court, or both?" 128 Ct. Cl. 82, 85, 120 F. Supp. 202, 204.

[5] See Hearings before House Committee on Agriculture on H. J. Res. 205, 80th Cong., 1st Sess.; Committee Print No. 12, House Committee on Interior and Insular Affairs, 83d Cong., 2d Sess.

Indian occupation between this decision of the Court of Claims, 128 Ct. Cl., at 90, 120 F. Supp., at 206–207, and the decision of the Court of Appeals for the Ninth Circuit in *Miller* v. *United States,* 159 F. 2d 997, 1003, we granted certiorari, 347 U. S. 1009.

The Alaskan area in which petitioner claims a compensable interest is located near and within the exterior lines of the Tongass National Forest. By Joint Resolution of August 8, 1947, 61 Stat. 920, the Secretary of Agriculture was authorized to contract for the sale of national forest timber located within this National Forest "notwithstanding any claim of possessory rights." [6] The Resolution defines "possessory rights" [7] and provides for all receipts from the sale of timber to be maintained in a special account in the Treasury until the timber and land rights are finally determined.[8] Section 3 (b) of the Resolution provides:

> "Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest."

The Secretary of Agriculture, on August 20, 1951, pursuant to this authority contracted for sale to a private company of all merchantable timber in the area claimed by petitioner. This is the sale of timber which peti-

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[6] 61 Stat. 921, § 2 (a).

[7] *Id.,* § 1: "That 'possessory rights' as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included within any reservation."

[8] *Id.,* § 3 (a).

tioner alleges constitutes a compensable taking by the United States of a portion of its proprietary interest in the land.

The problem presented is the nature of the petitioner's interest in the land, if any. Petitioner claims a "full proprietary ownership" of the land; or, in the alternative, at least a "recognized" right to unrestricted possession, occupation and use. Either ownership or recognized possession, petitioner asserts, is compensable. If it has a fee simple interest in the entire tract, it has an interest in the timber and its sale is a partial taking of its right to "possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378. It is petitioner's contention that its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; that Russia while it possessed Alaska in no manner interfered with their claim to the land; that Congress has by subsequent acts confirmed and recognized petitioner's right to occupy the land permanently and therefore the sale of the timber off such lands constitutes a taking *pro tanto* of its asserted rights in the area.

The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioner in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.

I. *Recognition.*—The question of recognition may be disposed of shortly. Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid

for subsequent taking.[9] The petitioner contends that Congress has sufficiently "recognized" its possessory rights in the land in question so as to make its interest compensable. Petitioner points specifically to two statutes to sustain this contention. The first is § 8 of the Organic Act for Alaska of May 17, 1884, 23 Stat. 24.[10] The second is § 27 of the Act of June 6, 1900, which was to provide for a civil government for Alaska, 31 Stat. 321, 330.[11] The Court of Appeals in the *Miller* case, *supra,* felt that these Acts constituted recognition of Indian ownership. 159 F. 2d 997, 1002–1003.

We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken.[12] There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be

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[9] *United States* v. *Creek Nation,* 295 U. S. 103, 109–110; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497; *Chippewa Indians* v. *United States,* 301 U. S. 358, 375–376; *United States* v. *Klamath Indians,* 304 U. S. 119; *Sioux Tribe* v. *United States,* 316 U. S. 317, 326.

[10] ". . . That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: . . . ."

[11] "The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, ..."

[12] 23 Stat. 24; see 15 Cong. Rec. 530–531; H. R. Rep. No. 476, 48th Cong., 1st Sess. 2; 31 Stat. 321; see 33 Cong. Rec. 5966.

the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 101.

This policy of Congress toward the Alaskan Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 under which the timber contracts were made.[13]

II. *Indian Title.*—(a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, c. V. The great case of *Johnson* v. *McIntosh*, 8 Wheat. 543, denied the power of an Indian tribe to pass their

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[13] 61 Stat. 921, § 3 (b), see p. 276, *supra;* H. R. Rep. No. 873, 80th Cong., 1st Sess.

right of occupancy to another. It confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." P. 587.

> "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." P. 588.
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> "Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies." Pp. 590–591. See *Buttz* v. *Northern Pacific R. Co.*, 119 U. S. 55, 66; *Martin* v. *Waddell*, 16 Pet. 367, 409; *Clark* v. *Smith*, 13 Pet. 195, 201.

In *Beecher* v. *Wetherby*, 95 U. S. 517, a tract of land which Indians were then expressly permitted by the United States to occupy was granted to Wisconsin. In

a controversy over timber, this Court held the Wisconsin title good.

> "The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government." P. 525.

In 1941 a unanimous Court wrote, concerning Indian title, the following:

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues." *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347.

No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been will-

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ingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat. 1050.

(b) There is one opinion in a case decided by this Court that contains language indicating that unrecognized Indian title might be compensable under the Constitution when taken by the United States. *United States* v. *Tillamooks,* 329 U. S. 40.

Recovery was allowed under a jurisdictional Act of 1935, 49 Stat. 801, that permitted payments to a few specific Indian tribes for "legal and equitable claims arising under or growing out of the original Indian title" to land, because of some unratified treaties negotiated with them and other tribes. The other tribes had already been compensated.[14] Five years later this Court unanimously held that none of the former opinions in Vol. 329 of the United States Reports expressed the view that recovery was grounded on a taking under the Fifth Amendment. *United States* v. *Tillamooks,* 341 U. S. 48. Interest, payable on recovery for a taking under the Fifth Amendment, was denied.

Before the second *Tillamook* case, a decision was made on Alaskan Tlingit lands held by original Indian title. *Miller* v. *United States,* 159 F. 2d 997. That opinion holds such a title compensable under the Fifth Amendment on reasoning drawn from the language of this Court's first *Tillamook* case.[15] After the *Miller* decision,

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[14] 329 U. S., at p. 44.

[15] It relies also, p. 1001, on *Minnesota* v. *Hitchcock,* 185 U. S. 373, and *United States* v. *Klamath Indians,* 304 U. S. 119. These cases, however, concern Government taking of lands held under Indian title recognized by the United States as an Indian reservation. See 185 U. S., at 390, 304 U. S., at 121, 16 Stat. 707, *United States* v. *Algoma Lumber Co.,* 305 U. S. 415, 420, and 329 U. S. 40, 52, note 29. See *United States* v. *10.95 Acres of Land,* 75 F. Supp. 841.

this Court had occasion to consider the holding of that case on Indian title in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 106, note 28. We there commented as to the first *Tillamook* case: "That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment." We further declared "we cannot express agreement with that [compensability of Indian title by the *Miller* case] conclusion." [16]

Later the Government used the *Hynes* v. *Grimes Packing Co.* note in the second *Tillamook* case, petition for certiorari, p. 10, to support its argument that the first *Tillamook* opinion did not decide that taking of original Indian title was compensable under the Fifth Amendment.[17] Thereupon this Court in the second *Tillamook* case, 341 U. S. 48, held that the first case was not "grounded on a taking under the Fifth Amendment." Therefore no interest was due. This later *Tillamook*

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[16] The statement concerning the *Miller* case was needed to meet the Grimes Packing Company argument that Congress could not have intended to authorize the Interior Department to include an important and valuable fishing area, see *Hynes* v. *Grimes Packing Co.*, 337 U. S., at 95, note 10, in a permanent reservation for an Indian population of 57 eligible voters. Actual occupation of Alaskan lands by Indians authorized the creation of a reservation. 337 U. S., at 91. One created by Congress through recognition of a permanent right in the Indians from aboriginal use would require compensation to them for reopening to the public. *Id.*, at 103–106. It was therefore important to show that there was no right arising from aboriginal occupation.

[17] Three million dollars was involved in the *Tillamook* case as the value of the land, and the interest granted by the Court of Claims was $14,000,000. The Government pointed out that if aboriginal Indian title was compensable without specific legislation to that effect, there were claims with estimated interest already pending under the Indian jurisdictional act aggregating $9,000,000,000.

decision by a unanimous Court supported the Court of Claims in its view of the law in this present case. See *Tee-Hit-Ton Indians* v. *United States,* 128 Ct. Cl., at 87, 120 F. Supp., at 204–205. We think it must be concluded that the recovery in the *Tillamook* case was based upon statutory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with the neighboring tribes, rather than upon a holding that there had been a compensable taking under the Fifth Amendment.[18] This leaves unimpaired the rule derived

[18] In *Cariño* v. *Insular Government of the Philippine Islands,* 212 U. S. 449, this Court did uphold as valid a claim of land ownership in which tribal custom and tribal recognition of ownership played a part. Petitioner was an Igorot who asserted the right to register ownership of certain land although he had no document of title from the Spanish Government and no recognition of ownership had been extended by Spain or by the United States. The United States Government had taken possession of the land for a public use and disputed the fact that petitioner had any legally recognizable title.

The basis of the Court's decision, however, distinguishes it from applicability to the Tee-Hit-Ton claim. The Court relied chiefly upon the purpose of our acquisition of the Philippines as disclosed by the Organic Act of July 1, 1902, which was to administer property and rights "for the benefit of the inhabitants thereof." 32 Stat. 695. This purpose in acquisition and its effect on land held by the natives was distinguished from the settlement of the white race in the United States where "the dominant purpose of the whites in America was to occupy the land." 212 U. S., at 458. The Court further found that the Spanish law and exercise of Spanish sovereignty over the islands tended to support rather than defeat a prescriptive right. Since this was no communal claim to a vast uncultivated area, it was natural to apply the law of prescription rather than a rule of sovereign ownership or dominium. Cariño's claim was to a 370-acre farm which his grandfather had fenced some fifty years before and was used by three generations as a pasture for livestock and some cultivation of vegetables and grain. The case bears closer analogy to the ordinary prescriptive rights situation rather than to a recognition by this Court of any aboriginal use and possession amounting to fee simple ownership.

from *Johnson* v. *McIntosh* that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.

This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.

(c) What has been heretofore set out deals largely with the Indians of the Plains and east of the Mississippi. The Tee-Hit-Tons urge, however, that their stage of civilization and their concept of ownership of property takes them out of the rule applicable to the Indians of the States. They assert that Russia never took their lands in the sense that European nations seized the rest of America. The Court of Claims, however, saw no distinction between their use of the land and that of the Indians of the Eastern United States. See *Tee-Hit-Ton Indians* v. *United States,* 128 Ct. Cl. 82, 87, 120 F. Supp. 202, 204–205. That court had no evidence that the Russian handling of the Indian land problem differed from ours. The natives were left the use of the great part of their vast hunting and fishing territory but what Russia wanted for its use and that of its licensees, it took. The court's conclusion on this issue was based on strong evidence.

In considering the character of the Tee-Hit-Tons' use of the land, the Court of Claims had before it the testimony of a single witness who was offered by plaintiff. He stated that he was the chief of the Tee-Hit-Ton tribe. He qualified as an expert on the Tlingits, a group composed of numerous interconnected tribes including the Tee-Hit-Tons. His testimony showed that the Tee-Hit-Tons had become greatly reduced in numbers. Membership de-

scends only through the female line. At the present time there are only a few women of childbearing age and a total membership of some 65.

The witness pointed out that their claim of ownership was based on possession and use. The use that was made of the controverted area was for the location in winter of villages in sheltered spots and in summer along fishing streams and/or bays. The ownership was not individual but tribal. As the witness stated, "Any member of the tribe may use any portion of the land that he wishes, and as long as he uses it that is his for his own enjoyment, and is not to be trespassed upon by anybody else, but the minute he stops using it then any other member of the tribe can come in and use that area."

When the Russians first came to the Tlingit territory, the most important of the chiefs moved the people to what is now the location of the town of Wrangell. Each tribe took a portion of Wrangell harbor and the chief gave permission to the Russians to build a house on the shore.

The witness learned the alleged boundaries of the Tee-Hit-Ton area from hunting and fishing with his uncle after his return from Carlisle Indian School about 1904. From the knowledge so obtained, he outlined in red on the map, which petitioner filed as an exhibit, the territory claimed by the Tee-Hit-Tons. Use by other tribal members is sketchily asserted. This is the same 350,000 acres claimed by the petition. On it he marked six places to show the Indians' use of the land: (1) his great uncle was buried here, (2) a town, (3) his uncle's house, (4) a town, (5) his mother's house, (6) smokehouse. He also pointed out the uses of this tract for fishing salmon and for hunting beaver, deer and mink.

The testimony further shows that while membership in the tribe and therefore ownership in the common prop-

erty descended only through the female line, the various tribes of the Tlingits allowed one another to use their lands. Before power boats, the Indians would put their shelters for hunting and fishing away from villages. With the power boats, they used them as living quarters.

In addition to this verbal testimony, exhibits were introduced by both sides as to the land use. These exhibits are secondary authorities but they bear out the general proposition that land claims among the Tlingits, and likewise of their smaller group, the Tee-Hit-Tons, was wholly tribal. It was more a claim of sovereignty than of ownership. The articles presented to the Court of Claims by those who have studied and written of the tribal groups agree with the above testimony. There were scattered shelters and villages moved from place to place as game or fish became scarce. There was recognition of tribal rights to hunt and fish on certain general areas, with claims to that effect carved on totem poles. From all that was presented, the Court of Claims concluded, and we agree, that the Tee-Hit-Tons were in a hunting and fishing stage of civilization, with shelters fitted to their environment, and claims to rights to use identified territory for these activities as well as the gathering of wild products of the earth.[19] We think this evidence introduced by both sides confirms the Court of Claims' con-

[19] Krause, Die Tlinkit-Indianer (The Tlinkit Indians), pp. 93–115 and 120–122; Oberg, The Social Economy of the Tlingit Indians (a dissertation submitted to the University of Chicago, Dept. of Anthropology for the Degree of Doctor of Philosophy, Dec. 1937); Goldschmidt-Haas Report to Commissioner of Indian Affairs on Possessory Rights of the Natives of Southeastern Alaska, pp. i, ii, iv, 1–25, 31–33, 123–133, related statements numbered 65, 66, 67, 68 and 69, and chart 11; S. Doc. No. 152, 81st Cong., 2d Sess. (Russian Administration of Alaska and the Status of the Alaskan Natives); see *Johnson* v. *Pacific Coast S. S. Co.*, 2 Alaska 224.

clusion that the petitioner's use of its lands was like the use of the nomadic tribes of the States Indians.[20]

The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not

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[20] It is significant that even with the Pueblo Indians of the Mexican Land Sessions, despite their centuries-old sedentary agricultural and pastoral life, the United States found it proper to confirm to them a title in their lands. The area in which the Pueblos are located came under our sovereignty by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, and the Gadsden Purchase Treaty of December 30, 1853, 10 Stat. 1031. The Treaty of Guadalupe Hidalgo contained a guarantee by the United States to respect the property rights of Mexicans located within the territory acquired. Art. VIII, 9 Stat. 929. This provision was incorporated by reference into the Gadsden Treaty. Art. V, 10 Stat. 1035. The latter treaty also contained a provision that no grants of land within the ceded territory made after a certain date would be recognized or any grants "made previously [would] be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico." Art. VI, 10 Stat. 1035. This provision was held to bar recognition of fee ownership in the Pueblo of Santa Rosa which claimed such by immemorial use and possession as well as by prescription against Spain and Mexico because they could produce no paper title to the lands. *Pueblo of Santa Rosa* v. *Fall*, 56 App. D. C. 259, 262, 12 F. 2d 332, 335, reversed on other grounds, 273 U. S. 315.

Disputes as to the Indian titles in the Pueblos and their position as wards required congressional action for settlement. See Brayer, Pueblo Indian Land Grants of the "Rio Abajo," New Mexico; Cohen, Handbook of Federal Indian Law, c. 20. These problems were put in the way of solution only by congressional recognition of the Pueblos' title to their land and the decisions of this Court as to their racial character as Indians, subject to necessary federal tutelage. 10 Stat. 308, Creation of Office of Surveyor-General of New Mexico to report area of bona fide holdings; Report of Secretary of the Interior, covering that of the Surveyor-General of New Mexico, S. Exec. Doc. No. 5, 34th Cong., 3d Sess. 174, 411; Confirmation of titles for approved Pueblo Land Claims, 11 Stat. 374; S. Doc. No. 1117, 37th Cong., 2d Sess. 581–582, Report of Secretary of Interior showing New Mexico Pueblos with confirmed titles.

Representative Sandidge, who reported the first Pueblo Confirmation Act to the House of Representatives, stated that the Pueblo

specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.[21] Every American schoolboy knows that the savage tribes of this continent were de-

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claims, "although they are valid, are not held to be so by this Government, nor by any of its courts, until the claim shall have been acted on specifically. I will say, furthermore, that the whole land system of the Territory of New Mexico is held in abeyance until these private land claims shall have been acted on by Congress." Cong. Globe, 35th Cong., 1st Sess. 2090 (1858).

The position as Indians of the inhabitants of the Pueblos was considered in *United States* v. *Joseph,* 94 U. S. 614, and *United States* v. *Sandoval,* 231 U. S. 28.

For an interesting sidelight on the difficulties inherent in the problems, see Brayer, *supra,* p. 14, and *United States* v. *Ritchie,* 17 How. 525.

Thus it is seen that congressional action was deemed necessary to validate the ownership of the Pueblos whose claim was certainly founded upon stronger legal and historical basis than the Tlingits.

[21] The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print No. 12, Supplemental Reports dated January 11, 1954, on H. R. 1921, 83d Cong., 2d Sess.

Department of Interior: "That the Indian right of occupancy is not a property right in the accepted legal sense was clearly indicated when *United States* v. *Alcea Band of Tillamooks,* 341 U. S. 48 (1951), was reargued. The Supreme Court stated, in a per curiam decision, that the taking of lands to which Indians had a right of occupancy was not a taking within the meaning of the fifth amendment entitling the dispossessed to just compensation.

"Since possessory rights based solely upon aboriginal occupancy or use are thus of an unusual nature, subject to the whim of the sovereign owner of the land who can give good title to third parties by extinguishing such rights, they cannot be regarded as clouds upon title in the ordinary sense of the word. Therefore, we suggest the deletion, in section 3 (c) of the bill, of the words 'upon aboriginal occupancy or title, or.'" P. 3.

Department of Agriculture: "We also concur in the belief which we understand is being expressed by the Department of the Interior that no rights presently exist on the basis of aboriginal occupancy or title. We believe that this is equally true with respect to lands

prived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land. The duty that rests on this Nation was adequately phrased by Mr. Justice Jackson in his concurrence, Mr. Justice Black joining, in *Shoshone Indians* v. *United States,* 324 U. S. 335, at 355, a case that differentiated "recognized" from "unrecognized" Indian title, and held the former only compensable. *Id.,* at 339–340. His words will be found at 354–358. He ends thus:

> "We agree with Mr. Justice Reed that no legal rights are today to be recognized in the Shoshones by reason of this treaty. We agree with Mr. Justice Douglas and Mr. Justice Murphy as to their moral deserts. We do not mean to leave the impression that the two have any relation to each other. The finding that the treaty creates no legal obligations does not restrict Congress from such appropriations as its judgment dictates 'for the health, education, and industrial advancement of said Indians,' which is the position in which Congress would find itself if we found that it did create legal obligations and tried to put a value on them." *Id.,* at 358.

In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion

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within the Tongass National Forest just as it is with respect to lands elsewhere in Alaska." P. 7.

Department of Justice: "Thus, there is no legal or equitable basis for claims or rights allegedly arising from 'aboriginal occupancy or title.'" P. 11.

does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.

The judgment of the Court of Claims is

Affirmed.

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

The first Organic Act for Alaska became a law on May 17, 1884, 23 Stat. 24. It contained a provision in § 8 which reads as follows:

> "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further,* That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid."

Section 12 provided for a report upon "the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education[,] what rights by occupation of settlers should be recognized," etc.

Respondent contends, and the Court apparently agrees, that this provision should be read, not as recognizing In-

dian title, but as reserving the question whether they have any rights in the land.

It is said that since § 8 contemplates the possible future acquisition of "title," it expressly negates any idea that the Indians have any "title." That is the argument; and that apparently is the conclusion of the Court.

There are, it seems to me, two answers to that proposition.

First. The first turns on the words of the Act. The general land laws of the United States were not made applicable to Alaska. § 8. No provision was made for opening up the lands to settlement, for clearing titles, for issuing patents, all as explained in Gruening, The State of Alaska (1954), p. 47 *et seq.* There were, however, at least two classes of claimants to Alaskan lands—one, the Indians; the other, those who had mining claims. Section 8 of the Act did not recognize the "title" of either. Rather, it provided that one group, the miners, should be allowed to "perfect their title"; while the others, the Indians, were to acquire "title" only as provided by future legislation. Obviously the word "title" was used in the conveyancer's sense; and § 8 did service in opening the door to perfection of "title" in the case of miners, and in deferring the perfection of "title" in the case of the Indians.

Second. The second proposition turns on the legislative history of § 8. Section 8 of the Act commands that the Indians "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." The words "or now claimed by them" were added by an amendment offered during the debates by Senator Plumb of Kansas. 15 Cong. Rec. 627–628. Senator Benjamin Harrison, in accepting the amendment, said, ". . . it was the intention of the committee to protect to the fullest extent all the rights of the Indians in Alaska and of any residents who had settled there, but

at the same time to allow the development of the mineral resources . . . ." *Id.*

Senator Plumb spoke somewhat humorously about the rights of the Indians:

> "I do not know by what tenure the Indians are there nor what ordinarily characterizes their claim of title, but it will be observed that the language of the proviso I propose to amend puts them into very small quarters. I think about 2 feet by 6 to each Indian would be the proper construction of the language 'actually in their use or occupation.' Under the general rule of occupation applied to an Indian by a white man, that would be a tolerably limited occupation and might possibly land them in the sea." *Id.*, at 530.

Senator Plumb went on to say, "I propose that the Indian shall at least have as many rights after the passage of this bill as he had before." *Id.*, at 531. Senator Harrison replied that it was the intention of the committee "to save from all possible invasion the rights of the Indian residents of Alaska." *Id.*, at 531. He gave emphasis to the point by this addition:

> "It was the object of the committee absolutely to save the rights of all occupying Indians in that Territory until the report which is provided for in another section of the bill could be made, when the Secretary of the Interior could ascertain what their claims were and could definitely define any reservations that were necessary to be set apart for their use. We did not intend to allow any invasion of the Territory by which private rights could be acquired by any person except in so far as it was necessary in order to establish title to mining claims in the Territory. Believing that that would occupy but the smallest portion of the territory here and there, isolated and detached

and small quantities of ground, we thought the reservation of lands occupied by the Indians or by anybody else was a sufficient guard against any serious invasion of their rights." *Id.*, at 531.

The conclusion seems clear that Congress in the 1884 Act recognized the claims of these Indians to their Alaskan lands. What those lands were was not known. Where they were located, what were their metes and bounds, were also unknown. Senator Plumb thought they probably were small and restricted. But all agreed that the Indians were to keep them, wherever they lay. It must be remembered that the Congress was legislating about a Territory concerning which little was known. No report was available showing the nature and extent of any claims to the land. No Indian was present to point out his tribe's domain. Therefore, Congress did the humane thing of saving to the Indians all rights claimed; it let them keep what they had prior to the new Act. The future course of action was made clear—conflicting claims would be reconciled and the Indian lands would be put into reservations.

That purpose is wholly at war with the one now attributed to the Congress of reserving for some future day the question whether the Indians were to have any rights to the land.*

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* The reading which the Court gives the 1884 Act dispels the slight hope which Ernest Gruening, our foremost Alaskan authority, found in its provisions dealing with the Indians. In The State of Alaska (1954) 355–356, Gruening states:

"For the first seventeen years of United States rule over Alaska, the aboriginal inhabitants, who constituted an overwhelming majority of its approximately thirty thousand souls, were as devoid of attention, or even mention, as was the population as a whole. They became, by virtue of the organic act of 1884, in one respect at least, a mildly privileged, or at least a less disadvantaged, group, as compared with subsequently arriving Americans.

"For the act provided 'that the Indians or other persons . . . shall

There remains the question what kind of "title" the right of use and occupancy embraces. Some Indian rights concern fishing alone. See *Tulee* v. *Washington,* 315 U. S. 681. Others may include only hunting or grazing or other limited uses. Whether the rights recognized in 1884 embraced rights to timber, litigated here, has not been determined by the finders of fact. The case should be remanded for those findings. It is sufficient now only to determine that under the jurisdictional Act the Court of Claims is empowered to entertain the complaint by reason of the recognition afforded the Indian rights by the Act of 1884.

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not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them.' The natives' right of occupancy was, in other words, affirmed, while all later arrivals had to await the slow evolution of the land laws for even the assurance of the right to possess land.

" 'The terms under which such persons [the Indians or other persons],' continued the act, 'may acquire title to such lands is reserved for future legislation by Congress.'

"Seventy years of future had passed by 1954 and the legislation by which the titles to Indians' lands could be acquired had not yet been enacted by Congress."

UNITED STATES *v.* GUY W. CAPPS, INC.

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

No. 14. Argued November 15, 1954.—Decided February 7, 1955.

In order to prevent interference with its potato price-support program under the Agricultural Act of 1948, the United States exchanged diplomatic correspondence with Canada under which the latter agreed to permit the export of no potatoes to the United States except seed potatoes and to obtain assurances that they would not be diverted or reconsigned for table stock purposes. In importing seed potatoes from Canada, respondent gave such assurance to the exporter. Claiming that such assurance constituted a contract made for its benefit and that respondent had violated it by selling such potatoes for table stock purposes, the United States sued respondent for damages alleged to have resulted from the United States being forced to purchase an equivalent amount of domestic potatoes. *Held:* On the record, there was no clear error in the District Court's directing a verdict for respondent on the ground that the evidence was not sufficient to prove the alleged breach of contract, and the judgment is affirmed on that ground alone. Pp. 296–305.

204 F. 2d 655, affirmed on other grounds.

Solicitor General Sobeloff argued the cause for the United States. With him on the brief were *Assistant Attorney General Rankin, Assistant Attorney General Burger, Oscar H. Davis, Paul A. Sweeney* and *Herman Marcuse.*

W. R. Ashburn argued the cause and filed a brief for respondent.

MR. JUSTICE BURTON delivered the opinion of the Court.

In this case the United States District Court directed a verdict for respondent because petitioner failed to present evidence of either a breach of contract or resulting damages sufficient to sustain a verdict for petitioner. The

Court of Appeals, however, affirmed the judgment on the ground that the alleged contract was unenforceable. For the reasons hereafter stated, we agree with the District Court that the evidence was not sufficient to sustain the alleged breach of contract. Accordingly, we do not reach or pass upon the other grounds discussed by the Court of Appeals.

In 1948, the crops of Irish potatoes in the United States and Canada were among the largest on record. As a result, the United States, in § 1 (b) of the Agricultural Act of 1948, 62 Stat. 1247, 1248, obligated itself to support the sale of such potatoes at 90% of their parity price. This program was carried out through agreements of the Commodity Credit Corporation to purchase, from eligible growers or dealers in the United States, all Irish potatoes harvested before January 1, 1949, provided such potatoes could not be sold commercially at 90% of parity. As the unsupported Canadian prices were lower than the supported prices in the United States, it became profitable to import Canadian potatoes despite the tariff and freight charges. Recognizing that fact, Congress authorized investigations by the Tariff Commission, under the President's direction, which might lead to imposing quantitative limitations on imports or to increasing import fees. 62 Stat. 1248–1250, 7 U. S. C. § 624.

However, without resorting to that procedure, the United States acted through diplomatic channels. Its Acting Secretary of State and the Canadian Ambassador exchanged notes on November 23, 1948, purporting to consummate an executive agreement effective at once. For their text see Appendix, *infra,* at 305–309. Of special significance to this litigation are the undertakings made by Canada, in its note, to place its Irish potatoes under export control, to withhold export permits for the movement of table stock potatoes to the United States, and to issue export permits for the shipment of Canadian certified

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seed potatoes to the United States only under specified circumstances. Those circumstances were that the shipments be limited to specified States where there was a legitimate demand for certified seed potatoes and to a short period before the normal seeding time. Permits were to be granted only to exporters having firm orders from legitimate United States users of Canadian seed potatoes, and those exporters were "to have included in any contract into which they might enter with a United States seed potato importer a clause in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes." Appendix, *infra*, at 306. The agreement terminated June 20, 1949.

In December 1948, Guy W. Capps, Inc., a Virginia corporation, respondent herein, bought 48,544 one-hundred-pound bags of Canadian certified Irish seed potatoes from H. B. Willis, Inc., of Charlottetown, Prince Edward Island, a Canadian exporter. Before the exporter's shipment of them on the S. S. *Empire Gangway* to respondent at Jacksonville, Florida, respondent wired the exporter as follows: "Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia." The shipment arrived at Jacksonville January 9, 1949.[1] On

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[1] January 10, 1949, the Acting Chief of the Potato Division, Fruit and Vegetable Branch of the United States Department of Agriculture, wired respondent:

"Have been informed ACCO [Atlantic Commission Company] representative, Jacksonville, Florida, claiming you have special permission from Department to sell Canadian seed for edible use, if no demand for seed. Please advise basis for claim. Account such disposition is contrary to the intent of U. S. Canadian agreement and to Canadian requirement regarding diversion or reconsignment."

January 11, 1949, respondent wired in reply: "Have not made such statement. Only put seed [potatoes] Jacksonville for seed purposes" and, later, on the same day:

"I realize fully the agreement with Canada, its intent and want

January 11, the potatoes were all invoiced by respondent to the Atlantic Commission Company at Jacksonville as "48,544 Sax Canada No. 1 Seed Potatoes @ $3.35 f. o. b." [2]

In January 1951, the United States filed the instant action against respondent in the United States District Court for the Eastern District of Virginia, claiming that the above circumstances constituted a contract between the exporter and respondent for the benefit of the United States. The complaint alleged further, upon information and belief, that, in January 1949, respondent, in violation of such contract, "sold the 48,544 sacks of seed potatoes for table stock purposes" to the damage of the United States in the amount of approximately $150,486, "in that for each quantity of potatoes so imported from Canada and sold for table stock in the United States, a substantially equivalent quantity of potatoes produced in the United States was offered for sale to the Department of Agriculture, and had to be and was purchased by the Department under the Agricultural Act of 1948."

Respondent's motion to dismiss the complaint for failure to state a claim upon which relief could be granted was denied. 100 F. Supp. 30. However, at the close of petitioner's case and after argument of counsel, the court directed a verdict for respondent. Judgment was entered accordingly. The court's findings of fact and con-

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to and expect to cooperate with the program. I am only bringing in seed for seed purposes. Canadian dealers are now quoting seed same territory I am selling. Have had quotations as low as 365 hundredweight delivered Norfolk, past week."

[2] "Less 10,000 Sax Canada No. 1 Seed Potatoes @ $3.65 f. o. b." These 10,000 sacks were immediately resold by the Atlantic Commission Company to respondent. Of them, 8,730 were invoiced by respondent on the same day as "Canada No. 1 Seed Potatoes" in seven lots to four separate dealers in Florida and Georgia, at prices between $3.75 and $4 per cwt. There was no evidence as to the disposition of the remaining 1,270 sacks.

clusions of law were contained in its oral opinion. That opinion, which has not been published, included the following highly significant statements:

> "The action here is for breach of contract made between a Canadian exporter and Capps, the American importer, and specifically of a stipulation placed in that contract which the Court has held was for the benefit of the United States.
>
> "The expression constituting that stipulation is that certified seed potatoes loaded on the S. S. *Gangway* are for planting in Florida and Georgia. Now, assuming that the Court is correct in holding that that stipulation is an agreement within the meaning of the Executive Treaty or an assurance, as it is called in the Executive Treaty, to the effect that the potatoes would not be diverted or reconsigned for table stock purposes—I say assuming that the Court is correct in holding that this provision is an assurance, there is no proof here sufficient to go to the jury that there has been such a diversion or reconsignment, or that there has been a lack of diligence or care on the part of this defendant to see to it that its assurance was carried out.
>
> "In the first place, the only diversion or reconsignment was from the defendant to the Atlantic Commission Company. Now that was not a diversion or reconsignment for table stock purposes. Nor does it evidence any want of care on the part of the defendant to see that the assurance was kept, because the evidence shows that this defendant had from year to year sold to Atlantic, potatoes exclusively for seed purposes. The evidence does not justify or would not justify the jury in drawing a conclusion that it was a reckless abandonment by the defendant of its obligation to see to the use of

these potatoes because the defendant had the right to rely upon its previous experiences.

"But going further, and assuming that it was incumbent upon the defendant to follow up and see that this reconsignment did not lead to the use of the potatoes for table purposes, we find that the A & P, to whom Atlantic sold, did sell seed potatoes. It is true that it was not its entire trade in potatoes, but it did sell a large amount, described as its secondary function, for seed purposes, and the other sales by Atlantic to wholesalers or to the trade, as it is spoken of, were to firms which used potatoes for seed purposes or disposed of them for seed purposes, so that the sales by the defendant here were equally consistent with the compliance as with the violation of the assurance."

The Court of Appeals disagreed with the District Court on the above points.[3] However, it affirmed the judgment on the ground that the international agreement, which the contract between respondent and the exporter sought to carry out, was void. The court regarded it as not authorized by Congress and as contravening the provision for procedure through the Tariff Commission. The court also held that the suit must fail because no cause of action had been created by Congress for this type of injury. 204 F. 2d 655, 658–661. We granted certiorari to determine whether the significant constitutional and statutory questions discussed by the Court of Appeals were necessary for the decision of the case and, if so, to give them consideration. 346 U. S. 884.

We have first examined the record in order to pass upon the preliminary questions on which the Court of Ap-

[3] "We have little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from the breach." 204 F. 2d, at 658.

peals disagreed with the trial court. See *Walling* v. *General Industries Co.*, 330 U. S. 545, 547, 550, and see also, *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U. S. 555, 560, 567–568.

Respondent's alleged obligation is stated in its first telegram, which must be read in the light of the above-mentioned correspondence between the United States and Canada. That correspondence recognized that importations of Canadian seed potatoes, as well as of Canadian table stock potatoes, might displace eligible American potatoes in American commercial markets and thus might add to the burden of the American price-support program. The correspondence, nevertheless, did not seek to exclude Canadian seed potatoes. On the contrary, it provided for the continuance of shipments of seed potatoes to specified States in the United States, during a short period immediately prior to the normal seeding time. In addition, Canada agreed to require its exporters to secure assurance from each importer of Canadian seed potatoes that such potatoes would not be diverted or reconsigned for table stock purposes. In effect, this agreement stopped the regular Canadian-American trade in Canadian table stock potatoes, while preserving such trade in Canadian seed potatoes. There was no suggestion that each importer, during the short open season for Canadian seed potatoes, had to take any new or extraordinary affirmative steps to see to it that the ultimate purchasers never ate their seed potatoes, or that each American retailer of Canadian seed potatoes, in its usual course of business, segregated such potatoes from table stock potatoes in any manner not customary in the sale of seed potatoes.

The undisputed evidence showed that the entire shipment to Jacksonville was made in containers with markings and tags identifying the potatoes as "Canadian No. 1 seed potatoes." There was no showing that this identi-

fication was separated from the potatoes at any point short of the ultimate offering of some of the potatoes at retail. There was, in short, no evidence that any of the potatoes were at any time reconsigned or otherwise treated except as had been customary in prior commercial dealings in seed potatoes.

At Jacksonville the entire shipment was invoiced by respondent to the Atlantic Commission Company as "Canada No. 1 Seed Potatoes." Most of the 10,000 sacks (which, at the time of their delivery to that company in Jacksonville, were resold by it to respondent) were invoiced by respondent to other customers in a like manner.[4] The Atlantic Commission Company, in turn, invoiced to its purchasers, in the same manner, the sacks which it received from respondent. Of them, 13,627 sacks were invoiced by the Commission Company to its parent company, the Great Atlantic & Pacific Tea Company, at three points in Florida and one in Georgia, but 1,641 sacks were invoiced to points in Alabama. The Great Atlantic & Pacific Tea Company primarily sold foodstuffs but also dealt in vegetables for planting purposes, such as seed potatoes, onion sets and cabbage sets. It sold seed potatoes not only to home gardeners but to planters of small commercial acreages. The Commission Company invoiced the remaining 24,926 sacks to over 30 separate dealers in Florida and Georgia, but invoiced 2,309 to points in Alabama. All of the consignees were dealers in vegetables and groceries, and the primary volume of their trade was in articles for food. But there was testimony that some of these dealers customarily handled seed potatoes for planting purposes and there was no evidence that any of them did not. Respondent previously had sold seed potatoes to the Atlantic Commission Company and that company had used channels of distribution compara-

[4] See note 2, *supra*.

ble to those used in this instance. There was no evidence of the reconsignment of any of these seed potatoes for table stock, or of the diversion of any of them from the commercial channels theretofore usually used for sales of seed potatoes in this area during the planting season. Exception has not been taken to the States designated or to the times when the sales were to be made.

The evidence also did not support the suggestion that some of these potatoes were unsuitable for planting in the areas designated. It was not enough that one witness said that only 20% of the original shipment consisted of potatoes belonging to the three most popular varieties grown in Florida in that year.

There was no evidence of bad faith, neglect or carelessness on the part of respondent in performing its contractual obligations. There was no evidence of any intent of respondent that the potatoes be sold for table use. It freely acknowledged the existence of the international agreement and declared its purpose to cooperate with it.

It was conceded that these potatoes were specially suited for use as seed but also that they were of high-grade edible quality. There was, however, no evidence that any substantial part of these potatoes ultimately was eaten. The most that appeared was that ten pounds of the seed potatoes were sold by a grocery in St. Augustine, Florida, to two women who appeared to be housewives buying for home use. There was also evidence that a few potatoes, probably from the shipment, were sold to customers of the same type by a Jacksonville store and by an A & P market in Atlanta, Georgia.

In sum, all that respondent did was to sell seed potatoes, labeled as seed potatoes, in seeding time to concerns which normally dealt in seed potatoes. Under these circumstances, the District Court was not clearly in error in making the findings it did or in directing the verdict for respondent on the ground that no breach of contract

was shown. *Walling* v. *General Industries Co.*, 330 U. S. 545.

In view of the foregoing, there is no occasion for us to consider the other questions discussed by the Court of Appeals. The decision in this case does not rest upon them.

Affirmed.

APPENDIX TO OPINION OF THE COURT.

Exchange of notes between the Canadian Ambassador to the United States and the Acting Secretary of State of the United States, November 23, 1948:

"*The Canadian Ambassador to the Secretary of State*

"CANADIAN EMBASSY
"AMBASSADE DU CANADA

"WASHINGTON, D. C.,
"No. 538 "*November 23rd, 1948.*

"SIR,

"I have the honour to refer to the discussions which have taken place between the representatives of the Government of Canada and of the Government of the United States of America regarding the problems which would confront the Government of the United States in the operation of its price support and other programmes for potatoes if the imports of Canadian potatoes, during this current crop year, were to continue to be unrestricted. After careful consideration of the various representations which have been made to the Canadian Government on this subject, the Canadian Government is prepared to:

"1. Include Irish potatoes in the list of commodities for which an export permit is required under the provisions of the Export and Import Permits Act.

"2. Withhold export permits for the movement of table stock potatoes to the United States proper, excluding Alaska.

"3. Issue export permits for the shipment of Canadian certified seed potatoes to the United States, but only under the following circumstances:

"(a) Export permits will be issued to Canadian exporters for shipments to specified States in the United States and such permits will only be granted within the structure of a specific schedule. The schedule is designed to direct the shipment of Canadian certified seed potatoes into those States where there is a legitimate demand for certified seed potatoes and only during a short period immediately prior to the normal seeding time. A draft of this schedule is now being jointly prepared by Canadian and United States officials.

"(b) Export permits would only be granted to Canadian exporters who could give evidence that they had firm orders from legitimate United States users of Canadian seed potatoes. Canadian exporters would also be required to have included in any contract into which they might enter with a United States seed potato importer a clause in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes.

"(c) The Canadian Government would survey the supply of Canadian certified seed potatoes by class and consider the possibility of giving precedence to the export of Foundation and Foundation A classes of certified seed.

"(d) The names and addresses of the consignees entered on the export permit would be compiled periodically and this information would be forwarded to the United States Government.

"In instituting a system which has the effect of restricting exports of Canadian potatoes to the United States, the Canadian Government recognizes a responsibility to

the Canadian commercial grower in certain surplus potato areas and is prepared to guarantee a minimum return on gradable potatoes for which the grower cannot find a sales outlet. Although the details of such a programme have not been finalized, it is anticipated that the Canadian Government will announce, at approximately the same time as potatoes are placed under export control, a floor price which will be effective April 1st, 1949 for certain carlot shipping areas in the East. To implement this programme the Canadian Government would inspect the potato holdings of commercial growers in Prince Edward Island, and several counties of New Brunswick, on or after April 1st and would undertake to pay a fixed price for every hundred pounds of Canada No. 1 potatoes found in the bins. It is not anticipated that any actual payment would be made at that time and it would be understood that if any of the potatoes examined were subsequently sold or used for seed purposes the owner would forfeit any claim for assistance on such potatoes. In other words, the Canadian Government would make no payment on potatoes which move into export trade, or which are used for seed purposes.

"It should be noted that the Canadian proposals to institute export permit control on Canadian potatoes and to inaugurate a price support programme are contingent upon assurances from the United States Government that:

"a) The United States Government will not hereafter impose any quantitative limitations or fees on Canadian potatoes of the 1948 crop exported to the United States under the system of regulating the movement of potatoes from Canada to the United States outlined herein.

"b) The Canadian Government proposal, as outlined herein, to guarantee a floor price to certain commercial growers in the Maritime Provinces would not be interpreted by United States authorities as either a direct or

indirect subsidy and that in consequence there would be no grounds for the imposition of countervailing duties under Section 303 of the United States Tariff Act of 1930.[1]

"If the United States Government in its replying note accepts the Canadian proposals and gives to the Canadian Government the assurances required, as outlined above, this note and the reply thereto will constitute an agreement on this subject.

"Accept, Sir, the renewed assurances of my highest consideration.

"H H WRONG

"The Honourable GEORGE C. MARSHALL,
"Secretary of State of the United States,
"Washington, D. C.

"The Acting Secretary of State to the Canadian Ambassador

"NOVEMBER 23, 1948

"EXCELLENCY:

"The Government of the United States appreciates the assurance of the Government of Canada contained in your note no. 538 of November 23, 1948, that the Government of Canada is prepared, contingent upon the receipt of certain assurances from the Government of the United States, to establish the controls outlined therein over the exportation of potatoes from Canada to the United States.

"In view of the adverse effect which unrestricted imports of Canadian potatoes would have on the potato programs of the United States and the fact that it is anticipated that the Canadian proposal will substantially reduce the quantity of potatoes which would otherwise be imported into the United States, and in the interest of

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" [1] 46 Stat. 687."

international trade between the United States and Canada and other considerations, the United States Government assures the Canadian Government that it will not hereafter impose any quantitative limitations or fees on Canadian potatoes of the 1948 crop imported into the United States under the system of regulating the movement of potatoes to the United States outlined in the Canadian proposal.

"The Government of the United States also wishes to inform the Canadian Government with respect to that Government's proposal to guarantee a floor price to certain commercial growers in the Maritime Provinces, that in the opinion of the Treasury Department, the operation of such a proposal as outlined by the Canadian Government would not be considered as a payment or bestowal, directly or indirectly, of any bounty or grant upon the manufacture, production, or export of the potatoes concerned and no countervailing duty would, therefore, be levied, under the provisions of Section 303, Tariff Act of 1930, as a result of such operation of the proposal on potatoes imported from Canada.

"The United States Government agrees that your note under reference, together with this reply, will constitute an agreement on this subject.

"Accept, Excellency, the renewed assurances of my highest consideration.

"ROBERT A. LOVETT
"Acting Secretary of State of the United States of America

"His Excellency
"HUME WRONG,
"Ambassador of Canada."

Treaties and Other International Acts Series 1896, Department of State, Publication 3474.

WILBURN BOAT CO. ET AL. *v.* FIREMAN'S FUND INSURANCE CO.

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

No. 7. Argued October 14–15, 1954.—Decided February 28, 1955.

Under a policy of marine insurance, the owners of a small houseboat used for commercial carriage of passengers on an inland lake between Texas and Oklahoma sued the insurer to recover for the loss of the boat by fire while moored on the lake. The insurer defended on the ground of alleged breaches of warranties against sale, transfer, assignment, pledge, hire, charter or use of the boat for commercial purposes without the insurer's written consent. Claiming that the policy had been made and delivered in Texas, the owners urged that the case was controlled by Texas law, under which no breach of the provisions of a fire insurance policy is a defense to any suit unless the breach contributes to the loss. *Held:* The case is remanded for trial under appropriate state law. Pp. 311–321.

(a) Since the insurance policy here sued on is a maritime contract, the Admiralty Clause of the Constitution brings it within federal jurisdiction. Pp. 313–314.

(b) There is no statutory or judicially established federal admiralty rule governing the warranties here involved. Pp. 314–316.

(c) This Court declines to establish such a rule. Pp. 316, 319–320.

(d) In the absence of such a federal admiralty rule, this case is governed by appropriate state law. Pp. 316–319, 320–321.

201 F. 2d 833, reversed and remanded.

Theodore G. Schirmeyer and *Mark Martin* argued the cause for petitioners. On the brief were *Mr. Schirmeyer, Hobert Price* and *Alexander Gullett.*

Edward B. Hayes argued the cause and filed a brief for respondent.

Leonard J. Matteson and *Ezra G. Benedict Fox* filed a brief for the American Institute of Marine Underwriters, as *amicus curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises questions concerning the power of States to regulate the terms and conditions of marine insurance contracts.

Glenn, Frank and Henry Wilburn, merchants in Denison, Texas, bought a small houseboat to use for commercial carriage of passengers on nearby Lake Texoma, an artificial inland lake between Texas and Oklahoma. The respondent Fireman's Fund Insurance Company insured the boat against loss from fire and other perils. While moored on the lake the boat was destroyed by fire. Following respondent's refusal to pay for the loss, this suit was brought in a Texas state court by the Wilburns and by their wholly owned corporation, the Wilburn Boat Company, to which the boat's legal title had been transferred. After removal of the case to the United States District Court because of diversity, respondent answered admitting issuance of the policy, payment of premiums and destruction of the boat. Liability was denied however because of alleged breaches of printed policy terms or "warranties" providing that, without written consent of the company, the boat could not be sold, transferred, assigned, pledged, hired or chartered, and must be used solely for private pleasure purposes.[1] The case was submitted on stipulated facts supplemented by oral testimony. Contending that the evidence showed the policy contract to have been made and delivered in Texas, petitioners urged that all questions concerning

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[1] "It Is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the Assurers."

"Warranted by the Assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this Policy and shall not be hired or chartered unless permission is granted by endorsement hereon."

alleged policy breaches were controlled by Texas law. If Texas law does govern, the policy provision against pledging may be wholly invalid.[2] Furthermore no breach by the insured of the provisions of a fire insurance policy is a defense to any suit under Texas law unless the breach contributes to the loss.[3] Without finding whether the policy had been made and delivered in Texas, the court refused to give that State's law any effect at all, holding that since a marine policy is a maritime contract, federal admiralty law—not state law—governed.[4] The court went on to hold that there is an established admiralty rule which requires literal fulfillment of every policy warranty so that any breach bars recovery, even though a loss would have happened had the warranty been carried out to the letter. Finding that the Wilburns had breached policy provisions against transfer, pledge and

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[2] Vernon's Rev. Civ. Stat., 1936, Art. 4890: "Any provision in any policy of insurance issued by any company subject to the provisions of this law to the effect that if said property is encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

[3] Vernon's Rev. Civ. Stat., 1936, Art. 4930: "No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

[4] The District Court said: "After much consideration of the above matter, I am of the opinion that the policy involved here is a maritime contract and therefore governed by the general admiralty law and not by the law of Texas, since the policy covered the vessel on navigable waters of the United States, without as well as within the State of Texas, and I find that the waters of Lake Texoma are navigable waters of the United States."

use of the boat,[5] the District Court entered judgment for the insurance company. Approving the District Court's actions in all respects, the Court of Appeals affirmed, saying that "It is the settled doctrine that a marine contract of insurance is 'derived from' is 'governed by', and is a 'part of' the general maritime law of the world." 201 F. 2d 833, 837. Importance of the questions involved prompted us to grant certiorari. 347 U. S. 950.[6]

Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. *Insurance Co.* v. *Dunham,* 11 Wall. 1. But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule. In the field of maritime contracts[7] as in that of maritime torts,[8] the National Government has left much regulatory power in the States. As later

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[5] There was evidence that prior to the loss the company had notice that the boat was constantly used for commercial purposes. Because of this petitioners urged that the company had waived the policy provision against such use and was also estopped to plead it. Questions involved in these contentions remain wholly open for consideration by the District Court in any new trial that may be had.

[6] The Court of Appeals assumed that if any state law applied it was that of Texas. The question of the appropriate state law is not before us, however, and we express no opinion on that aspect of the case. Cf. *Watson* v. *Employers Liability Assur. Corp.,* 348 U. S. 66. Likewise we are not concerned at this time with whether the District Court's holdings that the Wilburns' transactions constituted breaches, and that the breaches had not been waived by the company, would be correct holdings under state law.

[7] See, *e. g., The Lottawanna,* 21 Wall. 558; *Madruga* v. *Superior Court,* 346 U. S. 556. But cf. *Union Fish Co.* v. *Erickson,* 248 U. S. 308.

[8] See, *e. g., Just* v. *Chambers,* 312 U. S. 383; *The Hamilton,* 207 U. S. 398. But cf. *Pope & Talbot* v. *Hawn,* 346 U. S. 406; *Butler* v. *Boston & Savannah S. S. Co.,* 130 U. S. 527, 557–558.

318107 O - 55 - 26

discussed in more detail, this state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.

Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. See, *e. g., Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239. Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?

The only decision of this Court relied on by the Court of Appeals to support its holding that there is an established admiralty rule requiring strict fulfillment of marine insurance warranties was *Imperial Fire Insurance Co.* v. *Coos County,* 151 U. S. 452. There, because of a breach of warranty, an insurance company was relieved of liability for loss of a courthouse by fire, and this Court said it was immaterial whether the breach contributed to the loss. But no question of marine insurance was remotely involved nor was there any reliance on a marine insurance rule. Writing its own "general commercial law," as was the custom in diversity cases prior to *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, this Court in the *Coos County* case simply followed a general doctrine commonly applied to warranties in all types of insurance.[9] A mere

[9] See, *e. g., Phoenix Life Ins. Co.* v. *Raddin,* 120 U. S. 183, 189–190.

cursory examination of the cases, state and federal, will disclose that through the years this common-law doctrine, when accepted, has been treated not as an admiralty rule but as a general warranty rule applicable to many types of contracts including marine and other insurance.[10] There are very few federal cases on marine insurance in which the strict breach of warranty rule has even been considered. And only two circuits appear to have thought of the rule as a part of the general admiralty law.[11] On the contrary, other circuit court decisions, including the ones relied on in those few cases holding the rule to be one of federal admiralty, seem to indicate that state law was followed in applying the rule [12] or that the question was decided as one of "general commercial law," a uniform practice during the era of *Swift* v. *Tyson,* 16 Pet. 1.[13] This Court did say in one marine insurance case that warranties "must be strictly and literally performed." *Hazard's Administrator* v. *New England Marine Ins. Co.,* 8 Pet. 557, 580. But there is not the slightest indication that this statement referred to a federal admiralty rule and the Court in fact expressly followed and applied Massachusetts law to decide another question in that very case.

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[10] See, *e. g.,* cases collected in 87 A. L. R. 1074; L. R. A. 1918B, 429; 34 L. R. A. (N. S.) 563; 11 L. R. A. (N. S.) 981; 29 Am. Jur., Insurance, § 529 *et seq.*

[11] *Aetna Ins. Co.* v. *Houston Oil & Transport Co.,* 49 F. 2d 121 (1931); *Home Ins. Co.* v. *Ciconett,* 179 F. 2d 892 (1950).

[12] *Gelb* v. *Automobile Ins. Co.,* 168 F. 2d 774; *Levine* v. *Aetna Ins. Co.,* 139 F. 2d 217; *Shamrock Towing Co.* v. *American Ins. Co.,* 9 F. 2d 57. See also *United States Gypsum Co.* v. *Insurance Co. of North America,* 19 F. Supp. 767. See Goulder, Evolution of the Admiralty Law in America, 5 Am. Lawyer 314.

[13] *E. g., Canton Ins. Office, Ltd.* v. *Independent Transp. Co.,* 217 F. 213; *Whealton Packing Co.* v. *Aetna Ins. Co.,* 185 F. 108; *Robinson* v. *Home Ins. Co.,* 73 F. 2d 3; *Fidelity-Phenix Ins. Co.* v. *Chicago Title & Trust Co.,* 12 F. 2d 573.

Whatever the origin of the "literal performance" rule may be,[14] we think it plain that it has not been judicially established as part of the body of federal admiralty law in this country. Therefore, the scope and validity of the policy provisions here involved and the consequences of breaching them can only be determined by state law[15] unless we are now prepared to fashion controlling federal rules.

The whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties. The control of all types of insurance companies and contracts has been primarily a state function since the States came into being. In 1869, this Court held in *Paul* v. *Virginia,* 8 Wall. 168, that States possessed regulatory power over the insurance business and strongly indicated that the National Government did not have that power. Three years later, it was first authoritatively decided in *Insurance Co.* v. *Dunham, supra,* that federal courts could exercise "jurisdiction" over marine insurance contracts. In 1894, years after the *Dunham* holding, this Court applied the doctrine of *Paul* v. *Virginia* and held that States could regulate marine insurance the same as any other insurance. *Hooper* v. *California,* 155 U. S. 648. Later, the power of States to regulate marine insurance was reaffirmed in *Nutting* v. *Massachusetts,* 183 U. S. 553. This constitutional doctrine carrying implications of exclusive state power to regulate all types of insurance contracts remained until 1944 when this Court decided *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533. Thus it is clear that at least until 1944 this Court has always

[14] See Vance, The History of the Development of the Warranty in Insurance Law, 20 Yale L. J. 523; Patterson, Warranties in Insurance Law, 34 Col. L. Rev. 595.

[15] *The Hamilton,* 207 U. S. 398, and cases there cited.

treated marine insurance contracts, like all others, as subject to state control.[16] The vast amount of insurance litigation in state courts throughout our history also bears witness that until recently state legislatures and state courts have treated marine insurance as controlled by state law to the same extent as all other insurance.[17] This is aptly illustrated by a Massachusetts case decided in 1893 which expressly held a generally worded statute of that State relating to warranties to be applicable to marine insurance companies equally with other insurance companies. *Durkee* v. *India Mutual Ins. Co.,* 159 Mass. 514, 34 N. E. 1133.

Not only courts, but Congress, insurance companies, and those insured have all acted on the assumption that States can regulate marine insurance. In the Merchant Marine Act of 1920, Congress recognized that marine insurance companies were operating under state laws.[18] Then, following a three-year study of marine insurance, Congress in 1922 passed a law regulating *all* types of insurance in the District of Columbia.[19] This enactment generally referred to as the District of Columbia Model Marine Insurance Act, had the backing of insurance companies generally and was hailed as a model which it was hoped States would copy. Because of a provision in the bill as offered relating to "policy forms and conditions," the bill was first criticized by a national association of shipowners but was later ap-

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[16] For cases subsequent to 1944 holding that States could regulate insurance, see *Robertson* v. *California,* 328 U. S. 440; *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408.

[17] See cases collected in 9 L. Ed. 1123; 22 L. Ed. 216; 42 L. Ed. 113; 9 A. L. R. 1314; 13 A. L. R. 893; 43 A. L. R. 222; L. R. A. 1917C, 730; L. R. A. 1916F, 1171; 10 L. R. A. (N. S.) 742; 36 Am. St. Rep. 854; 29 Am. Jur., Insurance, §§ 227–237, 758–785, 1032–1051, 1198–1224; note 10, *supra.*

[18] 41 Stat. 1000, 46 U. S. C. § 885 (a)(2).

[19] 42 Stat. 408; D. C. Code, 1951, § 35–1101 *et seq.*

proved after the criticized provision was removed.[20] Hearings on the bill make it plain that shipowners and marine insurance companies recognized that marine insurance was then, and would continue to be, regulated by the States. This model bill which it was hoped would serve as a pattern for States to follow was prompted in part by widespread doubt created by *Paul* v. *Virginia* and *Hooper* v. *California* that the Federal Government could enter the field at all.[21] Again in 1935 marine insurance was discussed in congressional hearings in connection with the Limitation of Liability Act. 49 Stat. 1479, 46 U. S. C. §§ 181–196. There representatives of shipowners strongly opposed regulation of marine insurance by federal authority, arguing that it was better for the States to retain their regulatory function.[22] Finally, in 1944 and 1945, Congress had before it for consideration bills specifically designed to authorize States to continue to regulate the business of insurance. At the very beginning of extensive hearings on these bills the Committee's attention was directed to that part of this Court's opinion in *Hooper* v. *California* deciding that States could regulate the marine insurance business the same as they could regulate other kinds of insurance businesses.[23] Again and again the Committee was reminded of the *Paul* and *Hooper* cases which together showed that States had previously been

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[20] Hearings before Senate Committee on Commerce on S. 210, 67th Cong., 1st Sess. 111, 112, 213.

[21] *Id.*, at 20–30. See also S. Rep. No. 228, 67th Cong., 1st Sess.; H. R. Rep. No. 582, 67th Cong., 2d Sess.

[22] Hearings before House Committee on Merchant Marine and Fisheries on H. R. 4550, 74th Cong., 1st Sess. 124 *et seq.*

[23] Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362, H. R. 3269, H. R. 3270, 78th Cong., 1st Sess. 7. Attention was also called to *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, and other cases which held that States had power to bar policy provisions deemed contrary to the public interest and compel inclusion of provisions deemed to be in the public welfare.

regulating marine insurance as well as all other types. Passage of the bill followed *United States* v. *South-Eastern Underwriters Assn., supra,* holding that, despite the constitutional doctrine embodied in the *Paul* v. *Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the *South-Eastern* case, however, all the opinions had emphasized the historical fact that States had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue. Accordingly, the Act contains a broad declaration of congressional policy that the continued regulation of insurance by the States is in the public interest, and that silence on the part of Congress should not be construed to impose any barrier to continued regulation of insurance by the States.[24]

The hearings on the McCarran Act reveal the complexities and difficulties of an attempt to unify insurance law on a nationwide basis, even by Congress. Courts would find such a task far more difficult. Congress in passing laws is not limited to the narrow factual situation of a particular controversy as courts are in deciding lawsuits. And Congress could replace the presently functioning state regulations of marine insurance by one comprehensive Act. Courts, however, could only do it piecemeal, on a case-by-case basis. Such a creeping approach would result in leaving marine insurance largely unregulated for years to come.[25]

In this very case, should we attempt to fashion an admiralty rule governing policy provisions, we would at

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[24] 59 Stat. 33, 15 U. S. C. § 1011.

[25] For the multitudinous insurance regulations States have found necessary after long experience, see, *e. g.,* McKinney's N. Y. Laws, Insurance Law; La. Rev. Stat., 1950, Title 22; Vernon's Tex. Rev. Civ. Stat., 1936, Arts. 4679–5068b.

once be faced with the difficulty of determining what should be the consequences of breaches. We could adopt the old common-law doctrine of forfeiting all right of recovery in the absence of strict and literal performance of warranties, but that is a harsh rule.[26] Most States, deeming the old rule a breeder of wrong and injustice, have abandoned it in whole or in part. But that has left open the question of what kind of new rule could be substituted that would be fair both to insurance companies and policyholders. Out of their abundant broad experience in regulating the insurance business, some state legislatures have adopted one kind of new rule and some another.[27] Some States for example have denied companies the right to forfeit policies in the absence of an insured's bad faith or fraud. Other States have thought this kind of rule inadequate to stamp out forfeiture practices deemed evil. The result, as this Court has pointed out, has been state statutes like that of Texas which "go to the root of the evil" and forbid forfeiture for an insured's breach of policy terms unless the breach actually contributes to bring about the loss insured against. *Northwestern National Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 253–254. Thus there are a number of other possible rules from which this Court could fashion one for admiralty. But such a choice involves varied policy considerations and is obviously one which Congress is peculiarly suited to make. And we decline to undertake the task. See *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 285.

Under our present system of diverse state regulations, which is as old as the Union, the insurance business has

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[26] For criticisms of the rule see note 14, *supra*.

[27] 4 Couch, Cyclopedia of Insurance Law, § 819 *et seq.*; 12 Appleman, Insurance Law and Practice, § 7251 *et seq.* For instances where state courts have relaxed the rule of their own accord see 4 Appleman, Insurance Law and Practice, § 2695; 12 *id.*, § 7354.

become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted.[28] We, like Congress, leave the regulation of marine insurance where it has been—with the States.[29]

The judgments of the Court of Appeals and the District Court are reversed and the cause is remanded to the District Court for a trial under appropriate state law.

It is so ordered.

MR. JUSTICE FRANKFURTER, concurring in the result.

This case concerns a marine insurance policy covering a small houseboat yacht, inappropriately named *The Wanderer,* plying the waters of Lake Texoma, an artificial inland lake between Texas and Oklahoma. The coverage of the policy was specifically restricted to *The Wanderer's* trip to and use on that lake "solely for private pleasure purposes."* After *The Wanderer* was destroyed by fire while lying idle on Lake Texoma, it was discovered that certain warranties of the insurance policy had been

[28] Congress has made certain provisions in connection with war risk insurance. 64 Stat. 773, 46 U. S. C. §§ 1281–1294. And to a very limited extent it has authorized governmental agencies to regulate policies and insurance companies which are insuring vessels in which the Government has some interest. 41 Stat. 992, 46 U. S. C. § 868; 52 Stat. 969, 46 U. S. C. §§ 1271–1279; 55 Stat. 243, 50 U. S. C. App. § 1273.

[29] It is faintly contended that the Federal Constitution forbids States to regulate marine insurance, even where Congress acquiesces or expressly consents. This contention is so lacking in merit that it need not be discussed.

*The yacht had been purchased by the Wilburns while at Greenville, Mississippi. The policy had covered port risks at the Greenville yacht basin, the river voyage to Denison, Texas, and the overland "skid" around the dam onto the lake. The policy contemplated that *The Wanderer* would be "locked through to Texoma Lake," but there are no locks permitting water passage onto the lake.

ignored by petitioner. Under a uniform rule of admiralty law governing breach of such warranties, petitioner probably would be unable to recover on the policy. Texas statute law, however, might excuse the breaches of warranty, although this is by no means clear. Our problem is whether this situation—involving a marine policy such as is the basis of litigation—calls for a uniform rule throughout the country applicable to breaches of warranty of all similar marine insurance contracts.

There is no doubt that as to some matters affecting maritime affairs the States are excluded from indulging in variant state policies. *E. g., Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *The Lottawanna,* 21 Wall. 558. Equally, there is no doubt that some matters are so predominantly restricted in the range of their significance that a uniform admiralty rule need not be recognized or fashioned. *E. g., Madruga* v. *Superior Court,* 346 U. S. 556; *C. J. Hendry Co.* v. *Moore,* 318 U. S. 133; *The Hamilton,* 207 U. S. 398. Therefore the question, and the only question now to be decided, is whether the demands of uniformity relevant to maritime law require that marine insurance on a houseboat yacht brought to Lake Texoma for private recreation should be subject to the same rules of law as marine insurance on a houseboat yacht "confined," after arrival, to the waters of Lake Tahoe or Lake Champlain. The provision of the policy whereby the insured warranted "that the vessel be confined to Lake Texoma" conveys the emphasis of the situation—the essentially localized incidence of the transaction despite the interstate route followed in reaching the circumscribed radius within which the yacht was to move. It is reasonable to conclude that the interests concerned with shipping in its national and international aspects are substantially unconcerned with the rules of law to be applied to such limited situations. I join in a result restricted within this compass.

Unfortunately, for reasons that I do not appreciate, the Court's opinion goes beyond the needs of the problem before it. Unless I wholly misconceive that opinion, its language would be invoked when cases so decisively different in degree as to be different in kind come before this Court. It seems directed with equal force to ocean-going vessels in international maritime trade, as well as coastal, intercoastal and river commerce. Is it to be assumed that were the *Queen Mary*, on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyd's policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas? Such an assumption, I am confident, would not prevail were decision necessary. The business of marine insurance often may be so related to the success of many manifestations of commercial maritime endeavor as to demand application of a uniform rule of law designed to eliminate the vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers. See *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487, 493; *Calmar Steamship Corp.* v. *Scott*, 345 U. S. 427, 442–443. It cannot be that by this decision the Court means suddenly to jettison the whole past of the admiralty provision of Article III and to renounce requirements for nationwide maritime uniformity, except insofar as Congress has specifically enacted them, in the field of marine insurance.

It is appropriate to recall that the preponderant body of maritime law comes from this Court and not from Congress. Judicial enforcement of nationwide rules regarding marine insurance is, as my brother REED cogently shows, deeply rooted in history. What reason is there for abruptly turning over, pending action by Congress, to the crazy-quilt regulation of the different States what so long has been the business of the courts?

As is true of other maritime interests, however, the demand for uniformity is not inflexible and does not pre-

clude the balancing of the competing claims of state, national and international interests. The process and some of the relevant considerations here are not unlike those involved when the question is whether a State, in the absence of congressional action, may regulate some matters even though aspects of interstate commerce are affected. In rejecting abdication of all responsibility by this Court for uniformities in marine insurance and its complete surrender to the States, one is not required to embrace another absolute, complete absorption by this Court of the field of marine insurance and entire exclusion of the States. It is not necessary to assert that uniformity, if it be required in any case, is required in all cases cognizable in admiralty—whether the craft was for business or pleasure, touched in five states, five nations or never left the confines of an inland lake. The deceptive lure of certainty and comprehensive symmetry should not be permitted to conceal the fact that admiralty's expansion beyond "the ebb and flow of the tides" has been a response to demands more inclusive than those for mechanical uniformity.

Under the distribution of power between national authority and local law, admiralty has developed for more than a hundred years by rulings of the Court, but not by absolutes either of abstention or extension. While not able to join the dissenters, I can only hope that what are essentially *dicta* will not be found controlling when situations which have not called them forth, and to which they are not applicable, come before the Court for adjudication.

MR. JUSTICE REED, with whom MR. JUSTICE BURTON joins, dissenting.

The opinion of the Court states that "the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?"

By question (1) the Court means, as its opinion shows, a federal admiralty rule that a warranty of an insured is to be strictly enforced with the result that a breach of the warranty relieves the insurer of liability for loss although the breach was not shown to have contributed to the loss.

The Court concludes that the literal performance rule has not been established by statute or by judicial decision. It acknowledges that a maritime insurance policy is a maritime contract brought under federal jurisdiction by the Admiralty Clause of the Constitution. *Insurance Co.* v. *Dunham,* 11 Wall. 1. And so it recognizes that the power "to fashion controlling federal rules" rests in the Federal Government—in Congress and the federal courts. However, the Court determines that in the absence of congressional action it will leave the formulation of rules governing marine insurance policies to the States. It applies this conclusion to the effect of a breach of warranty in a maritime insurance policy.

I disagree with both conclusions. Our admiralty laws, like our common law, came from England. As a matter of American judicial policy, we tend to keep our marine insurance laws in harmony with those of England. *Queen Ins. Co.* v. *Globe Ins. Co.,* 263 U. S. 487, 493; *Calmar Steamship Corp.* v. *Scott,* 345 U. S. 427, 442–443. Before our Revolution, the rule of strict compliance with maritime insurance warranties had been established as the law of England.[1] That rule persists. While no case of this Court has been cited or found that says specifically that the rule of strict compliance is to be applied in admiralty and maritime cases, that presupposition has been consistently adopted as the basis of reasoning from our

[1] *Bean* v. *Stupart,* 1 Doug. 11; *De Hahn* v. *Hartley,* 1 T. R. 343 (each reported 99 Eng. Rep., full reprint, 9 and 1130, respectively); 2 Arnould, Marine Insurance (14th ed.), c. 20.

earliest days.[2] Other courts have been more specific.[3] No case holds to the contrary.

I am inclined to think that Congress or this Court might well consider modifying the strict rule insofar as the breached warranty does not contribute to the loss. But since the Court concludes that it will not undertake the

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[2] *Hodgson* v. *The Marine Ins. Co. of Alexandria,* 5 Cranch 100, 109:

"The insurance in this case being general, as well for the parties named as 'for all and every other person or persons to whom the vessel did or might appertain,' and containing no warranty of neutrality, belligerent as well as American property was covered by it."

Livingston v. *The Maryland Ins. Co.,* 6 Cranch 274, 278:

"The warranty, in this case, is in these words; 'warranted, by the assured, to be American property, proof of which to be required in the United States only.'

"The interest insured is admitted to be American property, in the strictest sense of the term; but it is contended, that Baruro, a Spanish subject, had an interest in the cargo, which falsifies the warranty.

"Whether Baruro could be considered as having an interest in the cargo, or not, is a question of some intricacy, which the court has not decided; and which, if determined in the one way or the other, would not affect the warranty; because, the assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral."

Hazard's Administrator v. *New Eng. Mar. Ins. Co.,* 8 Pet. 557, 570; *Calmar Steamship Corp.* v. *Scott,* 345 U. S. 427, 432–436.

[3] *Ogden* v. *Ash,* 1 Dall. 174 (Common Pleas of Philadelphia County); *Martin* v. *Delaware Ins. Co.,* 16 Fed. Cas. No. 9,161, p. 894 (C. C. D. Pa.); *Snyder* v. *Home Ins. Co.,* 133 F. 848 (D. C. S. D. N. Y.); *Whealton Packing Co.* v. *Aetna Ins. Co.,* 185 F. 108 (C. A. 4th Cir.); *Canton Ins. Office, Ltd.* v. *Independent Transp. Co.,* 217 F. 213 (C. A. 9th Cir.); *Shamrock Towing Co.* v. *American Ins. Co.,* 9 F. 2d 57, 60 (C. A. 2d Cir.); *Aetna Ins. Co.* v. *Houston Oil & Transp. Co.,* 49 F. 2d 121 (C. A. 5th Cir.); *Robinson* v. *Home Ins. Co.,* 73 F. 2d 3 (C. A. 5th Cir.); *Levine* v. *Aetna Ins. Co.,* 139 F. 2d 217 (C. A. 2d Cir.); *Home Ins. Co.* v. *Ciconett,* 179 F. 2d 892 (C. A. 6th Cir.); *Red Top Brewing Co.* v. *Mazzotti,* 202 F. 2d 481 (C. A. 2d Cir.); *United States Gypsum Co.* v. *Insurance Co.,* 19 F. Supp. 767 (D. C. S. D. N. Y.).

task,[4] it is unnecessary for me to go farther than to say that in the absence of federal amelioration I would follow the established rule of holding the insured to his warranty.[5]

This brings me to the crucial phase of the Court's decision which, so the Court says, "leave[s] the regulation of marine insurance where it has been—with the States." This is the dominant issue here, and the Court's decision strikes deep into the principle of a uniform admiralty law and will have the result of unduly burdening maritime commerce. This is the issue presented by the petition for certiorari and argued in petitioners' brief on the merits.

One rule of law stands unquestioned. That is that all courts, state and federal, which have jurisdiction to enforce maritime or admiralty substantive rights must do so according to federal admiralty law.[6] See particularly the

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[4] Compare *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 285.

[5] The facts in this case are that the boat was destroyed by fire of unknown origin while moored in Lake Texoma. "The policy provides that the insurance shall be void in case the interest insured shall be sold, assigned, transferred, or pledged without the previous consent in writing of the assurers, and further that it is warranted by the assured that the vessel shall be used solely for private pleasure purposes and shall not be hired or chartered unless permission is granted by indorsement on the policy." 201 F. 2d, at 834. All these warranties were breached. The insurer might reasonably have required their inclusion before issuing the policy.

[6] *Watts* v. *Camors,* 115 U. S. 353; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 243. "Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them." *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 409–410; *Madruga* v. *Superior Court,* 346 U. S. 556, 561; *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 413–419, and conc. 423 *et seq.* Cf. *The Armar,* [1954] 2 Lloyd's Rep. 95, 101 (N. Y. Sup. Ct.). See 1 Benedict, Admiralty (6th ed.), p. 55, n. 77.

excellent discussion by Judge Magruder in *Doucette* v. *Vincent,* 194 F. 2d 834, 841 *et seq.* The issue of an insurer's liability upon an insured's broken warranty is clearly a matter of substantive law.

The Court relies upon *Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648; and *Nutting* v. *Massachusetts,* 183 U. S. 553, as holding that "States could regulate marine insurance the same as any other insurance." Those cases only approve provisions of state law that require agents and companies to take out licenses and conform to various conditions preliminary to doing business.[7] The Court also relies on congressional action and inaction, but the fact that Congress has regulated the organization, taxing and licensing of fire, casualty and marine insurance companies in the District of Columbia, and has recognized the existence of marine companies under the Merchant Marine Act of 1920, has no relevancy to whether the provisions of state law should control the effect to be given to warranties in marine insurance policies. Nor does the McCarran Act indicate that States may legislate to change fundamentally maritime insurance law.[8] It was so decided in *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 413. The answer as to whether state or federal law governs marine insurance contracts lies in the nature of the federal admiralty jurisdiction.

The Constitution, Art. III, § 2, provides that "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." The First Congress enacted that the district courts "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the

[7] In *Durkee* v. *India Mutual Ins. Co.,* 159 Mass. 514, 34 N. E. 1133, the issue of the power of a State to change the admiralty law was not touched upon.

[8] 59 Stat. 33, 15 U. S. C. §§ 1011, 1012.

common law is competent to give it . . . ." [9] In this manner national control was asserted over maritime litigation. It was needed because the Republic bordered a great length of the Atlantic littoral and the navigable waters furnished the best avenue of transportation.

Although congressional authority over maritime trade was not expressly granted by the Constitution, the grant of admiralty jurisdiction together with the Necessary and Proper Clause has been found adequate to enable Congress to declare the prevailing maritime law for navigable waters throughout the Nation.[10] The Commerce Clause aids where interstate commerce is affected, but has not the scope of "navigable waters." [11] Congressional

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[9] Judiciary Act of 1789, § 9, 1 Stat. 77. There has been no intentional change in meaning by the revision of 1948, 28 U. S. C. (Supp. V, 1952) § 1333, which reads:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

The Reviser's Note states:

"The 'saving to suitors' clause in sections 41 (3) and 371 (3) of title 28, U. S. C., 1940 ed., was changed by substituting the words 'any other remedy to which he is otherwise entitled' for the words 'the right of a common-law remedy where the common law is competent to give it.' The substituted language is simpler and more expressive of the original intent of Congress and is in conformity with Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity."

[10] *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443; this includes power to change the admiralty procedure to trial by jury, *id.*, at 459–460; *In re Garnett*, 141 U. S. 1, 12; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215; *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 385; *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 138; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244; *O'Donnell* v. *Great Lakes Dredge Co.*, 318 U. S. 36, 39; *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334, 337.

Compare *The City of Norwalk*, 55 F. 98, 105.

[11] *The Belfast*, 7 Wall. 624, 640. Cf. *O'Donnell* v. *Great Lakes Dredge Co.*, n. 10, *supra*.

318107 O - 55 - 27

power to rest exclusive jurisdiction in the federal courts where, as here, the constitutionally delegated judicial authority exists, is established. *The Moses Taylor,* 4 Wall. 411, 429. The remedy preserved by the savings clause of the Judiciary Act of 1789, "is not a remedy in the common-laws courts . . . but a common-law remedy." *Id.,* at 431. The meaning of the quoted clause becomes plainer when read with the state statute which *The Moses Taylor* held unconstitutional. That statute authorized a "proceeding against the vessel," a strictly *in rem* proceeding in admiralty, *id.,* at 412, 413, different from the common-law action *in personam.* Consequently, when a California resident brought an *in rem* proceeding in a California court, he was pursuing an admiralty remedy, not a common-law remedy. This Court, therefore, held the case outside the savings clause of the ninth section of the Judiciary Act of 1789.[12]

On the other hand, a state court was held to have jurisdiction to sell a vessel to enforce a lien in *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638, where the suit was against the owner, *in personam,* although in equity for foreclosure of a possessory lien. "[T]he remedy chosen by the plaintiff was the detention of the raft for his towage charges." *Id.,* at 644. As this was a state-approved remedy in the common law, the use of state equity procedure to enforce the lien was held to be in accord with the reservation of a common-law remedy from the exclusive jurisdiction of admiralty.[13] Thus, by

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[12] The same rule was applied in efforts to enforce state-created liens in state courts by proceedings *in rem* against the boat in *The Robert W. Parsons,* 191 U. S. 17, 37, and in *The Glide,* 167 U. S. 606, 616–618, 623–624.

[13] Mr. Justice Brown wrote for the Court:

"The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be

saving a suitor's common-law remedy, Congress has created by § 9 of the Judiciary Act of 1789, now 28 U. S. C. (Supp. V, 1952) § 1333, only a limited exclusive jurisdiction. The state courts may furnish not only a common-law remedy existing at the time of the adoption of the Constitution, for substantive admiralty rights, but also new judicial remedies created by statute; that is, whatever remedy is not strictly *in rem*.[14]

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in rem against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, *or* if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute . . . of a common law remedy. The suit in this case being one in equity to enforce a common law remedy, the state courts were correct in assuming jurisdiction." 177 U. S., at 648.

See also *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303, 308; *C. J. Hendry Co.* v. *Moore*, 318 U. S. 133, 137; *The Moses Taylor*, 4 Wall. 411, 427.

[14] *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 123–124: "The 'right of a common law remedy', so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the States in the substantive admiralty law [*i. e.*, at p. 124, where it was said of state statutes held unconstitutional, they were "invalid, because their provisions were held to modify or displace essential features of the substantive maritime law"], but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais*, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 644 *et seq.*; *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303. A State may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction. *The Hine* v. *Trevor*, 4 Wall. 555; *The Glide*, 167 U. S. 606. But otherwise, the State, having concurrent jurisdiction, is free to adopt such remedies,

State authority, however, although it may provide remedies, does not extend to changing the general substantive admiralty law. That is the maritime law existing as a body of law enforceable in admiralty. The extent of the States' power to grant rights arising from maritime incidents is not subject to definition. It may vary as the course or manner of navigation or commerce changes. It exists in some circumstances, see *Just* v. *Chambers*, 312 U. S. 383, 388, and, as indicated both in the majority and minority opinions in the *Jensen* case, 244 U. S. 205, must be determined in each situation.[15] The principles which control the validity of an assertion of state power in the admiralty sphere are, however, clear. State power may be exercised where it is complementary to the general admiralty law. It may not be exercised where it would have the effect of harming any necessary or desirable uniformity.[16] The cases decided by this Court make it plain that state legislation will not be permitted to burden maritime commerce with variable rules of law that destroy that uniformity.[17]

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and to attach to them such incidents, as it sees fit. New York, therefore, had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the State, which is contained in a contract made in New York and which, by its terms, is to be performed there."

See *Steamboat Company* v. *Chase*, 16 Wall. 522, 530 *et seq.*; *Panama R. Co.* v. *Vasquez*, 271 U. S. 557, 560–561.

[15] Cf. *Cooley* v. *Board of Wardens*, 12 How. 299, 316; *Standard Dredging Corp.* v. *Murphy*, 319 U. S. 306, 309; *Caldarola* v. *Eckert*, 332 U. S. 155, 158. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 410, 418.

[16] *Levinson* v. *Deupree*, 345 U. S. 648.

[17] *Kelly* v. *Washington*, 302 U. S. 1, 15; *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 386–387, and cases cited; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 381 *et seq.*, and cases cited; *The City of Norwalk*, 55 F. 98, 106. See *Madruga* v. *Superior Court*, 346 U. S. 556, 561. 1 Benedict, Admiralty (6th ed.), p. 53. Cf. *Minnesota Rate Cases*, 230 U. S. 352, 399.

Since Congress has power to make federal jurisdiction and legislation exclusive, the situation in admiralty is somewhat analogous to that governing state action interfering with interstate commerce. In the absence of congressional direction, it is this Court that must bear the heavy responsibility of saying when a state statute has burdened the required federal uniformity.[18] It is one thing to allow the States to add a remedy or create a new cause of action for certain incidents arising out of maritime activity. It is quite another thing to relinquish an entire body of substantive law making for a whole phase of maritime activity to the States. Such action does violence to the premise upon which the admiralty jurisdiction was constructed.[19]

It is not only in markings, lights, signals, and navigation that States are barred from legislation interfering with maritime operation. The need for a uniform rule is just as great when dealing with the effect to be given to marine insurance on boats which plough our navigable waters. A vessel moves from State to State along our coasts or rivers. State lines may run with the channel or across it. Under maritime custom an insurance policy usually covers the vessel wherever it may go. If uniformity is needed anywhere, it is needed in marine insurance. It is like the question of seaworthiness which must be controlled by one law. It presents the same problem as a state law controlling the operation of interstate boats. *Kelly* v. *Washington,* 302 U. S. 1, 15. For a State to require policies to be issued under its authority or to require extra-state policies to be interpreted by its laws

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[18] *Just* v. *Chambers,* 312 U. S. 383, 388, 392; *Kelly* v. *Washington, supra,* at 14–15. Cf. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 769. See the statement from the international standpoint in *The Lottawanna,* 21 Wall. 558, 572.

[19] Canfield, The Uniformity of the Maritime Law, 24 Mich. L. Rev. 544, 556; Stevens, Erie R. R. v. Tompkins and the Uniform General Maritime Law, 64 Harv. L. Rev. 246, 269.

burdens maritime operations unduly. Shipmasters must know how to handle their vessels to preserve their insurance. Insurers must know the risks they are assuming when they fix their premiums. What law is to govern—that of the State where the insurance contract was issued, the State of the accident, or the State of the forum? It seems an unreasonable interference with maritime activity to allow the many States to declare the substantive law of marine insurance.

The Court refuses to declare the governing maritime law on warranties in this case because it could only be done "piecemeal, on a case-by-case basis." It would prefer to await congressional enactment of a comprehensive code. But questions of contract interpretation and the effect to be given to contract provisions are questions which the Court is particularly equipped to handle. A broad legislative approach might be desirable; but in its absence we could establish a rule governing the effect to be given to breaches of warranties which would be binding on every court in the land. It is certainly not desirable to defer to the legislature of Texas or any other State which, though it can enact a comprehensive code, can make it binding only in its own State. To do so destroys the essential uniformity of the maritime law.

My understanding of the facts and legal issues and the rule to be deduced from the Court's decision forbids my joining the limited concurrence of MR. JUSTICE FRANKFURTER. The policy here is not restricted to the boat's use on Lake Texoma nor to its use in any one State. In addition to its use on the lake, the policy covered a "cruise from Greenville, Mississippi via Mississippi and Red Rivers to Denison, Texas" and then to the lake. The waters of five States were navigated before reaching the lake, which is itself an interstate body of water lying between Texas and Oklahoma. The considerations which lead me to favor a uniform rule are not changed simply

because a relatively small boat was here involved, or the number of States through which it passed were few, or because its ultimate destination was a small lake.

This state rule of law covering the incidents of marine insurance affects not only Texas or Lake Texoma but the longest voyage within the cruising capacity of *The Wanderer*. As is shown by *The Hamilton*, 207 U. S. 398, such an exercise of state power permits the States to declare the applicable laws of marine insurance even on the high seas. The event of loss must always be local, but the coverage of the policy is general.[20] When state power intrudes upon the uniformity imposed by federal law, its exercise is invalid when applied to maritime litigation whether the application occurs in litigation arising from an incident that happens on a small lake or a mighty river.

I would affirm.

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[20] See *The City of Norwalk*, 55 F. 98, 106.

BOUDOIN *v.* LYKES BROTHERS STEAMSHIP CO., INC.

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

No. 406. Argued February 11, 1955.—Decided February 28, 1955.

An American seaman sued a shipowner in a Federal District Court to recover for injuries inflicted upon him by a fellow seaman who while drunk attacked him aboard the ship. On the facts of the case, the District Court found that the assailant was "a person of dangerous propensities and proclivities" at the time of the assault; that he was "a person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults"; and that he was not "equal in disposition and seamanship to the ordinary men in the calling." *Held:* The warranty of seaworthiness extends to the crew as well as to the ship and the gear; the record sustains the District Court's findings; and the findings warrant recovery for breach of the warranty of seaworthiness. Pp. 336–340.

211 F. 2d 618, reversed.

Raymond H. Kierr argued the cause for petitioner. With him on the brief was *Samuel C. Gainsburgh.*

Andrew R. Martinez argued the cause for respondent. With him on the brief were *Jos. M. Rault* and *William E. Wright.*

John J. Burns filed a brief for the American Merchant Marine Institute, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit by an American seaman against the owner and operator of an ocean freighter, the *Mason Lykes,* on which he was formerly employed. He based his claim for recovery both on negligence and on breach of the warranty of seaworthiness. The case was tried by the

court upon waiver of jury. The District Court found for the plaintiff, holding that the shipowner breached its warranty of seaworthiness and that its officers were negligent. 112 F. Supp. 177. The Court of Appeals reversed, 211 F. 2d 618. We granted certiorari to resolve a seeming conflict between that opinion and *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, decided by the Court of Appeals for the Second Circuit. 348 U. S. 814.

Plaintiff was employed in the engine department as an oiler. The ship had a deck maintenance man, named Manuel Gonzales. Plaintiff's injury was inflicted by Gonzales, who, during the course of a night's drinking party, went to plaintiff's room and took a bottle of brandy from under plaintiff's bed. Plaintiff awoke, startled; and Gonzales attacked him with the bottle, causing severe injuries.

The District Court placed liability for breach of the warranty of seaworthiness on the holding of the *Keen* case, where Judge Learned Hand wrote:

> "The warranty of seaworthiness as to hull and gear has never meant that the ship shall withstand every violence of wind and weather; all it means is that she shall be reasonably fit for the voyage in question. Applied to a seaman, such a warranty is, not that the seaman is competent to meet all contingencies; but that he is equal in disposition and seamanship to the ordinary men in the calling." 194 F. 2d, at 518.

The District Court found that Gonzales was not "equal in disposition and seamanship to the ordinary men in the calling." 112 F. Supp., at 180.

The assault by Gonzales on plaintiff occurred in the early morning of November 25, 1949. This happened during the course of a drinking party on board in which much liquor was consumed, Gonzales drinking nearly a fifth. Gonzales was, indeed, drunk when he assaulted plaintiff. The evidence is disputed; but the District

Court found that shortly after Gonzales struck plaintiff with the bottle, he returned with a large knife which he also intended to use on him. When plaintiff was taken to the ship's hospital, Gonzales created a disturbance outside—threatening the mate, trying to enter the sick bay, and offering to give blood to plaintiff for a transfusion. Those events followed on the heels of the assault.

About six hours after the assault, Gonzales was ordered to the master's cabin, where he refused to make any statement about the assault. Later he was ordered to clean the ship's hospital. Instead of doing that, he left the ship against orders. Early in the afternoon, Gonzales returned to the ship with bottles of liquor, at which time the captain apprehended him, took the bottles away, and placed him in irons—a step which the captain testified he seldom used.

The next day, November 26, Gonzales left the vessel without leave and did not return until the morning of November 28, when he was logged for disobedience of orders and fined for being absent without leave. On return of the *Mason Lykes* to the United States, Gonzales was discharged by the captain, though, since that time, he has served on respondent's vessels.

On the basis of these facts, the District Court found that Gonzales was "a person of dangerous propensities and proclivities" at the time of his assault on plaintiff; that Gonzales was "a person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults." 112 F. Supp., at 179.

We think the record does not warrant rejection of the District Court's findings and that the findings warrant recovery for breach of the warranty of seaworthiness.

The warranty of seaworthiness is a species of liability without fault. *The Osceola,* 189 U. S. 158; *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 90–94. Yet it does not

mean that the shipowner is liable for injuries "resulting from every sailors' brawl," as Judge Learned Hand put it in *Jones* v. *Lykes Bros. Steamship Co.*, 204 F. 2d 815, 816. It does not mean that the owner is liable every time a seaman gets drunk and does damage to a member of the crew. It does not mean that the owner is liable for injuries from all the fisticuffs on shipboard.

> "All men are to some degree irascible; every workman is apt to be angry when a fellow complains of his work to their common superior; and some will harbor their resentment and provoke a quarrel over it even after the lapse of several hours. Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of the 'disposition' of 'the ordinary men in the calling.'" *Jones* v. *Lykes Bros. Steamship Co., supra,* at 817.

The warranty of seaworthiness does not mean that the ship can weather all storms. It merely means that "the vessel is reasonably fit to carry the cargo." *The Silvia,* 171 U. S. 462, 464; *The Southwark,* 191 U. S. 1, 9. If it is not, the owner is liable, irrespective of any fault on his part. *The Osceola, supra; Seas Shipping Co.* v. *Sieracki, supra.*

We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other.* A seaman with a proclivity for assaulting people

*Situations involving breach of warranty of seaworthiness by reason of the disposition of a crew member have been presented in several recent decisions. Recovery was allowed in *Thompson* v. *Coastal Oil Co.*, 119 F. Supp. 838 (D. C. N. J.), rev'd on other grounds, 221 F. 2d 559. The court followed the *Keen* case in holding that a crewman who tried to murder one of his fellows with a meat cleaver was not equal in disposition to those of his calling.

In *Stankiewicz* v. *United Fruit Corp.*, 123 F. Supp. 714 (S. D. N. Y.), the court directed a verdict for defendant on a cause of

may, indeed, be a more deadly risk than a rope with a weak strand or a hull with a latent defect. The problem, as with many aspects of the law, is one of degree. Was the assault within the usual and customary standards of the calling? Or is it a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature? If it is the former, it is one of the risks of the sea that every crew takes. If the seaman has a savage and vicious nature, then the ship becomes a perilous place. A vessel bursting at the seams might well be a safer place than one with a homicidal maniac as a crew member.

We do not intimate that Gonzales is a maniac nor that that extreme need be reached before liability for unseaworthiness arises. We do think that there was sufficient evidence to justify the District Court in holding that Gonzales had crossed the line, that he had such savage disposition as to endanger the others who worked on the ship. We think the District Court was justified in concluding that Gonzales was not equal in disposition to the ordinary men of that calling and that the crew with Gonzales as a member was not competent to meet the contingencies of the voyage. We conclude that there was evidence to support the cause of action for breach of the warranty of seaworthiness. Therefore we do not reach the question of negligence.

Reversed.

MR. JUSTICE REED concurs in the result on the ground of the negligence of the ship's officers.

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action for breach of warranty of seaworthiness, on the ground that there was no evidence that the assailant was not equal in disposition to men of his calling. As noted, the same result followed in the *Jones* case, *supra*, where the court held the test of unseaworthiness had not been met where a crewman assaulted one of his fellows following an earlier argument. And see *Kelcey* v. *Tankers Co.*, 217 F. 2d 541.

Syllabus.

SECURITIES AND EXCHANGE COMMISSION *v.* DREXEL & CO.

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

No. 153. Argued February 9, 1955.—Decided February 28, 1955.

The Securities and Exchange Commission *held* to have jurisdiction under §§ 10, 11 and 12 of the Public Utility Holding Company Act of 1935 to pass on a fee to be paid by Electric Bond & Share Co. to Drexel & Co. in connection with a reorganization plan filed by its subsidiary, Electric Power & Light Corp., under § 11 (e) of the Act. Pp. 342–349.

(a) It was necessary by the terms of the Act that Bond & Share obtain the Commission's approval of the steps required of it by the plan of reorganization. P. 343.

(b) Bond & Share's exchange of its securities for new securities was a "sale" under the Act; its receipt of new securities was an "acquisition" under the Act; its cash payment in settlement of the intrasystem claims was incident to the "sale" and "acquisition"; and all three transactions were parts of the reorganization plan for which Bond & Share applied for the Commission's approval under §§ 10, 11 and 12. Pp. 343–344.

(c) The Commission has power under §§ 10, 11 and 12 to fix the fees payable by Bond & Share; and it was not precluded by the provisions of its order entered in the consolidated proceedings herein. Pp. 345–349.

(d) It is within the authority of the Commission, in the interest of orderly administration, to defer consideration of all the fees, until it has time to view the entire matter in perspective and evaluate the worth of each contribution. P. 347.

210 F. 2d 585, reversed.

William H. Timbers argued the cause for petitioner. With him on the brief were *Solicitor General Sobeloff, Myron S. Isaacs* and *Elizabeth B. A. Rogers.*

Arthur H. Dean argued the cause for respondent. With him on the brief were *Henry S. Drinker, Thomas Reath* and *John Mulford.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in the case is whether the Securities and Exchange Commission has jurisdiction to pass on a fee to be paid by Electric Bond & Share Co. to Drexel & Co. in connection with a reorganization plan filed by its subsidiary, Electric Power & Light Corp., under § 11 (e) of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. § 79a *et seq.* We hold that the Commission does have jurisdiction.

The problem arises out of the unraveling and reorganization of the vast empire of Bond & Share, pursuant to the command of the Act. The present case is one of several phases of the various reorganization plans adopted to bring the system into compliance.[1] The instant phase of this system's reorganization grew out of the filing of a voluntary plan of reorganization under § 11 (e) by Electric.

Electric owned operating subsidiaries in several States and in Mexico. The plan provided that (1) Electric would transfer to a new holding company, Middle South Utilities, Inc., its holdings in those operating subsidiaries, as well as certain other assets; (2) preferred stocks of Electric would be retired by distributing to those security holders shares of Middle South and shares of another subsidiary of Electric; (3) the remaining shares of Middle South and the other subsidiary would be distributed to

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[1] For various phases of the reorganization of this holding company system, see: (1) *Electric Bond & Share Co.*, 9 S. E. C. 978; *id.*, 12 S. E. C. 392; *id.*, 20 S. E. C. 615; *id.*, 21 S. E. C. 143; *id.*, 22 S. E. C. 866; (2) *Electric Bond & Share Co.*, 11 S. E. C. 1146, aff'd *sub nom. American Power & Light Co.* v. *Securities and Exchange Commission*, 141 F. 2d 606, 329 U. S. 90; *American Power & Light Co.*, 21 S. E. C. 191; (3) *United Gas Corp.*, 16 S. E. C. 531, aff'd *sub nom. In re United Gas Corp.*, 58 F. Supp. 501, 162 F. 2d 409; and (4) *Electric Bond & Share Co.*, 20 S. E. C. 786.

the holders of the common stock and of the warrants of Electric; and (4) Bond & Share would pay Electric $2,200,000 in settlement of intrasystem claims.

The plan filed by Electric under § 11 (e) required Bond & Share to do three things: *first,* sell or exchange its holdings of Electric stock; *second,* acquire in exchange the shares of Middle South and the other subsidiary; and *third,* pay the cash amount in settlement of the intrasystem claims. It was not sufficient for Bond & Share that Electric get approval for its plan under § 11 (e). It was also necessary by the terms of the Act that Bond & Share also get the Commission's approval of the steps required of it.

Bond & Share's exchange of its securities for the new securities was a "sale" under the Act, for "sale" includes "exchange." § 2 (a)(23). Bond & Share is a registered holding company. No "sale" of securities can be made by a registered holding company without Commission approval. That is the command of § 12 of the Act.[2] That approval is obtained, as § 12 shows,[3] by a procedure which submits the fees in connection with the sale to the scrutiny and approval of the Commission.

Bond & Share's receipt of the new securities was an "acquisition" within the meaning of the Act. § 2 (a)

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[2] Section 12 (d) provides:

"It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder."

[3] *Supra,* note 2.

(22). That "acquisition" was made subject to the jurisdiction of the Commission by § 9 (a).[4] That approval could be had only by submitting the "acquisition" to the Commission's scrutiny pursuant to § 10 of the Act, a scrutiny that includes supervision of the fees paid by the holding company in connection with the "acquisition." [5]

Bond & Share's cash payment in settlement of the intrasystem claim was incident to the "sale" under § 12 and the "acquisition" under § 10. And, as noted, all three transactions by Bond & Share were parts of the plan filed by Electric under § 11 (e).

Bond & Share, therefore, filed an application pursuant to §§ 10, 11, and 12 of the Act, asking for the Commission's approval of the transactions which the plan required of it.[6]

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[4] Section 9 (a) provides in relevant part:

"Unless the acquisition has been approved by the Commission under section 10, it shall be unlawful—

"(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to acquire, directly or indirectly, any securities or utility assets or any other interest in any business."

[5] Section 10 (b) provides in relevant part:

"If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

. . . . . .

"(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; . . . ."

[6] A petition for rehearing states that Electric is not a "public utility company" within the meaning of the Act and therefore § 12 (d) is inapplicable. We do not prejudice that position by this opinion, for whether or not Electric is a "public utility company," § 12 of the Act is concededly applicable. Section 12 (c) provides:

"It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or

The Commission consolidated the proceedings involving Electric's plan and Bond & Share's application and heard them together, and on March 7, 1949, entered one order in the consolidated proceedings, approving both. As respects Bond & Share the order said, "IT IS FURTHER ORDERED that the application-declaration of Bond and Share referred to above be and it is hereby granted and permitted to become effective." As respects the plan of Electric, the Commission in the same order gave its approval, subject to additional terms and conditions, the second of which reads:

> "That jurisdiction be and hereby is specifically reserved to determine the reasonableness and appropriate allocation of all fees and expenses and other

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instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public-utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder."

Section 12 (f) provides:

"It shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to negotiate, enter into, or take any step in the performance of any transaction not otherwise unlawful under this title, with any company in the same holding-company system or with any affiliate of a company in such holding-company system in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules and regulations thereunder."

The broad powers granted the Commission under these provisions are plainly adequate to give it the control it reserved in this case over the fees incident to the exchange of the old securities.

318107 O - 55 - 28

> remuneration incurred or to be incurred in connection with the said Plan, as amended, and the transactions incident thereto, other than the fairness and reasonableness of the fees and expenses incident to the stockholders' actions enumerated in Part II of the Plan, as amended."

It is said, however, that that reservation was "the reservation regarding . . . the fees in connection with Electric's plan under § 11, and cannot be made to supply the failure to fix or to reserve the matter of fees in the proceedings under §§ 10 and 12 in relation to which they were incurred."

There are two answers to that argument. *First,* the reservation was made in the § 10 and § 12 proceedings, for they were consolidated with the § 11 proceedings and one order entered in all three. *Second,* the order in the consolidated proceedings reserved jurisdiction over the fees and expenses incurred not only "in connection with the said Plan" but also in connection with "the transactions incident thereto." The latter obviously included the matters under § 10 and § 12, for they were the chief collateral ones before the Commission at the time. The parties so understood it, for Bond & Share and Drexel filed petitions for approval of the Drexel fee, invoking the reserved jurisdiction of the Commission. The Commission held hearings and fixed a fee for Drexel [7]

[7] Bond & Share asked that it be reimbursed by Electric for this fee. The Commission denied reimbursement, saying that Bond & Share's services in the proceedings "were not services merely designated to bring Electric into compliance with the Commission's order but were additionally, if not primarily, steps designed to simplify the Bond and Share system and Bond and Share itself at the apex of that system. . . . Any plan for the compliance of the subholding companies must necessarily have been as a step toward the ultimate resolution of Bond and Share's overall Section 11 problems which were its primary concern." Bond & Share took no step to contest that action.

which neither Drexel nor Bond & Share thought adequate.[8] The Commission applied to the District Court for approval of this and other fee and expense orders. The District Court approved. The Court of Appeals affirmed, except for the order as to Drexel; and as to that it reversed "for lack of jurisdiction in the Commission." 210 F. 2d 585, 592.

We see no such infirmity in the Commission's order. The Commission plainly has power under § 10 and under § 12 to fix the fees payable by Bond & Share. To be sure, the Commission did not fix any fee, when on March 7, 1949, it entered the consolidated order approving the applications under §§ 10, 11, and 12. That order merely reserved jurisdiction to determine the reasonableness of the fees. There is a suggestion that no reservation of jurisdiction over the fees is possible, at least so far as § 10 is concerned, since § 10 directs the Commission to approve the plan unless it finds the fees unreasonable. But the reservation by the Commission of jurisdiction over the fees is merely a means of assuring that they will not be unreasonable. Certainly, the Commission need not hold an entire plan in abeyance until it completes hearings on the fees to be paid in connection with one phase of it. We see no reason why the Commission, in the interest of orderly administration, cannot defer consideration of all the fees, until it has time to view the entire matter in perspective and evaluate the worth of each contribution. We would have to read the Act with an extremely hostile eye to deny the Commission that administrative leeway.

The error of the Court of Appeals was in overlooking the essential and critical role that §§ 10 and 12 play in the case and in relying on § 11 (e) alone.

The contrast between §§ 11 (e) and 11 (f) is plain, so far as jurisdiction over fees is concerned. Section 11 (f)

[8] Bond & Share asked $100,000 for Drexel. The Commission awarded $50,000.

contains an express provision concerning fees. The subsection, applicable to court proceedings where a receiver or trustee has been appointed, makes all fees "to whomsoever paid" subject to the approval of the Commission. Cf. *Leiman* v. *Guttman,* 336 U. S. 1. Section 11 (e) contains no such provision. It merely directs the Commission to approve the plan, if it finds the plan "fair and equitable to the persons affected." The amount of fees to be paid by Electric plainly would be relevant to the question whether the plan was fair and equitable. See *In re Public Service Corp. of New Jersey,* 211 F. 2d 231, 232. Payment of excessive fees was one of the historic abuses of the reorganization procedure whereby utility companies were milked, an abuse the Public Utility Holding Company Act sought to correct. 79 Cong. Rec. 4607; S. Rep. No. 621, 74th Cong., 1st Sess. 33. Questions of fees payable by and to protective committees present special considerations irrelevant here and we put them aside. Cf. *Leiman* v. *Guttman, supra.* Different considerations come into play when fees payable by individual security holders to their own counsel are involved. It would seem, for example, that the amount which a stockholder, say, agreed to pay his lawyer for representing him in a § 11 (e) proceeding would be no business of the Commission. The amount of that fee would seem to have no direct bearing on the fairness of the plan.

But the fees payable by the registered holding company in connection with the reorganization of its subsidiary or affiliate are, or may be, different. At least Congress thought so, for Congress was explicit in making the fees payable by them, in connection with the transactions covered by § 10 and by § 12, subject to Commission approval. Congress had before it the detailed record of holding company activities and knew that many of them had a proclivity for predatory practices. The fees were not only large; they were often loaded on affiliated

companies [9] and concealed in intrasystem accounts. Congress decided to put an end to the worst of these practices and control the critical ones. When it came to the intricacies of holding company finance, Congress expressed the desire to have the amount of the fees paid brought to light and to have the Commission decide who pays them and what amounts are reasonable. We cannot be faithful to that statutory design without granting the Commission the jurisdiction asserted here.

Reversed.

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

Fully aware of the complicated interrelations of holding-company systems, Congress did not enact a scheme for severance of all intercorporate relations among public utility interests. Instead, specific provisions were devised against specific abuses and the Securities and Exchange Commission was given specific authority to effectuate the defined functions of these different provisions. Enforcement of the Act entailed authorization by the Commission of reorganization to secure simplification of a holding-company system and regulation of transactions involving acquisitions and dispositions. Duly mindful of the abuses of excessive fees in the conduct of inter-company affairs, Congress effectively equipped the Commission with power to regulate fees in the various proceedings which required approval by the Commission. But Congress particularized. It did not vest this fee-fixing authority of the Commission in a comprehensive provision. It dealt with the problem distributively. It was

[9] When Bond & Share asked that Electric reimburse it for the fees paid Drexel (see note 7, *supra*), it was following a traditional holding company practice of using the affiliated companies as convenient pocketbooks of the system.

explicit in relating the power to fix fees to the particular proceeding.

The matter before us relates to the fixing of fees in a proceeding under § 11 of the Holding Company Act. That was a proceeding for the reorganization of Electric, a subsidiary of Bond and Share. That section gave the Commission full power to fix fees to be paid by Electric as a condition to approval of its plan for reorganization. To be sure, Electric's plan involved the parent, Bond and Share, and the confirmation of Electric's plan required approval by the Commission of "acquisition" by Bond and Share of new securities. That approval under § 10 subjected the fees which Bond and Share could pay Drexel to the scrutiny and approval of the Commission. The consummation of Electric's plan likewise involved a "sale" by Bond and Share under § 12. Again, that section made Bond and Share's payment of fees to Drexel subject to the Commission's approval. The Commission gave the required approval to the "acquisition" and "sale" under §§ 10 and 12, respectively, without passing on the fee payable by Bond and Share or reserving the question of the propriety of such fees. The reservation regarding fees in the proceedings of Electric was applicable to the fees in connection with Electric's plan under § 11, and cannot be made to supply the failure to fix or to reserve the matter of fees in the proceedings under §§ 10 and 12 in relation to which they were incurred.

The Holding Company Act of 1935 is a reticulated statute, not a hodge-podge. To observe its explicit provisions is to respect the purpose of Congress and the care with which it was formulated.

I would affirm the Court of Appeals.

UNITED STATES ET AL. *v.* CALIFORNIA EASTERN LINE, INC.

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

No. 263. Argued February 10, 1955.—Decided March 7, 1955.

Under the Renegotiation Act of 1942 as amended, the Maritime Commission determined that a steamship company should repay $164,000 as "excessive profits." The company took the matter to the Tax Court under § 403 (e) (1) of the Act, which authorizes that Court "to finally determine the amount, if any, of excessive profits" and provides that "such determination shall not be reviewed or redetermined by any court or agency." The Tax Court, without making any finding or determination as to profits, held that the only contract in the case was one between the company and a foreign government, and that the Commission had made no renegotiable contract within § 403 (e) (1) of the Act. *Held:* The decision of the Tax Court was reviewable by the Court of Appeals under 26 U. S. C. § 1141. Pp. 352–355.

(a) That 26 U. S. C. § 1141 was originally enacted primarily to authorize review of decisions on revenue matters does not render it inapplicable to decisions on other justiciable matters entrusted to the Tax Court by Congress. Pp. 353–354.

(b) *Macauley* v. *Waterman S. S. Co.*, 327 U. S. 540, distinguished. Pp. 354–355.

(c) The decision of the Tax Court in this case is not the kind of determination that § 403 (e) (1) of the Renegotiation Act makes final, and it is therefore subject to the normal type of review authorized by 26 U. S. C. § 1141. P. 355.

93 U. S. App. D. C. 289, 211 F. 2d 635, reversed.

Oscar H. Davis argued the cause for petitioners. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter.*

Harold B. Finn argued the cause for respondent. With him on the brief were *Cletus Keating* and *Robert E. Kline, Jr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The Renegotiation Act of 1942 as amended sets up departmental and Tax Court procedures to save the United States from the burden of "excessive profits" made by private contractors under war contracts with Government "Departments." [1] The question in this case is whether an order entered by the Tax Court under that Act is reviewable by the United States Court of Appeals for the District of Columbia Circuit.

In 1941 the Maritime Commission, defined as a "Department" in the Act, was charged with responsibility for aiding the British Government in the transport of war equipment and supplies for use in World War II. Respondent, California Eastern Line, Inc., among others, was asked by the Commission to carry supplies to the Red Sea area for the African campaign. After extensive negotiations respondent agreed with the Commission on detailed contractual terms for the carriage. And it was agreed that respondent would be paid by the Commission out of funds appropriated by Congress under the so-called Lend-Lease Act.[2] It was also understood that a written contract embodying only the terms previously agreed on would be executed between the respondent and the British Ministry of Transport. The charter was executed after respondent's boat had already sailed with its war cargo. In accordance with its agreement, the Commission paid the respondent about $351,000 for the carriage. Later the Commission chairman, after conforming with required procedure, determined that respondent should repay $164,000 as "excessive profits." Respondent took the matter to the Tax Court under § 403 (e)(1) of the Act which authorizes that court "to finally determine the amount, if any, of excessive profits" and provides that

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[1] 56 Stat. 245, as amended, 50 U. S. C. App. § 1191.

[2] 55 Stat. 31, 22 U. S. C. §§ 411–413.

"such determination shall not be reviewed or redetermined by any court or agency." But that court made no finding or determination at all about profits. It disposed of the whole case by finding as a fact and holding as a matter of law that the only contract was in the written charter with the British Ministry in which the Commission was not named as a party and that consequently the Commission had made no renegotiable contract within § 403 (e)(1) of the Renegotiation Act. 17 T. C. 1325.

The United States sought review in the Court of Appeals for the District of Columbia Circuit under the broad grant of jurisdiction in 26 U. S. C. § 1141 which vests Courts of Appeals with "exclusive jurisdiction to review the decisions of the Tax Court . . . ." [3] The Court of Appeals held that § 1141 does authorize review of Tax Court renegotiation orders with the exception of determinations as to profits which § 403 (e)(1) of the Renegotiation Act states shall not be reviewed by any court or agency. Viewing the issue decided by the Tax Court as coming within the nonreviewable category, the Court of Appeals dismissed. 93 U. S. App. D. C. 289, 211 F. 2d 635. The Ninth Circuit has construed § 1141 differently, however, holding that it gives Courts of Appeals no power whatever to review Tax Court renegotiation orders. *French* v. *War Contracts Price Adjustment Board,* 182 F. 2d 560. Never having passed on this jurisdictional question, we granted certiorari to decide it. 348 U. S. 810.

The language of § 1141 is broad enough to justify review of Tax Court renegotiation orders. And we cannot say that because the section was originally passed primarily to authorize review of decisions on revenue matters it

[3] § 1141 of the Internal Revenue Code of 1939. Similar provisions now appear in § 7482 of the Internal Revenue Code of 1954. Section 1141 contains exceptions to its general grant of jurisdiction to Courts of Appeals, but they are not relevant here.

should be held inapplicable to decisions on other justiciable matters entrusted to the Tax Court by Congress. As long ago as 1946 the Court of Appeals for the District of Columbia interpreted § 1141 as authorizing review of renegotiation orders.[4] It has followed that interpretation in a number of later cases, including this one.[5] All of these cases, however, have recognized that the scope of § 1141 review over renegotiation orders is narrowed by that part of the Renegotiation Act that makes nonreviewable Tax Court determinations of amounts of excess profits, if any. This reconciliation of § 1141 with the Renegotiation Act has a permissible basis, and accordingly we see no reason to upset the review practice that has grown up under it. Under this practice, the particular order here is reviewable under § 1141 unless it is a determination of "the amount, if any, of excessive profits" within the meaning of § 403 (e)(1) of the Act. The Court of Appeals, relying on *Macauley* v. *Waterman S. S. Co.*, 327 U. S. 540, held that it was. On this point we disagree.

In making determinations as to excess profits the Tax Court must decide at least two separate but interrelated questions: (1) whether a renegotiable contract is involved and (2) the amount if any of excessive profits. We held in the *Waterman* case that the Tax Court has primary, exclusive jurisdiction to decide whether a contract is renegotiable. That result was reached because the Act gives the Tax Court exclusive jurisdiction to determine the amount of profits and the existence of a

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[4] *U. S. Electrical Motors, Inc.* v. *Jones*, 80 U. S. App. D. C. 329, 153 F. 2d 134.

[5] *Psaty & Fuhrman, Inc.* v. *Stimson*, 87 U. S. App. D. C. 47, 182 F. 2d 985; *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 89 U. S. App. D. C. 281, 192 F. 2d 405; *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board*, 90 U. S. App. D. C. 218, 195 F. 2d 198.

renegotiable contract is essential to such a determination. In *Waterman,* however, we did not decide any question concerning the reviewability of Tax Court orders entered under the Renegotiation Act.

The language and history of the Renegotiation Act make it pretty clear that the Tax Court was selected to handle excess profits cases because of that Court's special familiarity with all kinds of business and accounting practices in regard to profits, losses, etc. Thus it is easy to understand why Congress in § 403 (e)(1) spelled out with meticulous clarity that Tax Court determinations of the amount of excessive profits, if any, should be final and nonreviewable. We agree that a § 1141 Court of Appeals review should not upset such determinations. But we do not agree that the Tax Court's determination here is in that category. The question of the amount of profits was not even reached by the Tax Court. It simply held, relying largely on common law principles of contract law, that there was no government contract to renegotiate. The existence or nonexistence of profits was wholly irrelevant to the holding. Consequently this is not the kind of determination that § 403 (e)(1) makes final and the Tax Court's decision in this case is therefore subject to the normal type of review authorized by § 1141.

Reversed.

MR. JUSTICE DOUGLAS dissents.

NATIONAL CITY BANK OF NEW YORK *v.* REPUBLIC OF CHINA ET AL.

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

No. 30. Argued November 9, 1954.—
Decided March 7, 1955.

1. The Republic of China sued an American bank in a Federal District Court to recover $200,000 deposited in the bank by a governmental agency of the Republic. The bank interposed counterclaims seeking an affirmative judgment for $1,634,432 on defaulted treasury notes of the Republic. The Republic pleaded sovereign immunity. *Held:* The counterclaims should not have been dismissed. Pp. 357–366.

   (a) Having been recognized as a sovereign by the Executive, the Republic of China and its governmental agencies enjoy a foreign sovereign's immunities to the same extent as any other country recognized by the United States. P. 358.

   (b) This case does not involve an attempt to bring a recognized foreign government into court as a defendant. A foreign government is invoking our law but resisting a claim against it which fairly would curtail its recovery. Pp. 361–362.

   (c) The contention that the counterclaim here involved is not based on the subject matter of the Republic's suit does not require a different result. Pp. 364–365.

2. That the bank, on certiorari, dropped its demand for affirmative relief did not reduce the counterclaim to a mere defense or deprive this Court of jurisdiction. P. 358, n. 2.

208 F. 2d 627, reversed and remanded.

Wm. Harvey Reeves argued the cause for petitioner. With him on the brief was *Chauncey B. Garver.*

Louis J. Gusmano argued the cause for respondents. With him on a brief for the Republic of China were *Cletus Keating* and *Robert E. Kline, Jr.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Shanghai-Nanking Railway Administration, an official agency of respondent Republic of China, established a $200,000 deposit account in 1948 with the New York head office of petitioner National City Bank of New York. Subsequently, respondent sought to withdraw the funds, but petitioner refused to pay, and respondent brought suit in Federal District Court under 48 Stat. 184, as amended, 12 U. S. C. § 632.

In addition to various defenses, petitioner interposed two counterclaims seeking an affirmative judgment for $1,634,432 on defaulted Treasury Notes of respondent owned by petitioner.[1] After a plea of sovereign immunity, the District Court dismissed the counterclaims, 108 F. Supp. 766, and entered judgment on them pursuant to Rule 54 (b), Federal Rules of Civil Procedure. Petitioner appealed, and while the appeal was pending sought leave from the District Court to amend the counterclaims by denominating them setoffs and including additional data. The District Court denied leave. 14 F. R. D. 186. The Court of Appeals for the Second Circuit affirmed the dismissal and the denial on the ground that the counterclaims were not based on the subject matter of respondent's suit (whether they be treated as requests for affirma-

[1] The Treasury Note on which the first counterclaim is based was pledged by the Republic of China in 1920 to secure a loan to the Pacific Development Company by a banking syndicate in which petitioner participated. The loan was not repaid, and during the liquidation of the Development Company the syndicate bought the collateral at a public sale. The Treasury Notes on which the second counterclaim is based were purchased by petitioner's Shanghai branch at the time of issue in 1947–1948. The record allows us to assume that the petitioner gave full value as its share of the loan to the Development Company and bought the notes in the second counterclaim at par.

tive relief or as setoffs) and, therefore, it would be an invasion of respondent's sovereign immunity for our courts to permit them to be pursued. 208 F. 2d 627. Because of the importance of the question and its first appearance in this Court, we granted certiorari.[2] 347 U. S. 951.

The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court. Accordingly, we start with the fact that the Republic and its governmental agencies enjoy a foreign sovereign's immunities to the same extent as any other country duly recognized by the United States. See *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 137–138.

The freedom of a foreign sovereign from being haled into court as a defendant has impressive title-deeds. Very early in our history this immunity was recognized, *De Moitez* v. *The South Carolina,* Bee 422, 17 Fed. Cas. 574, No. 9,697 (Admiralty Court of Pa., 1781, Francis Hopkinson, J.), and it has since become part of the fabric of our law. It has become such solely through adjudications of this Court. Unlike the special position accorded our States as party defendants by the Eleventh Amend-

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[2] At the outset respondent argues that since petitioner on certiorari has dropped its demand for affirmative relief, the case is not properly before us. It is conceded that dismissal of independent counterclaims would ordinarily contain the requisite finality on which to base our jurisdiction, but respondent contends that when petitioner reduced its counterclaims to mere demands for setoff, the claims became defenses and, as such, nonreviewable until the respondent's suit had been concluded below. We reject this view. A counterclaim does not dwindle to a defense solely because it is confined—as a result of the accepted jurisprudence of sovereign immunity, see *United States* v. *Shaw,* 309 U. S. 495—to reducing the sovereign's recovery. The District Court's judgment, as affirmed by the Court of Appeals, terminated a separable and distinct segment of the litigation.

ment, the privileged position of a foreign state is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court. To be sure, the nonsuability of the United States without its consent is likewise derived from considerations of policy. But these are of a different order from those that give a foreign nation such immunity. It is idle to repeat or rehearse the different considerations set forth in Mr. Chief Justice Marshall's classic opinion in *The Schooner Exchange* v. *M'Faddon,* 7 Cranch 116.

But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as "Public opinion as to the peculiar rights and preferences due to the sovereign has changed," *Davis* v. *Pringle,* 268 U. S. 315, 318; "There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past . . . ," *White* v. *Mechanics Securities Corp.,* 269 U. S. 283, 301; ". . . the present climate of opinion . . . has brought governmental immunity from suit into disfavor . . . ," *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 391. This chilly feeling against sovereign immunity began to reflect itself in federal legislation in 1797.[3] At that early day Congress decided that when the United States sues an individual, the individual can set off all debts properly due him from the sovereign. And because of the objections to *ad hoc* legislative allowance of private claims, Congress a hundred

[3] Act of Mar. 3, 1797, §§ 3, 4, 1 Stat. 514–515. The present version appears in 28 U. S. C. § 2406.

years ago created the Court of Claims,[4] where the United States, like any other obligor, may affirmatively be held to its undertakings. This amenability to suit has become a commonplace in regard to the various agencies which carry out "the enlarged scope of government in economic affairs," *Keifer & Keifer* v. *Reconstruction Finance Corp., supra,* at 390. The substantive sweep of amenability to judicial process has likewise grown apace.[5]

The outlook and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process. See James M. Landis, Statutes and the Sources of Law, in Harvard Legal Essays (1934), p. 213 *et seq.;* Harlan F. Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 13–16.

More immediately touching the evolution of legal doctrines regarding a foreign sovereign's immunity is the restrictive policy that our State Department has taken toward the claim of such immunity. As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit. *Ex parte Republic of Peru,* 318 U. S. 578, 581. Its failure or refusal to suggest such immunity has been accorded significant weight by this Court. See *Compania Espanola de Navigacion Maritima, S. A.* v. *The Navemar,*

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[4] Act of Feb. 24, 1855, 10 Stat. 612, as amended, 12 Stat. 765, 14 Stat. 9; see *United States* v. *Jones,* 119 U. S. 477.

[5] The most recent development is the subjection of the Government to tort liability. Act of Aug. 2, 1946, now 28 U. S. C. § 1346 (b).

303 U. S. 68; *Republic of Mexico* v. *Hoffman*, 324 U. S. 30. And this for the reason that a major consideration for the rule enunciated in *The Schooner Exchange* is the embarrassing consequences which judicial rejection of a claim of sovereign immunity may have on diplomatic relations. Recently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government, 26 Dept. State Bull. 984 (1952), despite the fact that this Court thirty years earlier rejected the weighty opinion of Judge Mack in *The Pesaro*, 277 F. 473 (see, also, his opinion in *The Gloria*, 286 F. 188), for differentiating between commercial and war vessels of governments. *Berizzi Bros. Co.* v. *Steamship Pesaro*, 271 U. S. 562.

And so we come to the immediate situation before us. The short of the matter is that we are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to the rule of law to which nongovernmental obligors must bow. We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery.[6] It wants our law, like any other

[6] Those cases that have dealt with the problem include: *Republic of China* v. *American Express Co.*, 195 F. 2d 230 (C. A. 2d Cir.); *United States* v. *National City Bank of New York*, 83 F. 2d 236 (C. A. 2d Cir.); *In re Patterson-MacDonald Shipbuilding Co.*, 293 F. 192 (C. A. 9th Cir.); *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 F. 341 (C. A. 2d Cir.); *Hungarian People's Republic* v. *Cecil Associates, Inc.*, 118 F. Supp. 954 (D. C. S. D. N. Y.); *Republic of China* v. *Pang-Tsu Mow*, 105 F. Supp. 411 (D. C. D. C.); *United States* v. *National City Bank of New York*, 90 F. Supp. 448 (D. C. S. D. N. Y.); *United States* v. *New York Trust Co.*, 75 F. Supp. 583 (D. C. S. D. N. Y.); *Kingdom of Norway* v. *Federal Sugar Refining Co.*, 286 F. 188 (D. C. S. D. N. Y., Mack, J.); *French Republic* v. *Inland Nav. Co.*, 263 F. 410 (D. C. E. D. Mo.); *Union of Soviet Republics* v. *Belaiew*, 42 T. L. R. 21 (K. B. Div.); *South African Republic* v. *La Compagnie Franco-Belge*, [1898] 1 Ch. 190; cf. *Guaranty Trust Co.* v. *United States*, 304 U. S. 126; *Dexter & Car-*

318107 O - 55 - 29

litigant, but it wants our law free from the claims of justice. It becomes vital, therefore, to examine the extent to which the considerations which led this Court to bar a suit against a sovereign in *The Schooner Exchange* are applicable here to foreclose a court from determining, according to prevailing law, whether the Republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China. As expounded in *The Schooner Exchange,* the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its "exclusive and absolute" jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the "power and dignity" of the foreign sovereign.[7]

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penter, Inc. v. *Kunglig Jarnvagsstyrelsen,* 43 F. 2d 705 (C. A. 2d Cir.); *Strousberg* v. *Republic of Costa Rica,* 44 L. T. R. (N. S.) 199 (C. A.); Claim of the Russian Volunteer Fleet against the British Admiralty, Annual Digest of Public International Law Cases 1925–1926, p. 210 (British Admiralty Transport Arbitration Board; affirmed by Court of Appeal).

Of the cited American decisions, only two district court cases directly involved the dismissal of counterclaims not based on the subject matter of the sovereign's suit and not seeking affirmative judgment: *Republic of China* v. *Pang-Tsu Mow, supra,* and *United States* v. *New York Trust Co., supra.*

[7] 7 Cranch, at 136–137, 143–144. For a comprehensive critique of the doctrine as it has subsequently been applied, see Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y. B. Int'l L. 220.

The Privy Council recently rejected the view of Lord Justice Scrutton in *The Jupiter,* [1924] P. 236 (C. A.), that the mere assertion of a claim by a foreign government to property the subject of an action by a private party compels the court to stay the action and decline jurisdiction. *Juan Ysmael & Co.* v. *Republic of Indonesia,* [1954] 3 W. L. R. 531. Earl Jowitt reviewed the decisions and indicated some of the subtleties into which the doctrine has led the English courts. Cf. *Republic of Mexico* v. *Hoffman,* 324 U. S. 30, 38–42 (concurring opinion).

(a) The Court of Claims is available to foreign nationals (or their governments) on a simple condition: that the foreign national's government can be sued in its courts on claims by our citizens.[8] An American or a Chinese [9] could sue in the Court of Claims for default on a United States bond, 28 U. S. C. § 1491 (4), or could counterclaim—to the extent of the Government's claim—in a suit by the United States in any court, 28 U. S. C. § 2406; see *United States* v. *Wilkins,* 6 Wheat. 135; cf. *United States* v. *Bank of the Metropolis,* 15 Pet. 377; *United States* v. *United States F. & G. Co.,* 309 U. S. 506, 511. Thus it seems only fair to subject a foreign sovereign, coming into our courts by its own choice, to a liability substantially less than our own Government long ago willingly assumed.

(b) The Republic of China is apparently suable on contract claims in its own courts,[10] and Americans have the same rights as Chinese in those courts.[11] No parochial bias is manifest in our courts which would make it an affront to the "power and dignity" of the Republic of China for us to subject it to counterclaims in our courts when it entertains affirmative suits in its own. Decisions of the Chinese courts which seem to grant absolute

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[8] 28 U. S. C. § 2502. The earliest version of this statute appears in 15 Stat. 243 (Act of July 27, 1868); see *United States* v. *O'Keefe,* 11 Wall. 178; cf. 43 Stat. 1113, 46 U. S. C. § 785; *Westfal-Larsen & Co.* v. *United States,* 41 F. 2d 550 (D. C. N. D. Calif.). That an American citizen can sue the Chinese Government in Chinese courts, see Judicial Yuan Interpretation No. 6 (Feb. 16, 1929).

[9] See Treaty of Nov. 4, 1946, Art. VI, § 4, 63 Stat. 1305.

[10] Judicial Yuan Interpretation No. 373 (Dec. 15, 1930); Supreme Court Uniform Interpretation No. 1933 (Peking, June 22, 1925), 3 China L. Rev., No. 2, p. 84; cf. Judicial Yuan Interpretation No. 6 (Feb. 16, 1929); Constitution of the Republic of China, Art. 24 (1947).

[11] Treaty of Nov. 4, 1946, Art. VI, § 4, 63 Stat. 1305.

immunity from direct suit to foreign sovereigns [12] are inapposite in this context and in light of our State Department's reluctance to raise the defense of sovereign immunity in foreign courts, see 26 Dept. State Bull. 984, 985 (1952); cf. 41 Stat. 527, 46 U. S. C. § 747.

(c) Respondent urges that fiscal management falls within the category of immune operations of a foreign government as defined by the State Department's 1952 pronouncement. This is not to be denied, but it is beside the point. A sovereign has freely come as a suitor into our courts; our State Department neither has been asked nor has it given the slightest intimation that in its judgment allowance of counterclaims in such a situation would embarrass friendly relations with the Republic of China.

(d) It is recognized that a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity.[13] This is proof positive that the doctrine is not absolute, and that considerations of fair play must be taken into account in its application. But the limitation of "based on the subject matter" is too indeterminate, indeed too capricious, to mark the bounds of the limitations on the doctrine of sovereign immunity. There is great diversity among courts on what is and what is not a claim "based on the subject matter of the suit" or "growing out of the same transaction." See Clark, Code Pleading (2d ed.), 653–660; cf. *United States* v. *National City Bank of New York,* 83 F. 2d 236 (C. A. 2d Cir.). No doubt the present counterclaims cannot fairly be deemed to be related to the

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[12] See *Rizaeff Fréres* v. *The Soviet Mercantile Fleet,* 3 China L. Rev., No. 6, p. 14 (Provisional Court of Shanghai 1927).

[13] *E. g., Hungarian People's Republic* v. *Cecil Associates, Inc.,* 118 F. Supp. 954 (D. C. S. D. N. Y.); *French Republic* v. *Inland Nav. Co.,* 263 F. 410 (D. C. E. D. Mo.); cf. *Republic of China* v. *American Express Co.,* 195 F. 2d 230 (C. A. 2d Cir.).

Railway Agency's deposit of funds except insofar as the transactions between the Republic of China and the petitioner may be regarded as aspects of a continuous business relationship. The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation. The considerations found controlling in *The Schooner Exchange* are not here present, and no consent to immunity can properly be implied. This conclusion was anticipated by Mr. Justice Washington on circuit four years after he had been of the Court which decided *The Schooner Exchange.*[14]

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[14] The case is *King of Spain* v. *Oliver,* 1 Pet. C. C. 276, 14 Fed. Cas. 572, No. 7,813 (C. C. D. Pa.). The King of Spain had sued two Americans for duties he alleged they owed him on shipments of goods they had made to the Spanish American colonies under royal licenses. The defendants replied that they had obtained the licenses from and paid the duties to Hope & Co., a Dutch concern which had a commercial concession from the King in return for which it had promised, *inter alia,* to pay duties on shipments to the colonies. Hope had also negotiated a loan for the King in what appears to have been an unrelated transaction, and the King had pledged all his public revenues to repay the loan. Instead of handing over the duties received from defendants to the King, Hope applied them to reduce the debt due from the King on the loan.

Mr. Justice Washington directed a verdict for the defendants. First he held that there was no privity of contract between the defendants and the King, so that payment to Hope discharged them. But assuming that there was privity he ruled that the duties had been properly applied by Hope to reduce the King's debt to it. "Let it be, as was argued, that the consent of the Spanish government, under the administration of Joseph [Bonaparte, who had, while in power, agreed that the duties be applied to reduce the debt], was invalid and of no obligation upon Ferdinand; still, Ferdinand, as the *successor of his father* [Charles IV, to whom the loan had been made], and the nation, were and are bound to pay the debt due in Holland; and if it has been in part discharged, out of funds charged with the payment of it [because they were public revenues], in the hands of Hope and Co., the payments of the duties, have in effect been made to the plaintiff,

The judgment of the Court of Appeals must be reversed and the case remanded to the District Court with directions to reinstate the counterclaims and for further proceedings not inconsistent with this opinion.

Reversed.

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

MR. JUSTICE REED, with whom MR. JUSTICE BURTON and MR. JUSTICE CLARK join, dissenting.

Some data must be premised if discussion is to be confined to a reasonable space. We start with the postulate that the sovereign is released from the jurisdiction of its own courts except as it may specifically submit itself to their power.[1]

That does not create a situation of irresponsibility. Satisfaction of sovereign liability may be had through the legislative organ which recognizes a moral obligation to pay the creditors of the government and to compensate those injured by it.

A sovereign's freedom from judicial control does not arise from or depend upon the will of the courts. As was said in *The Schooner Exchange* in speaking of the immunity of a foreign government, it depends upon "the will of the sovereign of the territory." ". . . all exemptions

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because he owes, of the debt due in Holland, less than what was originally due, by the amount of duties which were applied to its discharge by Hope and Co. After such an application, which I repeat it, Hope and Co. were authorised to make, under all the circumstances of the case, this action cannot be supported, to recover the amount of the duties so appropriated." 1 Pet. C. C., at 289–290, 14 Fed. Cas., at 577.

[1] *United States* v. *Clarke*, 8 Pet. 436, 444; *Kansas* v. *United States*, 204 U. S. 331, 341; *Larson* v. *Domestic & Foreign Com. Corp.*, 337 U. S. 682, 703.

from territorial jurisdiction, must be derived from the consent of the sovereign . . . ." 7 Cranch 116, 138, 143. The immunity rests on the ground that no enforceable right exists "against the authority that makes the law on which the right depends." [2]

The reason for the sovereign's consent to the exclusion of foreign sovereignties from the general jurisdiction of its courts was said by Chief Justice Marshall to rest on this proposition:

> "The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.
>
> "This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage." 7 Cranch, at 136.

It might be summarized by the word "comity." [3] The local sovereign may, of course, withdraw such consent.

> "Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be con-

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[2] *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353; *United States* v. *Shaw*, 309 U. S. 495, 501. Cf. *Duff Development Co.* v. *Government of Kelantan*, [1924] A. C. 797.

[3] *Compania Naviera Vascongado* v. *S. S. Cristina*, [1938] A. C. 485, 498.

sidered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise." *Id.*, at 146.[4]

An ancillary principle of law is that, in determining whether a defendant is a sovereign, the courts follow the guidance of the political branch.[5] In this case the sovereignty of the Republic of China is not questioned. Furthermore, the Chinese Government Treasury Note and its 36th Year Short Term Treasury Notes upon which the City Bank's counterclaims rest are sovereign obligations, *jure imperii* in form, of the highest public character. Consequently, the attitude of the Department of State as to the desirability of relaxing the strict rule of immunity as to acts of commerce, *jure gestionis,* is inapplicable. See 26 Dept. State Bull. 984 (1952), referred to in the Court's opinion, p. 361.

If the foregoing statements of law are sound, the Republic of China as a foreign sovereign is free from direct suits in our courts on the notes here in question unless the Congress of the United States has enacted a statute that restricts its immunity. This it has not done. The question in this case thus comes down to whether the Republic of China, by bringing this suit for the recovery of a bank deposit, waived its immunity and subjected itself to a counterclaim under the Fed. Rules Civ. Proc., Rule 13. Under the words of § (c) of that Rule, judgment over against the Republic of China would seem to be authorized if the counterclaim were for more than plaintiff's claim. But there would be no jurisdiction to render such judgment in an American court. It would violate the

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[4] See *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562, 571 *et seq.*

[5] *Ex parte Peru,* 318 U. S. 578, 588; *Mexico* v. *Hoffman,* 324 U. S. 30, 35. Cf. *Duff Development Co.* v. *Government of Kelantan, supra,* at 815.

immunity of a foreign sovereign to do so.[6] In the present case, the Court evidently feels that, since the counterclaim is limited to the amount of the Republic of China's claim, there is jurisdiction to allow a setoff to that extent. But the mere fact that a judgment over is not sought should not be relied upon to avoid the jurisdictional immunity of a foreign sovereign. I find no justification for the Court's restricting that immunity in the absence of legislative or executive action.[7]

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[6] Cf. *United States* v. *Shaw*, 309 U. S. 495, 502. In *South African Republic* v. *La Compagnie Franco-Belge*, [1898] 1 Ch. 190, 198, a foreign sovereign sued to enjoin the use of deposited funds. On a counterclaim not connected with the issue concerning the funds, Mr. Justice North held the foreign government could not be sued, citing *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 68, and *Strousberg* v. *Republic of Costa Rica*, 29 Weekly Reporter 125, 44 L. T. R. (N. S.) 199.

[7] Probably because it is obvious that there is no tenable distinction between the setoff of an unrelated claim, a proceeding for a judgment over on a counterclaim, and a direct suit against a foreign sovereign, few cases have dealt with this phase of the immunity of a foreign sovereign from claims. None that have discussed the issue have reached the result which the Court takes today. In addition to the two cases cited in note 6 of the majority opinion, the same issue here presented was considered and decided in accord with my position in the only foreign case discussing the issue that has come to my attention. In *The State of Belgium* v. *E. A. G. de Badts*, Nederlandsche Jurisprudentie, 1923, p. 618, Ann. Dig. of Pub. Int'l Law Cases 1919–1922, p. 129, the Belgian Government, a foreign sovereign, brought suit in the Dutch courts for an account of the sale of a certain cargo of wheat. The defendant sought to set off an entirely unrelated claim which he had against the Belgian Government. The court held:

"That the Court had no jurisdiction to take cognisance of the counter-claim against the Belgian State. A State which is entitled to claim immunity from foreign jurisdiction does not lose this right by the fact that it submits to that jurisdiction in another suit. The correctness of this statement is not impaired by the circumstance that the two actions are, for the sake of convenience, joined in the same proceed-

Affirmative legislative action was necessary to allow such a limited setoff against the United States.[8] Action of a similar nature should be required to authorize this setoff. The comity that gave the foreign sovereign full immunity from process was, as *The Schooner Exchange* pointed out, p. 146, only to be withdrawn "in a manner not to be misunderstood." That is by legislation.[9] The judicial creation of such jurisdiction over the property of a friendly nation might well merit the stricture of Chief Justice Marshall:

> "A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world." 7 Cranch, at 137.

International relations are pre-eminently a matter of public policy. Judicial views of supposed public interests are not the touchstone whereby to determine the law.[10]

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ings, since the counter-claim does not lose, in consequence thereof, its independent character. This is so particularly in cases in which the plaintiff Government bases its claim on a private law title, but in counter-claim is sued for acts performed in its sovereign capacity."

Nor can the majority derive much support from *King of Spain* v. *Oliver*, 1 Pet. C. C. 276, cited on p. 365, n. 14, of the Court's opinion. The question of sovereign immunity was not considered or even mentioned in that case, since no setoff or counterclaim was asserted against the foreign sovereign. The court simply held that payment, in the manner and under the circumstances there presented, was a good defense to a suit on a debt.

[8] See *United States* v. *Shaw*, 309 U. S. 495, 501.

[9] See Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, British Year Book of International Law, 1951, vol. XXVIII, at pp. 239, 269; *Mexico* v. *Hoffman*, 324 U. S. 30, 38; *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562, 573, 576.

[10] *Vidal* v. *Philadelphia*, 2 How. 127, 197–198; *Muschany* v. *United States*, 324 U. S. 49, 66.

The change from a generous to a parsimonious application of the principle of sovereign immunity should come from Congress or the Executive. Our courts possess great powers and have solemn obligations. Our country allots power to the judiciary in the confidence that, in view of the separation of powers, judicial authority will not undertake determinations which are the primary concern of other branches of our Government. Differences of view exist as to the desirable scope of sovereign immunity and the necessity for nonjudicial determinations.[11] But surely it is better that the decisions be left to those organs of Government that have the responsibility for determining public policy in carrying out foreign affairs. The establishment of political or economic policies is not for the courts. Such action would be an abuse of judicial power. It is only by a conscious and determined purpose to keep the functions of the various branches of government separate that the courts can most effectively carry out their duties. I would leave this question of the jurisdictional immunity of foreign sovereigns to the other branches.

The Court determines, however, that the question of changing the limitation of the immunity of foreign sovereigns pertains to its functions. Even on the assumption that such is a proper matter for judicial concern, I would reach a different conclusion than does the Court. If a direct suit cannot be brought against a foreign sovereign (as is conceded), why should we allow the same claim to be used as an offset to destroy the sovereign's right to recover? Why should the City Bank be able to assert its notes against the Republic of China, even defensively, when other noteholders not obligated to the sovereign are prevented from collecting their notes?

[11] Dissents in *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, 57, and *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 723; concurring opinion in *Mexico* v. *Hoffman*, 324 U. S. 30, 40.

Here we have an entirely disconnected claim on overdue national notes brought forward as a defense to an action to recover a bank deposit. The Court recognizes that the counterclaim is not related to China's cause of action against the City Bank. It says:

> "The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation."

The counterclaim here is of much the same character as a suit against a foreign sovereign. Deposits may be the lifeblood necessary for national existence. It is not wise for us to tell the nations of the world that any assets they may have in the United States, now or in the future, upon which suit must be brought, are subject to every counterclaim their debtors can acquire against them at par or at a discount. It is unfair to our foreign friends and detrimental to our own financial and mercantile interests. For fairness we need not go beyond the allowance of counterclaims arising out of transactions foreign sovereigns seek to enforce in our courts. It seems to me that the Court sanctions a circuitous evasion of the well-established rule prohibiting direct suits against foreign sovereigns.

I would affirm.

SAPIR *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 534. Decided March 7, 1955.

Finding that the judgment of the Court of Appeals reversing the judgment of conviction in this case and instructing the trial court to dismiss the indictment was correct, this Court reinstates that judgment and vacates a subsequent judgment directing a new trial.

216 F. 2d 722, judgment vacated.

Sam Dazzo for petitioner.

Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg and *Joseph A. Barry* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted.

We believe that the judgment of the Court of Appeals of October 20, 1954, reversing and remanding this cause with instructions to dismiss the indictment was correct. It is not necessary for us to pass on the question presented under its subsequent judgment of November 17, 1954, directing a new trial. We vacate the latter judgment, which directed the new trial, and we reinstate the former one which instructed the trial court to dismiss the indictment.

MR. JUSTICE DOUGLAS, concurring.

Petitioner was convicted by the jury of a conspiracy to defraud the United States. Petitioner moved for a judgment of acquittal. The District Court denied the motion. On appeal, the Court of Appeals held that that motion should have been granted, as the evidence

was insufficient to convict. 216 F. 2d 722. It accordingly reversed and remanded the cause with instructions to dismiss the indictment. Later, the Government moved to amend the judgment so as to grant a new trial on the ground of newly discovered evidence. The Court of Appeals granted the motion of the Government.

The granting of a new trial after a judgment of acquittal for lack of evidence violates the command of the Fifth Amendment that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

The correct rule was stated in *Kepner* v. *United States,* 195 U. S. 100, at 130, "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered . . . ." If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen. If, as in the *Kepner* case, the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when the appellate court orders a judgment of acquittal for lack of evidence.

If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens the whole record for such disposition as might be just. See *Bryan* v. *United States,* 338 U. S. 552. And see *Trono* v. *United States,* 199 U. S. 521; *Stroud* v. *United States,* 251 U. S. 15, 18; *Francis* v. *Resweber,* 329 U. S. 459, 462. Moreover, a reversal by the appellate court on grounds of error that infected the trial would also be different, as *Palko* v. *Connecticut,* 302 U. S. 319, shows. But an acquittal on the basis of lack of evidence concludes the controversy, as the *Kepner* case holds, and puts it at rest under the protection of the Double Jeopardy Clause, absent a motion by the defendant for a new trial.

WITMER *v.* UNITED STATES.

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

No. 164. Argued February 1, 1955.—Decided March 14, 1955.

1. Petitioner, a member of Jehovah's Witnesses, was convicted of failing to submit to induction into the armed forces in violation of § 12 (a) of the Universal Military Training and Service Act. *Held:* On the record in this case, this Court cannot find that there was no basis in fact for the Appeal Board's decision denying petitioner classification as a conscientious objector; and his conviction is affirmed. *Dickinson* v. *United States,* 346 U. S. 389, distinguished. Pp. 376–383.

   (a) In conscientious objector cases, the ultimate question is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. Pp. 381–382.

   (b) Petitioner's inconsistent statements were sufficient to cast doubt on the sincerity of his claim. Pp. 382–383.

2. After petitioner's application for classification as a farmer and a conscientious objector had been denied, he applied to the Local Board for classification as a minister of the gospel and appeared before the Board and submitted evidence in support of this claim. Before forwarding the case to the Appeal Board, the Local Board in fact considered this claim and advised petitioner of his continuance in the I–A classification. *Held:* This satisfied the requirement of § 1624.2 (b) and (c) of the Selective Service Regulations that the case be reopened and the registrant reclassified, though the Board's records did not use the words "reopen" or "reclassify." Pp. 383–384.

213 F. 2d 95, affirmed.

Petitioner was convicted of failing to submit to induction into the armed forces in violation of § 12 (a) of the Universal Military Training and Service Act. 115 F. Supp. 19. The Court of Appeals affirmed. 213 F. 2d 95. This Court granted certiorari. 348 U. S. 812. *Affirmed,* p. 384.

Hayden C. Covington argued the cause and filed a brief for petitioner.

J. F. Bishop argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, John F. Davis* and *Beatrice Rosenberg.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner, a member of the Jehovah's Witnesses, stands convicted of failing to submit to induction into the armed forces in violation of § 12 (a) of the Universal Military Training and Service Act, 62 Stat. 622, 50 U. S. C. App. § 462 (a). On trial, he centered his defense on the contention that he was wrongfully denied exemption as a conscientious objector. This Term, we have been asked to review a relatively large number of criminal prosecutions involving various procedural and substantive problems encountered in effectuating the congressional policy of exempting conscientious objectors from military service. We have granted petitions for certiorari in this and the three following cases to consider certain of the problems recurring in these prosecutions.[1]

Section 6 (j) of the Universal Military Training and Service Act, 62 Stat. 612, as amended, 50 U. S. C. App. § 456 (j), provides that no person who, "by reason of religious training and belief, is conscientiously opposed to participation in war in any form," shall be required to undergo combatant training or service in the armed forces. The conscientious objector, to prove his claim, fills out a questionnaire in which he makes a short statement of his religious beliefs and cites evidence, such as prior public expression of his views, to demonstrate his sincerity. If, on the basis of this and a personal interview, the local

[1] Because of the wide divergencies in the problems presented, we shall consider the cases before us in separate opinions.

Board decides that the requisite beliefs are sincerely held, the registrant will be classified a conscientious objector. If the local Board denies the claim, the registrant has a right of appeal to the Appeal Board. That Board, before reaching a final decision, refers the registrant's file to the Department of Justice for "inquiry and hearing." As the first step in this auxiliary procedure, the Federal Bureau of Investigation investigates the registrant's claim and refers its report to a hearing officer of the Department of Justice. The registrant may then appear before this officer to present evidence and witnesses in his behalf. After this, the hearing officer makes a report to his superiors in the Department of Justice, suggesting a disposition of the case. The Department, after reviewing the registrant's file, the FBI report and the report of the hearing officer, writes a short recommendation, stating its reasons and whether it has concurred in or overruled the suggestion of the hearing officer. This recommendation of the Department of Justice is transmitted to the Appeal Board and placed in the registrant's file. The statute provides that "the appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice . . . ." 62 Stat. 613, 50 U. S. C. App. § 456 (j). The Appeal Board, then, on the basis of the registrant's full file before it, comes to its conclusion, which, in the usual case, is the final determination of the Selective Service System. 62 Stat. 620, 50 U. S. C. App. § 460 (b)(3).

There is no direct judicial review of the actions of the Appeal Boards. Questions concerning the classification of the registrant may be raised either in a petition for habeas corpus or as a defense to prosecution for failure to submit to induction into the armed forces. All four of the cases decided today have arisen through the latter route.

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On January 31, 1951, Witmer filed his classification questionnaire, together with an explanatory letter stating that he worked 40 hours a week in a hat factory and also cultivated a portion of his father's farm. In the letter, Witmer stated that he intended to bring more of the farm under cultivation and closed, "For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use." [2]

In his general questionnaire, Witmer expressly disclaimed any ministerial exemption by writing the phrase, "Does not apply," opposite the line inquiring whether he was a "Minister, or Student Preparing for the Ministry." He did claim to be a conscientious objector, however, although, on the special form for those claiming such classifications, he failed to fill in the specifications supporting his objections to combatant or noncombatant service. On this special form, Witmer wrote "My training and belief in relation to a Supreme Being involves duties superior to those arising from any human relation. This prevents me from turning aside from those superior duties which I owe to a superior Being." Therefore, he wrote, he was required to maintain neutrality in the "combats of this world," and was permitted the use of force only "at the command of Almighty God." Although he inserted a negative answer to the question asking whether he had given public expression to his conscientious objector views, he claimed that he had demonstrated his convictions by studying the Bible and by telling others about God's Kingdom and "of how He will put a stop to all wars."

On February 21, 1951, the local Board classified Witmer I–A, denying his claims for classification as a farmer

[2] The record indicates that this farm had not been worked for 23 years, except for a garden tract used for family purposes.

and a conscientious objector. Eight days later, he wrote the Board advising them that he intended to appeal from their action and requesting classification as "a minister of the gospel." Less than a week after posting this claim, he left his job in the hat factory, and shortly thereafter, at his appearance before the local Board, Witmer presented an affidavit from a local officer of the Jehovah's Witnesses that he had "on many occasions" engaged in the "preaching of the good news or gospel to others." At the same time, he submitted a written statement that he carried Bibles and study aids from door to door, and, further, that one could be ordained as a minister of the Jehovah's Witnesses without attending a seminary or performing funeral or marriage ceremonies. In this statement Witmer wrote, "The work that I now do is of greatest universal importance therefore I could not take part in a conflict of national or even international importance." At the conclusion of the hearing, the Board felt the evidence did not warrant classification as a minister and "informed the registrant his case would be sent up to the Appeal Board following his physical examination." [3]

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[3] The minute of the local Board meeting is as follows:

"March 19, 1951

"Re: Order #36–28–30–71 Philip Andrew Witmer

"The Board met with registrant today. The registrant informed the Board that he left his place of employment on March 3, where he had worked for three years in a hat factory. The Board chairman immediately pointed out that he was classified as 1–A on February 21, which meant he left his position about two weeks later. He then mentioned that his father had a farm which had not been worked as a farm for 23 years but that he felt he was going to start getting this farm in shape. Prior to this time he stated he had gotten a few acres in shape for their own family use so that they would not be dependent upon other people.

"The registrant then pointed out that he was a minister of the Gospel and the only evidence he presented to substantiate this fact

The Appeal Board, pursuant to the Act, forwarded the case to the Department of Justice. Apparently, the FBI report contained nothing unfavorable to petitioner and even included statements that he appeared "very religious and very sincere" and that he had said it was wrong to go to war.

At the Department hearing, Witmer asserted that he could not engage in noncombatant service since he felt that "the boy who makes the snow balls is just as responsible as the boy who throws them." On the basis of the entire file, including the FBI report and the interview, the hearing officer suggested a conscientious objector classification. The Department of Justice, however, concluded that Witmer's inconsistent statements, together with his offer to contribute to the war effort, precluded such a classification and recommended to the Appeal Board that Witmer's claim be denied. After consideration, that Board retained petitioner in I–A, and when ordered to report for induction, he refused to submit. This prosecution followed, and Witmer's conviction, 115 F. Supp. 19, was affirmed by the Court of Appeals for the Third Circuit, 213 F. 2d 95. We granted certiorari. 348 U. S. 812.

The primary question here is whether, under the facts of this case, the narrow scope of review given this Court permits us to overturn the Selective Service System's refusal to grant petitioner conscientious objector status. It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on

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was some paraphernalia from the Watchtower Association of the Jehovah Witness [*sic*]. The registrant was asked if he was an ordained minister and he said Jehovah [*sic*] Witnesses became ordained when they started distributing their literature. The Board felt this was not sufficient evidence to warrant a 4–D Classification and informed the registrant his case would be sent up to the Appeal Board following his physical examination." R. 33–34, 54–55.

the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson* v. *United States,* 346 U. S. 389, 396 (1953). The classification can be overturned only if it has "no basis in fact." *Estep* v. *United States,* 327 U. S. 114, 122 (1946). In *Dickinson* v. *United States,* 346 U. S. 389 (1953), the most recent case in which this Court has applied this standard to the facts of a particular case, we set aside the conviction, holding that the local Board had wrongfully denied the registrant a ministerial classification. The objective facts on which Dickinson based his claim as a full-time minister were undisputed, and they placed him squarely within the terms of the Act. It was not for the Board to say whether he was motivated by sincere religious principles in becoming a minister, or whether his convictions were deep, but merely, as the Act provides, whether he was a "regular or duly ordained minister of religion" as therein defined. The Court therefore held that the local Board's decision was without basis in fact, there being no evidence "incompatible with the registrant's proof of exemption" to rebut his prima facie case.

Petitioner argues from this that there was no specific evidence here incompatible with his claimed conscientious objector status. But in *Dickinson* the registrant made out his prima facie case by means of objective facts—he was a "regular or duly ordained minister of religion." Here the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which casts doubt on the veracity

of the registrant is relevant. It is "affirmative evidence . . . that a registrant has not painted a complete or accurate picture . . . ." *Dickinson* v. *United States, supra,* p. 396. In short, the nature of a registrant's prima facie case determines the type of evidence needed to rebut his claim. If the issue is the nature of his activities, as in *Dickinson,* the evidence providing "basis in fact" must tend to show that his activities are other than as stated. If, as here, the issue is the registrant's sincerity and good faith belief, then there must be some inference of insincerity or bad faith.

Since Witmer stated his beliefs with apparent sincerity, and since we find no indication anywhere in the record that his demeanor appeared shifty or evasive or that his appearance was one of unreliability, we must examine the objective facts before the Appeal Board to see whether they cast doubt on the sincerity of his claim.

We note that when Witmer asked his Board for classification as a farmer, he knew that the land involved in his request had not been cultivated for 23 years, save for a few acres used for family purposes. At that time, he swore that the ministerial classification did not apply to him. Yet in March—after he knew his claim for exemption as a farmer had been denied—he just as fervently claimed he was a full-time minister.[4] Furthermore, although he asserted his conscientious objector belief in his first exemption claim, in the same set of papers he promised to increase his farm production and "contribute a satisfactory amount for the war effort." Subsequently, he announced "the boy who makes the snow balls is just as responsible as the boy who throws them." These inconsistent statements in themselves

[4] Ordinarily the claim of a Jehovah's Witness to exemption as a minister, though unfounded in law, would not reflect adversely on his good faith, since it is the doctrine of the Jehovah's Witnesses that all are ministers.

cast considerable doubt on the sincerity of petitioner's claim. This is not merely a case of a registrant's claiming three separate classifications; it goes to his sincerity and honesty in claiming conscientious objection to participation in war. It would not be mere suspicion or speculation for the Board to conclude, after denying Witmer's now-abandoned claims of farmer and minister, that he was insincere in his claim of conscientious objection. Even firemen become dubious after two false alarms. Aside from an outright admission of deception—to expect which is pure naivety—there could be no more competent evidence against Witmer's claimed classification than the inference drawn from his own testimony and conduct. There are other indications which, while possibly insignificant standing alone, in this context help support the finding of insincerity. Among these is petitioner's failure to adduce evidence of any prior expression of his allegedly deeply felt religious convictions against participation in war.

With due regard for the policy of Congress, which was to make review within the Selective Service System final in all cases where there was conflicting evidence or where two inferences could be drawn from the same testimony, we cannot hold that petitioner was wrongfully denied the conscientious objector classification. In short, there was basis in fact for the Board's decision.

Petitioner also complains of the local Board's action in not formally reopening his case at the March 19, 1951, meeting when he filed his application for reclassification as a minister. According to the testimony of the clerk of the Board, the Board chairman had stated that the case was out of their hands because petitioner had taken an appeal. The record of this hearing, however, shows that Witmer did offer his proof, and that the Board did discuss the matter. The chairman then told Witmer that the new evidence he submitted did not entitle him to a ministerial

exemption. It is true that § 1624.2 (b) and (c) of the Selective Service Regulations, 32 CFR (1949 ed.), required that the case be reopened and the registrant reclassified. However, in view of the concurrent findings of the trial judge and the Court of Appeals that there had, in fact, been a reconsideration of Witmer's claims and that he was then personally advised of his continuance in the I–A classification, we think the command of the regulation to *reopen* and *reclassify* was honored, even though the Board's action was not tagged with these words. In this state of the record, the contention of Witmer narrows down to mere cavilling. No prejudice is claimed from this and we find no error. The judgment is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

MR. JUSTICE MINTON, concurring.

Because the Board's order was an allowable one under the law and not arbitrarily taken, I concur in the result in this case.

SICURELLA *v.* UNITED STATES.

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

No. 250. Argued February 1, 1955.—Decided March 14, 1955.

Petitioner, a member of Jehovah's Witnesses, was denied classification as a conscientious objector under § 6 (j) of the Universal Military Training and Service Act. He appealed. After the usual investigation, the Department of Justice admitted his sincerity but recommended to the Appeal Board that classification as a conscientious objector be denied, on the ground that he was not entitled to exemption because he had indicated his willingness to fight in defense of "his ministry, Kingdom Interests and . . . his fellow brethren." The Appeal Board denied petitioner classification as a conscientious objector, and he was convicted of failing to submit to induction under § 12 (a) of the Act. *Held:* The recommendation of the Department of Justice was based on an error of law, and the conviction is reversed. Pp. 386–392.

(a) In view of petitioner's emphasis throughout his selective service form that the weapons of his warfare were spiritual, not carnal, his willingness to use force in defense of Kingdom Interests and brethren is not sufficiently inconsistent with his claim to justify the conclusion that he fell short of being a conscientious objector to "participation in war in any form" within the meaning of § 6 (j). Pp. 389–390.

(b) By relating a registrant's conscientious objection to his religious training and belief, Congress has made the beliefs of his religious sect relevant; but it was erroneous as a matter of law to deny a member of Jehovah's Witnesses exemption as a conscientious objector merely because members of that sect are ready to engage in a "theocratic war," if Jehovah so commands, and willing to fight at Armageddon with spiritual, not carnal, weapons. Pp. 390–391.

(c) When Congress referred to participation in war in any form, it had in mind actual military conflicts between nations of the earth in our time. P. 391.

(d) If a registrant has the requisite conscientious objection, on religious grounds, to participation in war in any form, he does not forfeit his rights under § 6 (j) because his other beliefs may extend beyond the exemption granted by Congress. P. 391.

(e) The Department of Justice's error of law in its report to the Appeal Board must vitiate the entire proceedings, since it is not clear that the Board relied on some legitimate ground in denying petitioner's classification as a conscientious objector. Pp. 391–392.

213 F. 2d 911, reversed.

Petitioner was convicted of failing to submit to induction into the armed forces in violation of § 12 (a) of the Universal Military Training and Service Act. The Court of Appeals affirmed. 213 F. 2d 911. This Court granted certiorari. 348 U. S. 812. *Reversed,* p. 392.

Hayden C. Covington argued the cause and filed a brief for petitioner.

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop.*

Mr. Justice Clark delivered the opinion of the Court.

Petitioner was born in 1927 and was brought up as a Jehovah's Witness by his parents, both of whom were of that faith. He has been identified with the sect since he was 6 years old, "was immersed and became a consecrated servant of Jehovah" at 15, and was ordained when 17 years old. He registered with his local Board in 1948, and, although he worked 44 hours a week for the Railway Express Company, he was first classified as a minister. In 1950, however, petitioner was reclassified for general service and, shortly thereafter, he filed his conscientious objector claim.

In the special form, petitioner included this statement:

> "The nature of my claim is that: I am already in the Army of Christ Jesus serving as a soldier of Jehovah's appointed Commander Jesus Christ. (2 Tim. 2:3 & 4). Inasmuch as the war weapons of

> the soldier of Jesus Christ are not carnal, I am not authorized by his Commander to engage in carnal warfare of this world. (2 Corinthians 10:3 & 4, Ephesians 6:11–18) Furthermore being enlisted in the army of Jesus Christ, I cannot desert the forces of Jehovah to assume the obligations of a soldier in any army of this world without being guilty of desertion and suffering the punishment meted out to deserters by Almighty God. . . ."

In answer to the question, "Under what circumstances, if any, do you believe in the use of force," he wrote:

> "Only in the interests of defending Kingdom Interests, our preaching work, our meetings, our fellow brethren and sisters and our property against attack. I (as well as all Jehovah's Witnesses) defend those when they are attacked and are forced to protect such interests and scripturally so. Because in doing so we do not arm ourselves or carry carnal weapons in anticipation of or in preparation for trouble or to meet threats. In doing so I try to ward off blows and attacks only in defense. I do not use weapons of warfare in defense of myself or the Kingdom interests. I do not retreat when attacked in my home or at meeting places, but will retreat on public or other property and shake the dust off my feet; so not giving what is holy to dogs and not throwing my pearls before swine. (Matthew 10:14 & 7:6) So I retreat when I can do so and avoid a fight or trouble. Also following the admonition at Acts 24:16; which states 'In this respect, indeed, I am exercising myself continually to have a consciousness of committing no offense against God and man.' "

Upon a denial of this claim by the local Board, petitioner appealed and his file was referred to the Department of Justice. It appears that the report of the Federal Bureau

of Investigation contained nothing unfavorable to petitioner's claim, and the hearing officer concluded that petitioner should be classified as a conscientious objector. In advising the Department of Justice, the hearing officer wrote that he "was convinced that [petitioner] has sincere objections to military service by reason of his religious training and beliefs." The Department of Justice, although admitting that the investigation was favorable to petitioner, recommended to the Appeal Board that petitioner's claim be denied on the ground that

> "While the registrant may be sincere in the beliefs he has expressed, he has, however, failed to establish that he is opposed to war in any form. As indicated by the statements on his SSS Form No. 150, registrant will fight under some circumstances, namely in defense of his ministry, Kingdom Interests, and in defense of his fellow brethren. He is, therefore, not entitled to exemption within the meaning of the Act."

The Appeal Board retained petitioner in his I–A classification, and thereafter, when duly ordered to report, he refused to submit to induction. This prosecution followed and the Seventh Circuit affirmed petitioner's conviction. 213 F. 2d 911. We granted certiorari. 348 U. S. 812.

In this case, unlike *Witmer, ante,* p. 375, it is admitted that petitioner is sincere; we are therefore relieved of the task of searching the record for basis in fact to support a finding of insincerity. The only question presented in this case is one of law—do the beliefs which petitioner says he holds amount to the conscientious opposition to "participation in war in any form" demanded by Congress as a prerequisite to the conscientious objector deferment?

Stated in the light of the background, the question at issue is whether a registrant under the Universal Military Training and Service Act, who is admittedly a sincere Jehovah's Witness and conscientious objector to participation in war, but who believes in the use of force in defending "his ministry, Kingdom interests and . . . his fellow brethren," is entitled to exemption under § 6 (j) of the Act from service in the armed forces. The Government insists that petitioner's statements reveal qualified and varied objection to war—and that "petitioner's willingness to fight in defense of 'Kingdom Interests', particularly when those words are considered in the light of the teachings of his sect, . . ." is clearly not opposition to war in any form.

The Government does not contend that the petitioner's belief in the use of force in self-defense, as well as the defense of his home, family and associates, is so inconsistent with his claim of conscientious objection as to serve as a basis for a denial of his claim.* The question here narrows to whether the willingness to use of force in defense of Kingdom interests and brethren is sufficiently inconsistent with petitioner's claim as to justify the conclusion that he fell short of being a conscientious objector. Throughout his selective service form, petitioner emphasized that the weapons of his warfare were spiritual, not carnal. He asserted that he was a soldier in the Army of Jesus Christ and that "the war weapons of the soldier of Jesus Christ are not carnal." With reference to the defense of his ministry, his brethren and Kingdom interests, he asserted that "we do not arm ourselves or carry carnal weapons . . . . I do not use weapons of warfare in defense . . . of Kingdom interests . . . ." In letters to

*In *United States* v. *Taffs*, in which we denied certiorari, 347 U. S. 928, the Government admitted as much in its petition. Its admission here does not extend to the category "brethren" which was not used in *Taffs*.

the local Board he reiterated these beliefs. On their face, these statements make it clear that petitioner's defense of "Kingdom Interests" has neither the bark nor the bite of war as we unfortunately know it today. It is difficult for us to believe that the Congress had in mind this type of activity when it said the thrust of conscientious objection must go to "participation in war in any form."

But the Government urges that these statements of petitioner must be taken in the light of the teachings of Jehovah's Witnesses. While each case must of necessity be based on the particular beliefs of the individual registrant, it is true that the Congress, by relating the registrant's conscientious objection to his religious training and belief, has made the belief of his sect relevant. Moreover, the petitioner does parenthetically say that his belief in the use of force was "as well . . . [the belief of] all Jehovah's Witnesses." On the other hand, though the Government has appended to its brief a copy of the Watchtower magazine of February 1, 1951, we do not find any such literature in the record. It is not at all clear that we may consider such material outside the record to support an Appeal Board decision, cf. *Cox* v. *United States,* 332 U. S. 442, 453–455 (1947), but we need not decide that here because in any event there is no substance to the Government's contention. Granting that these articles picture Jehovah's Witnesses as antipacifists, extolling the ancient wars of the Israelites and ready to engage in a "theocratic war" if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records

no such command since Biblical times and their theology does not appear to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons.

We believe that Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets. We believe the reasoning of the Government in denying petitioner's claim is so far removed from any possible congressional intent that it is erroneous as a matter of law.

The Court of Appeals also rested its decision on the conclusion that petitioner's objection to participation in war was only a facet of his real objection to all governmental authority. We believe, however, that if the requisite objection to participation in war exists, it makes no difference that a registrant also claims, on religious grounds, other exemptions which are not covered by the Act. Once he comes within § 6 (j), he does not forfeit its coverage because of his other beliefs which may extend beyond the exemption granted by Congress.

The Government also contends, apparently for the first time, that petitioner objects to "participation in war in any form," if in fact he does, not from a feeling that it is wrong to participate in war but because such participation will require time which petitioner feels should be devoted to his religious activities. In its memorandum indicating its lack of opposition to certiorari, the Government gave no hint that it considered such an issue in the case, and it is unnecessary for us to consider it here. The report

of the Department of Justice to the Appeal Board clearly bases its recommendation on petitioner's willingness to "fight under some circumstances, namely in defense of his ministry, Kingdom Interests, and in defense of his fellow brethren," and we feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. There is an impressive body of lower court cases taking this position and we believe that they state the correct rule. Cf. *United States ex rel. Levy* v. *Cain,* 149 F. 2d 338, 342 (C. A. 2d Cir. 1945); *United States* v. *Balogh,* 157 F. 2d 939, 943–944 (C. A. 2d Cir. 1946), judgment vacated on other grounds, 329 U. S. 692; *United States* v. *Everngam,* 102 F. Supp. 128 (S. D. W. Va. 1951).

The decision below is therefore

Reversed.

MR. JUSTICE REED, dissenting.

It is not important to the United States military strength that a few people eligible for military service are excused from combat and noncombatant duties as conscientious objectors. It is important to other American citizens that many without such scruples against war must serve while the few continue their assigned tasks with no exposure to danger greater than that of other civilians.

Many, by reason of religious training or moral conviction, may be opposed to certain wars declared by the Nation. But they must serve because they do not meet the test of the statute, "conscientiously opposed to participation in war in any form." The Court assumes that

Sicurella's conscience permits him to participate in theocratic wars, that is, those approved by Jehovah, such as the blood and flesh wars of the Israelites. Sicurella testified he would use force in defense of "Kingdom Interests." Those words also seem to me to include theocratic wars. Under the assumption of the Court and petitioner's statements, he is not covered by the statutory exemption. His position is inconsistent with his claimed opposition to war. I would require him to serve in the military service.

MR. JUSTICE MINTON, dissenting.

The findings and classification made by the Selective Service Board and the Appeal Board are final. 50 U. S. C. App. (1952 ed.) § 460 (b)(3). This Court does not sit as a court of review. It is not our province to substitute our judgment of the facts for that of the Board or to correct the Board's errors of law unless they are so wanton, arbitrary and capricious as to destroy the jurisdiction of the Board.

This Court said in *Estep* v. *United States*, 327 U. S. 114, at pp. 122–123:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final *even though they may be erroneous.* The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." (Emphasis added.)

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In that case, Estep had claimed that his classification was made arbitrarily and capriciously. This is always a question of jurisdiction. Was the Board acting in wanton disregard of its legal boundaries? If it was not, but made what we might consider an honest mistake in judgment, this Court should not intervene.

In the instant case, the Court does not say that the Board acted capriciously and arbitrarily or that the judgment of the Board was not an allowable judgment of reasonable men. The Court states that a mistake in advice was made by the Department of Justice to the Appeal Board.

> "The report of the Department of Justice . . . clearly bases its recommendation on petitioner's willingness to 'fight under some circumstances, namely in defense of his ministry, Kingdom Interests, and in defense of his fellow brethren,' and we feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings . . . ."

It will be noted that the Court says there was error of law not by the Appeal Board but by the Department of Justice, whose recommendation is purely advisory and not binding upon the Appeal Board. 50 U. S. C. App. (1952 ed.) § 456 (j). The Court concludes that the Department of Justice committed an error of law by recommending to the Appeal Board that the petitioner be denied conscientious objector classification because of petitioner's willingness to "fight under some circumstances, namely in defense of his ministry, Kingdom Interests, and in defense of his fellow brethren." The record in this case clearly establishes that this was the position and attitude of the petitioner as a faithful Jehovah's Witness. Petitioner

says he is opposed to fighting a secular war but is not opposed to fighting a religious war where the interests of his sect are involved. This does not meet the test of the statute, 50 U. S. C. App. (1952 ed.) § 456 (j), which provides:

> "Nothing contained in this title [sections 451–454 and 455–471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

The petitioner is not opposed to "participation in war in any form." That is the congressional test. On the contrary, he reserves the right to choose the wars in which he will fight. The petitioner refused even to be inducted for any kind of limited service, combatant or otherwise.

The Court's opinion gives the impression that the petitioner and his sect would not use force. In petitioner's own statement to the Board, he contradicts such a position. SSS Form No. 150, filled out by the petitioner and submitted to the Board, contains the following question and answer:

> "5. Under what circumstances, if any, do you believe in the use of force?
>
> "Only in the interests of defending Kingdom Interests, our preaching work, our meetings, our fellow brethren and sisters and our property against attack. I (as well as all Jehovah's Witnesses) defend those when they are attacked and are forced to protect such interests and scripturally so. Because in doing so we do not arm ourselves or carry carnal weapons in anticipation of or in preparation for trouble or to meet threats."

This answer clearly shows that the petitioner and his sect will fight for Kingdom Interests, whatever that is, preaching work, their meetings, their fellow brethren and sisters, and their property. They do not, they say, carry carnal weapons in anticipation of attack, but they will use them in case of attack. This evidence clearly supports the District Court's finding of guilt; and the conclusion of the Selective Service Board based on such evidence was an allowable one.

I think the Department of Justice might very well have believed petitioner did not meet the test laid down by Congress. By accepting the Department's recommendation, the Board might have been mistaken, but it was an honest mistake. There is not the slightest intimation of arbitrary or capricious conduct on the part of the Board.

Because we do not sit to review errors of fact or law unless the latter be so arbitrary and capricious as to destroy the Board's jurisdiction, and because I think the decision of the Appeal Board, even if the Board accepted and relied upon the recommendation of the Department of Justice, was an honest opinion and, therefore, an allowable judgment not arbitrarily and capriciously made, I would affirm.

SIMMONS *v.* UNITED STATES.

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

No. 251. Argued February 2, 1955.—Decided March 14, 1955.

Petitioner, a member of Jehovah's Witnesses who had sought and had been denied conscientious objector exemption, was convicted under the Universal Military Training and Service Act for refusal to submit to induction into the armed forces. *Held:* In the circumstances of this case, the failure of the Department of Justice to furnish petitioner with a fair résumé of all adverse information in the Federal Bureau of Investigation report deprived him of the "hearing" provided by § 6 (j) of the Act; and the conviction is reversed. Pp. 398–406.

(a) The requirement of § 6 (j) that a fair résumé of FBI reports be made available to the registrant is not a matter of grace within the Department's discretion, but is an essential element in the processing of conscientious objector claims. P. 403.

(b) The Government's contention that petitioner failed to make a timely request for the summary cannot be sustained; nor may petitioner be deemed to have waived his rights in this respect. P. 404.

(c) The remarks of the hearing officer at the hearing in the Department did not give petitioner adequate notice of the unfavorable evidence in the FBI report, and the hearing was therefore lacking in basic fairness. Pp. 404–405.

(d) A fair résumé is one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force. P. 405.

(e) The Government's contention that no prejudice was shown and none resulted cannot be sustained. Pp. 405–406.

(f) Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation. P. 406.

213 F. 2d 901, reversed.

Petitioner was convicted under the Universal Military Training and Service Act for refusal to submit to induction into the armed forces. The Court of Appeals affirmed. 213 F. 2d 901. This Court granted certiorari. 348 U. S. 812. *Reversed,* p. 406.

Hayden C. Covington argued the cause and filed a brief for petitioner.

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay.*

Mr. Justice Clark delivered the opinion of the Court.

This case presents another question concerning the processing of conscientious objector claims under the Universal Military Training and Service Act. Petitioner contends that the failure of the Department of Justice to furnish him with a fair résumé of all adverse information in the Federal Bureau of Investigation report deprived him of the "hearing" provided by § 6 (j) of the Act, 62 Stat. 612, as amended, 50 U. S. C. App. § 456 (j), and thereby invalidated his I–A classification. In the circumstances of this case, we conclude that a fair résumé, as contemplated in *United States* v. *Nugent,* 346 U. S. 1 (1953), was not furnished petitioner, and that this deprived him of a fair hearing within the terms of the Act.

Petitioner registered under the selective service laws in 1948. He was then employed as a chauffeur at the Great Lakes Naval Training Center, having had 8 years of grade school and 2½ years of high school. At that time, he did not claim to be a minister or a conscientious objector, but stated that he believed his classification

should be I–A. The local Board so classified him. In 1949, petitioner was married, and on June 4, 1951, he was given a dependency deferment, which was terminated on October 22, 1951. Within a week of his restoration to I–A, petitioner filed the special form for conscientious objectors, claiming exemption from combatant and noncombatant service. In this and in subsequent statements to the selective service authorities, petitioner revealed that he had first been contacted by a member of the Jehovah's Witnesses in November 1949; that he had started a Bible study course at that time and had progressed gradually toward the status of minister; that he had become an unordained minister in December 1950, and an ordained minister in October 1951; that he preached from house to house and on the streets, giving public expression to his conscientious objections to war; that the demands of his "ministry" and the commands of the Bible, admonishing him not to kill and to follow God rather than men, precluded his participation in the military; and that he would not use force "[u]nless it be under the supervision of Jehovah God." After a personal appearance, in which petitioner sought exemption as a minister rather than as a conscientious objector, the local Board continued him in I–A. Petitioner filed an appeal. The Appeal Board tentatively found against him, and referred the case to the Department of Justice.

Following an investigation by the Federal Bureau of Investigation, petitioner was notified to appear for a hearing. No copy of the notice appears in the record, but it appears that the form sent to registrants during the period in question stated that the hearing officer would advise the registrant "as to the general nature and character" of adverse evidence in the FBI report if he requested such information "at any time after receipt by him of the notice of hearing and before the date

set for the hearing." [1] There is no evidence that petitioner made such a request prior to the hearing. He did, however, make a request at the hearing. According to petitioner's uncontradicted testimony, the hearing officer told him that the FBI report disclosed that he had been hanging around poolrooms, and the hearing officer asked him if he did that now. Petitioner replied that he did not, and asked what else was in the report. The hearing officer changed the subject. He subsequently asked petitioner's wife how she was feeling and how petitioner was treating her. Her reply was "fine." The hearing officer reported that petitioner impressed him as sincere, but recommended that he be classified I–A because his religious activities coincided with pressure from the Draft Board.

In its report to the Appeal Board, the Department of Justice adopted the hearing officer's recommendation, relying on the timing of petitioner's religious activities and "his abusiveness and the exercise of physical violence towards his wife." [2] The latter reason rested on data presumably gathered by the FBI. According to the Depart-

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[1] The form notice appears as an appendix to the Government's brief, p. 55. The pertinent paragraph follows:

"2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence."

[2] The complete text of the report is as follows:

"Registrant is twenty-five years of age, married, born in Illinois and has completed approximately two years of high school. At the present time he is employed as a chauffeur. He was first contacted by a member of the Jehovah's Witnesses Sect in November 1949, although the exact date of membership is not reflected.

"The registrant believes in a Supreme Being and describes the

ment's report, police records showed that petitioner was arrested and fined in May 1950 for hitting his wife; that the police were called upon to settle a "hot argument" in June 1950; and that petitioner's wife claimed in January

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nature of his belief by citing various parts of the Scriptures, in part, as follows:

" 'Romans 13:1—. . . that Jehovah God and Christ Jesus are the higher powers, and I recognize them as the supreme powers. Peter at Acts 5:29 admonishing all footstep followers of Christ Jesus that "We must obey God rather than men." Also Paul at 2 Cor. 4:4. . . Satan the Devil is the God of this system of things. Showing that we show (sic) obey the Creator rather than the Creation of God. Jehovah God in one of his Ten Commandments at Ex. 20:13 "Thou shall not kill." '

"Registrant relates that in November 1949, at the suggestion of one Clarence Howze, he started a Bible book study and as he progressed wanted more and more to become a minister of truth. At the present time he is receiving training from the Watchtower Bible and Tract Society. As to the question regarding use of force he states 'None whatsoever. Unless it be under the supervision of Jehovah God.' He claims to engage in the work of his religion by preaching from house to house and on the streets.

"At his present place of employment he has been seen reading the Bible during lunch hour and discussing same with a few co-workers. References, all of whom are members of the same sect, believe registrant is sincere, as do his neighbors. A confidential informant, of known reliability, reports that during the last seven or eight months registrant was actively engaged in distributing pamphlets; that prior to that time registrant was personally known to him as a rather heavy drinker and crap shooter in and around local taverns and pool halls. This informant believes registrant is now sincere. Registrant states he has changed his ways and now prays many times during the day. His wife also states he has changed. It is to be noted that registrant is reported to have had a very poor home life.

"Police records reflect that registrant was arrested May 29, 1950 on a complaint by his wife that he pulled her out of a car and hit her in the face—fined $13.60; on June 12, 1950 police were called to settle a 'hot argument' and on January 6, 1952, wife claimed registrant was abusive. Police settled last two matters so no charges were filed.

"The file also reflects that registrant was mailed his questionnaire

1952 that he was "abusive" towards her. Also narrated in the report, although not specifically relied on in making the recommendation, is the statement of a "confidential informant" that prior to his recent religious activity petitioner had been "a rather heavy drinker and crap shooter in and around local taverns and pool halls." [3] Petitioner was continued in I–A by the Appeal Board. He refused to submit to induction and this prosecution followed. On trial, petitioner claimed that he had not been afforded a fair summary of the FBI report and secured the issuance of a subpoena *duces tecum* requiring production of the

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on December 6, 1948 and did not sign that part (series XIV) reserved for a conscientious objection. He was classified I–A on December 23, 1948 and married his present wife on March 5, 1949.

"The Hearing Officer reports registrant impressed him as sincere but notes that his religious activities are coincident with pressing draft activities by officials and, therefore, recommends a I–A classification.

"From the available information it appears that registrant had little, if any, religious training prior to November 1949 and it was not until after his 3–A classification was changed to I–A that he evidenced any conscientious objection. From the time he first attended a Bible study class until approximately October 1951, registrant had a little less than two years of Jehovah's Witness religious training. In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity as to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical violence towards his wife. In this connection police records reflect a complaint by his wife as late as January 6, 1952.

"After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained. It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and noncombatant training and service be not sustained."

[3] This informant had also stated that petitioner had changed his ways and now seemed sincere. While the statement as a whole may therefore be favorable to petitioner's claim, the disclosure of petitioner's gambling and drinking activities was certainly adverse.

original report. On motion of the Government, and over objection of petitioner, the subpoena was quashed. Thereafter petitioner was convicted, and the Court of Appeals for the Seventh Circuit affirmed, 213 F. 2d 901.

Section 6 (j) of the Act provides that "[t]he Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith" of the claimed conscientious objections. In *United States* v. *Nugent, supra,* we held that this "hearing" did not entail disclosure of the secret FBI reports. In reaching this conclusion, however, we relied on the availability to the registrant of a fair résumé of these reports:

> ". . . We think the Department of Justice satisfies its duties under § 6 (j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report." 346 U. S., at 6.

We did not view this provision for a fair summary as a matter of grace within the Department's discretion, but rather as an essential element in the processing of conscientious objector claims. *United States* v. *Nugent* represented a balancing between the demands of an effective system for mobilizing the Nation's manpower in times of crisis and the demands of fairness toward the individual registrant. We permitted the FBI report to remain secret because we were of the view that other safeguards in the proceeding, particularly the furnishing of a fair résumé, maintained the basic elements of fair play. If the balance struck in *Nugent* is to be preserved, the registrant must receive the fair summary to which he is entitled. The Department expressly recognizes this and, since *Nugent,* has furnished each registrant, at the time

he is notified of the hearing, with a written résumé of the information developed in the FBI report, a copy of which is also placed in his file for use by the Appeal Board.[4]

The Government assumes that the Department of Justice is required to furnish the registrant with a fair résumé upon request. But it contends that petitioner failed to make a timely request for the summary; that the remarks of the hearing officer gave him adequate notice of the unfavorable evidence in the FBI report; and, finally, that the lack of notice, if there was such, was harmless.

As to the request for the summary, the Government must rely on a document which is not in the record and which was not open to attack or explanation in the trial court. Indeed, had the Government produced the form notice in the lower courts, petitioner might have been able to show that he had made a request prior to the hearing. But leaving these difficulties aside, the notice reproduced in the Government's brief does not, in our view, convey clearly to the layman the idea that he must make a request for the résumé prior to the hearing or forever waive his rights in this respect.[5] There is nothing in either the statute or the regulations authorizing such a waiver. And the discussion of this point in *Nugent*, 346 U. S., at 6, n. 10, was not directed at the time or method of requesting the résumé, but only at its availability.

That petitioner never received a fair résumé of the unfavorable evidence gleaned by the FBI seems hardly arguable on this record. As to his alleged gambling and drinking, the hearing officer merely told petitioner that he was reported to have been hanging around pool rooms. And

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[4] This procedure was not in effect at the time petitioner was notified to appear for his hearing.

[5] Registrants are not to be treated as though they were engaged in formal litigation assisted by counsel. *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888; *Smith* v. *United States*, 157 F. 2d 176.

as to the reported incidents of violence and abuse towards his wife, the hearing officer, in an apparent aside, advanced only the general query to petitioner's wife, asking her how petitioner was treating her now. A fair résumé is one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force. The remarks of the hearing officer at most amounted to vague hints, and these apparently failed to alert petitioner to the dangers ahead. Certainly they afforded him no fair notice of the adverse charges in the report. The Congress, in providing for a hearing, did not intend for it to be conducted on the level of a game of blindman's buff. The summary was inadequate and the hearing in the Department was therefore lacking in basic fairness.

The Government's argument that no prejudice was shown and none resulted can be readily disposed of. Relying on a case concerned with constitutional restrictions on the States in regulating public utilities, *Market Street Railway Co.* v. *Railroad Comm'n of California,* 324 U. S. 548, it contends that the petitioner must specifically show prejudice in order to question the fairness of the résumé. The holding of the *Market Street Railway* case was that the Due Process Clause was "not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties," that the Commission could make "incidental reference" to the railroad's own reports to verify its judgment, formulated on the basis of the entire record, without introducing the reports in evidence. *Id.,* at 562. We are not now dealing with constitutional limitations. We are endeavoring to apply a procedure, set forth by Congress, in accordance with the statutory plan and the concepts of basic fairness which underlie all our legislation. We have held that to meet its duty under § 6 (j) the Department must furnish the registrant with a fair résumé of the FBI report. It is clear in the

circumstances of this case that it has failed to do so, and that petitioner has thereby been deprived of an opportunity to answer the charges against him. This is not an incidental infringement of technical rights. Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation.

It being evident from the record before the Court that the Department of Justice has failed to provide petitioner with a fair résumé of the FBI report, it is unnecessary for us to pass on petitioner's further contention that the trial court erred in quashing his subpoena *duces tecum*.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, adhering to their dissent in *Nugent* v. *United States*, 346 U. S. 1, 13, join in this opinion and judgment.

MR. JUSTICE REED would affirm on the ground that, as no summary was requested, it was not necessary to furnish more to the registrant than was given by the hearing officer. See *Gonzales* v. *United States*, decided today, *post*, p. 407.

MR. JUSTICE MINTON, dissenting.

Even if the Board has denied petitioner a fair résumé of all adverse information in the FBI reports, it does not appear to have been done arbitrarily or capriciously, and the judgment of the Board in doing so was allowable "even if erroneous." It takes more than disagreement with the Board to destroy jurisdiction, the only condition upon which courts may interfere. I would affirm.

GONZALES *v.* UNITED STATES.

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

No. 69. Argued February 1–2, 1955.—Decided March 14, 1955.

Petitioner, a member of Jehovah's Witnesses who had claimed and had been denied conscientious objector exemption, was convicted under the Universal Military Training and Service Act for refusal to submit to induction into the armed forces. *Held:* The failure to furnish petitioner with a copy of the recommendation made by the Department of Justice to the Appeal Board under the provisions of § 6 (j) of the Act deprived petitioner of the right to present his side of the case to the Appeal Board; and the conviction is reversed. Pp. 408–417.

(a) Although not expressly required by § 6 (j) of the Act, it is implicit in the Act and Regulations that a copy of the recommendation of the Department be furnished the registrant at the time it is forwarded to the Appeal Board, and that he be afforded an opportunity to reply. Pp. 411–414, 417.

(b) The right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered. Pp. 414–416.

(c) Petitioner's rights were not adequately protected by the provision in the regulations for a mode of "rehearing." Pp. 416–417.

212 F. 2d 71, reversed.

Petitioner was convicted under the Universal Military Training and Service Act for refusal to submit to induction into the armed forces. 120 F. Supp. 730. The Court of Appeals affirmed. 212 F. 2d 71. This Court granted certiorari. 348 U. S. 811. *Reversed,* p. 417.

Hayden C. Covington argued the cause and filed a brief for petitioner.

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is another prosecution under 62 Stat. 622, 50 U. S. C. App. § 462 (a), for refusal to submit to induction into the armed services. The only question necessary to the decision of this case is whether petitioner, claiming exemption because of conscientious objections to participation in war, was entitled to receive a copy of the recommendation made by the Department of Justice to the Appeal Board under the provisions of § 6 (j) of the Universal Military Training and Service Act, 62 Stat. 612, as amended, 50 U. S. C. App. § 456 (j). The trial judge held that he was not, and that the classification of petitioner as I–A was valid. Petitioner was found guilty as charged, 120 F. Supp. 730, and the Court of Appeals for the Sixth Circuit affirmed, 212 F. 2d 71.

Petitioner registered under the selective service laws on January 4, 1950. In his classification questionnaire, filed on March 9, 1951, he claimed exemption as a minister and conscientious objector, his claims stemming from his association with the Jehovah's Witnesses. Under the doctrines of this sect, each member is a minister; and their tenets are widely interpreted as banning personal participation in political wars. See *Sicurella* v. *United States, ante,* p. 385. Only petitioner's conscientious objector claim is now before the Court.

Petitioner's secular education consisted of elementary school training and two years of high school. On September 27, 1948, he married a member of the Jehovah's Witnesses. The record indicates that, beginning in November 1949, he received "private instruction" in the

Bible from a member of the sect, and that in December he began "actively serving" as a Jehovah's Witness. On January 4, 1950, petitioner registered under the selective service laws. The following month he was ordained as a minister of the Witnesses. Petitioner's religious affiliation, at least as late as 1948, had been Catholic, and his parents and family were Catholic. He began work with the Great Lakes Steel Corporation, a steel plant manufacturing articles of war, on August 19, 1950. On October 1, 1950, petitioner was recognized as a "pioneer" by the Jehovah's Witnesses and embarked on more extensive religious activities.[1]

In his special form for conscientious objectors, filed on April 3, 1951, petitioner claimed exemption from combatant and noncombatant service. He relied on "the ten commandments of God found in the Bible" to support his claim. He said he would use force "[i]n protection of person and ministerial activities, but at no time in aggression." Petitioner declined to rely on the official pronouncements of the Jehovah's Witnesses to support his position, stating that "I am basing myself entirely on my knowledge of the Bible." He supported his claims, however, with an affidavit signed by 22 persons, attesting to petitioner's activity in the Witnesses for the 18 months preceding April 8, 1951, and with a certificate of 4 persons stating that petitioner was conducting weekly Bible studies with them. Petitioner had not given public expression to his views "other than" through his general religious activity.

After an intervening classification of III–A (dependency deferment), petitioner was classified I–A on January

[1] A much more extensive narration of petitioner's background is given in the hearing officer's report. (R. 11a *et seq.*) The latter document, under applicable regulations, 32 CFR (1954 Supp.) § 1626.25, was not transmitted to the Appeal Board for its consideration in classifying petitioner.

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8, 1952. On February 19, 1952, following a personal appearance, the local Board decided unanimously to continue petitioner in I–A, and petitioner noted an appeal. The Appeal Board made a tentative finding against him and referred the case to the Department of Justice. The FBI then made its investigation and petitioner was given a hearing. The hearing officer, while noting that petitioner "appeared to be a sincere Jehovah's Witness and as such is conscientiously opposed to war," recommended denial of the conscientious objector classification. The Department of Justice, in its report to the Appeal Board, made a similar recommendation. In accepting the view expressed by the hearing officer, the Department found support in "[t]he fact that registrant became a member of the Jehovah's Witness sect one month after his Selective Service System registration in January, 1950, despite the fact that his wife had been a member for many years." [2] No copy of this report or other notice of the recommendation was given petitioner prior to the Appeal

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[2] The complete text of the report is as follows:

"Registrant was born July 22, 1931, in San Antonio, Texas. He left the Edison High School of that city in June, 1948, after two years of attendance and took employment as a sheet metal worker with a local firm. He married his present wife in September, 1948. In the summer of 1949 he came to Detroit and worked as a laborer for the Adams Lumber Company until July, 1950. From August, 1950 to present he has been employed as a laborer and general maintenance man at the Great Lakes Steel Corporation. Registrant previously was a Catholic and has five sisters and a brother all of whom are Catholics. His parents were Catholics. His mother is dead and his father lives in San Antonio, Texas. Registrant's wife became a Jehovah's Witness in 1941 and registrant was baptized a member in February, 1950. In October, 1950, he became a 'pioneer' and he participates in the usual activities of his sect, attending several weekly meetings including the Theocratic Ministry School. He also does house to house work and sells the publications of the sect. Registrant bases his claim for exemption upon his own personal interpretation of the Bible with the guidance of the Watchtower Bible aids and relies

Board's decision. On December 11, 1952, the Appeal Board unanimously classified petitioner I–A, and upon his refusal to submit to induction this prosecution was brought.

Petitioner contends that his classification is invalid because he was not furnished a copy of the Justice Department's recommendation to the Appeal Board and accorded an opportunity to reply thereto. Section 6 (j) of the Universal Military Training and Service Act, outlining the procedure in conscientious objector cases, is silent on this question.[3] But a similar silence was not held to be

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particularly on the Ten Commandments. He believes in the use of force in self defense.

"The investigation reflects that registrant is well regarded in the several communities in which he has lived and that he and his wife are said to be very religious. Neighbors advise that they hold Bible studies in their apartment and appear to devote considerable time to religious work. References and co-religionists state that he is a devoted member of the sect and applies himself earnestly to his religious work. Employment records reveal that registrant was remembered as a good worker and that his record is good and contains no derogatory information.

"After a personal appearance, the Hearing Officer stated that registrant appeared to be a sincere Jehovah's Witness but concluded that his affiliation with that sect has been too recent and too closely related to his draft status to warrant the acceptance of his conscientious objector position as genuine. The fact that registrant became a member of the Jehovah's Witness sect one month after his Selective Service System registration in January, 1950, despite the fact that his wife had been a member for many years, lends weight to this conclusion.

"After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained. It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and noncombatant training and service be not sustained."

[3] This section does provide that the Department of Justice shall make an "appropriate inquiry," and hold a "hearing" with respect to the claimed conscientious objections. If after such hearing it

a considered rejection of the right of a registrant to be supplied with a fair résumé of adverse evidence in the FBI reports, *United States* v. *Nugent,* 346 U. S. 1 (1953); *Simmons* v. *United States, ante,* p. 397, and we believe it also to be implicit in the Act and Regulations—viewed against our underlying concepts of procedural regularity and basic fair play—that a copy of the recommendation of the Department be furnished the registrant at the time it is forwarded to the Appeal Board, and that he be afforded an opportunity to reply.[4]

It is true that the recommendation of the Department is advisory. 50 U. S. C. App. § 456 (j). Indeed, this very consideration led us in *United States* v. *Nugent, supra,* to allow considerable latitude in the auxiliary hearing which culminated in the Department's report. A natural corollary of this, however, is that a registrant be given an opportunity to rebut this recommendation when it comes to the Appeal Board, the agency with the ultimate responsibility for classification. For in the usual case it is the Appeal Board which renders the selective service determination considered "final" in the courts, not

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finds the claims unfounded, "it shall recommend to the appeal board that such objections be not sustained." The regulations are of the same tenor, 32 CFR (1954 Supp.) § 1626.25.

[4] Inapplicable to the instant question are cases dealing with whether a recommendation or intermediate report is necessary to begin with, *Labor Board* v. *Mackay Co.,* 304 U. S. 333; *Public Service Corp.* v. *S. E. C.,* 129 F. 2d 899 (C. A. 3d Cir. 1942), whether the recommendation can be subjected to judicial review, *Chicago & Southern Air Lines* v. *Waterman Corp.,* 333 U. S. 103, and whether satisfactory procedures were employed in formulating the recommendation, *Williams* v. *New York,* 337 U. S. 241; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294. The latter three cases are distinguishable, moreover, because they do not involve individualized fact finding and classification, but legislative determinations, political judgments, and the exercise of judicial discretion in the imposition of sentence.

See also *Mazza* v. *Cavicchia,* 15 N. J. 498, 105 A. 2d 545 (1954).

to be overturned unless there is no basis in fact. *Estep* v. *United States,* 327 U. S. 114.

It should be emphasized, moreover, that in contrast to the strictly appellate functions it exercises in other cases, the Appeal Board in handling conscientious objector claims is the first selective service board to receive the Department's recommendation, and is usually the only decision-making body to pass on the entire file. An opportunity for the registrant to reply is therefore the only means of insuring that this Board will have *all* of the relevant data. Furthermore, if the registrant is to present his case effectively to the Appeal Board, he must be cognizant of all the facts before the Board as well as the over-all position of the Department of Justice. See *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 300–305; *United States* v. *Abilene & So. Ry. Co.,* 265 U. S. 274, 289; *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, 93.

The facts here underscore this necessity. The Department in its recommendation emphasizes that the petitioner was of a Catholic family and concluded that petitioner's "affiliation with [Jehovah's Witnesses] has been too recent and too closely related to his draft status to warrant the acceptance of his conscientious objector position as genuine. The fact that registrant became a member of the Jehovah's Witness sect one month after his . . . registration . . . lends weight to this conclusion." But petitioner contends he was a member of the Witnesses *before* he registered, and there is testimony that he had not been of the Catholic belief since 1948. Nor was this facet of the case explored at the Department of Justice hearing. If petitioner had been afforded a copy of the recommendation, he might have successfully contradicted the basis of the Department's conclusion or diminished the forcefulness of its thrust. The record also discloses that the local Board apparently placed little

emphasis on the lateness of petitioner's conversion, inquiring instead about the tenets of the sect and petitioner's employment in the steel plant. On appeal, it was logical for petitioner to direct his attention to these matters. But the Department of Justice based its rejection of his claim on the proximity of petitioner's conversion to his registration for the draft, a contention of which he had no knowledge and no opportunity to meet. The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions. See *Morgan* v. *United States,* 304 U. S. 1, 18.[5]

Nor is this requirement inconsistent with the views expressed in *United States* v. *Nugent, supra,* that selective service procedures, "geared to meet the imperative needs of mobilization and national vigilance," are not to be delayed by "litigious interruption." The registrant in that case sought to make the auxiliary procedure of the Department of Justice "a full-scale trial for each appealing registrant." We refused to compel "an all-out collateral attack at the [Department of Justice] hearing on the testimony obtained in its prehearing investigation." Here all that is involved is the mailing of a copy of the Department's recommendation to the registrant and permitting a reply to the Appeal Board. The registrant already has the right to file a statement with the

[5] "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Appeal Board.[6] Just as the right to a hearing means the right to a meaningful hearing, *United States* v. *Nugent, supra; Simmons* v. *United States, supra,* so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered.

A similar problem has arisen once before in the administration of our selective service laws. Under the Selective Training and Service Act of 1940, local Boards referred to panels of clergymen and laymen of a particular faith questions concerning the validity of ministerial and divinity student claims. The panel interviewed the registrant and made a report to the local Board. In sustaining the use of these panels, this Court emphasized the right of the registrant under the regulations to

[6] See 32 CFR § 1626.12. "The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file." It is true that this section requires that the statement be made at the time the appeal is initiated. And 32 CFR § 1626.24 (b) provides that "the appeal board shall not receive or consider any information which is not contained in the record received from the local board except (1) the advisory recommendation from the Department of Justice under § 1626.25, and (2) general information concerning economic, industrial, and social conditions." But the broad scope of review provided in § 1626.12 is inconsistent with any implication that registrants in conscientious objector cases are required to file their statements with the initial appeal. Such a requirement, if indeed the section is viewed as an absolute bar to supplemental and amendatory statements, may be proper in the normal case. But where the record is augmented on appeal, the registrant can effectively point out error and failure to consider only after the Department of Justice has acted.

examine the report and "explain or correct it, or deny it." *Eagles* v. *Samuels,* 329 U. S. 304, 313. See also *Eagles* v. *Horowitz,* 329 U. S. 317, 323. And, in a case where it was not shown that the registrant had access to the panel's report, Judge Learned Hand said:

> "As the case comes to us, the board made use of evidence of which [the registrant] may have been unaware, and which he had no chance to answer: a prime requirement of any fair hearing." *United States* v. *Balogh,* 157 F. 2d 939, 943, judgment vacated on other grounds, 329 U. S. 692.

See also *Brewer* v. *United States,* 211 F. 2d 864 (C. A. 4th Cir. 1954).

So basic, indeed, is this "prime requirement of any fair hearing" that counsel for the Government contended for the first time in oral argument that the rights of the registrant were amply protected by the provision in the regulations for a mode of "rehearing." In short, the argument is that after the Appeal Board decides against the registrant and his file is returned to the local Board, he has the right under the selective service regulations to examine all information in his file, including the recommendation of the Department, 32 CFR § 1606.32 (a) (1); 32 CFR § 1606.38 (c). The registrant would then have a right to request a reopening of his classification, 32 CFR § 1625.1 (a); 32 CFR § 1625.2, if he submitted "proof of error in documents submitted to the appeal board by the Department of Justice."[7] Moreover, he may present his contentions to the Director of Selective Service or the State Director of Selective Service, requesting a reopening of his classification or a reconsideration by the Appeal Board, 32 CFR § 1625.3 (a); 32 CFR § 1626.61 (a).

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[7] See letter of General Hershey, February 4, 1955.

We believe these remedies to be too little and too late. Too little, because the right to present petitioner's side of the case is broader than the bare right to correct "errors" made by the Department in its recommendation. Too late, because, except with the permission of the national or state Director, only the local Board may reopen the case; and a certain reluctance is to be expected after the Appeal Board, albeit on incomplete presentation, has rejected the registrant's claim. Moreover, the local Board has discretion to refuse to reopen the case if it "is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification . . . ." 32 CFR § 1625.4.

We hold that the over-all procedures set up in the statute and regulations, designed to be "fair and just" in their operation, 62 Stat. 605, 50 U. S. C. App. § 451 (c), require that the registrant receive a copy of the Justice Department's recommendation and be given a reasonable opportunity to file a reply thereto. Accordingly, the decision of the Court of Appeals, upholding petitioner's conviction for refusing to submit to induction, is

Reversed.

MR. JUSTICE REED, with whom MR. JUSTICE BURTON joins, dissenting.

I would affirm. The prescribed procedure, including especially the hearing before a hearing officer, provided adequate protection for petitioner, and I find no express or implied statutory or administrative requirement that the Department of Justice send to petitioner a copy of its advisory report to the Appeal Board.

The report of the Department of Justice is advisory only. As the registrant has, under Selective Service

Regulations, 32 CFR § 1606.32 (a)(1), a right to examine the report, as well as all other information in the file, and under § 1625 (1) and (2) reopen the classification on a showing of error, the "fair and just" requirement for a hearing is satisfied. *United States* v. *Nugent*, 346 U. S. 1.

MR. JUSTICE MINTON, dissenting.

Because the regulations of the Board did not require the Department of Justice to send petitioner a copy of its advisory report, and since the petitioner did not request that he be allowed to see the report or a summary thereof, the action of the Board was not arbitrary and capricious. The Board did not lose its jurisdiction or act beyond it. I would affirm.

LEWIS *v.* UNITED STATES.

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

No. 203. Argued February 3, 1955.—Decided March 14, 1955.

The provisions of 26 U. S. C. § 3290 and related sections, making it a federal offense to engage in the business of accepting wagers without paying the occupational tax imposed by that section, are constitutional, as applied to violations occurring in the District of Columbia, where wagering is made a crime by federal law. *United States* v. *Kahriger*, 345 U. S. 22. Pp. 419–423.

(a) The statute is a valid exercise of the taxing power and not a penalty in the guise of a tax. P. 421.

(b) As applied to petitioner in the District of Columbia, it does not violate the privilege against self-incrimination guaranteed by the Fifth Amendment. Pp. 421–423.

(c) Since petitioner had purchased no tax stamp, he is not in a position to raise the question whether the requirement of 26 U. S. C. § 3293 that the taxpayer exhibit a tax stamp in his place of business contravenes the Fourth Amendment's ban against unreasonable search and seizure. P. 423.

94 U. S. App. D. C. —, 214 F. 2d 853, affirmed.

Walter E. Gallagher argued the cause for petitioner. With him on the brief was *Myron G. Ehrlich.*

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, Marvin E. Frankel* and *Joseph A. Barry.*

MR. JUSTICE MINTON delivered the opinion of the Court.

An information was filed in the Municipal Court of the District of Columbia charging the petitioner with violation of 26 U. S. C. § 3290 in that he engaged in the business of accepting wagers without paying the occupational tax imposed by that section. The Municipal Court sustained

a motion to dismiss the information. The Municipal Court of Appeals for the District reversed, 100 A. 2d 40, and the Circuit Court of Appeals affirmed the Municipal Court of Appeals. 94 U. S. App. D. C. ——, 214 F. 2d 853. We granted certiorari. 348 U. S. 810.

The questions presented in this case are: Does the Act, as applied to the petitioner in the District of Columbia, constitute a valid exercise of the taxing power or is it a penalty under the guise of a tax? Secondly, does it violate the Fifth Amendment's prohibition as to compulsory self-incrimination? Thirdly, does it contravene the Fourth Amendment's ban against unreasonable search and seizure? The first two questions were categorically answered in the negative, and the validity and constitutionality of the Act upheld by us in *United States* v. *Kahriger,* 345 U. S. 22; the third question is not substantially different from the second and is also controlled by *Kahriger.* The only material factual difference between that case and the instant case is that in *Kahriger* the violation occurred in a State, namely, Pennsylvania, while in the instant case the violation is charged to have taken place in the District of Columbia.

The statute, 26 U. S. C. § 3290, provides:

> "A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

Another section, 26 U. S. C. § 3271, reads:

> "Payment of tax—(a) Condition precedent to doing business.
>
> "No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter."

Subchapter A, referred to in § 3290, provides in § 3285:

> "(a) Wagers.
>
> "There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof."

These provisions must be read together, and when we do, it seems clear that payment of the special $50 tax is to be made prior to engaging in the business of accepting wagers.

We held in *Kahriger* that this statute was a constitutional exercise of the taxing power and was not a penalty under the guise of a tax. 345 U. S., at 24–32. It is argued that that case involved wagering in a State, where such activity is not a violation of federal law, that the instant case arises in the District of Columbia, where wagering is by federal law a crime, D. C. Code, 1951, § 22–1501 *et seq.*, and that this statute as applied to petitioner in the District of Columbia is a penalty in the guise of a tax. The short answer to this argument is that this Court has long held that the Federal Government may tax what it also forbids. *United States* v. *Stafoff,* 260 U. S. 477.

Secondly, it is contended by petitioner that the Act in question is unconstitutional because compliance compels self-incrimination in contravention of the Fifth Amendment. The Fifth Amendment provides that one cannot be *compelled,* in a criminal case, to be a witness against himself. It is a shield that prevents one from being convicted out of his own mouth by anything short of voluntary statements.

Petitioner maintains that the taxes imposed are retrospective in application. It is argued that he must be liable for the tax under subchapter A in the sense that he must have already wagered before he is required to take out the occupational tax, and that to require him to do so

compels admission that he has gambled. We do not so read the statute. The Act does not mean one must first have made a wager as defined in subchapter A and therefore incurred liability to pay the tax levied therein before liability for the occupational tax attaches. The Act is wholly prospective and by its terms did not become applicable until November 1, 1951, more than ten days after its enactment on October 20, 1951. See compiler's note to 26 U. S. C. § 3285. The statute simply designates a class that *is liable* to pay the ten percent tax when a wager or wagers are made. Payment of the $50 tax here under consideration is a registration fee that must be paid before engaging in the business of wagering.

We said in *Kahriger, supra,* at 32–33: "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." The condition here important was that petitioner must first pay the $50 tax, but that did not give him any license to engage in an unlawful business. *License Tax Cases,* 5 Wall. 462, 471. It only warned that if he proposed to carry on this particular business he must pay the tax.

If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, as in this case, he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but

there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.

And, finally, the petitioner argues that to require him to pay the tax and exhibit the stamp in his place of business, as required by 26 U. S. C. § 3293 of the Act, is to furnish probable cause for the issuance of a search warrant. This is just another facet of the Fifth Amendment argument, but the ready answer is that the petitioner has no stamp. If he does not purchase a stamp even though he wagers, which is this case, it is difficult to see how such failure would give probable cause for the issuance of a search warrant. His complaint is that if he had one he might get in trouble. Since petitioner is without a stamp, he is not in a position to raise the question as to what might happen to him if he had one.

The judgment is

Affirmed.

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

United States v. *Kahriger*, 345 U. S. 22, put a most restrictive interpretation on the Fifth Amendment's provision against compelling persons to confess facts which will help government take away their liberty. But this case reduces the Fifth Amendment's protection still more. Kahriger had to confess only to state law violations to save himself from going to jail for violating the federal registration law. This was one of the arguments relied on by the Government to persuade this Court to sustain the federal law as applied to Kahriger.[1] But the peti-

[1] The Government there argued: "Wagering is doubtless unlawful in many states (perhaps in all but Nevada), but it is not forbidden by any federal law.

"Thus the registration statement in which the taxpayer is required to set forth his name, address and places of business, and the names and addresses of his agents or principals does not call for a disclosure

tioner here, in order to be permitted to pay the $50 tax, must file a written confession with the District of Columbia Internal Revenue Collector revealing that, in violation of federal law, he is at the moment he registers "engaged in the business of accepting wagers." [2] He must also tell where he carries on the illegal business, the names and addresses of those who receive wagers for him and of those for whom he receives wagers.[3] For engaging in this wagering business, which registration would compel petitioner to confess, he could be convicted of felony, fined $1,000, imprisoned three years, or both.[4] And for conspiring with his employers or employees to promote a lottery even in the future, which compulsory registration is designed to reveal, petitioner could be punished by a fine of $10,000, imprisonment for five years, or both.[5] Thus in order to pay the tax, petitioner would be

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of information which will reveal a violation of federal law." Reply Brief for the United States, p. 3, *United States* v. *Kahriger,* 345 U. S. 22.

[2] See *United States* v. *Kahriger,* 210 F. 2d 565, 570. Paragraph 4 of Instructions on the tax return which petitioner would have been compelled to sign in order to pay the $50 tax provides: "The information called for on the return must be completely furnished. If not so furnished, the special tax stamp will not be issued."

[3] That petitioner would have been compelled to make such confessions is shown by a copy of the "Special Tax Return and Application for Registry—Wagering" in effect at the time of petitioner's failure to register. It reads in part: "5. Are you engaged in the business of accepting wagers on your own account? . . . If yes, [give] (*a*) Name and address where each such business is conducted. . . . (*b*) Number of employees and/or agents engaged in receiving wagers on your behalf. . . . (*c*) True name, current address, and special tax stamp number of each such person. . . . 6. Do you receive wagers for or on behalf of some other person or persons? . . . If yes, give true name and address of each such person. . . ."

[4] The D. C. Code, 1951, § 22–1501 makes promotion of lotteries a crime. The definition of lotteries here includes the definition of wagers in the registration law. 65 Stat. 529, 26 U. S. C. § 3285.

[5] 18 U. S. C. § 371.

compelled to supply evidence useful and maybe sufficient to convict him of felonies for which he could be incarcerated for years. If this would not violate the Fifth Amendment's privilege against self-incrimination, it is hard to think of anything that would. Cf. *Blau* v. *United States,* 340 U. S. 159, and cases cited.

And yet the Court holds petitioner can be sent to jail for refusal to make a public registration of his guilt of criminal conduct. This result seems to be largely dependent on the statement that petitioner has "no constitutional right to gamble." Of course not. But if we remain faithful to the letter and spirit of the Bill of Rights, gamblers, like others, have a right to invoke its safeguards. It should not be forgotten that breaches opened to get lawless gamblers remain to jeopardize the liberty of the law-abiding.

MR. JUSTICE FRANKFURTER, dissenting.

In view of the recentness of the decision in *United States* v. *Kahriger,* 345 U. S. 22, and my continuing disagreement with the constitutional views which it expressed, I cannot acquiesce in this decision. Indeed, this case only emphasizes the difficulties which I found in *Kahriger,* for here we are concerned with a spurious use of the taxing power as a means of facilitating prosecution of federal offenses.

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COMMISSIONER OF INTERNAL REVENUE *v.* GLENSHAW GLASS CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

No. 199. Argued February 28, 1955.—Decided March 28, 1955.

Money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble-damage antitrust recovery must be reported by a taxpayer as "gross income" under § 22 (a) of the Internal Revenue Code of 1939. Pp. 427–433.

(a) In determining what constitutes "gross income" as defined in § 22 (a), effect must be given to the catchall language "gains or profits and income derived from any source whatever." Pp. 429–430.

(b) *Eisner* v. *Macomber*, 252 U. S. 189, distinguished. Pp. 430–431.

(c) The mere fact that such payments are extracted from the wrongdoers as punishment for unlawful conduct cannot detract from their character as taxable income to the recipients. P. 431.

(d) A different result is not required by the fact that § 22 (a) was re-enacted without change after the Board of Tax Appeals had held punitive damages nontaxable in *Highland Farms Corp.*, 42 B. T. A. 1314. Pp. 431–432.

(e) The legislative history of the Internal Revenue Code of 1954 does not require a different result. The definition of gross income was simplified, but no effect upon its present broad scope was intended. P. 432.

(f) Punitive damages cannot be classified as gifts, nor do they come under any other exemption in the Code. P. 432.

211 F. 2d 928, reversed.

Solicitor General Sobeloff argued the cause for petitioner. With him on the brief were *Assistant Attorney General Holland, Charles F. Barber, Ellis N. Slack* and *Melva M. Graney.*

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*Together with *Commissioner of Internal Revenue* v. *William Goldman Theatres, Inc.*, which was a separate case decided by the Court of Appeals in the same opinion.

Max Swiren argued the cause for the Glenshaw Glass Company, respondent. With him on the brief were *Sidney B. Gambill* and *Joseph D. Block.*

Samuel H. Levy argued the cause for William Goldman Theatres, Inc., respondent. With him on the brief was *Bernard Wolfman.*

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

This litigation involves two cases with independent factual backgrounds yet presenting the identical issue. The two cases were consolidated for argument before the Court of Appeals for the Third Circuit and were heard *en banc.* The common question is whether money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble-damage antitrust recovery must be reported by a taxpayer as gross income under § 22 (a) of the Internal Revenue Code of 1939.[1] In a single opinion, 211 F. 2d 928, the Court of Appeals affirmed the Tax Court's separate rulings in favor of the taxpayers. 18 T. C. 860; 19 T. C. 637. Because of the frequent recurrence of the question and differing interpretations by the lower courts of this Court's decisions bearing upon the problem, we granted the Commissioner of Internal Revenue's ensuing petition for certiorari. 348 U. S. 813.

The facts of the cases were largely stipulated and are not in dispute. So far as pertinent they are as follows:

Commissioner v. *Glenshaw Glass Co.*—The Glenshaw Glass Company, a Pennsylvania corporation, manufactures glass bottles and containers. It was engaged in protracted litigation with the Hartford-Empire Company, which manufactures machinery of a character used by Glenshaw. Among the claims advanced by Glenshaw

[1] 53 Stat. 9, 53 Stat. 574, 26 U. S. C. § 22 (a).

were demands for exemplary damages for fraud [2] and treble damages for injury to its business by reason of Hartford's violation of the federal antitrust laws.[3] In December, 1947, the parties concluded a settlement of all pending litigation, by which Hartford paid Glenshaw approximately $800,000. Through a method of allocation which was approved by the Tax Court, 18 T. C. 860, 870–872, and which is no longer in issue, it was ultimately determined that, of the total settlement, $324,529.94 represented payment of punitive damages for fraud and antitrust violations. Glenshaw did not report this portion of the settlement as income for the tax year involved. The Commissioner determined a deficiency claiming as taxable the entire sum less only deductible legal fees. As previously noted, the Tax Court and the Court of Appeals upheld the taxpayer.

Commissioner v. *William Goldman Theatres, Inc.*— William Goldman Theatres, Inc., a Delaware corporation operating motion picture houses in Pennsylvania, sued Loew's, Inc., alleging a violation of the federal antitrust laws and seeking treble damages. After a holding that a violation had occurred, *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738, the case was remanded to the trial court for a determination of damages. It was found that Goldman had suffered a loss of profits equal to $125,000 and was entitled to treble damages in the sum of $375,000. *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 69 F. Supp. 103, aff'd, 164 F. 2d 1021, cert. denied, 334 U. S. 811. Goldman reported only $125,000 of the recovery as gross income and claimed that the $250,000

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[2] For the bases of Glenshaw's claim for damages from fraud, see *Shawkee Manufacturing Co.* v. *Hartford-Empire Co.*, 322 U. S. 271; *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238.

[3] See *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 324 U. S. 570.

balance constituted punitive damages and as such was not taxable. The Tax Court agreed, 19 T. C. 637, and the Court of Appeals, hearing this with the *Glenshaw* case, affirmed. 211 F. 2d 928.

It is conceded by the respondents that there is no constitutional barrier to the imposition of a tax on punitive damages. Our question is one of statutory construction: are these payments comprehended by § 22 (a)?

The sweeping scope of the controverted statute is readily apparent:

> "SEC. 22. GROSS INCOME.
>
> "(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, *or gains or profits and income derived from any source whatever. . . .*" (Emphasis added.) [4]

This Court has frequently stated that this language was used by Congress to exert in this field "the full measure of its taxing power." *Helvering* v. *Clifford,* 309 U. S. 331, 334; *Helvering* v. *Midland Mutual Life Ins. Co.,* 300 U. S. 216, 223; *Douglas* v. *Willcuts,* 296 U. S. 1, 9; *Irwin* v. *Gavit,* 268 U. S. 161, 166. Respondents contend that punitive damages, characterized as "windfalls" flowing from the culpable conduct of third parties, are not within the scope of the section. But Congress applied no limitations as to the source of taxable receipts, nor restrictive

[4] See note 1, *supra.*

labels as to their nature. And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted. *Commissioner* v. *Jacobson,* 336 U. S. 28, 49; *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 87–91. Thus, the fortuitous gain accruing to a lessor by reason of the forfeiture of a lessee's improvements on the rented property was taxed in *Helvering* v. *Bruun,* 309 U. S. 461. Cf. *Robertson* v. *United States,* 343 U. S. 711; *Rutkin* v. *United States,* 343 U. S. 130; *United States* v. *Kirby Lumber Co.,* 284 U. S. 1. Such decisions demonstrate that we cannot but ascribe content to the catchall provision of § 22 (a), "gains or profits and income derived from any source whatever." The importance of that phrase has been too frequently recognized since its first appearance in the Revenue Act of 1913 [5] to say now that it adds nothing to the meaning of "gross income."

Nor can we accept respondents' contention that a narrower reading of § 22 (a) is required by the Court's characterization of income in *Eisner* v. *Macomber,* 252 U. S. 189, 207, as "the gain derived from capital, from labor, or from both combined." [6] The Court was there endeavoring to determine whether the distribution of a corporate stock dividend constituted a realized gain to the shareholder, or changed "only the form, not the essence," of

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[5] 38 Stat. 114, 167.

[6] The phrase was derived from *Stratton's Independence, Ltd.* v. *Howbert,* 231 U. S. 399, 415, and *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 185, two cases construing the Revenue Act of 1909, 36 Stat. 11, 112. Both taxpayers were "wasting asset" corporations, one being engaged in mining, the other in lumbering operations. The definition was applied by the Court to demonstrate a distinction between a return on capital and "a mere conversion of capital assets." *Doyle* v. *Mitchell Bros. Co., supra,* at 184. The question raised by the instant case is clearly distinguishable.

his capital investment. *Id.*, at 210. It was held that the taxpayer had "received nothing out of the company's assets for his separate use and benefit." *Id.*, at 211. The distribution, therefore, was held not a taxable event. In that context—distinguishing gain from capital—the definition served a useful purpose. But it was not meant to provide a touchstone to all future gross income questions. *Helvering* v. *Bruun, supra,* at 468–469; *United States* v. *Kirby Lumber Co., supra,* at 3.

Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion. The mere fact that the payments were extracted from the wrongdoers as punishment for unlawful conduct cannot detract from their character as taxable income to the recipients. Respondents concede, as they must, that the recoveries are taxable to the extent that they compensate for damages actually incurred. It would be an anomaly that could not be justified in the absence of clear congressional intent to say that a recovery for actual damages is taxable but not the additional amount extracted as punishment for the same conduct which caused the injury. And we find no such evidence of intent to exempt these payments.

It is urged that re-enactment of § 22 (a) without change since the Board of Tax Appeals held punitive damages nontaxable in *Highland Farms Corp.*, 42 B. T. A. 1314, indicates congressional satisfaction with that holding. Re-enactment—particularly without the slightest affirmative indication that Congress ever had the *Highland Farms* decision before it—is an unreliable indicium at best. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100–101; *Koshland* v. *Helvering,* 298 U. S. 441, 447. Moreover, the Commissioner promptly published his nonacquiescence in this portion of the *Highland Farms* holding[7] and has,

[7] 1941–1 Cum. Bull. 16.

before and since, consistently maintained the position that these receipts are taxable.[8] It therefore cannot be said with certitude that Congress intended to carve an exception out of § 22 (a)'s pervasive coverage. Nor does the 1954 Code's [9] legislative history, with its reiteration of the proposition that statutory gross income is "all-inclusive," [10] give support to respondents' position. The definition of gross income has been simplified, but no effect upon its present broad scope was intended.[11] Certainly punitive damages cannot reasonably be classified as gifts, cf. *Commissioner* v. *Jacobson,* 336 U. S. 28, 47–52, nor do they come under any other exemption provision in the Code. We would do violence to the plain meaning of the statute and restrict a clear legislative attempt to

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[8] The long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages following injury to property. See 2 Cum. Bull. 71; I–1 Cum. Bull. 92, 93; VII–2 Cum. Bull. 123; 1954–1 Cum. Bull. 179, 180. Damages for personal injury are by definition compensatory only. Punitive damages, on the other hand, cannot be considered a restoration of capital for taxation purposes.

[9] 68A Stat. 3 *et seq.* Section 61 (a) of the Internal Revenue Code of 1954, 68A Stat. 17, is the successor to § 22 (a) of the 1939 Code.

[10] H. R. Rep. No. 1337, 83d Cong., 2d Sess. A18; S. Rep. No. 1622, 83d Cong., 2d Sess. 168.

[11] In discussing § 61 (a) of the 1954 Code, the House Report states:

"This section corresponds to section 22 (a) of the 1939 Code. While the language in existing section 22 (a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. Section 61 (a) is as broad in scope as section 22 (a).

"Section 61 (a) provides that gross income includes 'all income from whatever source derived.' This definition is based upon the 16th Amendment and the word 'income' is used in its constitutional sense." H. R. Rep. No. 1337, *supra,* note 10, at A18.

A virtually identical statement appears in S. Rep. No. 1622, *supra,* note 10, at 168.

bring the taxing power to bear upon all receipts constitutionally taxable were we to say that the payments in question here are not gross income. See *Helvering* v. *Midland Mutual Life Ins. Co., supra,* at 223.

Reversed.

MR. JUSTICE DOUGLAS dissents.

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

GENERAL AMERICAN INVESTORS CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 114. Argued February 28, 1955.—Decided March 28, 1955.

Payments received by a corporation pursuant to the "insider profits" provisions of the Securities Exchange Act of 1934 and the Investment Company Act of 1940 are taxable as "gross income" to the corporation under § 22 (a) of the Internal Revenue Code of 1939. *Commissioner* v. *Glenshaw Glass Co., ante*, p. 426. Pp. 434–436. 211 F. 2d 522, affirmed.

Norris Darrell argued the cause for petitioner. With him on the brief was *John F. Dooling, Jr.*

Solicitor General Sobeloff argued the cause for respondent. With him on the brief were *Assistant Attorney General Holland, Charles F. Barber, Ellis N. Slack* and *Melva M. Graney.*

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

The sole question presented by this case is whether a payment is taxable as gross income when received by a corporation pursuant to the "insider profits" provisions of the Securities Exchange Act of 1934 [1] and the Investment Company Act of 1940.[2] Subject to exceptions not presently relevant, § 16 (b) of the Securities Exchange Act provides that the profit realized from certain defined securities transactions undertaken by a director or major stockholder of the issuing corporation "shall inure to and be recoverable by the issuer." [3] This provision is made

[1] 48 Stat. 881, 15 U. S. C. § 78a.

[2] 54 Stat. 789, 15 U. S. C. § 80a–1.

[3] 48 Stat. 896, 15 U. S. C. § 78p.

applicable to investment companies by § 30 (f) of the Investment Company Act of 1940.[4] Under these provisions, petitioner, a registered closed-end investment company, received payments totalling $170,038.04. This sum represented the profits accruing to one of petitioner's directors and a stockholder through dealings covered by § 16 (b); the money was paid over to petitioner on demand and without litigation. The payments were not reported as income on petitioner's tax returns. The Commissioner of Internal Revenue allowed a $13,000 deduction for legal expenses incurred in recovering the amounts due but asserted a deficiency for the balance on the ground that the receipts constituted taxable gains under § 22 (a) of the Internal Revenue Code of 1939.[5] The Tax Court, 19 T. C. 581, and the Court of Appeals for the Second Circuit, 211 F. 2d 522, sustained the Commissioner's determination. We granted certiorari, 348 U. S. 812, because of an apparent similarity of issues here to those involved in *Commissioner* v. *Glenshaw Glass Co.*, 211 F. 2d 928 (C. A. 3d Cir.), and the possible conflict between that case and this.[6]

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[4] 54 Stat. 837, 15 U. S. C. § 80a–29.

[5] "SEC. 22. GROSS INCOME.

"(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, *or gains or profits and income derived from any source whatever. . . .*" (Emphasis added.) 53 Stat. 9, 53 Stat. 574, 26 U. S. C. § 22 (a).

[6] There was, however, no disagreement among lower courts which faced the question of the taxability of a § 16 (b) recovery of "insider profits." See *Park & Tilford Distillers Corp.* v. *United States*, 123 Ct. Cl. 509, 107 F. Supp. 941; *Noma Electric Corp.*, 12 T. C. M. 1 (CCH Tax Ct. Mem., Dec. 1953).

We have this day decided that the recovery of punitive damages for fraud or antitrust violation is reportable as gross income within the meaning of § 22 (a). *Commissioner* v. *Glenshaw Glass Co., ante,* p. 426. The reasons which dictated that result are equally compelling here. We see no significant difference in the nature of these receipts which might make that ruling inapplicable. As in *Glenshaw,* the taxpayer realized the money in question free of any restrictions as to use. The payments in controversy were neither capital contributions nor gifts. Cf. *Texas & Pacific R. Co.* v. *United States,* 286 U. S. 285. There is no indication that Congress intended to exempt them from coverage. In accordance with the legislative design to reach all gain constitutionally taxable unless specifically excluded, we conclude that the petitioner is liable for the tax and the judgment is

Affirmed.

MR. JUSTICE DOUGLAS concurs in the result.

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

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES *v.* WESTINGHOUSE ELECTRIC CORP.

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

No. 51. Argued November 17–18, 1954.—Decided March 28, 1955.

Under § 301 of the Labor Management Relations Act and the Federal Declaratory Judgment Act, petitioner, an unincorporated labor organization, brought suit in a federal district court in Pennsylvania against respondent, a Pennsylvania corporation engaged in interstate commerce, to enforce a collective bargaining agreement between them. Petitioner alleged that it was the collective bargaining representative of a group of respondent's employees and that respondent had violated the agreement by refusing to pay 4,000 of them for work on one day when they were absent. It asked the court to interpret the contract, declare the rights of the parties, compel respondent to make an accounting, and enter judgment for the unpaid wages against respondent and in favor of the individual employees, who were not made parties to the suit. *Held:* The federal court did not have jurisdiction of the suit. Pp. 439–465.

210 F. 2d 623, affirmed.

MR. JUSTICE FRANKFURTER, in an opinion joined by MR. JUSTICE BURTON and MR. JUSTICE MINTON, concluded that:

1. Neither the text of § 301 nor its legislative history implies the existence or the establishment of a body of general federal substantive law for application in suits under it. Pp. 441–449.

2. In the present suit, there is neither diversity of citizenship nor a "federal question" in the traditional sense. Therefore, a serious constitutional question would arise if § 301 were construed to authorize this suit in a federal court. Pp. 449–452.

3. This constitutional problem may not be avoided by judicial creation of federal substantive law. Pp. 452–459.

4. In view of the constitutional problem and in the absence of any positive indication either on the face of the statute or in its

legislative history that such suits were contemplated, § 301 will not be construed to grant a federal court jurisdiction over this suit. Pp. 459–461.

MR. CHIEF JUSTICE WARREN, in a concurring opinion joined by MR. JUSTICE CLARK, concluded that the only question involved is one of statutory interpretation and that the language of § 301 is not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer. P. 461.

MR. JUSTICE REED, concurring, concluded that:

1. A cause of action for breach of a contract made under the National Labor Relations Act between a union and an employer is a cause of action arising under federal law, and Congress may constitutionally give a federal court jurisdiction over it. Pp. 461–464.

2. In this case, the claim for wages arises from separate hiring contracts between the employer and each employee, not from the collective bargaining agreement between the employer and the union. Therefore, it does not involve such a violation of a contract between an employer and a union as is required to confer jurisdiction under § 301. Pp. 464–465.

A suit brought by petitioner against respondent under § 301 of the Labor Management Relations Act was dismissed on the merits by the District Court. 107 F. Supp. 692. The Court of Appeals directed a dismissal for lack of jurisdiction. 210 F. 2d 623. This Court granted certiorari. 347 U. S. 1010. *Affirmed*, p. 461.

David E. Feller argued the cause for petitioner. With him on the brief were *Arthur J. Goldberg* and *Thomas E. Harris.*

Mahlon E. Lewis argued the cause for respondent. With him on the brief was *Loyal H. Gregg.*

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which MR. JUSTICE BURTON and MR. JUSTICE MINTON join.

Respondent is a Pennsylvania corporation engaged in the manufacture and sale of electrical equipment in interstate commerce. Petitioner, an unincorporated labor organization and the collective bargaining representative of some 5,000 salaried employees at two of respondent's plants, filed this suit against respondent in the United States District Court for the Western District of Pennsylvania to enforce collective bargaining agreements then in effect between it and respondent. The suit was brought under § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185, and the Federal Declaratory Judgment Act, 62 Stat. 964, as amended, 28 U. S. C. §§ 2201, 2202.

More specifically, petitioner alleged that under the contracts respondent was obligated to pay the employees represented by petitioner their full salary during April 1951, regardless of whether they missed a day's work, unless the absence was due to "furlough" or "leave of absence," and that respondent had violated the contracts by deducting from the pay of some 4,000 of those employees their wages for April 3, when they were absent. No reason was given for their absence, but it was alleged that the reason was not furlough or leave of absence. The employees were not named and were not made parties to the suit. Petitioner requested the court to interpret the contracts, declare the rights of the parties, compel respondent to make an accounting (and name the employees involved and the amounts of unpaid salaries), and enter a judgment against respondent and in favor of the individual employees for the unpaid wages.

Respondent moved to dismiss the complaint on three grounds: the court lacked jurisdiction over the subject matter, petitioner was the wrong party plaintiff under

Fed. Rules Civ. Proc., 17 (a), and the complaint failed to state a claim upon which relief could be granted. The district court held that it had jurisdiction over the subject matter and that petitioner was a proper plaintiff but dismissed the complaint for failure to state a claim for relief, without prejudice to petitioner's right to amend. It held that, without affirmative averments as to the cause of the absences from work, it must be assumed the absences were voluntary, and that the bargaining contracts did not obligate respondent to pay wages during voluntary absences. 107 F. Supp. 692.

The Court of Appeals for the Third Circuit, sitting *en banc,* three judges dissenting, vacated the district court's order dismissing the complaint on the merits, and directed a dismissal for lack of jurisdiction. After stating that § 301 "is a grant of federal-question jurisdiction and thus creates a federal, substantive right" and reviewing various theories explaining the relationship between union, employer and employees under a collective bargaining agreement, the court adopted an "eclectic theory," based primarily upon language in *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332. The bargaining contract, said the Court, obligates the employer to include in the contracts of hire with each employee the terms and conditions which had been settled between the union and the employer, but the collective contract itself is not a contract of hire. Not until an employee enters into an individual contract of hire and performs services does the employer become bound to pay the particular employee the specified wages. It follows, said the Court, that if there was a breach in this case, it was a breach of the employment contracts with the individual employees who were not paid. Section 301, on the other hand, grants jurisdiction to federal courts only over cases involving breaches of the collective bargaining contract between the union and the employer. There-

fore, it was concluded, the district court was without jurisdiction of the suit. 210 F. 2d 623.

The dissenting judges agreed that a failure to pay wages might well constitute a breach of the individual hiring contracts as a basis of common-law suits by the employees. But they deemed the breach, if any, also a breach of the collective bargaining contracts and as such cognizable in the federal court under § 301. They concluded that Rule 17 (a) permitted the union to sue alone, without joinder of the employees, to vindicate the rights of these employees as a class, such employees being beneficiaries of the collective contracts. They agreed with the district court, however, that, on this complaint, the bargaining contracts did not make respondent liable, since the cause of the absences from work was not alleged. 210 F. 2d, at 630.

The case was brought here for construction of a section of the Taft-Hartley Act which has proved a fertile source of difficulty for the lower courts. 347 U. S. 1010.

1. In dealing with an enactment such as § 301 of the Labor Management Relations Act,[1] it is necessary first

[1] Section 301 provides:

"SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its

318107 O - 55 - 34

to ascertain its jurisdictional scope, more particularly, whether it extends to the suit at hand. Here, as may not infrequently be the case, this question turns in large measure on what sources a federal court would be required to draw upon in determining the underlying substantive rights of the parties—in this case, in deciding whether the union has the contract right which it asserts. If Congress has itself defined the law or authorized the federal courts to fashion the judicial rules governing this question, it would be self-defeating to limit the scope of the power of the federal courts to less than is necessary to accomplish this congressional aim. If, on the other hand, Congress merely furnished a federal forum for enforcing the body of contract law which the States provide, a serious constitutional problem would lie at the threshold of jurisdiction. Moreover, if the function of § 301 is merely that of providing a federal forum for state law, there are good reasons for finding that, despite the broad wording of § 301, Congress did not intend to confer jurisdiction over this type of suit.

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assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, 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 representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

If the section is given the meaning its language spontaneously yields, it would seem clear that all it does is to give procedural directions to the federal courts. "When an unincorporated association that happens to be a labor union appears before you as a litigant in a case involving breach of a collective agreement," Congress in effect told the district judges, "treat it as though it were a natural or corporate legal person and do so regardless of the amount in controversy and do not require diversity of citizenship."

Since a statute like the Taft-Hartley Act is an organism, § 301 must be placed in the context of the legislation as a whole. So viewed, however, the meaning which the section by itself affords is not affected. While some sections of the Act in certain instances may be relevant in actions for breach of contract and as such binding also on the States,[2] no provision suggests general application of

[2] Section 1 of the Act states the congressional aim to be the enumeration of "legitimate rights" of employers and employees and the definition of practices to be outlawed in the interest of furthering industrial peace. No inference pertinent to the jurisdictional content of § 301 can be drawn from this introductory generalization. No other provision of the Act indicates that substantive federal law was to guide the determination of the contractual rights and liabilities that are to flow from a collective bargaining contract. Section 302 contains a highly specialized restriction on the legality of employers' agreements to make payments to employee representatives. Section 303 provides a federal right to recover damages suffered as a result of improper boycotts. Section 8 enumerates unfair labor practices; these may in some instances become relevant to the validity or interpretation of a collective agreement. Certain procedural safeguards are placed about the collective bargaining agreement: an obligation to confer in good faith on questions arising under it; a duty to follow certain steps prior to terminating or modifying the agreement unilaterally. (§§ 8 (d), 204 (a)(2).) And a limited number of substantive rights conferred under the Act may incidentally involve the interpretation of the collective agreement. (*E. g.*, § 9 (a).) It is significant, however, that breach of contract is not an "unfair labor

defined or theretofore available federal substantive law in actions arising under § 301.

This examination would conclude the construction of the section by English courts, that is, by any court reading legislation as it is written without drawing on parliamentary debates. And considering that the construction we have found seems plain, the so-called "plain meaning rule," on which construction is from time to time rested also in this Court, likewise makes further inquiry needless and indeed improper. But that rule has not dominated our decisions. The contrary doctrine has prevailed. See *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 48; *United States* v. *Dickerson,* 310 U. S. 554, 561. And so we proceed to an examination of the legislative history to see whether that raises such doubts that the search for meaning should not be limited to the statute itself.

Congressional concern with obstacles surrounding union litigation began to manifest itself as early as 1943. In the first session of the 78th Congress and thereafter numerous bills were introduced proposing various solutions, including federal incorporation,[3] denial of rights under the Wagner Act to contract violators,[4] creation of a cause of action for strikes and other acts in violation of the collective bargaining contract,[5] and grants of federal juris-

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practice." A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42.) The Act expressly defers to state law on the question of legality of the union shop provision. (§§ 8 (a) (3), 14 (b).)

[3] H. R. 1781, 78th Cong., 1st Sess.; H. R. 4960, 79th Cong., 1st Sess.; S. 2488, S. J. Res. 133; H. J. Res. 318, 79th Cong., 2d Sess.; S. J. Res. 8; H. J. Res. 43, 80th Cong., 1st Sess.

[4] S. 1641, 79th Cong., 1st Sess.

[5] S. 1656, 79th Cong., 1st Sess.; S. 123; H. R. 267, 1430, 80th Cong., 1st Sess.

diction similar to the present § 301.[6] Only one of these, the so-called "Case bill," was acted upon. This bill, which passed both Houses in 1946, only to fail through President Truman's veto, included as § 10 a provision somewhat similar to the present section. That section passed the House in the following form:

> "SEC. 10. BINDING EFFECT OF COLLECTIVE-BARGAINING CONTRACTS.—All collective-bargaining contracts shall be mutually and equally binding and enforceable against each of the parties thereto, any other law to the contrary notwithstanding. In the event of a breach of any such contract or of any agreement contained in such contract by either party thereto, then, in addition to any other remedy or remedies existing, a suit for damages for such breach may be maintained by the other party or parties in any State or United States district court having jurisdiction of the parties." H. R. 4908, 79th Cong., 2d Sess.

Discussion in that chamber was not enlightening, due perhaps to the fact that the Case bill had been substituted on the House floor for the text of a very different bill and thus had never been considered in committee. Section 10 was presented as necessary to achievement of "mutuality" of obligation between employer and union, but there was no guiding explanation of the nature of the obstacle to mutuality. The language of the section, however, gave support to the view that a federal cause of action was to be created.

After the bill passed the House, hearings were held on it by the Senate Committee on Education and Labor, during which Senator Taft pointed out to Representative Case that, in his view, the section as written failed to deal

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[6] S. 55, 404; H. R. 725, 80th Cong., 1st Sess. Under S. 937, 80th Cong., 1st Sess., a system of federal labor courts to hear all cases arising out of collective bargaining contracts would have been established.

with the real problem, which was not substantive enforceability but procedural difficulty in obtaining jurisdiction over unincorporated labor organizations. Mr. Case agreed that the section should be redrafted to reach that problem.[7] The Committee reported the bill without § 10, asserting that as it passed the House the section was "based upon a misapprehension as to the legal responsibility of the parties under such contracts," that such contracts "are at present legally enforceable in the courts," and that to promote litigation concerning them would be undesirable.[8] Senators Ball, Taft and H. Alexander Smith filed a minority report conceding that collective agreements "theoretically are legally enforceable contracts" but contending that action was necessary to overcome practical obstacles to enforcement arising from the status of unions as unincorporated associations. They proposed a differently worded section later adopted in substance by both Houses, which closely approximated the wording of the present § 301.[9]

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[7] Hearings before a Subcommittee of the Senate Committee on Education and Labor on H. R. 4908, 79th Cong., 2d Sess. 11.

[8] S. Rep. No. 1177, 79th Cong., 2d Sess. 8.

[9] *Id.*, Part 2, at 3–4, 10–14. The section which they proposed was as follows:

"SEC. —. (a) Suits for violation of a contract concluded as the result of collective bargaining between an employer and a labor organization if such contract affects commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties.

"(b) Any labor organization whose activities affect commerce as defined in this Act shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States: *Provided,* That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

In introducing this proposed amendment, Senator Taft stated:

> ". . . All we provide in the amendment is that voluntary associations shall in effect be suable as if they were corporations, and suable in the Federal courts if the contract involves interstate commerce and therefore involves a Federal question. . . ." 92 Cong. Rec. 5705.

This rather casual *non sequitur* seems to suggest reliance not on the existence or establishment of any substantive federal law governing collective bargaining contracts to create a "federal question" in the technical sense relevant to jurisdiction of district courts, but on the mere power of Congress to enact such law.[10] While some statements on the Senate floor by opponents of the amendment are ambiguous,[11] all authoritative materials indicate the strictly procedural aim of the section. The aim was to open the federal courts to suits on agreements solely because they were between labor organizations and employers without providing federal law for such suits.

In the first session of the 80th Congress, bills introduced independently in both Houses contained sections strikingly similar to the final version of § 10 of the Case

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[10] During the hearings on the Taft-Hartley bill, Senator Taft suggested that the fact that the collective bargaining agreement was the product of the exercise of federally created rights and duties was an adequate justification for federal jurisdiction. Hearings before Senate Committee on Labor and Public Welfare, on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. 57.

[11] See the statements of Senators Murray and Magnuson which seemed to suggest that § 10 would create "Federal rights." 92 Cong. Rec. 5708, 5720, 5411–5415. Senator Murray, however, appears to have been thinking only of the procedural and jurisdictional rights admittedly conferred by § 10. Senator Magnuson spoke before Senator Taft introduced the amendment containing § 10, and may not have understood that it differed considerably from the House version.

bill.[12] Discussion was more analytical. While generalities in praise of mutuality and enforceability reappear, it was evident that the specific desire was to remove procedural obstacles to suit by and against the union. Senator Pepper and Secretary of Labor Schwellenbach deemed the measure one "to provide a Federal forum" for suits on contracts based on local law.[13] It was assumed that this would result in mutual enforceability, which in turn would further labor harmony. The testimony of Secretary Schwellenbach (who together with the labor unions opposed § 301), minority reports in both Houses,[14] and opposition statements on the floor of the Senate [15] directed

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[12] H. R. 3020, 80th Cong., 1st Sess. § 302; S. 1126, 80th Cong., 1st Sess. § 301.

[13] Hearings before Senate Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess. 58. During these hearings Secretary Schwellenbach stated: "Since the field of necessary legislative action is so narrow, I see no reason why the gates of the Federal courts should be opened so wide as to invite litigation, as is done by this proposed section. Speaking as a lawyer and former member of the Federal judiciary, I have an objection to the abandonment in this field of the requirement of the $3,000 amount in controversy as a prerequisite to Federal jurisdiction. This is a right which has been jealously guarded by the Congress and by the Federal courts. To have them cluttered up with a great mass of petty litigation involving amounts less than $3,000 would bring them back to the position which they occupied during prohibition days when they became just a little bit above the level of the average police court insofar as criminal work was concerned.

"I do not see why it is necessary in this field to abandon the diversity of citizenship requirement. In fact I doubt that it can be abandoned constitutionally. The Constitution, as you know, limits suits in the Federal courts to cases arising under the Constitution and the laws of the United States or involving diversity of citizenship." *Id.*, at 56.

[14] H. Rep. No. 245, 80th Cong., 1st Sess. 108–110; S. Rep. No. 105, 80th Cong., 1st Sess., Part 2, 13–15.

[15] 93 Cong. Rec. 4033, 4906 (Senator Murray); *id.*, at 4768 (Senator Thomas).

attention to the fact that state law would govern actions under § 301 and that this, diversity jurisdiction apart, would raise a substantial constitutional question. No denial of the first of these assertions appears. Senator Taft did not justify § 301 as dependent on federal substantive law governing interpretation of collective bargaining contracts:

> "Mr. President, title III of the bill . . . makes unions suable in the Federal courts for violation of contract. As a matter of law unions, of course, are liable in theory on their contracts today, but as a practical matter it is difficult to sue them. They are not incorporated; they have many members; in some States all the members must be served; it is difficult to know who is to be served. But the pending bill provides they can be sued as if they were corporations and if a judgment is found against the labor organization, even though it is an unincorporated association, the liability is on the labor union and the labor-union funds, and it is not on the individual members of the union, where it has fallen in some famous cases to the great financial distress of the individual members of labor unions." 93 Cong. Rec. 3839.

Legislative history, in its relevant aspects, thus reinforces the meaning conveyed by the statute itself as a mere procedural provision.

2. From this conclusion inevitably emerge questions regarding the constitutionality of a grant of jurisdiction to federal courts over a contract governed entirely by state substantive law, a jurisdiction not based on diversity of citizenship yet one in which a federal court would, as in diversity cases, administer the law of the State in which it sits. The scope of allowable federal judicial power that this grant must satisfy is constitutionally defined as

"Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Art. III, § 2.

Almost without exception, decisions under the general statutory grants of jurisdiction strikingly similar to the constitutional wording, have tested jurisdiction in terms of the presence, as an integral part of plaintiff's cause of action, of an issue calling for interpretation or application of federal law.[16] Although it has sometimes been suggested that the "cause of action" must derive from federal law,[17] it has been found sufficient that some aspect of federal law is essential to plaintiff's success.[18] The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not be remote, collateral or peripheral.

It has generally been assumed that the full constitutional power has not been exhausted by these general jurisdictional statutes.[19] And in two lines of decision, under special jurisdictional grants for actions by or against federally incorporated organizations [20] and trustees in bankruptcy,[21] federal jurisdiction has been sustained despite the fact that the traditional "federal question" theory of jurisdiction has considerable latitude if satisfied by the

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[16] *E. g., Gully* v. *First Nat. Bank,* 299 U. S. 109.

[17] See *American Well Works Co.* v. *Layne & Bowler Co.,* 241 U. S. 257, 260.

[18] *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180.

[19] See, *e. g.,* Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 160; Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 405, n. 47; Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 225.

[20] *Osborn* v. *Bank of the United States,* 9 Wheat. 738; *Pacific Railroad Removal Cases,* 115 U. S. 1.

[21] *Schumacher* v. *Beeler,* 293 U. S. 367; *Williams* v. *Austrian,* 331 U. S. 642.

contingent likelihood of presentation of a federal question. Analysis of these cases in terms of that theory reveals analogies to § 301. For federal law is, in certain respects, in the background of any action on a collective bargaining agreement affecting commerce: § 301 vests rights and liabilities, which under state law are distributed among the union members, in a legal "entity" recognized by federal law for purposes of actions on collective bargaining agreements in the federal courts; in such actions, the validity of the agreement may be challenged on federal grounds—that the labor organization negotiating it was not the representative of the employees involved, or that subsequent changes in the representative status of the union have affected the continued validity of the agreement.[22]

Federal jurisdiction based solely on the fact of federal incorporation has, however, been severely restricted by Congress,[23] and this Court has cast doubt on its continued vitality.[24] Whether the precedent might be extended to meet the substantial difficulties encountered under § 301 would pose a serious constitutional problem.

Recognition of jurisdiction in the bankruptcy cases, despite the fact that the actions might be governed solely by state law, draws on the reach of the bankruptcy power, which may reasonably be deemed to sweep within its scope interests sufficiently related to the main purpose of bankruptcy to call for organic treatment. To attempt to reason from these cases to § 301 raises the equally if not more serious question of what, if anything, is encompassed

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[22] Cf. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18.

[23] 62 Stat. 934, 28 U. S. C. § 1349: "The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."

[24] See *Gully* v. *First Nat. Bank,* 299 U. S. 109, 113.

in jurisdiction over cases "arising under the laws of the United States" beyond that which traditional "federal question" theory recognizes.[25]

3. In an effort to avoid these problems, lower federal courts have given discordant answers. Most have ascribed to § 301 the creation of "substantive federal rights" or the subjection of collective agreements to a body of federal common law.[26] We must, of course,

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[25] For some of the views advanced concerning the power of Congress to confer jurisdiction despite the absence of any "federal question" in the traditional sense, see *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 600; *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137; Hart and Wechsler, The Federal Courts and the Federal System, 744–747; Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 224; Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 184.

[26] At least one federal court has held that state law is to be applied, perhaps on the theory of federal incorporation of state law as federal law. *Insurance Agents' International Union* v. *Prudential Ins. Co.*, 122 F. Supp. 869; see *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137, 140 (suggestion of such a possibility). Cf. *International Woodworkers* v. *McCloud River Lumber Co.*, 119 F. Supp. 475 (state law applied where jurisdiction was based on diversity as well as § 301); *Isbrandtsen Co.* v. *Local 1291*, 107 F. Supp. 72, aff'd 204 F. 2d 495 (diversity again present; on appeal, federal and state law found to be the same and question of applicable law avoided); *John Hancock Mutual Life Ins. Co.* v. *United Office & Professional Workers*, 93 F. Supp. 296 (removal to federal court denied on ground that even if § 301 gives federal rights, the complaints were framed with reference solely to state law).

Most federal courts, however, hold that § 301 created federal substantive rights and, when called upon to choose between state and federal law, apply the latter. *E. g.*, *United Electrical, Radio & Machine Workers* v. *Oliver Corp.*, 205 F. 2d 376; *Milk & Ice Cream Drivers & Dairy Employees Union* v. *Gillespie Milk Products Corp.*, 203 F. 2d 650; *Shirley-Herman Co.* v. *International Hod Carriers Union*, 182 F. 2d 806; *International Plainfield Motor Co.* v. *Local 343*, 123 F. Supp. 683; *Waialua Agr. Co.* v. *United Sugar Workers*, 114 F. Supp. 243; *Ludlow Mfg. & Sales Co.* v. *Textile Workers Union*,

defer to the strong presumption—even as to such technical matters as federal jurisdiction—that Congress legislated in accordance with the Constitution. Legislation must, if possible, be given a meaning that will enable it to survive. This rule of constitutional adjudication is normally invoked to narrow what would otherwise be the natural but constitutionally dubious scope of the language. *E. g., United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *United States* v. *Rumely,* 345 U. S. 41. Here the endeavor of lower courts has resulted in adding to the section substantive congressional regulation even though Congress saw fit not to exercise such power nor to give the courts any concrete guidance for defining such regulation.

To be sure, the full scope of a substantive regulation is frequently in dispute and must await authoritative determination by courts. Congress declares its purpose imperfectly or partially and the judiciary rounds it out compatibly. But in this case we start with a provision which is wholly jurisdictional and as such bristles with consti-

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108 F. Supp. 45; *Pepper & Potter, Inc.* v. *Local 977,* 103 F. Supp. 684; *Fay* v. *American Cystoscope Makers, Inc.,* 98 F. Supp. 278; *Textile Workers Union* v. *Aleo Mfg. Co.,* 94 F. Supp. 626; *Wilson & Co.* v. *United Packinghouse Workers,* 83 F. Supp. 162; *Colonial Hardwood Flooring Co.* v. *International Union,* 76 F. Supp. 493, aff'd 168 F. 2d 33; *International Union* v. *Dahlem Const. Co.,* 193 F. 2d 470 (semble); see *Rock Drilling, Local Union No. 17* v. *Mason & Hanger Co.,* 217 F. 2d 687, 691; *Schatte* v. *International Alliance,* 182 F. 2d 158, 164. Cf. *Textile Workers Union* v. *Arista Mills Co.,* 193 F. 2d 529 (refusal to pass on whether substantive federal rights created; federal law apparently viewed as applicable to issue raised in any event).

At least two courts have drawn a distinction between the law to be applied to matters of "substantive right" and "remedy." *Hamilton Foundry & Machine Co.* v. *International Molders Union,* 193 F. 2d 209 (federal rights created but state statute of frauds applied); *Textile Workers Union* v. *American Thread Co.,* 113 F. Supp. 137 (whether or not federal law applies to other matters, federal law regarding enforcement of arbitration clauses applies).

tutional problems under Article III. To avoid them, interpolation of substantive regulation has been proposed. From what materials are we to draw a determination that § 301 is something other than what it clearly appears to be? The problem is particularly vexing in view of the very difficult choice of policy that the alternatives of state or federal law present and the uncertainty as to the consequences of the choice. Is the Court justified in creating all these difficult problems of choice in matters of delicate legislative policy without any direction from Congress and merely for the sake of giving effect to a provision which seems to deal with a different subject? How far are courts to go in reshaping or transforming the obvious design of Congress in order to achieve validity for something Congress has not fashioned? In the words of Mr. Justice Cardozo, speaking for the whole Court: "We think the light is so strong as to flood whatever places in the statute might otherwise be dark. Courts have striven mightily at times to canalize construction along the path of safety. . . . When a statute is reasonably susceptible of two interpretations, they have preferred the meaning that preserves to the meaning that destroys. . . . 'But avoidance of a difficulty will not be pressed to the point of disingenuous evasion.' . . . 'Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power.' " *Hopkins Federal Savings & Loan Assn.* v. *Cleary,* 296 U. S. 315, 334–335.

But assuming that we would be justified in proceeding further, the suggestion that the section permits the federal courts to work out without more a federal code governing collective bargaining contracts does not free us from difficulties.

Such a task would involve the federal courts in multiplying problems which could not be solved without disclosing that Congress never intended to raise them.

Application of a body of federal common law would inevitably lead to one of the following incongruities: (1) conflict in federal and state court interpretations of collective bargaining agreements; (2) displacement of state law by federal law in state courts, not only in actions between union and employer but in all actions regarding collective bargaining agreements; or (3) exclusion of state court jurisdiction over these matters. It would also be necessary to work out a federal code governing the interrelationship between the employee's rights and whatever rights were found to exist in the union. Moreover, if the general unfolding of such broad application of federal law were designed, the procedural objectives of Congress would have been accomplished without the need of any special jurisdictional statute. Federal rights would be in issue, and, under 28 U. S. C. § 1331 and Federal Rule 17 (b), the suit could be brought in any district court by or against the union as an entity. The only effect of § 301 would then be to dispense with the requirement of amount in controversy and to adopt certain other minor procedural rules.

It has been suggested that a more modest role might be assigned to federal law. The suggestion is that, in view of the difficulties which originally plagued the courts called upon to identify the nature of the legal relations created by a collective contract [27] and in view of the gener-

[27] The collective agreement was variously viewed as: (1) the mere formulation of usage or custom relevant to the interpretation of the individual employment contract; (2) a contract between the employer and the individual member-employees, negotiated by the union as the employees' agent; (3) a contract between the union and employer for the benefit of the individual employees; and (4) as held by the court below, a contract between the union and employer giving the union certain rights, including the right to insist that the employer contract with his employees consistently with the terms of the agreement, but giving the union no right to enforce obligations running to individuals under their contracts of hire.

alized statements in the legislative history of § 301 in favor of enforceability of collective agreements, § 301 may be viewed as a congressional authorization to the federal courts to work out a concept of the nature of the collective bargaining contract, leaving detailed questions of interpretation to state law.

This is an excessively sophisticated attribution to Congress. Evidence is wholly wanting that Congress was aware of the diverse views taken of the collective bargaining agreement or, in any event, that they were interfering with any federal objective. Moreover, once the right of the union to enter into contracts is granted by state law, these problems are really questions of interpretation of the language of ambiguously drawn contracts. If federal law undertook to resolve these ambiguities, it would become inextricably involved in questions of interpretation of the language of contracts. Discrepancies between federal and state court treatment, while not so inevitable as where federal law undertook the entire task of interpretation, would result. And any difference between state and federal theories of enforceability would present opportunities for forum-shopping.

To turn § 301 into an agency for working out a viable theory of the nature of a collective bargaining agreement smacks of unreality. Nor does it seem reasonable to view that section as a delivery into the discretionary hands of the federal judiciary, finally of this Court, of such an important, complicated and subtle field. These difficulties may be illustrated by a discussion of the holding of the Court of Appeals in the present case. Its "eclectic theory" of the nature of a collective agreement has no support in the statute, and, on the contrary, it is in some ways repugnant to it. (1) For example, the National Labor Relations Act seeks in § 9 (a) to preserve the "right" of an individual employee to take up grievances with his employer; but no one has ever suggested

that these grievances may not be taken up by the union. (2) It excludes from the court stage the party that is recognized in the required preliminary stages. The union that is empowered to negotiate and settle the controversy before suit is barred from bringing suit when settlement is not reached. (3) This would tend to impair the union's power to negotiate a mutually satisfactory settlement. As a practical matter, the employees expect their union not just to secure a collective agreement but more particularly to procure for the individual employees the benefits promised. If the union can secure only the promise and is impotent to procure for the individual employees the promised benefits, then it is bound to lose their support. And if the union cannot ultimately resort to suit, it is encouraged to resort to strike action.

Perhaps the prime example of an individual cause of action, as distinguished from a union cause, under the Court of Appeals' "eclectic theory," would be the case of the discharge of a single employee. To make the situation vivid, assume that there is no dispute whatever as to the propriety of the alleged ground for the discharge and that the only matter in controversy is the question of fact whether the employee did or did not commit the offense alleged. Yet precisely such incidents often pull the trigger of work stoppages. When stoppages do occur, they most frequently involve a grievance with respect to one employee or a few employees much smaller in number than those involved in the stoppage. That such stoppages are wildcat and officially unauthorized merely emphasizes the fact of group interest in the incident. It is a matter of industrial history that stoppages of work because of disciplinary penalties against individuals, or because of failure to pay the rates claimed, or because of the promotion or layoff of one employee rather than another, or for similar reasons, have been frequent occurrences. A legal rule denying standing to the union to

318107 O - 55 - 35

protect individual rights under what is to be deemed a contract with individuals would encourage such indiscipline. And this is true even though the ultimately desirable social policy is to make it a matter of industrial habit to rely for a remedy for such grievances not on stoppage of work or on lawsuits but on the grievance procedure within an industry. There is in fact a strong group interest in procuring for the employee the benefit promised as well as the promise in the collective agreement. If the union can represent and press that group interest, the stoppage may be avoided; if it cannot, the group resorts to wildcat self-help. The holding below cannot eliminate this group interest; it can stimulate its manifestation by way of a strike.

Is the line which the Court of Appeals has drawn the result of interpretation of the particular contract or of a rule of law beyond the power of the parties to alter? If it is the former, then the line can be obliterated by express language in the contract; and the unions can be trusted to find suitable language. They were quick to secure amendment to their constitutions or statutes in order to avoid the decision of this Court in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 327 U. S. 661.[28] If it is the latter, what is the basis for the rule? It is not to be found in fear that the employee

[28] The Brotherhood of Locomotive Engineers amended their Standing Rules to provide for automatic consent of all members to the Brotherhood's prosecution of grievances at their Tenth Triennial Convention in March and April 1947. The Brotherhood of Locomotive Firemen and Enginemen added a similar provision to their Constitution at their 35th Convention in 1947. The Order of Railway Conductors and Brakemen amended their "statute" in a similar fashion in 1946. The Brotherhood of Railroad Trainmen at their 1946 Convention adopted a new General Rule which empowered the Brotherhood to prosecute grievances "Except in individual cases where the member or members involved serve seasonable written notice on the Brotherhood to the contrary."

may not be able to sue. To hold that the union may sue, it is not necessary to hold that the employee may not sue in any forum, and vice versa. At least when the union and the employee are in agreement, there is no reason why either or both should not be permitted to sue. Such is the situation under § 9 (a) of the National Labor Relations Act with respect to the adjustment of grievances without suit. When the employee and the union are in disagreement, the question is not which may sue, but rather the extent to which the one may conclude the other.

Speculative reflection reveals other possible substantive additions which might be made to § 301. When tested against the limitations which must restrict judicial elaboration of legislation, however, all meritorious possibilities are either too specialized to reach this case or too insignificant an addition to dissipate the constitutional doubts which have revealed themselves.

4. In the present case, however, serious constitutional problems may be avoided, and indeed must be, through the orthodox process of limiting the scope of doubtful legislation. We cannot adopt the reasoning of the Court of Appeals in reaching our conclusion that § 301 does not extend jurisdiction to the present case. That court relied upon an assumed federal concept of the nature of a collective bargaining agreement which is not justified either in terms of discoverable congressional intent or considerations relevant to the function of the collective agreement in the field of labor relations. The same objections do not, however, prevail against the view that whether or not the applicable substantive law—in our view state law—would recognize a right in the union, Congress did not intend to burden the federal courts with suits of this type.

Considering the nature of a collective bargaining contract, which involves the correlative rights of employer,

employee *and* union, we might be disposed to read § 301 as allowing the union to sue in this case. With due regard to the constitutional difficulties which would be raised, and in view of the fact that such an interpretation would bring to the federal courts an extensive range of litigation heretofore entertained by the States, we conclude that Congress did not will this result. There was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee. The employees have always been able to enforce their individual rights in the state courts.[29] They have not been hampered by the

[29] For examples of such suits by employees in state courts prior to 1947, when the Taft-Hartley Act was passed, see *Gulla* v. *Barton*, 164 App. Div. 293, 149 N. Y. Supp. 952; *H. Blum & Co.* v. *Landau*, 23 Ohio App. 426, 155 N. E. 154; *Mastell* v. *Salo*, 140 Ark. 408, 215 S. W. 583; *McGregor* v. *Louisville & N. R. Co.*, 244 Ky. 696, 51 S. W. 2d 953; *O'Jay Spread Co.* v. *Hicks*, 185 Ga. 507, 195 S. E. 564 (class suit); *Rentschler* v. *Missouri Pac. R. Co.*, 126 Neb. 493, 253 N. W. 694; *Volquardsen* v. *Southern Amusement Co.*, 156 So. 678 (La. App.); *Yazoo & M. V. R. Co.* v. *Sideboard*, 161 Miss. 4, 133 So. 669; *Cross Mountain Coal Co.* v. *Ault*, 157 Tenn. 461, 9 S. W. 2d 692; and *Hall* v. *St. Louis-San Francisco R. Co.*, 224 Mo. App. 431, 28 S. W. 2d 687. See also *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 336; I Teller, Labor Disputes and Collective Bargaining (1940, 1947 Cum. Supp.), §§ 166–168; II Williston, Contracts (rev. ed. 1936), § 379A.

And such suits are still being entertained. *E. g.*, *Dufour* v. *Continental Southern Lines, Inc.*, 219 Miss. 296, 68 So. 2d 489; *Donahoo* v. *Thompson*, 270 S. W. 2d 104; *Marranzano* v. *Riggs Nat. Bank*, 87 U. S. App. D. C. 195, 184 F. 2d 349; *MacKay* v. *Loew's, Inc.*, 182 F. 2d 170 (diversity case); II Williston, Contracts, § 379A (1954 Cum. Supp.).

rules governing unincorporated associations. To this extent, the collective bargaining contract has always been "enforceable."

Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one.

Affirmed.

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

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE CLARK joins, concurring.

We agree with the decision but not with all that is said in the opinion. The only question we see here is one of statutory interpretation. For us the language of § 301 is not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer. Thus viewed, it becomes unnecessary for us either to make labor policy or to raise constitutional issues.

MR. JUSTICE REED, concurring.

My analysis of this case leads me to concur on grounds stated later without the extensive comment and broad treatment given by the opinion of MR. JUSTICE FRANKFURTER.

What is there said as to the substantive law to be applied in § 301 actions will be pertinent in cases which are deemed to have been properly brought under that section—that is, where there is set forth the

violation of a collective bargaining agreement based on the failure of either the employer or the union to carry out its undertakings with the other. It is appropriate therefore for me to state my views as to the law which will be applied in those actions and in so doing to express my disagreement with the constitutional doubts raised by the opinion of MR. JUSTICE FRANKFURTER.

Assuming that the purpose of § 301 was to make unions suable as if corporations, with provisions for venue and service, it also gave jurisdiction to federal district courts over certain matters related to interstate commerce and thus within the legislative powers of Congress. *Labor Board Cases,* 301 U. S. 1. The Labor Management Relations Act, 1947, is directed primarily to federal regulation of labor relations affecting commerce through the means of collective bargaining. While all contract questions that may arise in § 301 actions are not covered by the federal statute, the Act furnishes some substantive law which will be applied in those cases. It sets forth guiding principles which will bear on contracts made under it, and it also controls the machinery for reaching those agreements. It points out many things the parties may or may not do in commerce, just as other Acts, such as the Interstate Commerce Act, do. Thus the contracts sued upon in § 301 actions will have been entered into in accordance with federal law; and although federal law does not set forth explicitly just what constitutes a breach, § 301, by granting federal jurisdiction over actions between employers and unions on collective bargaining contracts, does make breaches of them by either of those parties actionable. The fact that unions may make contracts under state law does not bar the Federal Government from legislation in its field. In case of conflict, federal law prevails. It is as true in federal laws as it is in state laws that the power to enact gives power to interpret. *Jones* v. *Prairie Oil Co.,* 273 U. S. 195, at 200.

It may be that in proper litigation under § 301 it will be necessary for federal courts to draw largely on state law for the solution of issues. In such instances state law is relied upon because its application is not contrary to federal policy, but supplements and fulfills it. *Board of Comm'rs* v. *United States,* 308 U. S. 343, 351. It has been held that a suit in equity on a federal right in a federal court does not necessarily follow a state statute of limitation. *Holmberg* v. *Armbrecht,* 327 U. S. 392. The general rule is that federal interpretation controls a federal act. *Jerome* v. *United States,* 318 U. S. 101, 104.

The fact that a considerable amount of state law may be applied in suits under § 301 should not affect the validity of the statute. This Court sustained the jurisdictional grant of § 23 (a) of the Bankruptcy Act, 44 Stat. 664, despite the fact that causes of action brought thereunder were created and governed solely by state law. *Schumacher* v. *Beeler,* 293 U. S. 367; *Williams* v. *Austrian,* 331 U. S. 642. See also *Osborn* v. *Bank of the United States,* 9 Wheat. 738, and *Pacific Railroad Removal Cases,* 115 U. S. 1, 11. Cf. the Federal Tort Claims Act. Since Congress has legislative power over labor matters affecting interstate commerce, it may grant jurisdiction to the federal courts to try incidents of that activity that raise legal issues, and dictate what law should be applied. The application of federal law raises no constitutional problem. If state law is to be applied, it is state law operating at the direction of and by the permission of Congress. State law is, in effect, incorporated by reference. Since the contract entered into through provisions of the Labor Act creates rights over which Congress has legislative authority, a breach of the contract is likewise within its power. Congress by § 301 has manifested its purpose to vest jurisdiction over breaches, to a certain extent, in the federal courts. Whether the rules of substantive law applied by the federal courts are derived from federal

or state sources is immaterial. The rules are truly federal, not state. The cause of action for breach of contract is thus a cause of action arising under federal law, the source of federal judicial power under Art. III of the Constitution.

From the recognition of the power of Congress to regulate matters affecting commerce in *Houston & Texas R. Co.* v. *United States* (The Shreveport Doctrine), 234 U. S. 342, 351 (1914), to *Labor Board Cases,* 301 U. S. 1 (1937), questions as to the power of Congress over local incidents of national commerce plagued advocates of legal changes with doubts as to the constitutional power of Congress to regulate labor relations effectually. With the full recognition of the integration of the local with the national, the power to use national authority in commerce, when needed, was established. I see no occasion, at this late date, to allow the fog of another day to obscure the national interest in these problems—this time by reason of Article III of the Constitution. Cf. subdivision 2 of MR. JUSTICE FRANKFURTER'S opinion.

The reason, I think, that this union cannot recover from the employer in this suit under § 301 is that the claim for wages for the employees arises from separate hiring contracts between the employer and each employee. The union does not undertake to do work for the employer or even to furnish workers. The duty, if any there be, to pay wages to an employee arises from the individual contract between the employer and employee, not from the collective bargaining agreement. Therefore there is set out no violation of a contract between an employer and a labor organization as is required to confer jurisdiction under § 301. The facts show an alleged violation of a contract between an employer and an employee—a situation that is not covered by the statute.

The interpretation contained in the preceding paragraph conforms to the words of the section and avoids sug-

gesting constitutional limitations that would cripple the creation of a national system for the enforcement of statutes concerning labor relations.

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

I agree with MR. JUSTICE REED that Congress in the Taft-Hartley Act created federal sanctions for collective bargaining agreements, made the cases and controversies concerning them justiciable questions for the federal courts, and permitted those courts to fashion from the federal statute, from state law, or from other germane sources, federal rules for the construction and interpretation of those collective bargaining agreements.

My dissent is from the refusal of the majority to allow the union standing to bring this suit. The complaint alleged that by reason of a collective bargaining agreement the employer was obligated to pay each employee, whom the union represents, his full salary during April 1951, regardless of whether he missed a day's work, unless the employee's absence was due to "furlough" or "leave of absence." The complaint further alleged that the employer had violated the collective bargaining contract by deducting from the pay of some 4,000 employees their wages for April 3 on account of their absence, that absence not being a "furlough" or "leave of absence" within the meaning of the collective bargaining agreement. The union requested a declaration of rights under the collective bargaining agreement. Though the employees affected were not parties to the suit, the complaint prayed for an accounting of the amount owed each employee and a judgment in favor of the individual employees for the unpaid wages.

We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving the con-

struction and enforcement of the collective bargaining agreement. Individual contracts of employment result from each collective bargaining agreement. But those contracts are the resultant of the collective bargaining system, a system that continues to function and operate after the contracts are made. The concept of collective bargaining contained in the statute (29 U. S. C. § 159 (a)) includes, of course, the negotiation of the collective agreement and the settling of the terms of the individual contracts. But the collective bargaining relationship does not end there. To be sure, the Taft-Hartley Act provides that there shall be no changes in the provisions of the agreement during its term, 29 U. S. C. § 158 (d). But that does not mean that the collective bargaining agent drops out of the picture once the agreement is made. We know enough of trade-union practices to know that the advent of collective bargaining has produced a permanent, organized relationship between the union and the employer, involving a day-to-day administration of the collective agreement. The Act indeed extends the right of collective bargaining that far. For it specifically provides that ". . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, *or any question arising thereunder . . .*," 61 Stat. 142, 29 U. S. C. § 158 (d) (italics added).

The processing of grievances is recognized by the Act as a function which the labor organization performs or may perform. For 29 U. S. C. § 152 (5) defines "labor organization" as an agency which deals with employers, *inter alia,* "concerning grievances." As the National Labor Relations Board stated in *Hughes Tool Co.,* 104 N. L. R. B. 318, 326, "The adjustment of grievances,

viewed in the larger aspect, constitutes, to a great degree, the actual administration of a collective-bargaining contract."

The administration of the collective agreement is its life and meaning. The adjustment and settlement of grievances, the development of an administrative practice concerning the collective agreement give it force and authority.

The right of individual employees to present their own grievances is recognized by the Act. 29 U. S. C. § 159 (a). But even when they desire to speak for themselves, rather than through the union, Congress attached two important conditions. *First,* any adjustment of the individual grievance must not be "inconsistent with the terms of a collective-bargaining contract or agreement then in effect." *Second,* the union must be given "opportunity to be present at such adjustment." *Id.*

It is plain, I think, that the grievance procedure is a part of the collective bargaining process. And a lawsuit is one of the ultimates of a grievance. A lawsuit, like negotiation or arbitration, resolves the dispute and settles it.

In short, the union represents the interests of the community of employees in the collective bargaining agreement. The wide range of its interests are envisaged by the Act, which gives the collective bargaining agency exclusive authority to bargain "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U. S. C. § 159 (a). The range of its authority is the range of its interests. What the union obtains in the collective agreement it should be entitled to enforce or defend in the forums which have been provided. When we disallow it that standing, we fail to keep the law abreast of the industrial developments of this age.

WEBER ET AL. *v.* ANHEUSER-BUSCH, INC.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 97. Argued February 2–3, 1955.—Decided March 28, 1955.

In a dispute between two unions over work being performed for respondent, each claiming the work for its own members, one union went on strike. Respondent filed with the National Labor Relations Board a charge of an unfair labor practice under § 8 (b) (4) (D) of the Taft-Hartley Act against the striking union; but the Board held that no "dispute" existed within the meaning of that subsection and quashed the notice of a hearing. Respondent filed a complaint in a Missouri state court, alleging violations of other subsections of § 8 (b) (4) of the Taft-Hartley Act and also a violation of the State's restraint of trade statute. The state court enjoined the strike as a restraint of trade. *Held:* The state court was without jurisdiction to enjoin the conduct of the union, since its jurisdiction had been pre-empted by the authority vested in the National Labor Relations Board. Pp. 469–482.

(a) Whether the Board's finding that no violation of § 8 (b) (4) (D) was involved necessarily encompassed a ruling on the other subsections was a question for the Board to pass upon in the first instance. Pp. 477–478.

(b) Congress has sufficiently expressed its purpose to bring the conduct here in controversy within federal control and to exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade. Pp. 480–481.

(c) Where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may reasonably be deemed to come within the protection afforded by that Act, a state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance. P. 481.

(d) *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, distinguished. Pp. 481–482.

364 Mo. 573, 265 S. W. 2d 325, reversed.

The State Supreme Court affirmed a permanent injunction issued by a lower state court against petitioner. 364 Mo. 573, 265 S. W. 2d 325. This Court granted certiorari. 348 U. S. 808. *Reversed and remanded,* p. 482.

Robert A. Roessel argued the cause for petitioners. With him on the brief was *Plato E. Papps.*

David E. Feller argued the cause for the Congress of Industrial Organizations, as *amicus curiae,* urging reversal. With him on the brief was *Arthur J. Goldberg.*

Mark D. Eagleton argued the cause and filed a brief for respondent.

Solicitor General Sobeloff, George J. Bott, David P. Findling and *Dominick L. Manoli* filed a brief for the National Labor Relations Board, as *amicus curiae,* urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case grew out of a dispute between petitioner, the International Association of Machinists (IAM), affiliated with the American Federation of Labor, and the Millwrights, affiliated with the United Brotherhood of Carpenters and Joiners (Carpenters), which in turn was affiliated with the American Federation of Labor, over millwright work being performed for respondent, each union claiming the work for its own members.

Respondent is engaged in the interstate manufacture and sale of beer and other commodities, with its principal place of business in St. Louis, Missouri. Its employees include members of both the IAM and the Carpenters. Respondent has always required a large amount of millwright work to be performed by outside contractors in the expansion of its facilities. After the IAM was certi-

fied in 1948 by the National Labor Relations Board as the exclusive bargaining representative of respondent's machinists, respondent executed a collective bargaining contract with the IAM for 1949 which provided in part that when the repair or replacement of machinery was necessary, this work would be given only to those contractors who had collective agreements with the IAM. As a result of protests from the Carpenters, who claimed the same type of work for their own members, the clause was deleted from the 1950 contract between respondent and the IAM, but it was later reinstated in the 1951 contract. The Carpenters again protested, this time threatening that they would sign no contract with respondent covering those employees who were members of the Carpenters until the clause was deleted from the IAM contract. When the 1951 IAM contract expired and negotiations for a 1952 contract began, respondent refused to agree to the insertion of the clause in the new contract. An impasse was reached in the negotiations, and finally the IAM went on strike.

At the time the strike was called, only one contractor was actually engaged in respondent's millwright work, and the employees of that one contractor were covered by a contract with the IAM.

On April 8, 1952, the day after the strike was called, respondent filed a charge of an unfair labor practice under § 8 (b)(4)(D) of the Taft-Hartley Act against the IAM.[1]

On November 18, 1952, the National Labor Relations Board quashed the notice of a hearing, holding that no "dispute" existed within the meaning of the invoked subsection. The Board reasoned that at the time of the strike, the IAM could not have been requesting the assignment of "particular" work to IAM members, because the IAM was not complaining about the assignment

[1] 61 Stat. 140, 29 U. S. C. § 158 (b)(4)(D). The subsection is quoted in footnote 2, *infra*.

of work by respondent to its own employees, and as to work assigned by respondent's contractors, (1) the IAM had made no demand on those contractors to give their work to IAM labor, and (2) no millwright work performed by respondent's contractors at that time was in fact being performed by other than IAM labor. *District No. 9, International Association of Machinists,* 101 N. L. R. B. 346.

It must be emphasized that the only unfair labor practice charge filed with the Board, and the only one upon which the Board acted, was that prescribed in Subsection (D) of § 8 (b)(4).

In the meantime, on April 19, 1952, after it had filed the charge with the Board but before the Board had acted upon it, respondent sought an injunction against the IAM in the State Circuit Court in St. Louis. In its complaint, respondent alleged that the strike constituted "a secondary boycott under the common law of the State of Missouri," and also was in violation of Subsections (A), (B) and (D) of § 8 (b)(4) of the Taft-Hartley Act [2] and

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[2] "It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organiza-

of § 303 (a)(1), (2) and (4) of that same Act.[3] A temporary injunction issued. On April 30, respondent amended its complaint with the additional claim that the IAM's conduct constituted an illegal conspiracy in restraint of

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tion or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . ." 61 Stat. 140, 29 U. S. C. § 158 (b)(4)(A), (B) and (D).

[3] "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

. . . . .

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. . . ." 61 Stat. 158, 29 U. S. C. § 187 (a)(1), (2) and (4).

In view of the questions involving unfair labor practices and protected activity which are present in this case, it is not necessary to discuss the possible effect on state jurisdiction of § 303 (a)(1), (2) and (4).

trade under Missouri common law and conspiracy statutes. Mo. Rev. Stat., 1949, § 416.010. The temporary injunction was thereupon made permanent on September 30, 1952, some time before the Board, it will be recalled, held that there was no violation of § 8 (b)(4)(D) of the Taft-Hartley Act. This injunction was vacated, but immediately re-entered, on October 3, 1952.

The IAM appealed to the Missouri Supreme Court from the Circuit Court's injunction. That court affirmed the permanent injunction on February 8, 1954, more than a year after the Board found no violation of § 8 (b)(4)(D).

The Missouri Supreme Court held that the IAM's conduct constituted a violation of the State's restraint of trade statute and as such was enjoinable. It referred to the ruling of the Board as a determination that "no labor dispute existed between these parties and that no unfair labor practices were there involved, and the Board, upon such ruling, quashed the notice of the hearing." The court then stated: "The cases relied on by the defendants [the IAM] are largely cases involving existing labor disputes and unfair labor practices. We think those cases are not in point." The court concluded: "A jurisdictional quarrel between two rival labor unions is not a labor dispute within the Norris-LaGuardia Act, . . . the Wagner Act or the Taft-Hartley Act." 364 Mo. 573, 584, 586, 265 S. W. 2d 325, 332, 333. The State Supreme Court thus treated the Board's holding as a determination that the allegation on which the injunction issued excluded the basis for a charge of an unfair labor practice under the Taft-Hartley Act.

The principal question that the case raises, whether the state court had jurisdiction to enjoin the IAM's conduct or whether its jurisdiction had been pre-empted by the authority vested in the National Labor Relations Board, has an importance in the federal-state relations regarding

318107 O - 55 - 36

industrial controversies that led us to grant certiorari. 348 U. S. 808.

The Court has had numerous occasions to deal with this delicate problem of the interplay between state and federal jurisdiction touching labor relations. It is helpful to a consideration of this latest phase briefly to summarize where our decisions, under both the Wagner Act and the Taft-Hartley Act, have brought us.

1. The Court has ruled that a State may not prohibit the exercise of rights which the federal Acts protect. Thus, in *Hill* v. *Florida,* 325 U. S. 538, the State enjoined a labor union from functioning until it had complied with certain statutory requirements. The injunction was invalidated on the ground that the Wagner Act included a "federally established right to collective bargaining" with which the injunction conflicted. *International Union* v. *O'Brien,* 339 U. S. 454, involved the strike-vote provisions of a state act which prohibited the calling of a strike until a specific statutory procedure had been followed. The state act was held to conflict not only with the procedure and other requirements of the Taft-Hartley strike provisions but also with the protection afforded by § 7 of that Act.[4] In *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, the state court issued an injunction under a statute which made it a misdemeanor to interrupt by strike any essential public utility services. It was held that the state statute was invalid in that it denied a right

[4] Section 7 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 8 (a) (3)." 61 Stat. 140, 29 U. S. C. § 157.

which Congress had guaranteed under § 7 of the Taft-Hartley Act—the right to strike peacefully to enforce union demands for wages, hours and working conditions. Last Term the Court noted in *Garner* v. *Teamsters Union,* 346 U. S. 485, 499, that

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

2. A State may not enjoin under its own labor statute conduct which has been made an "unfair labor practice" under the federal statutes. Such was the holding in the *Garner* case, *supra.* The Court pointed out that exclusive primary jurisdiction to pass on the union's picketing is delegated by the Taft-Hartley Act to the National Labor Relations Board. See also *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board,* 338 U. S. 953; *Building Trades Council* v. *Kinard Construction Co.,* 346 U. S. 933. And in *Capital Service, Inc.* v. *Labor Board,* 347 U. S. 501, a picket line established at retail stores to induce the organization of a manufacturer's employees was enjoined by the State as contrary to its public policy.[5]

[5] The complaint in the state court charged the defendant unions with engaging in "an unlawful conspiracy combination and agreement, contrary to the common law of the State of California and contrary to the provisions of the Cartwright Act (Stats. 1907, p. 1835,

This Court granted a limited certiorari which assumed that exclusive jurisdiction over the subject matter was in the National Labor Relations Board.[6] The Board was allowed to obtain an injunction against enforcement of the conflicting state court injunction.

3. The federal Board's machinery for dealing with certification problems also carries implications of exclusiveness. Thus, a State may not certify a union as the collective bargaining agent for employees where the federal Board, if called upon, would use its own certification procedure. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18. The same result is reached even if the federal Board has refused certification, if the employer is subject to the Board's jurisdiction. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767.

4. On the other hand, in the following cases the authority which the State exercised was found not to have been exclusively absorbed by the federal enactments.

Ch. 530), now constituting Chapter 2 of Part 2, Division 7, of the Business and Professions Code, sections 16720, et seq., to create and carry out restrictions in trade and commerce and to prevent competition in manufacturing, making, transporting, selling and purchasing of bakery products as hereinafter set forth." The state court, however, reasoned that primary picketing was as much a combination in restraint of trade as secondary picketing, and primary picketing had been held legal by numerous state decisions. The court instead enjoined the conduct on the ground that "secondary picketing is contrary to the public policy of this state. . . ." *Capital Service, Inc.* v. *Bakery Drivers Local Union,* Civil No. 595892, Superior Court of California for the County of Los Angeles.

[6] The Court granted certiorari limited to the following question, propounded by the Court: "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.

In *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, the State was allowed to enjoin mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads, the blocking of entrance to and egress from a factory, and the picketing of employees' homes. The Court held that such conduct was not subject to regulation by the federal Board, either by prohibition or by protection.

International Union v. *Wisconsin Employment Relations Board,* 336 U. S. 245, involved recurrent, unannounced work stoppages. The Court upheld the state injunction on the ground that such conduct was neither prohibited nor protected by the Taft-Hartley Act and thus was open to state control.

The Court allowed a State to forbid enforcement of a maintenance-of-membership clause in a contract between employer and union in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301. Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State.

Finally, *United Construction Workers* v. *Laburnum Construction Corp.,* 347 U. S. 656, was an action for damages based on violent conduct, which the state court found to be a common-law tort. While assuming that an unfair labor practice under the Taft-Hartley Act was involved, this Court sustained the state judgment on the theory that there was no compensatory relief under the federal Act and no federal administrative relief with which the state remedy conflicted.

We come, then, to the facts in this case.

Contrary to the assumption of the Missouri Supreme Court, the Board had not ruled that no unfair labor practice was involved in the conduct by the IAM of which respondent complained. The Board had determined only that there was no violation of Subsection (D) of § 8 (b)

(4). That was, in fact, the extent of the ruling it was empowered to make, because (D) was the only subsection alleged to have been violated. In its complaint in the state court, however, respondent broadened its allegations to include violations of Subsections (A) and (B).

We do not mean to pass on the question whether the Board, by finding that no violation of (D) was involved, inferentially ruled that other subsections were or were not violated. The point is rather that the Board, and not the state court, is empowered to pass upon such issues in the first instance. If a ruling on (D) necessarily encompassed a ruling on the other subsections, we would have a different case. But the ruling on (D) was based on the finding that no "particular work" was involved—a phrase of (D) that is absent in (A) and (B). Congress has lodged in the Board responsibility for determining in the first instance whether the same considerations apply to (A) or (B) as apply to (D).

Nor is it within our competence now to determine whether the conduct in controversy is subject to the authority of Subsections (A) or (B). Under the Board's decisions, for example, it may become pertinent whether this is eventually deemed primary pressure, directed at respondent to force insertion of the disputed clause in its contract with the IAM, rather than secondary pressure, aimed at subcontractors to force them to use IAM labor.[7] We are not now ruling on that distinction. However, the point is pertinent to our discussion, because even if it were clear that no unfair labor practices were involved, it would not necessarily follow that the State was free to issue its injunction. If this conduct does not fall within the prohibitions of § 8 of the Taft-Hartley Act, it may fall

[7] Cf., *e. g., Reilly Cartage Co.*, 110 N. L. R. B., No. 233; *Oil Workers International Union*, 84 N. L. R. B. 315; *International Brotherhood of Teamsters*, 84 N. L. R. B. 360, rev'd *sub nom. International Rice Milling Co.* v. *Labor Board*, 183 F. 2d 21, rev'd 341 U. S. 665.

within the protection of § 7, as concerted activity for the purpose of mutual aid or protection.

Respondent itself alleged that the union conduct it was seeking to stop came within the prohibitions of the federal Act, and yet it disregarded the Board and obtained relief from a state court. It is perfectly clear that had respondent gone first to a federal court instead of the state court, the federal court would have declined jurisdiction, at least as to the unfair labor practices, on the ground that exclusive primary jurisdiction was in the Board.[8] As pointed out in the *Garner* case, 346 U. S., at 491, the same considerations apply to the state courts.

The Missouri Supreme Court oversimplified the factual situation when it called this merely a "jurisdictional quarrel between two rival labor unions." A jurisdictional dispute and a secondary boycott are not necessarily mutually exclusive, as respondent itself showed by alleging, *inter alia,* that this was a secondary boycott prohibited by Missouri common law. Even the Board has not always been consistent in its interpretations of the various subsections of § 8 (b)(4).

Respondent argues that Missouri is not prohibiting the IAM's conduct for any reason having to do with labor relations but rather because that conduct is in contravention of a state law which deals generally with restraint of trade. It distinguishes *Garner* on the ground that there the State and Congress were both attempting to regulate labor relations as such.

We do not think this distinction is decisive. In *Garner* the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct.

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[8] See, *e. g., Amazon Cotton Mill Co.* v. *Textile Workers Union,* 167 F. 2d 183, 188–190; *Bakery & Confectionery Workers' International Union* v. *National Biscuit Co.,* 177 F. 2d 684; see also *Garner* v. *Teamsters Union,* 346 U. S. 485, 491.

And in *Capital Service, Inc.* v. *Labor Board, supra,* we did not stop to inquire just what category of "public policy" the union's conduct allegedly violated. Our approach was emphasized in *United Construction Workers* v. *Laburnum Construction Corp., supra,* where the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act.

Moreover, we must not forget that this case is not clearly one of "unfair labor practices." Certainly if the conduct is eventually found by the National Labor Relations Board to be *protected* by the Taft-Hartley Act, the State cannot be heard to say that it is enjoining that conduct for reasons other than those having to do with labor relations. In *Amalgamated Association* v. *Wisconsin Employment Relations Board, supra,* the statute was directed at the preservation of public utility services and not at maintenance of sound labor relations, but the State's injunction was reversed. Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised.

By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner* v. *Teamsters Union, supra.* But as the opinion in that case recalled, the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much." 346 U. S., at 488. This penumbral area can be rendered progressively

clear only by the course of litigation. Regarding the conduct here in controversy, Congress has sufficiently expressed its purpose to bring it within federal oversight and to exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade.

We realize that it is not easy for a state court to decide, merely on the basis of a complaint and answer, whether the subject matter is the concern exclusively of the federal Board and withdrawn from the State. This is particularly true in a case like this where the rulings of the Board are not wholly consistent on the meaning of the sections outlawing "unfair labor practices," and where the area of free "concerted activities" has not been clearly bounded. But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance.[9]

The state decree granting the permanent injunction found that "Defendants' [IAM's] picket line was so placed and maintained that it prevented the movement of railroad cars into and out of plaintiff's [respondent's] premises by a common carrier without danger of physical

[9] The Missouri Supreme Court relied upon *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, for the proposition that a state court retains jurisdiction over this type of suit. But *Giboney* was concerned solely with whether the State's injunction against picketing violated the Fourteenth Amendment. No question of federal preemption was before the Court; accordingly, it was not dealt with in the opinion.

injury to the pickets, and movement of the cars was stopped for that reason." The Missouri Supreme Court stated that "the transportation into and out of the plant was stopped 'because it endangered their [presumably the pickets'] lives and limbs'; . . . ." 364 Mo., at 581, 265 S. W. 2d, at 330. We do not read this as an unambiguous determination that the IAM's conduct amounted to the kind of mass picketing and overt threats of violence which under the *Allen-Bradley Local* case give the state court jurisdiction. It does not preclude the conclusion that the transportation was stopped for fear of crossing an otherwise peaceful picket line. In any event, the state injunction enjoined all picketing.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the result.

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

Syllabus.

WILLIAMSON, ATTORNEY GENERAL OF OKLAHOMA, ET AL. *v.* LEE OPTICAL OF OKLAHOMA, INC. ET AL.

NO. 184. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.*

Argued March 2, 1955.—Decided March 28, 1955.

1. Provisions of an Oklahoma statute making it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist, are not invalid under the Due Process Clause of the Fourteenth Amendment. *Roschen* v. *Ward,* 279 U. S. 337. Pp. 484–488.
2. To subject opticians to this regulatory system while exempting all sellers of ready-to-wear glasses does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 488–489.
3. A provision making it unlawful to solicit the sale of frames, mountings or any other optical appliances does not violate the Due Process Clause of the Fourteenth Amendment. Pp. 489–490.
4. A provision forbidding any retail merchandiser to rent space, sublease departments or otherwise permit any person "purporting to do eye examination or visual care" to occupy space in a retail store does not violate the Due Process Clause of the Fourteenth Amendment. Pp. 490–491.
5. A provision making it unlawful to solicit the sale of spectacles, eyeglasses, lenses and prisms by the use of advertising media is constitutional. P. 491.

120 F. Supp. 128, affirmed in part and reversed in part.

James C. Harkin, Assistant Attorney General of Oklahoma, argued the cause for appellants in No. 184 and appellees in No. 185. With him on the brief were *Mac Q. Williamson,* Attorney General, *Fred Hansen,* First Assistant Attorney General, and *Leroy Powers. Edmund G. Brown,* Attorney General of California, and *Eimo G.*

*Together with No. 185, *Lee Optical of Oklahoma, Inc. et al.* v. *Williamson, Attorney General of Oklahoma, et al.*, also on appeal from the same Court.

Funke, Assistant Attorney General, were of counsel on the brief.

Dick H. Woods argued the cause for appellees in No. 184 and appellants in No. 185. With him on the brief were *Duke Duvall* and *John M. Phillips.*

Philip B. Perlman argued the cause for the American Optometric Association, Inc., as *amicus curiae,* urging reversal in No. 184 and affirmance in No. 185. With him on the brief were *Ellis Lyons* and *William P. MacCracken, Jr.*

By special leave of Court, *Herbert A. Bergson* argued the cause and filed a brief for the Guild of Prescription Opticians of America, Inc. et al., as *amici curiae,* urging affirmance in No. 184.

Briefs of *amici curiae* urging reversal in No. 184 and affirmance in No. 185 were filed for the States of Arkansas, by *Tom Gentry,* Attorney General, *James L. Sloan,* Assistant Attorney General, and *Carl Langston;* California, by *Edmund G. Brown,* Attorney General, *E. G. Funke,* Assistant Attorney General, and *Dan Kaufmann,* Deputy Attorney General; Kansas, by *Harold R. Fatzer,* Attorney General, and *Paul E. Wilson,* First Assistant Attorney General; and Mississippi, by *J. P. Coleman,* Attorney General, and *Richard A. Billups, Jr.,* Special Assistant Attorney General.

Mr. Justice Douglas delivered the opinion of the Court.

This suit was instituted in the District Court to have an Oklahoma law (59 Okla. Stat. Ann. §§ 941–947, Okla. Laws 1953, c. 13, §§ 2–8) declared unconstitutional and to enjoin state officials from enforcing it (28 U. S. C. §§ 2201, 2202, 2281) for the reason that it allegedly violated various provisions of the Federal Constitution. The matter was heard by a District Court of three judges,

as required by 28 U. S. C. § 2281. That court held certain provisions of the law unconstitutional. 120 F. Supp. 128. The case is here by appeal, 28 U. S. C. § 1253.

The District Court held unconstitutional portions of three sections of the Act. First, it held invalid under the Due Process Clause of the Fourteenth Amendment the portions of § 2 which make it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.[1]

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[1] Section 2 reads as follows:

"It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses."

Chapter 11, Title 59, Okla. Stat. 1951, provides for the licensing of ophthalmologists and other doctors. Chapter 13 provides for the certification of optometrists.

An ophthalmologist is a duly licensed physician who specializes in the care of the eyes. An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses. The optician is an artisan qualified to grind lenses, fill prescriptions, and fit frames.

The effect of § 2 is to forbid the optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. In practical effect, it means that no optician can fit old glasses into new frames or supply a lens, whether it be a new lens or one to duplicate a lost or broken lens, without a prescription. The District Court conceded that it was in the competence of the police power of a State to regulate the examination of the eyes. But it rebelled at the notion that a State could require a prescription from an optometrist or ophthalmologist "to take old lenses and place them in new frames and then fit the completed spectacles to the *face* of the eyeglass wearer." 120 F. Supp., at 135. It held that such a requirement was not "reasonably and rationally related to the health and welfare of the people." *Id.*, at 136. The court found that through mechanical devices and ordinary skills the optician could take a broken lens or a fragment thereof, measure its power, and reduce it to prescriptive terms. The court held that "Although on this precise issue of duplication, the legislature in the instant regulation was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved." *Id.*, at 137. It was, accordingly, the opinion of the court that this provision of the law violated the Due Process Clause by arbitrarily interfering with the optician's right to do business.

We think the due process question is answered in principle by *Roschen* v. *Ward,* 279 U. S. 337, which upheld a

New York statute making it unlawful to sell eyeglasses at retail in any store, unless a duly licensed physician or optometrist were in charge and in personal attendance. The Court said, ". . . wherever the requirements of the Act stop, there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil." *Id.*, at 339.

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription. It also appears that many written prescriptions contain no directive data in regard to fitting spectacles to the face. But in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition. The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. To be sure, the present law does not require a new examination of the eyes every time the frames are changed or the lenses duplicated. For if the old prescription is on file with the optician, he can go ahead and make the new fitting or duplicate the lenses. But the law need not be in every respect logically consistent with its aims

to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia* v. *New York,* 291 U. S. 502; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Olsen* v. *Nebraska,* 313 U. S. 236; *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525; *Daniel* v. *Family Ins. Co.,* 336 U. S. 220; *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421. We emphasize again what Chief Justice Waite said in *Munn* v. *Illinois,* 94 U. S. 113, 134, "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

Secondly, the District Court held that it violated the Equal Protection Clause of the Fourteenth Amendment to subject opticians to this regulatory system and to exempt, as § 3 of the Act [2] does, all sellers of ready-to-wear glasses.

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[2] Section 3 reads as follows:

"It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas,* 310 U. S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Dental Examiners,* 294 U. S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L.* v. *American Sash Co.,* 335 U. S. 538. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch.

Third, the District Court held unconstitutional, as violative of the Due Process Clause of the Fourteenth Amendment, that portion of § 3 which makes it unlawful "to solicit the sale of . . . frames, mountings . . . or any other optical appliances." [3] The court conceded that state regulation of advertising relating to eye examinations was a matter "rationally related to the public health and welfare" (120 F. Supp., at 140) and therefore subject to regulation within the principles of *Semler* v. *Dental Examiners, supra.* But regulation of the advertising of eyeglass frames was said to intrude "into a mercantile field only casually related to the visual care of the public"

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shall prohibit the sale of ready-to-wear glasses equipped with convex-spherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser."

[3] See note 2, *supra.*

318107 O - 55 - 37

and restrict "an activity which in no way can detrimentally affect the people." 120 F. Supp., at 140–141.[4]

An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. *Semler* v. *Dental Examiners, supra.* The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers.

Fourth, the District Court held unconstitutional, as violative of the Due Process Clause of the Fourteenth Amendment, the provision of § 4 of the Oklahoma Act which reads as follows:

> "No person, firm, or corporation engaged in the business of retailing merchandise to the general public

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[4] The court also said:

"Advertising directed exclusively at this feature of eye wear can have no deleterious effect on the public, inasmuch as it has no influence on the *prospective* wearer of eyeglasses, and to the *present* wearer (a person already examined by a licensed professional) is but a mere piece of merchandise.

"The dispensing optician, a merchant in this particular, cannot arbitrarily be divested of a substantial portion of his business upon the pretext that such a deprivation is rationally related to the public health." 120 F. Supp., at 142.

> shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

It seems to us that this regulation is on the same constitutional footing as the denial to corporations of the right to practice dentistry. *Semler* v. *Dental Examiners, supra,* at 611. It is an attempt to free the profession, to as great an extent as possible, from all taints of commercialism. It certainly might be easy for an optometrist with space in a retail store to be merely a front for the retail establishment. In any case, the opportunity for that nexus may be too great for safety, if the eye doctor is allowed inside the retail store. Moreover, it may be deemed important to effective regulation that the eye doctor be restricted to geographical locations that reduce the temptations of commercialism. Geographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds.

What we have said is sufficient to dispose of the appeal in No. 185 from the conclusion of the District Court that that portion of § 3 which makes it unlawful to solicit the sale of spectacles, eyeglasses, lenses, and prisms by the use of advertising media is constitutional.

The other contentions urged by appellants in No. 185 are without merit.

Affirmed in part and reversed in part.

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

FEDERAL POWER COMMISSION *v.* COLORADO INTERSTATE GAS CO.

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

No. 45. Argued January 31, 1955.—Decided March 28, 1955.

1. On a petition to review a natural gas rate reduction order of the Federal Power Commission under the Natural Gas Act, a Court of Appeals may not consider, *sua sponte,* an objection which has not been urged before the Commission in the application for rehearing prescribed by § 19 of the Act. Pp. 493–501.

   (a) Respondent's application for a rehearing by the Commission did not object to the validity of the condition which the Commission had written into its certification of a merger between respondent and another gas company; and respondent thus did not meet the requirements of § 19 (b). Pp. 497–498.

   (b) Respondent's application not having met the requirements of § 19 (b) and respondent itself being barred from attacking the validity of the merger condition in the Court of Appeals, that Court is precluded, by the terms of § 19, from raising, considering or sustaining the same objection *sua sponte.* Pp. 498–499.

   (c) Section 10 (e) of the Administrative Procedure Act does not require a different result. Pp. 499–500.

   (d) The requirements of § 19 (b) cannot be disregarded under a claim that to limit judicial review by the Court of Appeals to objections previously urged specifically before the Commission will prevent that Court from reviewing effectively the "end result" of natural gas rate orders. P. 501.

2. On a petition to review a natural gas rate reduction order of the Federal Power Commission under the Natural Gas Act, a Court of Appeals may not invalidate, *sua sponte,* an existing order of the Commission, which prohibits the inclusion of certain operating expenses of the natural gas company in its cost of service, where such order not only has been proposed and acquiesced in by the company, but has been imposed on it by the Commission as a condition of a merger under which the company is operating. Pp. 493–494, 501–502.

3. A contention of respondent that, under the Commission's allocation of gasoline costs and the condition requiring the company to absorb them, the rate of return is reduced from 5.75% to 5.01%, and is therefore unreasonable and confiscatory, is not sustained. P. 502.

209 F. 2d 717, 732, reversed.

On respondent's petition to review an order of the Federal Power Commission under the Natural Gas Act, 95 P. U. R. (N. S.) 97, the Court of Appeals reversed the Commission's order and remanded the cause for further proceedings. 209 F. 2d 717, 732. This Court granted the Commission's petition for certiorari. 347 U. S. 1009. *Reversed,* p. 502.

Assistant Attorney General Burger argued the cause for petitioner. With him on the brief were *Solicitor General Sobeloff, Melvin Richter, Willard W. Gatchell, Lambert McAllister* and *Jacob Goldberg.*

James Lawrence White argued the cause for respondent. With him on the brief were *William A. Dougherty, John P. Akolt, Sr., John R. Turnquist, Charles E. McGee* and *Lewis M. Poe.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The principal question before us is whether, on a petition to review a natural gas rate reduction order of the Federal Power Commission, a Court of Appeals may consider, *sua sponte,* an objection which has not been urged before the Commission in the application for rehearing prescribed by § 19 of the Natural Gas Act.[1] Alterna-

[1] 52 Stat. 831–832, as amended, 15 U. S. C. § 717r. The material provisions of § 19 (a) and (b) are set forth in the body of this opinion at p. 497, *infra.* For related litigation not material to the issues now presented, see *Colorado Interstate Gas Co.* v. *Federal Power Commission,* and *Canadian River Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, and *Colorado-Wyoming Gas Co.* v. *Federal Power Commission,* 324 U. S. 626.

tively, a question also is raised whether, in such a rate proceeding, a Court of Appeals may invalidate, *sua sponte,* an existing order of the Commission, which prohibits the inclusion of certain operating expenses of the natural gas company in its cost of service, where such order not only has been proposed and acquiesced in by the company, but has been imposed on it by the Commission as a condition of a merger under which the company is operating. For the reasons hereafter stated, we answer each of these questions in the negative.

In 1948, the Federal Power Commission, petitioner herein, instituted a rate investigation against respondent, the Colorado Interstate Gas Company, under § 5 (a) of the Natural Gas Act, 52 Stat. 823–824, 15 U. S. C. § 717d (a). While this was pending, respondent and the Canadian River Gas Company filed a joint application under § 7 of the same Act, 52 Stat. 824–825, as amended, 15 U. S. C. § 717f. That application sought a certificate of public convenience and necessity permitting respondent to merge with the latter company, acquire and operate its properties, and construct additional facilities. Objection was made that consumers, receiving natural gas from respondent, might be forced by this merger to share respondent's loss if the costs of certain gasoline operations to be undertaken by it exceeded its revenues from them. To meet this objection, respondent proposed that the Commission, in any natural gas rate proceeding, exclude such loss from the company's cost of service.[2]

March 1, 1951, the Commission wrote in the above proposal as a condition of its certification of the merger. 10

[2] The proposal in respondent's letter of June 8, 1950, to the Commission, was that "in order to keep a rate payer from meeting this deficiency the Commission could condition the certificate of public convenience and necessity so as in effect to provide that such deficit would not be considered in determining reasonable rates. In other words, the stockholders of Colorado Interstate Gas Company would take the risk as to whether or not gasoline prices will go down."

F. P. C. 105, 778.[3] No review was sought. The merger was consummated and respondent has enjoyed its benefits since December 31, 1951.

The rate investigation was resumed in 1951 and the year 1952 became the test year. The usual intermediate decision was omitted and, on August 8, 1952, the Commission issued its findings and rate order. 95 P. U. R. (N. S.) 97. In that proceeding, respondent had argued for a "volumetric" allocation of gasoline costs which, in 1952, would result in a showing of no loss suffered by it from the gasoline operations in question. The Commission, however, had declined to adopt that method and had applied a "relative market value method" of allocating costs. This showed a loss of $421,537 from such operations and, pursuant to its merger order, the Commission held that such loss "shall not be considered as a part of the cost of service which we have heretofore determined." On that basis, the Commission found respondent's total cost of service, in 1952, to be $14,952,567, including federal taxes of $185,599 and the proceeds of a 5.75% rate of return ($3,280,317 on a rate base of $57,048,988). De-

[3] "(i) The authorization herein granted for effectuating the acquisition and operation of Canadian's properties and facilities is upon the express understanding and condition that if, as a result of carrying out the terms and conditions in the transaction proposed as a part of the acquisition and merger of Canadian into Colorado whereby rights to liquid hydrocarbons in place are granted to Southwestern Development Co. and whereby Colorado is to receive 50 percent of the gross proceeds from the sale of certain liquid hydrocarbons and 15 percent of the net revenue to be received by Colorado from the hydrocarbons resulting from the operation of Fritsch Natural Gasoline Plant of Texoma Natural Gas Co., the costs properly allocable to such hydrocarbons exceed the amounts payable to Colorado pursuant to such transaction, *then and in that case in any proceeding in which the effective or proposed rates of Colorado are under inquiry such excess shall not be considered as a cost of service to Colorado's natural gas customers and consumers.*" (Emphasis supplied.) 10 F. P. C., at 780.

ducting that cost from its gas service revenues of $17,962,532 left respondent with excess revenues of over $3,000,000. The Commission accordingly ordered a rate reduction eliminating that excess. *Id.*, at 127.

Respondent applied for a rehearing pursuant to § 19 (a) of the Natural Gas Act. The application stated respondent's objections to the Commission's allocation of the expense of the gasoline operations and a claim that, if the costs were properly allocated, there would be no resulting loss. Respondent complained further that the Commission's computation, in effect, reduced the company's rate of return from 5.75% to 5.01%. At no point did respondent contend that the Commission's order excluding respondent's loss from gasoline operations from its cost of service was invalid. Upon consideration of the application, the Commission denied the rehearing and modified the new rates only to a slight degree not material here.

On respondent's petition for review by the Court of Appeals for the Tenth Circuit, that court generally upheld the Commission's findings and order. It accepted the Commission's method of allocating respondent's gasoline costs and the computation which fixed the resulting loss at $421,537. However, the court held, *sua sponte,* that, despite the action taken in the merger proceeding, this loss must be added to respondent's cost of service. The court therefore reversed the Commission's order and remanded the cause for further proceedings. 209 F. 2d 717. After reargument, the court reaffirmed its position. 209 F. 2d 732. Recognizing the importance of such a result in relation to the judicial review of administrative orders, we granted the Commission's petition for certiorari but denied respondent's cross-petition. 347 U. S. 1009; 348 U. S. 818, 884. 28 U. S. C. § 1254 (1); 52 Stat. 831–832, 15 U. S. C. § 717r (b).

The Natural Gas Act prescribes explicitly the procedure to be followed by any person seeking judicial review of an order of the Federal Power Commission, and limits the scope of that review as follows:

> "SEC. 19. (a) Any person . . . aggrieved by an order issued by the [Federal Power] Commission in a proceeding under this Act to which such person . . . is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth *specifically* the ground or grounds upon which such application is based. . . . *No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.*
>
> "(b) . . . *No objection to the order of the Commission shall be considered by the court [of Appeals] unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. . . .*" (Emphasis supplied.) 52 Stat. 831–832, 15 U. S. C. § 717r (a) and (b).

Respondent first contends that its application for a rehearing by the Commission did, in substance, object to the validity of the merger condition and thus did meet the requirements of § 19 (b). We find, however, that in such application, respondent objected to the exclusion of the loss of $421,537 from gasoline operations merely on the ground that the Commission's certificate approving the merger required a "proper allocation" of the costs, and that the method of allocation chosen by the Commission was not "proper." Respondent also unsuccessfully proposed an alternative method of allocation, which would eliminate the loss. In passing upon these contentions, the Commission assumed, as did respondent, that any properly

computed loss resulting from the gasoline operations was to be excluded from the cost of service. Respondent's objection thus gave no notice that respondent was attacking the validity of the merger condition. The same is true of respondent's objection to the Commission's treatment of its income taxes, and of respondent's claim that the ultimate effect of the Commission's order was to reduce its net share of the proceeds of the rate of return from one of 5.75% to one of 5.01%. These were bids for a higher rate of return or for a recomputation of the loss from the gasoline operations, not claims that the merger condition was invalid.

Respondent's second and principal contention is that, although its application did not meet the requirements of § 19 (b) and *it* therefore is barred from attacking the validity of the merger condition in the Court of Appeals, nothing precludes that court itself from raising, considering and sustaining the same objection, *sua sponte*. Respondent's error appears on the face of the statute. Section 19 (a) first precludes the *bringing* of any proceeding in a Court of Appeals to review an order of the Commission, *unless the person bringing it previously has applied to the Commission for a rehearing on that order.* Section 19 (b) then expressly precludes the *consideration* by the court of any objection to an order of the Commission, *unless the objection shall have been urged before the Commission in the application for rehearing.* As the court is thus expressly *precluded from considering* an objection when, without prior application to the Commission, that objection is presented to the court by the party directly aggrieved,[4] it cannot be assumed that Congress intended to *permit* the same court to consider the

[4] ". . . Petitioner, moreover, failed to object in its application for rehearing before the Commission to the inclusion of its producing properties and gathering facilities in the rate base. It is accordingly precluded by § 19 (b) of the Act from attacking the order of the

same objection, under the same circumstances, *sua sponte,* merely because the objection was *not* presented to the court by the party aggrieved. Section 19 (b) reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19 (b) that objections must first come before the Commission.

Section 10 (e) of the Administrative Procedure Act does not require a different result.[5] That Act purports to

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Commission on the ground that they are included." *Panhandle Co.* v. *Federal Power Commission,* 324 U. S. 635, 649, and see 650–651. See also, *Labor Board* v. *Cheney Lumber Co.,* 327 U. S. 385, 388–389, and *Labor Board* v. *Seven-Up Co.,* 344 U. S. 344, where failure to preserve the issue by objection before the agency was treated as a bar to the judicial consideration of it.

[5] "SEC. 10. *Except so far as (1) statutes preclude judicial review* or (2) agency action is by law committed to agency discretion—

. . . . . .

"(e) SCOPE OF REVIEW.—So far as necessary to decision *and where presented* the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (Emphasis supplied.) 60 Stat. 243–244, 5 U. S. C. § 1009 (e).

strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review. The Senate Committee, recommending the bill for that Act, said:

> "A party cannot wilfully fail to exhaust his administrative remedies and then, after the agency action has become operative, either secure a suspension of the agency action by a belated appeal to the agency, *or resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application of the time-honored doctrine of exhaustion of administrative remedies. . . .*" (Emphasis supplied.) S. Doc. No. 248, 79th Cong., 2d Sess. 289, n. 21.

Furthermore, § 10, by its own terms, is made inapplicable in "so far as (1) statutes [as here] preclude judicial review," and § 10 (e) applies only to situations where the question at issue has been properly "presented," as has not been done here. It is not a reasonable interpretation of the general terms of that Act to hold that they repeal the administrative procedures specifically set forth in the Natural Gas Act.

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States* v. *Tucker Truck Lines,* 344 U. S. 33, 36–37. See also, *Riss & Co.* v. *United States,* 341 U. S. 907; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33; *United States* v. *Capital Transit Co.,* 338 U. S. 286, 291; *Unemployment Compensation Commission* v. *Aragon,* 329 U. S. 143, 155.

The necessity for prior administrative consideration of an issue is apparent where, as here, its decision calls for the application of technical knowledge and experience not usually possessed by judges. The Federal Power Commission is an administrative agency the decisions of which involve those difficult problems of policy, accounting, economics and special knowledge that go into public utility rate making. For reviewing a rate made by the Federal Power Commission, the Court of Appeals has no inherent suitability comparable to that which it has for reviewing the judicial decisions made by a United States District Court.

Respondent further suggests that to limit the judicial review of the Court of Appeals to those objections which have been urged specifically before the Commission prevents that court from reviewing effectively the "end result" of the rate order. See *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591. To accept that argument would wipe out at a single stroke the expressly prescribed policy of § 19 (b). Not only would such acceptance be contrary to the terms of the statute, but it would fail to recognize the fundamental consideration that it is not the function of a court itself to engage in rate making.

Returning to the language of § 19, we hold that the Court of Appeals does not here have authority, either under § 19 or *sua sponte,* to reverse the Commission by overruling its exclusion of $421,537 of gasoline production expense from respondent's cost of service for rate purposes.

As an alternative ground for reversal, the Commission also contends that the Court of Appeals is here precluded from redetermining the validity of the merger condition because of respondent's and the Commission's previous conduct in approving it. Cf. *United States* v. *Hancock Truck Lines,* 324 U. S. 774, 778–780. In 1950, respondent proposed this condition in its merger proceeding.

That merger had many facets and a difference of opinion existed within the Commission on its merits. 10 F. P. C. 105, 119. In 1951, the condition before us became an important factor in securing the Commission's finding that the merger would be in the public interest. *Id.*, at 780. After the merger was approved on that condition, respondent sought no review of it. On the other hand, respondent consummated the merger and has enjoyed its benefits ever since. It cannot now be allowed to attack an officially approved condition of the merger while retaining at the same time all of its benefits. The impropriety of the attack is rendered twofold because it is not made in the merger proceeding but is attempted in a separate rate proceeding. While respondent also charges that, under the Commission's allocation of gasoline costs and the condition requiring the company to absorb them, the rate of return is reduced from 5.75% to 5.01% and is therefore unreasonable and confiscatory, we do not sustain that charge.

The judgment of the Court of Appeals accordingly is

Reversed.

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

UNITED STATES *v.* BRAMBLETT.

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

No. 159. Argued February 7, 1955.—Decided April 4, 1955.

The Disbursing Office of the House of Representatives is a "department or agency" of the United States within the meaning of 18 U. S. C. § 1001, which forbids the willful falsification of a material fact "in any matter within the jurisdiction of any department or agency of the United States." Pp. 503–510.

(a) The legislative history of this section shows that it was the intention of Congress to make it applicable to the legislative and judicial branches of the Government. Pp. 504–508.

(b) A different result is not required by the definitions of "department" and "agency" in 18 U. S. C. § 6. Pp. 508–509.

(c) The development, scope and purpose of § 1001 shows that "department," as used in this context, was meant to describe the executive, legislative and judicial branches of the Government. P. 509.

(d) That criminal statutes must be construed strictly does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature. Pp. 509–510.

120 F. Supp. 857, reversed.

Charles F. Barber argued the cause for the United States. With him on briefs were *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg, Ralph S. Spritzer* and *Richard J. Blanchard.*

Edward Bennett Williams argued the cause for appellee. With him on the brief was *Murdaugh Stuart Madden.*

MR. JUSTICE REED delivered the opinion of the Court.

On November 10, 1953, an 18-count indictment was returned in the United States District Court for the District of Columbia, charging the appellee, a former mem-

ber of Congress, with violations of 18 U. S. C. § 1001.[1] During the course of the trial a judgment of acquittal was ordered on counts 8 through 18 of the indictment. The jury returned a verdict of guilty on the remaining 7 counts which charged the appellee with having falsely and fraudulently represented to the Disbursing Office of the House of Representatives that a named woman was entitled to compensation as his official clerk. The District Court granted appellee's motion in arrest of judgment, holding that he had not falsified a material fact "within the jurisdiction of any department or agency of the United States" since the Disbursing Office was not a department or agency within the meaning of the statute. The District Court was of the opinion that the statute does not afford protection to the legislative and judicial branches of the Government. The Government brought this case here on direct appeal pursuant to 18 U. S. C. § 3731. Reference to the evolution of § 1001 will assist in determining the correctness of the decision below. A detailed analysis appears in the opinion of the trial court. 120 F. Supp. 857.

Section 1001 had its origin in a statute passed almost 100 years ago in the wake of a spate of frauds upon the Government. The Act of March 2, 1863, 12 Stat. 696, "An Act to prevent and punish Frauds upon the Government of the United States," made it a criminal offense for

> "any person in the land or naval forces of the United States . . . [to] make or cause to be made, or present

[1] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

> or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . . ."

This provision clearly covers the presentation of false claims against any component of the Government to any officer of the Government. The prohibition of the statute is broad, although its application was limited to military personnel.

False statements were proscribed in the following clause of the same section in these terms:

> "any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry."

It will be noted that there is here no specification as to the group to whom the false statements had to be made. The provision in the false claims section which made the presentation of false claims to "any person or officer in the civil or military service of the United States" punishable might reasonably have been applied here. There would be no justification for giving the false statements section a narrower scope, for, so long as the false statement was made with the indicated purpose, the statute made it punishable.

From 1863 to 1934 the coverage of the statute was at various times extended, but no change was made which could be or is taken by the appellee as restricting the

318107 O - 55 - 38

scope of the false statements provision to the executive branch.[2]

The words urged as crucial in this case first appeared in the revision of 1934. 48 Stat. 996. No change was made in the false claims portion of the statute, but the false statements section was amended to read:

> "or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, *in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder;* . . . ." (Italics supplied.)

The amendment deleted all words as to purpose and inserted the italicized phrase. Under the prior statutes there had been no possibility of a restrictive interpretation which would read out falsifications made to officers of the legislative or judicial branches. Did the insertion of the new phrase exclude those branches? We think not.

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[2] Under the codification of December 1, 1873, approved June 22, 1874, R. S. § 5438, the statute was extended to cover "every person"—not merely military personnel. The Act of May 30, 1908, 35 Stat. 555, simply changed the penalties, and in the codification of 1909, 35 Stat. 1088, § 5438 was redesignated § 35. Section 35 was in turn revised in 1918, 40 Stat. 1015. The false claims provision was extended to cover corporations in which the United States held stock; and false statements were proscribed if made "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States" as well as if made for the purpose of obtaining payment of a false claim.

The 1934 revision was largely the product of the urging of the Secretary of the Interior.[3] The Senate Report, S. Rep. No. 1202, 73d Cong., 2d Sess., indicates that its purpose was to broaden the statute so as to reach not only false papers presented in connection with a claim against the Government, but also nonmonetary frauds such as those involved in the "hot-oil" shipments. A greater variety of false statements were meant to be included.[4] There is no indication in either the committee reports[5] or in the congressional debates[6] that the scope of the statute was to be in any way restricted. There was certainly no suggestion that the new phrase was to be interpreted so that only falsifications made to executive agencies would be reached.[7] Apparently the italicized phrase was inserted simply to compensate for the deleted

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[3] For a discussion of the legislative history of the Act, see *United States* v. *Gilliland*, 312 U. S. 86, 93–95.

[4] In *United States* v. *Cohn*, 270 U. S. 339, the Court held that the 1918 Act did not proscribe false statements made to a customs collector where the purpose was not to defraud the Government of either its money or property. After the 1934 amendment, however, the Court sustained an indictment charging the defendants with willfully falsifying reports required to be filed under the "Hot-Oil" Act of February 22, 1935. The Court stated that the purpose of the 1934 amendment was to remove the prior "restriction to cases involving pecuniary or property loss to the government." *United States* v. *Gilliland*, 312 U. S. 86, 93.

[5] S. Rep. No. 1202; H. R. Rep. No. 1463, 73d Cong., 2d Sess.

[6] 78 Cong. Rec. 8136, 11270, 11513.

[7] In *Romney* v. *United States*, 83 U. S. App. D. C. 150, 167 F. 2d 521, the Sergeant at Arms of the House of Representatives of the United States was convicted of presenting false statements of his accounts and of concealing shortages in reporting to the General Accounting Office, which was created as an establishment "independent of the executive departments and under the control and direction of the Comptroller General of the United States." 42 Stat. 23, 31 U. S. C. § 41.

language as to purpose—to indicate that not all falsifications but only those made to government organs were reached.

The 1948 revision put the statute into its present form.[8] 62 Stat. 683. The false claims provision became § 287 of Title 18 and retained its prior form without significant change. Section 1001 is the "false statements" section. Except for housekeeping changes in language which are of no particular significance, the deletion of the reference to corporations, and the transposition of the "in any matter" clause to the beginning of the section, there has been no change since the 1934 statute. There is no indication that the revision was intended to work any substantive change. It would thus be supposed that the statute retained its broad scope, a scope at least as broad as the false claims section, and could not be limited to falsifications made to executive agencies.

The appellee and the District Court rely on § 6 of Title 18 to restrict the scope of § 1001. Section 6 provides:

> "As used in this title:
>
> "The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> "The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

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[8] In 1938, § 35 was divided into subsections, but the part of the statute with which we are here concerned was left unchanged. 52 Stat. 197.

The falsification here involved was held to be within the jurisdiction of the Disbursing Office of the House which it was thought could not meet the definitions in § 6. It seemed significant to the trial court "that Title 18, § 287 (formerly the first part of old Section 35) provides penalties against any one who 'makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim . . . knowing such claim to be false,' " whereas § 1001 does not contain such language. 120 F. Supp., at 861.

It might be argued that the matter here involved was within the jurisdiction of the Treasury Department, as the appellee's misstatements would require the payment of funds from the United States Treasury. Or, viewing this as a matter within the jurisdiction of the Disbursing Office, it might be argued, as the Government does, that that body is an "authority" within the § 6 definition of "agency." We do not rest our decision on either of those interpretations. The context in which this language is used calls for an unrestricted interpretation. This is enforced by its legislative history. It would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section shows that "department," as used in this context, was meant to describe the executive, legislative and judicial branches of the Government. The difference between the language of § 287 and that of § 1001 can only be understood in the light of legislative history. That history dispels the possibility of attaching any significance to the difference.

That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority.

But this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.[9]

The judgment below is accordingly

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE BURTON and MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

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[9] Cf. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537; *Spivey* v. *United States*, 109 F. 2d 181.

AMALGAMATED CLOTHING WORKERS OF AMERICA ET AL. *v.* RICHMAN BROTHERS CO.

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

No. 173. Argued March 4, 7, 1955.—Decided April 4, 1955.

Without applying to the National Labor Relations Board for relief, a corporation engaged in interstate commerce sued in a state court to enjoin a labor union from peacefully picketing the corporation's places of business, on the ground that such conduct constituted a common-law conspiracy and a statutory and common-law restraint of trade in violation of state law. Claiming that the matter was in the exclusive jurisdiction of the National Labor Relations Board and that the state court had no jurisdiction, the union sued in a Federal District Court to enjoin the corporation from further prosecution of its suit in the state court, basing jurisdiction on 28 U. S. C. §§ 1337 and 1651. *Held:* Under 28 U. S. C. § 2283, the Federal District Court was denied power to enjoin the proceedings in the state court. Pp. 512–521.

1. The clear-cut prohibition of § 2283 against a federal court granting an injunction to stay proceedings in a state court cannot be held inapplicable whenever a party applying to a Federal District Court to enjoin proceedings in a state court alleges that the state court is without jurisdiction of the subject matter because it has invaded a field pre-empted by Congress. Pp. 514–516.

2. The specific exception in § 2283 which permits an injunction to issue "as expressly authorized by Act of Congress" is not applicable to this case. The Taft-Hartley Act authorizes the National Labor Relations Board and its representatives to apply to a District Court for injunctive relief in certain circumstances; but it does not authorize private litigants to apply for such relief. Pp. 516–519.

3. Nor is this case within the specific exception to § 2283 which permits a federal court to issue an injunction "where necessary in aid of its jurisdiction." Pp. 519–521.

211 F. 2d 449, affirmed.

William J. Isaacson argued the cause for petitioners. With him on the brief was *Louis H. Pollak.*

By special leave of Court, *Philip Elman* argued the cause for the National Labor Relations Board, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Sobeloff, David P. Findling, Dominick L. Manoli* and *Norton J. Come.*

Luther Day argued the cause and filed a brief for respondent.

Mr. Justice Frankfurter delivered the opinion of the Court.

In *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, decided last Monday on writ of certiorari to the Missouri Supreme Court, we considered the jurisdiction of a state court to enjoin conduct which in one aspect brought it within exclusive federal authority under the Taft-Hartley Act and in another constituted a violation of a state statute against restraint of trade. In this case we have to decide the question whether, under similar circumstances, a union has open to it, without resorting to the appellate procedures of the State and eventually of this Court, jurisdiction of a federal district court to enjoin the employer from pursuing his action in the state court.

Petitioner, an unincorporated association of clothing workers, was responsible for peaceful picketing of a number of respondent's retail stores, presumably to compel its factory employees to join the union. Respondent, an Ohio corporation engaged in the manufacture and sale of men's clothing in interstate commerce, filed suit in the Court of Common Pleas for Cuyahoga County, Ohio, alleging that the union's conduct constituted a common-law conspiracy as well as a statutory and common-law restraint of trade. It prayed for temporary and permanent injunctions. The union brought proceedings to

remove the case to the United States District Court for the Northern District of Ohio, claiming that the employer's petition alleged facts bringing the case within the original jurisdiction of the District Court as a civil action arising under the Taft-Hartley Act. 28 U. S. C. § 1337. That court remanded the action to the state court on the ground that if, as the union contended, the complaint in effect alleged a violation of § 8 (b)(1)(A) of the Taft-Hartley Act, under the decision in *Garner* v. *Teamsters Union,* 346 U. S. 485, only the National Labor Relations Board had jurisdiction of its subject matter. *Richman Brothers Co.* v. *Amalgamated Clothing Workers,* 114 F. Supp. 185, rehearing denied, 116 F. Supp. 800.

Upon remand, the union invoked the ground taken by the District Court in denying its jurisdiction in a motion to dismiss the action in the state court. This motion was denied without opinion. The union then filed this complaint in the same District Court seeking an injunction which would require the employer to withdraw the action commenced in the state court. Jurisdiction was based on 28 U. S. C. § 1337. This provision confers jurisdiction on federal courts over any civil action arising under any Act of Congress regulating interstate commerce. The union also relied on 28 U. S. C. § 1651, the all-writs section. The District Court held that under 28 U. S. C. § 2283, which prohibits federal injunctions against state court proceedings, it was without power to grant the requested relief, inasmuch as the action did not come within any of the exceptions to that general prohibition. The Court of Appeals for the Sixth Circuit unanimously affirmed, 211 F. 2d 449. The jurisdictional question is plainly important in this area of federal-state relations and we granted certiorari, 348 U. S. 813.

Subsequent to the affirmance by the Court of Appeals, the Ohio Court of Common Pleas ruled favorably on the employer's motion for a temporary injunction. *Rich-*

man Brothers Co. v. *Amalgamated Clothing Workers,* 51 Ohio Op. 145, 116 N. E. 2d 60.

1. Under the decision in *Weber* v. *Anheuser-Busch, Inc.,* we may assume that the conduct in controversy is subject to whatever relief the Taft-Hartley Act may afford, and therefore is outside state authority. The question is whether a federal court may, before complaint has been entertained by the Board and at the request of one of the private parties, enjoin the attempt to secure relief through state proceedings.

We need not re-examine the series of decisions, prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied exceptions to the historic prohibition against federal interference with state judicial proceedings. See *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118. By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. Former § 265 of the Judicial Code 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." 36 Stat. 1162.

The 1948 enactment revised as well as codified. The old section was thus embodied in the new § 2283:

> "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."

In lieu of the bankruptcy exception of § 265, Congress substituted a generalized phrase covering all exceptions, such as that of the Interpleader Act, 28 U. S. C. § 2361, to be found in federal statutes. Two newly formu-

lated exceptions to the general prohibition deal with problems of judicial administration which had earlier been the subject of the series of decisions dealt with in the *Toucey* case. If confirmation of the comprehensive scope thus revealed on the face of the enactment were necessary, it is to be found in the Reviser's Notes, which state:

> "An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions." [1]

In the face of this carefully considered enactment, we cannot accept the argument of petitioner and the Board, as *amicus curiae,* that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is "wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress." No such exception had been established by judicial decision under former § 265.[2] In any event, Congress has left no justification for its recognition now. This is not a

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[1] H. R. Rep. No. 308, 80th Cong., 1st Sess. A181. Petitioner and the Board, as *amicus curiae,* emphasize the statement in the Reviser's Notes that "the revised section restores the basic law as generally understood and interpreted prior to the Toucy [*sic*] decision." Even if taken to mean that, despite the revised wording, the section is to derive its content from decisions prior to 1948, these contain no precedent for the present proceeding. See note 2, *infra.* Moreover, in context it is clear that the quoted phrase refers only to the particular problem which was before the Court in the *Toucey* case.

[2] The statement in *Bowles* v. *Willingham,* 321 U. S. 503, 511, that "Congress thus preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts. The rule expressed in § 265 which is designed to avoid collisions between state and federal authorities . . . thus does not come into play," must be read in the context of the scheme of the Emergency Price Control Act of 1942 (56 Stat. 23) and particularly the authority in that Act for resort by the Administrator of the Office of Price Administration to injunctive relief under the circumstances there presented. § 205 (a), 56 Stat. 33. It is also to be noted that this observation was made prior to the revision of 1948.

statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.

We are further admonished against taking the liberty of interpolation when Congress clearly left no room for it, by the inadmissibility of the assumption that ascertainment of pre-emption under the Taft-Hartley Act is self-determining or even easy. As we have noted in the *Weber* case, "the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds." 348 U. S., at 480. What is within exclusive federal authority may first have to be determined by this Court to be so.

2. We turn, therefore, to the specific exemptions contained in § 2283. The first of these permits an injunction to issue "as expressly authorized by Act of Congress." In the present case we are directed to no "express" authorization within even the most attenuated meaning of the term. Of course no prescribed formula is required; an authorization need not expressly refer to § 2283. But the only "express" authorization, in the freest use of the word, to be found in the Taft-Hartley Act does not help petitioner. Congress has provided an administrative agency to pass on claims that rights granted by the Act are denied or that restrictions imposed by the Act are disregarded. Only after the Board has found such claims to be well-founded and has formulated remedies for their vindication does the jurisdiction for review by the Court of Appeals come into being. However, injunctive relief or a temporary restraining order may be obtained by the Board from the appropriate District Court, pending final adjudication by the Board, "upon issuance of a complaint" by the Board or when there is "reasonable cause to believe" in the truth of a charge that a party "has

engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8 (b)." Congress explicitly gave such jurisdiction to the district courts only on behalf of the Board on a petition by it or "the officer or regional attorney to whom the matter may be referred." § 10 (j), (l), 61 Stat. 149, 29 U. S. C. § 160 (j), (l). To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify. To find exclusive authority for relief vested in the Board and not in private parties accords with other aspects of the Act. See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261. Such was the authority recognized in *Capital Service, Inc.* v. *Labor Board,* 347 U. S. 501.

But the argument is made that to permit the state courts to proceed unchecked in their incursion upon a federally pre-empted domain dislocates the federal scheme as a whole. This argument is only a rephrasing of the suggestion that whenever Congress is found to have pre-empted a field by legislation § 2283 must yield. But its thrust is deeper in the particular circumstances of this case. If the employer's use of the judicial process of the State does not amount to an unfair labor practice, and if the Board is without power to seek an injunction before a complaint is filed with it, the federal mechanism will not be invoked and federally protected rights may be denied until the injunction is lifted. The employer, who might have brought a charge of an unfair labor practice before the Board, has chosen to ignore his remedy under the Taft-Hartley Act. The temporary injunction which has been issued is not, under Ohio law, appealable,[3] and

[3] A temporary injunction which merely serves to preserve the *status quo* pending the hearing on a request for a permanent injunction is not a final order appealable under §§ 2505.02, 2505.03 of Page's

the appellate procedures which will be available if a permanent injunction is issued are necessarily time-consuming. Thus, so the argument runs, unless the federal court can intervene, delay will not only undercut the legislative scheme, but opportunity for effective union activity may be diminished if not lost.

The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions.[4] During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.

We cannot assume that this confidence has been misplaced. Neither the course of this case, nor the history of state court actions since the decision in *Garner* v. *Teamsters Union*, 346 U. S. 485, demonstrates recal-

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Ohio Rev. Code (1954). *May Co.* v. *Bailey Co.*, 81 Ohio St. 471, 91 N. E. 183; *Tipling* v. *Randall Park Holding Co.*, 94 Ohio App. 505, 114 N. E. 2d 279.

[4] With the exception of the short-lived "Midnight Judges" Act of February 13, 1801, 2 Stat. 89 (repealed on March 8, 1802, 2 Stat. 132), the so-called federal specialties, and specific *ad hoc* grants of jurisdiction, enforcement of federal rights was confined to the state courts prior to the Act of March 3, 1875, 18 Stat. 470. See 13 Cornell L. Q. 499, 507–509.

citrance on the part of state courts to recognize the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems. In its effort to define what has been withdrawn from the States and what has been left them, the opinion in *Garner,* decided just last Term, was hedged with qualifications, even in a case which dealt only with state court enforcement of a state labor policy as such.

Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them. To permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established. A district court's assertion of equity power or its denial may in turn give rise to appellate review on this collateral issue. There may also be added an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties.

3. The exception to § 2283 which permits the District Court to issue injunctions "where necessary in aid of its jurisdiction" remains to be considered. In no lawyer-like sense can the present proceeding be thought to be in aid of the District Court's jurisdiction. Under no circumstances has the District Court jurisdiction to enforce rights and duties which call for recognition by the Board. Such nonexistent jurisdiction therefore cannot be aided.[5]

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[5] We have been referred by petitioner to decisions in the lower federal courts under 28 U. S. C. § 1651 and its antecedents holding that the Court of Appeals may resort to writ of mandamus or prohibition "in aid of its jurisdiction" to prevent a district court from acting in a manner which would defeat the Court of Appeals' power of review. These decisions might be more relevant had the injunction been sought from the Court of Appeals. Only that court has power to

Insofar as protection is needed for the Board's exercise of its jurisdiction, Congress has, as we have seen, specifically provided for resort, but only by the Board, to the District Court's equity powers. Since the very presupposition of this proceeding is that jurisdiction of the subject matter of which the employer complained was in the Board and not in the state court, any aid that is needed to protect jurisdiction is the aid which the Board may need for the safeguarding of its authority. Such aid only the Board could seek, and only if, in a case pending before it, it has satisfied itself as to the adequacy of the complaint.

It is urged that an employer may deliberately prevent Board action by going into a state court. For one thing, it has not yet been determined that, if an employer resorts to a state court in relation to conduct that is obviously taken over by the Taft-Hartley Act and outside the bounds of state relief, it may not under appropriate circumstances give ground for a finding of an unfair labor practice.[6] In any event, if resort to a state court

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review decisions of the Board. In any event, it has never been authoritatively suggested that this example of injunctive aid to a potential jurisdiction, which finds roots in traditional concepts of the relationship between inferior and superior courts of the same judicial system, has any relevance where the offending action sought to be enjoined is insulated by two intervening and essentially unrelated systems, one of an administrative rather than judicial nature, the other the manifestation of a distinct sovereign authority.

[6] In *W. T. Carter and Brother*, 90 N. L. R. B. 2020, the Board has held that an employer's action in procuring a state court injunction prohibiting federally protected employee activities constitutes a violation of § 8 (a)(1) of the Act which designates as an unfair labor practice an employer's restraint of employees in the exercise of rights guaranteed under § 7. The Board now argues that this case is limited to situations in which the employer's resort to the state court is part of a bad faith scheme to defeat union organization and the underlying union conduct which has been enjoined is protected under the Taft-Hartley Act.

may not be circumvented by the power of the Board to entertain such a complaint, we are bound to repeat that, insofar as a penumbral region must remain between state and federal authority touching industrial relations until finally clarified by definitive rulings here or further legislation by Congress, state litigation must, in view of § 2283, be allowed to run its course, including the ultimate reviewing power in this Court.

Affirmed.

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

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

There can be no doubt, apart from the limitations of 28 U. S. C. § 2283,[1] that the District Court had jurisdiction under 28 U. S. C. § 1337 [2] to issue the injunction sought by the union in this case. This Court so held in *Capital Service* v. *Labor Board*, 347 U. S. 501. It is true that the plaintiff in *Capital Service* was the National Labor Relations Board, but § 1337 is general in terms and makes no distinction between public and private plaintiffs.

Thus, as in *Capital Service*, the question is whether § 2283, on the facts of this case, precludes the exercise of

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[1] Section 2283 provides:

"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."

[2] Section 1337 provides:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

318107 O - 55 - 39

jurisdiction under § 1337. In *Capital Service,* the Court stated (347 U. S., at 505, n. 2):

> "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."

That question is now here.

In the *Willingham* case, a landlord had obtained a state court injunction restraining the Price Administrator from issuing certain rent orders under the Emergency Price Control Act. The Price Administrator brought an action in a federal district court to enjoin enforcement of the state court injunction. Exclusive jurisdiction to determine the validity of rent orders, the Administrator argued, was vested by Congress in the Emergency Court of Appeals. This Court upheld the Administrator's position. As one ground for its decision that § 265 of the Judicial Code [3]—the predecessor of § 2283—was no bar to the injunction sought by the Administrator, the Court stated (321 U. S., at 511):

> "Congress thus preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts. The rule expressed in § 265 which is designed to avoid collisions between state and federal authorities (*Toucey* v. *New York Life Ins. Co., supra*) thus does not come into play."

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[3] Section 265 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." 36 Stat. 1162.

Thus stood the law in 1948 when § 265 was succeeded by the present § 2283.[4]

Contrary to the suggestion of the majority opinion, § 2283 is not broader in scope than its predecessor, § 265. Indeed, the express purpose of § 2283 was to contract—not expand—the prohibition of § 265. The Revisers stated that "An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted *to cover all exceptions.*" [5] (Italics added.) The only substantive change noted by the Revisers was an overruling of this Court's decision in *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118. The *Toucey* decision held that § 265 barred a federal court from enjoining a state court *in personam* proceeding involving a claim previously adjudicated by the federal court. The Revisers, expressly approving the *Toucey* dissent, stated that "the revised section restores the basic law as generally understood and interpreted prior to the Toucy [*sic*] decision. Changes were made in phraseology." [6] By enacting § 2283, Congress thus rejected the *Toucey* decision and its philosophy of judicial inflexibility.[7] However imprecise may be the language of § 2283, its legislative history makes it abundantly clear that the provision was not intended to repeal pre-existing exceptions to § 265.

To read § 2283 literally—as the majority opinion does—ignores not only this legislative history but also over a century of judicial history.[8] In addition, for the reasons

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[4] See also *Hale* v. *Bimco Trading Co.*, 306 U. S. 375, 378; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183.

[5] H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A181.

[6] *Id.*, p. A182.

[7] See Moore's Commentary on the U. S. Judicial Code (1949) 407, 410; Note, 48 Nw. U. L. Rev. 383 (1953).

[8] See Hart and Wechsler, The Federal Courts and The Federal System (1953), 1075–1076; Moore's Commentary on the U. S. Judicial Code (1949) 395–407, 410.

pointed out by MR. JUSTICE DOUGLAS in his dissenting opinion, such a literal interpretation seriously frustrates a comprehensive regulatory scheme established by Congress for the resolution of the kind of labor dispute involved here. The Board, although clearly having exclusive jurisdiction of the subject matter, cannot adjudicate the dispute as long as the employer does not file an unfair labor practice charge; and the employer has no incentive to do so as long as the state court injunction is outstanding. I would reverse.

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

"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." So reads 28 U. S. C. § 2283. So read, apart from exceptions not relevant here, former § 265 of the Judicial Code.

The purpose of the law, as explained in *Oklahoma Packing Co.* v. *Gas Co.*, 309 U. S. 4, 9, was "to prevent needless friction between state and federal courts." It is, however, construed and applied today in a way which can only defeat a federal regulatory scheme. For today's decision allows state courts to intrude in a domain where the federal agencies, *i. e.*, the National Labor Relations Board and the District Court, have been granted primary and exclusive jurisdiction, without leaving the aggrieved party any effective relief.

This is not a case where the state court has concurrent jurisdiction with the federal agencies. The matter on which the state court takes hold has been pre-empted by the Congress and placed as firmly and completely in the

federal domain as if Congress by express words had forbidden state courts to intrude. The addition of an express exception to § 2283 would not make the congressional purpose any clearer.

Where Congress has made clear that federal agencies have exclusive jurisdiction of a controversy, that legislation should be taken to qualify § 2283 *pro tanto*. That has been the view up to this time. The Removal Acts, starting with 1 Stat. 73, 79, allowed cases to be removed from state to federal courts, and provided that a case once removed passed beyond the jurisdiction of the state courts. Those Acts were construed to qualify the predecessor of § 2283. *Dietzsch* v. *Huidekoper*, 103 U. S. 494; *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, 245. The same construction was given an Act of 1851 which limited the liability of shipowners and provided that, after a shipowner transfers his interest in the vessel to a trustee for the benefit of the claimants, "all claims and proceedings against the owner or owners shall cease." 9 Stat. 635, 636. The Court held in *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 600, that, despite the predecessor to § 2283, the Limited Liability Act ousted the state courts, since otherwise the Act would be thwarted.

Those cases showed no clearer need for the qualification of § 2283 *pro tanto* than does the Taft-Hartley Act.

The Court has been ready to imply other exceptions to § 2283, where the common sense of the situation required it. Thus, if the federal court first takes possession of a *res*, it may protect its control over it, even to the extent of enjoining a state court from interfering with the property. That result flies in the face of the literal words of § 2283. Yet the injunction is allowed to issue as the preferable way of avoiding unseemly clashes between state and federal authorities. See *Hagan* v. *Lucas*, 10 Pet. 400, 403; *Kline* v. *Burke Constr. Co.*, 260 U. S. 226,

229, 235. Another illustration, as THE CHIEF JUSTICE points out, is *Bowles* v. *Willingham,* 321 U. S. 503, where the case for exclusive jurisdiction of the federal authorities was no stronger than the one now presented.

A like exception is needed here, if the state suit is not to dislocate severely the federal regulatory scheme. Under the present decision, an employer can move in the state courts for an injunction against the strike. The injunction, if granted, may for all practical purposes settle the matter. There is no way for the union to transfer the dispute to the federal Board, for it seems to be assumed by both parties that the employer has committed no unfair labor practice. By today's decision the federal court is powerless to enjoin the state action. The case lingers on in the state court. There can be no appeal to this Court from the temporary injunction. *Building Union* v. *Ledbetter Co.,* 344 U. S. 178. It may take substantial time in the trial court to prepare a record to support a permanent injunction. Once one is granted, the long, drawn-out appeal through the state hierarchy and on to this Court commences. Yet by the time this Court decides that from the very beginning the state court had no jurisdiction, as it must under the principle of *Garner* v. *Teamsters Union,* 346 U. S. 485, a year or more has passed; and time alone has probably defeated the claim.

That course undermines the federal regulation; it emasculates the federal remedy; it allows one party to a labor-management controversy to circumvent the law which Congress enacted to resolve these disputes.

The federal regulatory scheme cries out for protection against these tactics of evasion. No one is in a position to seek the protection of the federal court, except the federal Board or a party to the dispute who is aggrieved. Either should be allowed standing under the principle of *Capital*

Service, Inc. v. *Labor Board,* 347 U. S. 501, to invoke the jurisdiction of the federal court. Certainly a suit to protect the exclusive jurisdiction of federal agencies under the Taft-Hartley Act is a suit "arising under any Act of Congress regulating commerce" within the meaning of 28 U. S. C. § 1337. See *Capital Service, Inc.* v. *Labor Board, supra,* at 504.

UNITED STATES *v.* MENASCHE.

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

No. 104. Argued March 1, 1955.—Decided April 4, 1955.

An alien who filed his declaration of intention to become an American citizen before the effective date of the Immigration and Nationality Act of 1952, and who otherwise complied with the naturalization laws then in effect, has a "status," "condition" or "right in process of acquisition" preserved by § 405 (a), the general savings clause of the 1952 Act, even though his petition for naturalization was filed after the effective date of that Act. Pp. 529–539.

(a) When subsection (a) of the savings clause was broadened in the 1952 Act, Congress manifested its intention that the Act should take effect prospectively where there was no specific provision to the contrary. Pp. 533–535.

(b) The 1952 extension of subsection (a) is not limited to situations concerning derivative citizenship. P. 535.

(c) The fact that, under the 1952 Act, declarations of intention are no longer prerequisite to naturalization is immaterial here, in view of the provision in § 405 (a) preserving the "validity" of declarations of intention "valid at the time this Act shall take effect." Pp. 535–536.

(d) In this case, the alien's inchoate right to citizenship is protected by § 405 (a) and is not defeated by any implication stemming from § 405 (b). Pp. 536–539.

(e) Section 316 (a) of the 1952 Act, which imposes a more stringent requirement as to residence than did the prior law, did not "otherwise specifically provide" that the 1952 Act rather than the prior law was to apply to the situation of the alien in this case. P. 539.

210 F. 2d 809, affirmed.

Gray Thoron argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, L. Paul Winings* and *Lorraine Wall Hurney.*

Peyton Ford argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case and *Shomberg* v. *United States, post,* p. 540, present questions concerning the proper interpretation of the general savings clause of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. § 1101, note. This clause, § 405 of the Act, provides as follows:

> "(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [*sic*], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . .
>
> "(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed."

The issue here presented is whether an alien, who filed his declaration of intention to become an American citizen before the effective date of the 1952 Act, and who otherwise complied with the naturalization laws then in

effect, has a "status," "condition," or "right in process of acquisition" preserved by § 405 (a), *supra,* despite the fact that his petition for naturalization was filed after the effective date of the new Act. The Government contends that petitions for naturalization are to be governed exclusively by § 405 (b), and that since respondent does not come within the terms of that subsection—his petition not having been filed before the effective date of the new Act—the savings clause is inapplicable and the substantive provisions of the 1952 Act apply.

The facts are not in dispute. Respondent was admitted for permanent residence in the United States on March 7, 1948, and the following month he filed his declaration of intention to become a citizen. During the next five years, respondent was absent from the United States on business for several periods of less than a year each. Although the aggregate of these absences was some forty-four months, it is conceded that respondent had not at any time abandoned his American residence. Accordingly, all other prerequisites to citizenship having been satisfied, respondent was entitled to be naturalized under the Nationality Act of 1940 upon completing five years of residence. 54 Stat. 1142, 8 U. S. C. (1946 ed.) § 707. But before this period had run, the Immigration and Nationality Act became effective on December 24, 1952. Section 316 (a) of this Act, 66 Stat. 242, 8 U. S. C. § 1427 (a), imposed a new requirement of physical presence: to be eligible for citizenship, an alien must be physically present in the United States for at least one-half the period constituting his five-year residence. When, on April 24, 1953, Menasche filed his petition for naturalization, he lacked 14 months of fulfilling this new requirement. Thus, if the 1952 Act applies to respondent's case, it is clear he may not be naturalized, while under the 1940 Act he is admittedly eligible for citizenship.

The district judge admitted Menasche to citizenship, holding that the 1940 Act governs because respondent enjoyed a status, condition, and right in process of acquisition preserved by § 405 (a) of the new Act. 115 F. Supp. 434. The Court of Appeals affirmed. 210 F. 2d 809. We granted certiorari because of the importance of the questions presented in this and the companion case of *Shomberg* v. *United States, supra,* in the administration of our nationality laws. 348 U. S. 811.

In interpreting § 405 of the Immigration and Nationality Act in relation to the facts of this case, we must consider the historical background of the savings clause and of the procedure for filing declarations of intention. The declaration of intention was introduced into our law by the second Act of Congress on the subject of naturalization, 1 Stat. 414 (1795), and remained an integral part of our naturalization procedure until the Act of 1952 dispensed with it as a prerequisite to citizenship. 66 Stat. 254, 8 U. S. C. § 1445 (f). For the more than 150 years between these enactments, Congress considered it appropriate to require aliens to declare their intention to become United States citizens several years before they petitioned for naturalization. Exceptions were made from time to time to avoid hardship or to expedite the naturalization of a favored group, but until the 1952 enactment the declaration constituted the "first papers" toward American citizenship in the usual naturalization procedure. See Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess., on S. 716, H. R. 2379, and H. R. 2816, pp. 79–80, 723–725; S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 732–734.

Savings clauses of the type here involved—broad, inclusive provisions—date back to the general statutes on immigration and naturalization enacted in the early part of this century. The Naturalization Act of 1906, 34 Stat.

596, the first real codification of our nationality laws, did not contain a general savings clause, but sought to protect certain prior rights by means of specific provisions. 34 Stat. 597, 599, 603. Nor was there an over-all savings provision in the first of the general immigration laws following the turn of the century. 32 Stat. 1213 (1903). The germ was there, however, in a clause stating that "nothing contained in this Act shall be construed to affect any prosecution or other proceeding, criminal or civil," begun under a prior Act. 32 Stat. 1220. In subsequent immigration laws, the predecessors of the instant provision could be more clearly discerned. The Immigration Act of 1907 provided that nothing in the Act "shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this Act." 34 Stat. 907. To the same effect is the savings clause of the Immigration Act of 1917. 39 Stat. 897. In the years that followed, amendments to the immigration and naturalization laws were enacted with more limited savings clauses, tailored to the special changes made by the new legislation. 40 Stat. 545, 547, 548; 40 Stat. 559, amended, 55 Stat. 252; 42 Stat. 1022; 43 Stat. 169; 46 Stat. 854.[1] These provisions, though differing in their terms, manifested an intention on the part of Congress to save rights which had accrued under prior laws.

The direct antecedent of the savings clause here involved appeared as § 347 of the Nationality Act of 1940, 54 Stat. 1168, 8 U. S. C. (1946 ed.) § 747, the last legislation prior to 1952 to deal with our general system of naturalization. Like the present § 405, the provision in the 1940 Act was divided into two subsections. The first of these, subsection (a), expanded upon the multiplicity of legal

[1] See also 54 Stat. 1150, 8 U. S. C. (1946 ed.) § 726; 64 Stat. 1015, 8 U. S. C. (1946 ed., Supp. V) § 725 (b).

subjects preserved by the 1907 and 1917 immigration laws.[2] Subsection (b), on the other hand, introduced an entirely new wrinkle by providing that pending naturalization petitions "shall be heard and determined within two years thereafter in accordance with the requirements of law in effect when such petition was filed."[3] The litigation under this section, involving, first, the scope of subsection (a) and, secondly, the relation between the two subsections, throws considerable light on the parallel problems under § 405 presented in the instant case.

The 1952 Act made the enumeration of matters preserved by subsection (a) more complete and all-inclusive by adding: "status," "condition," "right in process of acquisition," "liability," and "obligation." The change was undoubtedly prompted by several sets of inconsistent decisions dealing with the vague terminology in § 347 (a) of the 1940 Act preserving "any act, thing, or matter, civil or criminal." The first of these concerned the question whether the withdrawal of a declaration of intention to avoid service in the armed forces constituted an "act" existing under the prior law which continued to debar the alien from citizenship. Compare

[2] "SEC. 347. (a) Nothing contained in either chapter III or in chapter V of this Act, unless otherwise provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization or of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any act, thing, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the statutes or parts of statutes repealed by this Act, are hereby continued in force and effect."

[3] "(b) Any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined within two years thereafter in accordance with the requirements of law in effect when such petition was filed."

Petition of Otness, 49 F. Supp. 220, with *In re Urmeneta,* 42 F. Supp. 138, and *In re Samowich,* 70 F. Supp. 273. A second and more significant conflict concerned inchoate rights to derivative citizenship, which, when proper conditions were met, required only the passage of time to ripen into full citizenship. When the 1940 Act changed certain of the conditions in this process, the question arose whether those whose time had begun to run before the 1940 Act took effect were to be governed by the old law or the new. The Second Circuit held that the new law applied, because § 347 (a) of the 1940 Act did not extend to "a mere condition, unattended by any affirmative action." *United States ex rel. Aberasturi* v. *Cain,* 147 F. 2d 449, 452. The Court of Appeals for the District of Columbia disagreed, construing the broad language of § 347 (a) as covering "rights partly accrued" and "rights in process of acquisition." *Bertoldi* v. *McGrath,* 86 U. S. App. D. C. 1, 2, 3, 178 F. 2d 977, 978, 979. This latter conflict must have been paramount in the minds of Congress when the first subsection of the savings clause was broadened. See Analysis of S. 3455, 81st Cong., 2d Sess., pp. 361–1 and 361–2 (prepared by the Immigration and Naturalization Service for the committees of Congress considering this legislation). We conclude that Congress intended to adopt the principle of the *Bertoldi* case that "the new act should take effect prospectively." 86 U. S. App. D. C., at 2, 178 F. 2d, at 978. This is, after all, no more than a reaffirmation of the principle underlying the less sweeping 1940 provision. In a report to the congressional committees considering this earlier section, it was said that the provision "contains the customary clauses by which the status quo is maintained in relation to naturalization proceedings and other related matters." Report of the Joint Departmental Committee, reproduced in Hearings before House Committee on Immigration and Naturalization, 76th Cong.,

1st Sess., on H. R. 6127, superseded by H. R. 9980, 411, 484.

The Government would have us limit the 1952 extension of subsection (a) to situations concerning derivative citizenship, arguing that this problem was entirely responsible for the new language on status, condition, and right in process of acquisition. With this we cannot agree. The change in the section was designed to extend a savings clause already broadly drawn, and embodies, we believe, congressional acceptance of the principle that the statutory *status quo* was to continue even as to rights not fully matured. It should be noted, further, that the conflict between *Aberasturi* and *Bertoldi* involved a situation where the alien had failed to take *any* affirmative action to assert his claim to citizenship. Even the more restrictive *Aberasturi* opinion recognized that affirmative action by the alien might alter the result there reached. 147 F. 2d, at 452. If Congress was willing to preserve a "mere condition, unattended by any affirmative action," we think its savings clause also reaches instances, such as this, where affirmative action is present. The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress.

The Government argues against hinging statuses, conditions and rights in process of acquisition on the filing of a declaration of intention, because, it contends, the 1952 Act has rendered such declarations totally meaningless as far as naturalization proceedings are concerned. They are no longer a prerequisite to naturalization and

they confer no special advantage on the alien-declarant.[4] But all this is immaterial. First, the congressional resolution of the *Bertoldi-Aberasturi* conflict indicates a willingness, at least in some situations, to preserve rights in process of acquisition without requiring affirmative action on the part of the alien. It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under § 405 (a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship. But while our decision could be rested on this ground, it is sufficient here merely to refer to the provision in § 405 (a), derived verbatim from § 347 (a) of the 1940 Act, preserving the "validity" of declarations of intention "valid at the time this Act shall take effect."

The Government contends, however, that even if § 405 (a), considered alone, covers this case, § 405 (b) deals specifically with naturalization petitions and by necessary implication excludes their coverage in § 405 (a). As we read the statute, subsection (b) merely implements and emphasizes the operation of its forerunner. It is clear, first, that subsection (b) is not a specific exception to § 405 (a), since *both* subsections state that prior law should apply in certain circumstances. The slight negative implication derived from the fact that § 405 (b) applies to *pending* petitions for naturalization, and not to

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[4] The alien may, if he wishes, file a declaration of intention with the Immigration and Naturalization Service. 66 Stat. 254, 8 U. S. C. § 1445 (f). The apparent object of this optional provision is to preserve the rights of aliens under state laws, where, for example, there may be a requirement that a legally resident alien shall have filed his declaration of intention before he can obtain work. See Joint Hearings on S. 716, H. R. 2379 and H. R. 2816, *supra*, p. 80; S. Rep. No. 1515, *supra*, p. 738.

those filed after the effective date of the new Act, is overcome by the broad sweep of § 405 (a) and its direction that prior law applies unless the Act "otherwise *specifically* provide[s]." [5] (Emphasis supplied.)

This view is strengthened by the relation between the predecessors of § 405 (a) and (b). The Report of the Joint Departmental Committee, *supra,* at 484, stated that under § 347 (b) of the 1940 Act "a period of 2 years would be granted during which any petition for naturalization filed prior to the enactment of the new measure might be heard under the law in effect when the proceeding was begun." The approach of the courts, in dealing with pending naturalization petitions alleged to be governed by the 1940 savings clause, was generally to see whether petitioner's rights were saved by § 347 (a), and then, if applicable, apply the two-year limitation of § 347 (b). See *In re Shaver,* 140 F. 2d 180; *Petition of La Bella,* 52 F. Supp. 980; *Petition of Hirsch,* 50 F. Supp. 638; *In re McInnis,* 50 F. Supp. 303. But cf. *Petition of Ferrara,* 43 N. Y. S. 2d 244. Thus § 347 (a) was considered the source

[5] It is possible, although we do not pass on the point in this opinion, that § 405 (b) serves a function which carries with it a negative implication different from that advanced by the Government. Section 405 (b) provides that pending petitions for naturalization shall be governed by the "law in effect *when such petition was filed.*" (Emphasis supplied.) Section 405 (a), on the other hand, provides that nothing in the new Act shall "affect" any of the enumerated subjects, preserving the law as it existed *immediately prior to the effective date of the Act.* Thus § 405 (b) may "otherwise specifically provid[e]" for a law applicable to pending petitions different from the law preserved by § 405 (a) for other protected interests. We have not fully considered, in passing on the question before us, the consonance of such an interpretation with the over-all statutory scheme, but advance it merely as another illustration of the meaning which can be given § 405 (b) to avoid both the result pressed by the Government in this case and the objection that § 405 (b) is rendered redundant by holding that petitioner has rights protected by § 405 (a).

318107 O - 55 - 40

of rights under the savings clause, and § 347 (b) merely a special limitation on these rights. Indeed, there were two cases in which petitions for naturalization filed *after* the effective date of the 1940 Act were considered solely in relation to § 347 (a). *In re Samowich,* 70 F. Supp. 273; *Petition of Rothschild,* 57 F. Supp. 814. These decisions ignored the supposedly obvious negative implications of § 347 (b), and cast considerable doubt on the Government's present view that § 347 (b) automatically removed from the coverage of prior law petitions filed after the effective date of the 1940 Act. Thus the construction advanced by the Government concerning the relation between § 405 (a) and § 405 (b) would not continue the relation between the predecessor provisions, but would actually be a marked departure. The only significant change made in subsection (b) by the 1952 Act was the deletion of the two-year time limit, and there is nothing to indicate that Congress, in making this change, intended to alter the entire structure of the savings clause by making § 405 (b) the exclusive provision for naturalization petitions. See Analysis of S. 3455, *supra.* The few decisions considering this problem under the 1952 Act accord with the decisions of the District Court and Court of Appeals in the instant case, holding that § 405 (a) preserves rights accruing in the pre-petition stages of the naturalization process. *United States* v. *Pringle,* 212 F. 2d 878, affirming 122 F. Supp. 90; *In re Jocson,* 117 F. Supp. 528. We believe that Congress so intended.

The Government's contention that § 405 (a) does not apply to any phase in the processing of naturalization petitions would defeat and destroy the plain meaning of that section. "The cardinal principle of statutory construction is to save and not to destroy." *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 30. It is our duty "to give effect, if possible, to every

clause and word of a statute," *Montclair* v. *Ramsdell,* 107 U. S. 147, 152, rather than to emasculate an entire section, as the Government's interpretation requires. Accordingly, we hold that respondent's inchoate right to citizenship is protected by § 405 (a) and is not defeated by any implication stemming from § 405 (b). All that remains, therefore, is to look to § 316 (a), which imposes the new requirement of physical presence, to determine whether it "otherwise specifically provide[s]" that the new Act is to apply to respondent's situation. It is clear that it does not. Section 316 (a) merely says that, "except as otherwise provided," the stated degree of physical presence shall be required, and this may be viewed as a reference, *inter alia,* to § 405 (a), strengthening our conclusion that prior law applies.

The District Court and the Court of Appeals were correct in concluding that § 405 (a) preserved respondent's inchoate rights under the prior law, and their decisions are accordingly

Affirmed.

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

SHOMBERG *v.* UNITED STATES.

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

No. 48. Argued March 1, 1955.—Decided April 4, 1955.

An alien who filed his petition for naturalization two days before the effective date of the Immigration and Nationality Act of 1952 cannot compel a final hearing on such petition before the determination of deportation proceedings instituted against him after the effective date of the Act and based solely on grounds initiated by that Act. Pp. 541–548.

(a) The "priority provision" of § 318 of the 1952 Act, that "no petition for naturalization shall be finally heard . . . if there is pending against the petitioner a deportation proceeding," specifically excepts rights under the prior law from the protection of the savings clause of § 405 when these rights stem from a petition for naturalization or from some other step in the naturalization process. Pp. 542–545.

(b) Congress did not intend § 318 to apply only to deportation proceedings based on grounds existing under the prior law. P. 546.

(c) The contention that a change in the punctuation of § 318 resulted in the application of the "notwithstanding" clause to final findings of deportability but not to pending proceedings is rejected. P. 546, n. 4.

(d) The "notwithstanding" language in § 318 clearly manifested the intent of Congress that certain policies should override the otherwise broad and pervasive principle of the savings clause of § 405. Pp. 546–548.

210 F. 2d 82, affirmed.

Alan Y. Cole argued the cause for petitioner. With him on the brief was *Max Schultz.*

Gray Thoron argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Olney, L. Paul Winings* and *Lorraine Wall Hurney.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The precise issue in this proceeding is whether petitioner, who filed his petition for naturalization two days before the effective date of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. § 1101 *et seq.*, may compel a final hearing on the same before the determination of deportation proceedings instituted after the effective date of the Act and based solely on grounds initiated by that Act. The "priority provision" of the Act, § 318, states "no petition for naturalization shall be finally heard . . . if there is pending against the petitioner a deportation proceeding." 66 Stat. 244, 8 U. S. C. § 1429.[1] But petitioner claims that the savings clause of the Act, § 405, 66 Stat. 280, 8 U. S. C. § 1101, note, which we considered in *United States* v. *Menasche, ante,* p. 528, preserves his eligibility for citizenship under prior law, and that final hearing thereon cannot be delayed by reason of the pendency of the subsequently instituted deportation action. Both the trial court, 115 F. Supp. 336, and the Court of Appeals, 210 F. 2d 82, decided against the petitioner. We granted certiorari, 348 U. S. 811, in order to determine the relationship between § 318 and § 405 of the 1952 Act.

On October 1, 1952, petitioner submitted to the Immigration and Naturalization Service a preliminary application to file a petition for naturalization, Form N–400.

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[1] The text of this provision, in material part, is as follows:

"SEC. 318. . . . Notwithstanding the provisions of section 405 (b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: . . . ."

Following a preliminary examination, he filed his petition for naturalization on December 22, 1952, two days before the effective date of the Immigration and Nationality Act of 1952. The prenaturalization investigation disclosed that petitioner had a criminal record; he had been convicted of grand larceny in 1913 and of manslaughter in 1915. Section 241 (a) of the 1952 Act subjects aliens to deportation if they are convicted "at any time after entry . . . of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct." 66 Stat. 204, 8 U. S. C. § 1251 (a)(4). On June 22, 1953, a warrant of arrest was issued against petitioner, based on his 1913 and 1915 convictions, charging as grounds for deportation petitioner's presence in the country in violation of § 241 (a)(4). The deportation proceedings were in progress when on July 28, 1953, petitioner, through an order to show cause filed in this case, moved to compel a final hearing on his petition for naturalization, and, in the interim, to stay the deportation proceedings. Relying on § 318, *supra,* the district judge denied the motion and the Court of Appeals affirmed.

Petitioner's main argument is that under § 405 (a) nothing contained in the new Act, "unless otherwise specifically provided therein, shall be construed to affect . . . any status, condition, right in process of acquisition . . . done or existing, at the time this Act shall take effect." Petitioner was eligible for citizenship under the prior law and remains eligible under the new Act. But under the prior law petitioner was not deportable. Petitioner argues that the deportation proceeding, based solely on § 241 (a) of the new Act,[2] is adversely affecting a right protected by § 405 (a), to wit, his inchoate right to citizen-

[2] It is assumed for the purposes of this proceeding that petitioner *is* deportable under § 241 (a). See note 3, *infra.*

ship. This, he claims, is in direct contravention of the terms of § 405 (a) unless some other section in the Act "otherwise specifically provide[s]." Section 318, advanced as just such an exception, says "Notwithstanding the provisions of section 405 (b) . . . ," and makes no mention of § 405 (a). Thus, petitioner concludes, § 318 is not a specific exception to the protection afforded his rights by § 405 (a), and if he is to vindicate his rights under that section he must prevail in the present proceedings.

We agree with petitioner that, absent a specific provision to the contrary, he has rights protected by § 405 (a). These stem from the filing of his Form N–400, from his petition for naturalization, and, perhaps, from his fulfillment of the five-year residence requirement. *United States* v. *Menasche, supra.* But we hold that § 318 specifically excepts rights under the prior law from the protection of § 405 when these rights stem from a petition for naturalization or from some other step in the naturalization process.[3]

The practice previous to the enactment of a priority provision in the immigration and nationality laws was for both the deportation and naturalization processes to proceed along together until either petitioner's deportation or naturalization *ipso facto* terminated the possibility of the other occurring. See *United States* v. *Waskowski,* 158 F. 2d 962. And in the few instances where deportations were stayed in order to permit aliens to obtain a

[3] This is not to say that petitioner cannot challenge the authority of the Attorney General to deport him under § 241 (a) of the 1952 Act. We express no opinion as to whether such a challenge, grounded on the savings clause or otherwise, might succeed if made in the deportation proceedings. Whether the question of deportability could be raised in a naturalization proceeding was expressly waived by the petitioner. See Petitioner's Brief, p. 7.

hearing under a recently enacted naturalization provision, the remedy was by habeas corpus after the termination of the deportation proceedings and after a stay had been denied in those proceedings. *United States ex rel. Walther* v. *District Director of Immigration and Naturalization,* 175 F. 2d 693; *Petition of Kavadias,* 177 F. 2d 497. But as a general rule stays were not utilized, cf. *Klig* v. *Watkins,* 84 F. Supp. 486, and there ensued a race between the alien to gain citizenship and the Attorney General to deport him. If the alien was successful in forcing a final hearing and the granting of his naturalization petition, the deportation proceedings were completely nullified. To remedy this situation, the Congress incorporated § 27 in the Subversive Activities Control Act of 1950, 64 Stat. 1015, 8 U. S. C. (1946 ed., Supp. V) § 729 (c). This section prohibited naturalization or the holding of final hearings on naturalization petitions where deportation proceedings were instituted "under the provisions of this or any other Act." The 1950 Act took effect immediately and contained no savings clause, although it introduced new grounds for deportation which were to be retroactively applied. See *Galvan* v. *Press,* 347 U. S. 522. And in *United States ex rel. Jankowski* v. *Shaughnessy,* 186 F. 2d 580, the priority provision—§ 27—was held to apply to naturalization petitions filed before the effective date of the Act, even though the deportation proceedings were commenced, as here, under the new statute.

Section 318 of the Immigration and Nationality Act of 1952 re-enacted § 27 in substantially the same form, retaining the language of its predecessor in suspending final hearings on naturalization where deportation proceedings were instituted *under this or any other Act.* But petitioner contends that this plain language does not apply to his case because Congress did not specifically

exempt § 318 from the operation of the savings clause embodied in § 405 (a), under which his inchoate right to citizenship is preserved.

It is true that § 318 begins with the phrase "Notwithstanding the provisions of section 405 (b)," which at first glance might indicate that it was intended not to apply to § 405 (a). But further analysis renders this position untenable. The same priority section had been inserted as an emergency provision in the Subversive Activities Control Act of 1950, and had been given immediate prospective and retroactive effect. It was carried forward almost verbatim as § 318 in the 1952 Act. And to make certain that it would apply to rights existing under petitions for naturalization, the Congress added to § 318 the phrase "Notwithstanding the provisions of section 405 (b)," referring to the only part of the savings clause which deals explicitly with the law applicable to naturalization petitions. The congressional purpose must have been to have § 318 supersede rights stemming from such petitions, for under any other interpretation its previous approach under the 1950 law is unexplainedly reversed and the "notwithstanding" clause is rendered meaningless. It may be that the draftsmen could have been more exact in their language, since § 405 (a), as well as § 405 (b), embraces rights under pending petitions, see *United States* v. *Menasche, supra.* But we think their intent is plain enough.

Petitioner contends that this application of § 318 will have the result of affording more protection to prepetition rights of the *Menasche*-type than to inchoate rights under a petition for naturalization itself, since the former are not embraced within § 405 (b). But we do not believe § 318 differentiates between these steps in the process of naturalization. Each is but part of the whole process leading to citizenship and each is subject to the provisions of § 318.

Nor can we accept petitioner's argument that Congress intended § 318 to apply only to deportation proceedings based on grounds existing under the prior law. In making this contention, petitioner gives away nothing and gains nothing. If the grounds for deportation are the same under the prior law as under the new Act, then nothing in the new Act *affects* petitioner; it is clear that rights under the savings clause have not been infringed even if there is no specific exception. Only where something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play. Only then is a specific exception to § 405 required. Thus, if petitioner's construction were to prevail, the "notwithstanding" language in § 318 would be as meaningless as under the interpretation previously advanced and rejected. The "notwithstanding" clause takes on meaning only when we assume that the new Act has made some change in the law to which the "notwithstanding" statement is noting a specific exception. That is this case.[4]

The role thus played by § 405 (b) is in substantial accord with the operation of its predecessor, § 347 (b) of the Nationality Act of 1940, 54 Stat. 1168, 8 U. S. C. (1946 ed.) § 747. It was pointed out in *Menasche, supra,* that § 347 (b), with its two-year limitation, was considered to be a special limitation on the rights preserved by subsection (a) of that savings clause. The two-year period has been deleted in § 405 (b), but the subsection

[4] Petitioner's further argument, that a change in the punctuation of § 318 resulted in the application of the "notwithstanding" clause to final findings of deportability but not to pending proceedings, must be rejected. When viewed against the purpose of the clause, the circumstances surrounding the controverted change, and the usual rules of proper punctuation, the contention is shown to be without substance.

remains a special limitation on the broad savings provision, bringing to bear the specific exceptions found in § 318 and other provisions of the new Act whenever the protection of § 405 (a) is sought for rights connected with the naturalization process.[5]

In our view, § 405 (b) is the vehicle for applying each of these exceptions to the rights and liabilities emerging from naturalization proceedings under prior law and otherwise preserved by § 405 (a). In using the "notwithstanding" language in these sections, Congress clearly manifested its intent that certain policies should override the otherwise broad and pervasive principle of the savings clause. In *United States* v. *Menasche, supra,* we recognized the wide scope to be given the savings clause. We would be lax in our duty if we did not give recognition also to the congressional purpose to override the savings clause when other considerations were thought more com-

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[5] Section 311 provides that the right to naturalization shall not be abridged because of race, sex or marriage, and, "[n]otwithstanding section 405 (b), this section shall apply to any person whose petition for naturalization shall hereafter be filed, or shall have been pending on the effective date of this Act." 66 Stat. 239, 8 U. S. C. § 1422.

Section 313 (a) states: "Notwithstanding the provisions of section 405 (b), no person shall hereafter be naturalized" who engages in specified subversive activities or who is a member of described subversive organizations. 66 Stat. 240, 8 U. S. C. § 1424 (a).

Section 315 (a) provides: "Notwithstanding the provisions of section 405 (b)," one who claims or has claimed his alienage and "is or was" thereby relieved of service in the armed forces, "shall be permanently ineligible to become a citizen." 66 Stat. 242, 8 U. S. C. § 1426 (a).

Section 331 (d) provides for the ending of enemy alien status and states: "Notwithstanding the provisions of section 405 (b), this subsection shall also apply to the case of any such alien whose petition for naturalization was filed prior to the effective date of this Act and which is still pending on that date." 66 Stat. 252, 8 U. S. C. § 1442 (d).

pelling than the preservation of the *status quo*. If we are not to nullify this clear legislative purpose and render meaningless the "notwithstanding" language of § 318 and the other sections, we must find for the Government and hold that § 318 bars petitioner's attempt to compel a hearing on his naturalization petition while the deportation proceeding is pending.

Affirmed.

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

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 548 and 801 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 THE BEGINNING OF OCTOBER TERM, 1954, THROUGH APRIL 5, 1955.

Cases Dismissed in Vacation.

No. 175. Government of Guam *v.* Hatchett. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. September 10, 1954. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Howard D. Porter,* Attorney General of Guam, and *Louis A. Otto, Jr.,* Deputy Attorney General, for petitioner. Reported below: 212 F. 2d 767.

No. 49, Misc. Ruffin *v.* United States et al. On motion for leave to file petition for writ of habeas corpus. September 10, 1954. Dismissed pursuant to Rule 60 of the Rules of this Court on motion of petitioner.

No. 161. A/S Hakedal *v.* Kloeckner Reederei und Kohlenhandel, G. m. b. H. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. September 17, 1954. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *James M. Estabrook* for petitioner. *William Garth Symmers* for respondent. Reported below: 210 F. 2d 754.

No. 26. Meacham Corporation et al. *v.* United States. Certiorari, 347 U. S. 932, to the United States Court of Appeals for the Fourth Circuit. September 28, 1954. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Thomas B. Gay* and *H. Merrill Pasco* for petitioners. *Solicitor General Sobeloff* for the United States. Reported below: 207 F. 2d 535.

OCTOBER 14, 1954.

Decisions Per Curiam.

No. 88. WILLIAMS *v.* CAROLINA LIFE INSURANCE CO. ET AL. C. A. 5th Cir. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Robert Culpepper, Jr.* for petitioner. Reported below: 210 F. 2d 477.

No. 106. STAPLING MACHINES CO. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI, ET AL. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Bernard Leonard Tighe, Jr.* for appellant. *John E. Stone* for appellees. Reported below: 220 Miss. 470, 71 So. 2d 205.

No. 116. BOHLING *v.* CORSI, COMMISSIONER, DIVISION OF EMPLOYMENT, DEPARTMENT OF LABOR OF NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Merwin K. Hart, Jr.* for appellant. *Nathaniel Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Francis R. Curran,* Assistant Attorney General, for appellee. Reported below: 306 N. Y. 815, 118 N. E. 2d 823.

No. 152. JAYNE ET AL., JUDGES OF THE CIRCUIT COURT OF WAYNE COUNTY, ET AL. *v.* CITY OF DETROIT ET AL. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *George E. Brand* for appellants. *James H. Lee* for appellees. Reported below: 339 Mich. 62, 62 N. W. 2d 626.

No. 111. HARRIS ET AL. *v.* BATTLE, GOVERNOR, ET AL. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to substitute Thomas B. Stanley as a party appellee in the place and stead of John S. Battle is granted. It appearing that the cause has become moot, the judgment of the Supreme Court of Appeals of Virginia is vacated and the cause is remanded for such proceedings as by that Court may be deemed appropriate. *United States* v. *Anchor Coal Co.,* 279 U. S. 812. MR. JUSTICE REED would dismiss the appeal for lack of jurisdiction. *Norfolk Turnpike Co.* v. *Virginia,* 225 U. S. 264, 269. Since the Court, however, treats the appeal as properly before it, he votes to dismiss on the ground of mootness. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the case is not moot and that this Court should consider and decide the federal questions raised. *Bernard Cushman* and *Justus R. Moll* for appellants. *J. Lindsay Almond, Jr.,* Attorney General of Virginia, *C. F. Hicks,* Assistant Attorney General, and *Henry T. Wickham* for appellees. Reported below: 195 Va. lxxxviii.

No. 115. TRAFTON *v.* TEXAS. Appeal from the Court of Criminal Appeals of Texas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted. *Harry S. Pollard* for appellant. *John Ben Shepperd,* Attorney General of Texas, and *Rudy G. Rice* and *Robert O. Fagg,* Assistant Attorneys General, for appellee. Reported below: 160 Tex. Cr. R. ——, 271 S. W. 2d 814.

No. 167. POMPROWITZ, DOING BUSINESS AS L. C. L. TRANSIT COMPANY, ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Wisconsin. *Per Curiam:* The motion to

affirm is granted and the judgment is affirmed. *Warren H. Wagner* for appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees. Reported below: 119 F. Supp. 824.

No. 177. McGraw Electric Co. et al. *v.* United States et al. Appeal from the United States District Court for the Eastern District of Missouri. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Arthur J. Freund* for appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Leo P. Day* and *Richmond C. Coburn* for the Akron, Canton & Youngstown Railroad Co. et al., appellees. Reported below: 120 F. Supp. 354.

No. 176. Arkansas Fuel Oil Corp. *v.* Fontenot, Collector of Revenue of Louisiana. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Robert Roberts, Jr.* and *Ben R. Miller* for appellant. Reported below: 225 La. 166, 72 So. 2d 465.

Miscellaneous Orders.

No. 6. Watson et ux. *v.* Employers Liability Assurance Corp., Ltd. et al. Certiorari, 347 U. S. 958, to and appeal from the United States Court of Appeals for the Fifth Circuit. The motion to dismiss is denied. *Val Irion, Richard H. Switzer* and *Cleveland C. Burton* for appellants-petitioners. *Benjamin C. King* and *Charles D. Egan* for Employers Liability Assurance Corp., Ltd., appellee-respondent. Reported below: 202 F. 2d 407.

No. 648, October Term, 1953. Brand et al. *v.* Commissioner of Internal Revenue. The petition for

writ of mandamus is denied. Reported below: 209 F. 2d 255.

No. 9, Original. TEXAS *v.* NEW MEXICO ET AL. The plaintiff's motion for leave to amend the prayer of its complaint is hereby referred to John Raeburn Green, Special Master, to hear the parties and report his opinion and recommendation as to whether the motion should be granted and whether if granted it would cure any defect of parties herein. *John Ben Shepperd,* Attorney General, *Burnell Waldrep,* Assistant Attorney General, and *Eugene T. Edwards,* Special Assistant Attorney General, for the State of Texas, plaintiff. *Richard Robinson,* Attorney General, and *Fred E. Wilson,* Special Assistant Attorney General, for the State of New Mexico, and *Martin A. Threet* and *D. A. Macpherson, Jr.* for the Middle Rio Grande Conservancy District et al., defendants.

No. 11, Original. MISSISSIPPI *v.* LOUISIANA. The motion of Eleanor R. Woolgar and Erma L. Richards for leave to intervene as codefendants is denied. *J. P. Coleman,* Attorney General, *Gerard H. Brandon* and *James D. Thames,* Special Assistant Attorneys General, and *Clarence Clifton,* Associate Attorney, for the State of Mississippi, plaintiff. *Fred S. LeBlanc,* Attorney General, and *John L. Madden,* Assistant Attorney General, for the State of Louisiana, defendant. *L. Bryan Dabney* for Woolgar et al., movants.

No. 145. MARCELLO *v.* BONDS, OFFICER IN CHARGE, U. S. IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Original petition for writ of certiorari granted. Supplemental petition denied. *Charles W. Kehl* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 212 F. 2d 830.

No. 18, Misc. MILLER *v.* HUMPHREY, WARDEN;
No. 20, Misc. COLLINS *v.* LOONEY, WARDEN;
No. 54, Misc. DARNELL *v.* LOONEY, WARDEN;
No. 57, Misc. PAGE *v.* DEPARTMENT OF CORRECTIONS AND ADULT AUTHORITY OF CALIFORNIA;
No. 106, Misc. MIMS *v.* LOONEY, WARDEN;
No. 112, Misc. BARNES *v.* KNIGHT ET AL.;
No. 113, Misc. WILLIAMS *v.* MICHIGAN;
No. 119, Misc. MORGAN *v.* MICHIGAN;
No. 123, Misc. EX PARTE SMITH; and
No. 126, Misc. EX PARTE SZTWIERTNIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 76, Misc. EX PARTE COMPTON;
No. 77, Misc. LEWIS *v.* ATTORNEY GENERAL OF THE UNITED STATES; and
No. 122, Misc. GLISSON *v.* MICHIGAN ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 78, Misc. BRINK *v.* UNITED STATES; and
No. 116, Misc. SCHUYLER *v.* NEW YORK ET AL. Motions for leave to file petitions for writs of certiorari denied.

No. 91, Misc. SLAGE *v.* BANNAN, WARDEN. Motions for leave to file petitions for writs of certiorari and habeas corpus denied.

Probable Jurisdiction Noted.

No. 162. UNITED STATES *v.* E. I. DU PONT DE NEMOURS & Co. Appeal from the United States District Court for the District of Delaware. Probable jurisdiction noted. The motion to clarify and define the assignment of errors is denied. MR. JUSTICE CLARK took no part in the consideration or decision of these questions. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and

Charles H. Weston for the United States. *Gerhard A. Gesell* and *David C. Acheson* for appellee. Reported below: 118 F. Supp. 41.

Nos. 171 and 282. SECRETARY OF AGRICULTURE *v.* UNITED STATES ET AL.; and

Nos. 172 and 283. UTAH POULTRY & FARMERS CO-OPERATIVE ET AL. *v.* UNITED STATES ET AL. Appeals from the United States District Court for the District of Utah. Probable jurisdiction noted. *Robert L. Farrington* and *Neil Brooks* for the Secretary of Agriculture. *John H. Pratt* for the Utah Poultry & Farmers Cooperative, *Arthur C. O'Meara* and *John P. Staley* for Swift & Co., appellants in Nos. 172 and 283, and *Paul E. Blanchard* (in No. 172) and *Marcus Whiting* (in No. 283) for Armour & Co., appellant. *Edward M. Reidy* and *Allen Crenshaw* for the Interstate Commerce Commission; and *Bryan P. Leverich, J. Edgar McDonald* and *William F. Zearfaus* for the Intervening Railroads, appellees. Reported below: 119 F. Supp. 846.

No. 204. SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND *v.* PECK, TAX COMMISSIONER OF OHIO. Appeal from the Supreme Court of Ohio. Probable jurisdiction noted. The Solicitor General is invited to file a brief as *amicus curiae*. MR. JUSTICE BURTON took no part in the consideration or decision of this question. *Charles W. Sellers* and *David A. Gaskill* for appellant. *C. William O'Neill,* Attorney General of Ohio, and *Joseph S. Gill,* First Assistant Attorney General, for appellee. Reported below: 161 Ohio St. 122, 118 N. E. 2d 651.

No. 220. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF WARREN *v.* BOWERS (SUCCESSOR TO PECK), TAX COMMISSIONER OF OHIO. Appeal from the Supreme Court of Ohio. Probable jurisdiction noted. The Solicitor

General is invited to file a brief as *amicus curiae*. MR. JUSTICE BURTON took no part in the consideration or decision of this question. *Robert G. Day* for appellant. *C. William O'Neill*, Attorney General of Ohio, and *Joseph S. Gill*, First Assistant Attorney General, for appellee. Reported below: 161 Ohio St. 149, 118 N. E. 2d 667.

Certiorari Granted. (*See also Nos. 88 and 145, supra.*)

No. 10. UNITED STATES *v.* OLYMPIC RADIO & TELEVISION, INC. Court of Claims. Certiorari granted. *Solicitor General Sobeloff*, *Robert L. Stern*, then Acting Solicitor General, and *Oscar H. Davis* for the United States. *Eugene Meacham* and *Fred R. Tansill* for respondent. Reported below: 124 Ct. Cl. 33, 39, 108 F. Supp. 109, 110 F. Supp. 600.

No. 32. CALIFORNIA EX REL. BROWN, ATTORNEY GENERAL, ET AL. *v.* ST. LOUIS UNION TRUST CO. St. Louis Court of Appeals of Missouri. Certiorari granted. *Edmund G. Brown*, Attorney General of California, and *Elizabeth Miller*, Deputy Attorney General, for petitioners. *Chas. D. Long* and *Milton Yawitz* for respondent. Reported below: —- Mo. App. —-, 260 S. W. 2d 821.

No. 55. INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, *v.* NEBEKER. Supreme Court of Indiana. Certiorari granted. *Edwin K. Steers*, Attorney General, and *Carl M. Franceschini*, *Cornelius G. Jamison* and *Lloyd C. Hutchinson*, Deputy Attorneys General, for petitioner. Respondent *pro se*. Reported below: 233 Ind. 58, 116 N. E. 2d 104.

No. 97. WEBER ET AL. *v.* ANHEUSER-BUSCH, INC. Supreme Court of Missouri. Certiorari granted. *Plato E. Papps* and *Robert A. Roessel* for petitioners. *Mark*

D. Eagleton for respondent. Reported below: 364 Mo. 573, 265 S. W. 2d 325.

No. 125. HARSH *v.* ILLINOIS TERMINAL RAILROAD CO. Supreme Court of Illinois. Certiorari granted. *Morris B. Chapman* for petitioner. *George D. Burroughs* for respondent. Reported below: See 351 Ill. App. 272, 114 N. E. 2d 901.

No. 131. WHITEHOUSE ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari granted. *Milton Kramer, Lester P. Schoene* and *Mozart G. Ratner* for petitioners. *John W. Foster, Herbert J. Deany* and *Joseph H. Wright* for the Illinois Central Railroad Co.; and *Kenneth F. Burgess* and *Walter J. Cummings, Jr.* for Carrier Members, National Railroad Adjustment Board, Third Division, respondents. Reported below: 212 F. 2d 22.

No. 150. UNITED STATES EX REL. TOTH *v.* TALBOTT, SECRETARY OF THE AIR FORCE. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Al. Philip Kane, Charles V. Koons* and *William A. Kehoe, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Chester W. Wilson* for respondent. *Ralph B. Gregg* filed a brief for the American Legion, as *amicus curiae,* supporting petitioner. Reported below: 94 U. S. App. D. C. —, 215 F. 2d 22.

No. 153. SECURITIES AND EXCHANGE COMMISSION *v.* DREXEL & CO. C. A. 2d Cir. Certiorari granted. *Solicitor General Sobeloff* and *William H. Timbers* for the Securities and Exchange Commission. *Henry S. Drinker, Thomas Reath* and *John Mulford* for respondent. Reported below: 210 F. 2d 585.

October 14, 1954. 348 U. S.

No. 163. LAWLOR ET AL., TRADING AS INDEPENDENT POSTER EXCHANGE, *v.* NATIONAL SCREEN SERVICE CORP. ET AL. C. A. 3d Cir. Certiorari granted. *Francis Anderson* for petitioners. *Louis Nizer* for the National Screen Service Corporation, *Wm. A. Schnader* and *Earl G. Harrison* for Columbia Pictures Corporation, and *Louis J. Goffman* for Warner Bros. Pictures Distributing Corporation, respondents. Reported below: 211 F. 2d 934.

No. 203. LEWIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Walter E. Gallagher* and *Myron G. Ehrlich* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 94 U. S. App. D. C. —, 214 F. 2d 853.

No. 213. INDIAN TOWING CO., INC. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Cicero C. Sessions* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney* for the United States. Reported below: 211 F. 2d 886.

No. 261. GRANVILLE-SMITH *v.* GRANVILLE-SMITH. C. A. 3d Cir. Certiorari granted. *Abe Fortas, George H. T. Dudley* and *Milton V. Freeman* for petitioner. *Warren H. Young* for respondent. Reported below: 214 F. 2d 820.

No. 263. UNITED STATES ET AL. *v.* CALIFORNIA EASTERN LINE, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Sobeloff* for the United States and the Secretary of Commerce, petitioners. *Cletus Keating,*

Harold B. Finn and *Robert E. Kline, Jr.* for respondent. Reported below: 93 U. S. App. D. C. 289, 211 F. 2d 635.

No. 48. SHOMBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Alan Y. Cole* and *Max Schultz* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 210 F. 2d 82.

No. 104. UNITED STATES *v.* MENASCHE. C. A. 1st Cir. Certiorari granted. *Solicitor General Sobeloff* for the United States. Reported below: 210 F. 2d 809.

No. 50. BISSO, RECEIVER, *v.* INLAND WATERWAYS CORP. C. A. 5th Cir. Certiorari granted. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioner. *Solicitor General Sobeloff* for respondent. Reported below: 211 F. 2d 401.

No. 70. BOSTON METALS CO. *v.* THE WINDING GULF ET AL. C. A. 4th Cir. Certiorari granted. *John H. Skeen, Jr.* for petitioner. *Charles S. Bolster* and *Seymour P. Edgerton* for respondents. Reported below: 209 F. 2d 410.

No. 210. UNITED STATES *v.* NIELSON ET AL., TRADING AS DAUNTLESS TOWING LINE. C. A. 2d Cir. Certiorari granted. *Solicitor General Sobeloff* for the United States. *Anthony V. Lynch, Jr.* for respondents. Reported below: 209 F. 2d 958.

No. 69. GONZALES *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Robert S. Erdahl* and *J. F. Bishop* for the United States. Reported below: 212 F. 2d 71.

No. 164. WITMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 213 F. 2d 95.

No. 250. SICURELLA *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 213 F. 2d 911.

No. 251. SIMMONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 213 F. 2d 901.

No. 80. FEDERAL TRADE COMMISSION *v.* RHODES PHARMACAL CO., INC. ET AL. C. A. 7th Cir. Certiorari granted. *Solicitor General Sobeloff* and *Earl W. Kintner* for petitioner. *Frank E. Gettleman, Arthur Gettleman* and *Edward Brodkey* for respondents. Reported below: 208 F. 2d 382.

No. 105. O'NEILL *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 6th Cir. Certiorari granted. *C. Richard Grieser* for petitioner. *E. H. Burgess, Arvin J. Alexander, Robert F. Ebinger* and *Kenneth H. Ekin* for respondent. Reported below: 211 F. 2d 190.

No. 114. GENERAL AMERICAN INVESTORS CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari granted. *Norris Darrell* and *John F. Dooling, Jr.* for petitioner. *Solicitor General Sobeloff* for respondent. Reported below: 211 F. 2d 522.

No. 199. COMMISSIONER OF INTERNAL REVENUE *v.* GLENSHAW GLASS CO. ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Sobeloff* for petitioner. *Max Swiren, Sidney B. Gambill* and *Joseph D. Block* for the Glenshaw Glass Co.; and *Samuel H. Levy* for William Goldman Theatres, Inc., respondents. Reported below: 211 F. 2d 928.

No. 173. AMALGAMATED CLOTHING WORKERS OF AMERICA ET AL. *v.* RICHMAN BROTHERS CO. C. A. 6th Cir. Certiorari granted. *William J. Isaacson* and *Louis H. Pollak* for petitioners. *Luther Day* for respondent. Reported below: 211 F. 2d 449.

No. 230. MITCHELL, SECRETARY OF LABOR, *v.* JOYCE AGENCY, INC. C. A. 7th Cir. Certiorari granted. *Solicitor General Sobeloff* for petitioner. *Stanford Clinton* for respondent. Reported below: 211 F. 2d 241.

No. 157. RYAN STEVEDORING CO., INC. *v.* PAN-ATLANTIC STEAMSHIP CORP. C. A. 2d Cir. Certiorari granted. Motion for leave to file brief of National Association of Stevedores, as *amicus curiae*, denied. *Sidney A. Schwartz* for petitioner. *Charles H. Lawson* for respondent. Reported below: 211 F. 2d 277.

No. 186. GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, ET AL. *v.* AMERICAN TOBACCO CO., INC. Court of Appeals of Kentucky. Certiorari granted. The Solicitor General is invited to file a brief setting forth the views of the National Labor Relations Board. *Ralph H. Logan, David Previant, J. Albert Woll, Herbert S. Thatcher* and *James A. Glenn* for petitioners. *Nelson Helm, George W. Whiteside, Ralph D. Ray* and *Francis E. Koch* for respondent. Reported below: 264 S. W. 2d 250.

No. 236. PENNSYLVANIA *v.* NELSON. Supreme Court of Pennsylvania, Western District. Certiorari granted. The Solicitor General is invited to file a brief setting forth the views of the Government. *Frank F. Truscott,* Attorney General of Pennsylvania, *Frank P. Lawley, Jr.* and *Harrington Adams,* Deputy Attorneys General, *William F. Cercone,* Special Deputy Attorney General, *Harry F. Stambaugh* and *Albert A. Fiok* for petitioner. *Victor Rabinowitz* for respondent. Briefs of *amici curiae* supporting petitioner were filed by *John Ben Shepperd,* Attorney General, and *John Atchison,* Assistant Attorney General, for the State of Texas; *George Fingold,* Attorney General, and *Lowell S. Nicholson, Samuel H. Cohen* and *Fred L. True, Jr.,* Assistant Attorneys General, for the State of Massachusetts; *Latham Castle,* Attorney General, and *Grenville Beardsley, John L. Davidson, Jr.* and *William C. Wines,* Assistant Attorneys General, for the State of Illinois; and *Louis C. Wyman,* Attorney General, for the State of New Hampshire, joined by the Attorneys General of the States of Arizona, Connecticut, Florida, Georgia, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia, Washington and Wisconsin. Reported below: 277 Pa. 58, 104 A. 2d 133.

No. 95, Misc. BOUDOIN *v.* LYKES BROS. STEAMSHIP CO., INC. C. A. 5th Cir. Certiorari granted. *Irwin William Rosenthal* for petitioner. *Joseph M. Rault* for respondent. Reported below: 211 F. 2d 618.

Certiorari Denied. (*See also No. 145 and Misc. Nos. 78, 91 and 116, supra.*)

No. 42. TILLMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Charles B. Evins, Heber T.*

Dotson, Howard T. Savage and *Earl E. Strayhorn* for petitioner. Reported below: 1 Ill. 2d 525, 116 N. E. 2d 344.

No. 47. PITTMAN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Ralph D. Pittman, pro se. Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 127 Ct. Cl. 173, 116 F. Supp. 576.

No. 56. SMITH-DOUGLASS CO., INC. *v.* UNITED STATES; and

No. 60. UNITED STATES *v.* SMITH-DOUGLASS CO., INC. Court of Claims. Certiorari denied. *Charles B. McInnis, Harold A. Kertz, Roger H. Muzzall* and *Irene Kennedy* for the Smith-Douglass Co., Inc. *Solicitor General Sobeloff* for the United States, and with him in No. 56 were *Assistant Attorney General Burger* and *Samuel D. Slade*. Reported below: 126 Ct. Cl. 758, 116 F. Supp. 570.

No. 57. NATIONAL BEVERAGE LABORATORIES, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Harold E. Marks, Henry W. Dieringer* and *Michael F. Mulcahy* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Joseph F. Goetten* for the United States. Reported below: 126 Ct. Cl. 745, 116 F. Supp. 724.

No. 58. JUNIOR TOY CORP. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Harold E. Marks, Henry W. Dieringer* and *Michael F. Mulcahy* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Joseph F. Goetten* for the United States. Reported below: 126 Ct. Cl. 681, 116 F. Supp. 730.

No. 59. PACIFIC CONTACT LABORATORIES, INC. ET AL. *v.* SOLEX LABORATORIES, INC. C. A. 9th Cir. Certiorari denied. *Collins Mason* for petitioners. *Fred H. Miller* for respondent. Reported below: 209 F. 2d 529.

No. 61. CAPITAL TRANSIT CO. *v.* PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA ET AL.; and No. 66. POTOMAC ELECTRIC POWER CO. *v.* CAPITAL TRANSIT CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edmund L. Jones, F. Gloyd Awalt, Samuel O. Clark, Jr., W. V. T. Justis* and *F. Keith Kelly* for the Capital Transit Co. *Marx Leva* was with them in No. 61. *James Francis Reilly, Cornelius Means, T. Justin Moore* and *George D. Gibson* for the Potomac Electric Power Co. Reported below: 93 U. S. App. D. C. 194, 213 F. 2d 176.

No. 62. RENSTA, ADMINISTRATOR, ET AL. *v.* BEVERLY BEACH PROPERTIES, INC. ET AL. Supreme Court of Florida. Certiorari denied. *Carl A. Hiaasen* for petitioners. *William Gresham Ward* and *Stanley C. Myers* for Beverly Beach Properties, Inc., respondent. Reported below: 68 So. 2d 604.

No. 63. GIDEONS INTERNATIONAL ET AL. *v.* TUDOR. Supreme Court of New Jersey. Certiorari denied. *Jacob Stam* and *Charles S. Piepgrass* for petitioners. *Leo Pfeffer, Will Maslow* and *Shad Polier* for respondent. Reported below: 14 N. J. 31, 100 A. 2d 857.

No. 65. BROWN ET AL. *v.* BROWN. Supreme Court of Michigan. Certiorari denied. *William H. Brown* and *Eugene Gressman* for petitioners. Reported below: 338 Mich. 492, 61 N. W. 2d 656.

No. 67. HALL BROS. ET AL. *v.* CITY OF CLEVELAND ET AL. Supreme Court of Ohio. Certiorari denied. *Kent*

Meyers for petitioners. Reported below: 161 Ohio St. 71, 117 N. E. 2d 705.

No. 68. GLO COMPANY *v.* MURCHISON ET AL. C. A. 5th Cir. Certiorari denied. *William C. Wines* for petitioner. *Luther M. Bickett* for Murchison et al.; and *James C. Denton, Jr.* and *M. D. Kirk* for Barnsdall Oil Co. et al., respondents. Reported below: 210 F. 2d 372.

No. 73. SWEET *v.* UNITED STATES;

No. 74. CHOMIAK *v.* UNITED STATES; and

No. 75. CHARNOWOLA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *George W. Crockett, Jr.* for petitioners. *Ernest Goodman* was with him in No. 73. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 211 F. 2d 118.

No. 77. EXCEL PACKING CO., INC. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Emmet A. Blaes* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Herman S. Greitzer* for the United States. Reported below: 210 F. 2d 596.

No. 78. MCCARTHY ET AL. *v.* CITY OF MANHATTAN BEACH. Supreme Court of California. Certiorari denied. *T. B. Cosgrove, John N. Cramer* and *Leonard A. Diether* for petitioners. *Robert H. Dunlap, John W. Holmes* and *Emrys J. Ross* for respondent. Reported below: 41 Cal. 2d 879, 264 P. 2d 932.

No. 79. LAS VEGAS MERCHANT PLUMBERS ASSOCIATION ET AL. *v.* UNITED STATES; and

No. 84. ALSUP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Alexander H. Schullman* for peti-

tioners in No. 79. *Toy R. Gregory* for petitioner in No. 84. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Ralph S. Spritzer* and *Daniel M. Friedman* for the United States. Reported below: 210 F. 2d 732.

No. 82. SINISCAL ET AL. *v.* UNITED STATES, AS TRUSTEE ETC., ET AL. C. A. 9th Cir. Certiorari denied. *John C. Veatch* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *Fred W. Smith* for the United States. Reported below: 208 F. 2d 406.

No. 83. HOUSING AUTHORITY OF THE CITY OF DALLAS *v.* THOMAS ET UX. Supreme Court of Texas. Certiorari denied. *H. P. Kucera* for petitioner. *Mike McKool* and *Bert Bader* for respondents. Reported below: 153 Tex. —, 264 S. W. 2d 93.

No. 85. ARTUKOVIC *v.* IVANCEVIC, CONSUL GENERAL OF THE FEDERAL PEOPLES' REPUBLIC OF YUGOSLAVIA, ET AL. C. A. 9th Cir. Certiorari denied. *Robert T. Reynolds* for petitioner. *Lawrence S. Lesser* for respondents. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* filed a brief for the United States, as *amicus curiae,* urging that the petition for a writ of certiorari be denied. Reported below: 211 F. 2d 565.

No. 86. COLORADO INTERSTATE GAS CO. *v.* FEDERAL POWER COMMISSION. C. A. 10th Cir. Certiorari denied. *James Lawrence White, William A. Dougherty, John P. Akolt, Sr., John R. Turnquist, Charles E. McGee* and *Lewis M. Poe* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter, Willard W. Gatchell, Reuben Goldberg* and *Jacob Goldberg* for respondent. Reported below: 209 F. 2d 717, 732.

No. 90. WOLIN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Armistead L. Boothe, Thurman Arnold* and *Milton V. Freeman* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 211 F. 2d 770.

No. 91. WILLIAMS *v.* ROBBINS, ADMINISTRATOR, RECONSTRUCTION FINANCE CORPORATION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Keith L. Seegmiller* and *Irving Wilner* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney* for respondent. Reported below: 93 U. S. App. D. C. 380, 210 F. 2d 874.

No. 92. SCHMIDT *v.* CROWELL-COLLIER PUBLISHING CO. ET AL. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Thomas L. Marshall* for the Crowell-Collier Publishing Co., respondent. Reported below: 210 F. 2d 908.

No. 93. SCHMIDT *v.* READER'S DIGEST ASSOCIATION, INC. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Thomas L. Marshall* for respondent. Reported below: 210 F. 2d 908.

No. 94. SCHMIDT *v.* ESQUIRE, INC. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Le Roy Russell Krein* for respondent. Reported below: 210 F. 2d 908.

No. 95. BLACK, ADMINISTRATRIX, *v.* LOCKHART, COLLECTOR OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *William C. Wines* for petitioner. *Solicitor*

318107 O - 55 - 42

General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott and *Joseph F. Goetten* for respondent. Reported below: 209 F. 2d 308.

No. 96. COMPAGNIE NATIONALE AIR FRANCE *v.* KOMLOS, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. *Frank J. Foley* for petitioner. *Theodore E. Wolcott* and *Frederick W. Scholem* for respondent. Reported below: 209 F. 2d 436.

No. 98. NESEN *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Frederick A. Potruch* and *Erwin Lerten* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 211 F. 2d 559.

No. 99. UNITED CORPORATION *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 3d Cir. Certiorari denied. *Richard Joyce Smith, William S. Potter* and *William R. Sherwood* for petitioner. *Solicitor General Sobeloff* and *William H. Timbers* for respondent. Reported below: 211 F. 2d 231.

No. 101. VICTRYLITE CANDLE CO. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward Brodkey, Frank E. Gettleman, Arthur Gettleman* and *Horace A. Young* for the Victrylite Candle Co., petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 102. HOTPOINT COMPANY *v.* UNITED STATES. Court of Claims. Certiorari denied. *Ednyfed H. Williams* and *John M. Leonard, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 127 Ct. Cl. 402, 117 F. Supp. 572.

No. 103. TURNER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *De Long Harris* 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 652.

No. 107. GEIGY CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Richard Ernst* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Samuel M. Singer* for respondent. Reported below: 211 F. 2d 553.

No. 108. BORIN, DOING BUSINESS AS WICHITA PACKING CO., *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Herman A. Greenberg* and *W. J. Holt* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney* for the United States. *Moses Lasky* filed a brief for the Western States Meat Packers Association, Inc., as *amicus curiae,* supporting petitioner. Reported below: 209 F. 2d 145.

No. 110. BRIDOUX *v.* EASTERN AIR LINES, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Brainard H. Warner III* for petitioner. *Joseph W. Henderson, Richard W. Galiher* and *John M. Aherne* for respondent. Reported below: 93 U. S. App. D. C. 369, 214 F. 2d 207.

No. 112. WALDRIP *v.* HUDSON SALES CORP. C. A. 5th Cir. Certiorari denied. *Hobert Price* for petitioner. *John W. Rutland, Jr.* for respondent. Reported below: 211 F. 2d 268.

No. 113. DOLMAGE *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. Supreme Court of Minnesota. Certiorari denied. *Donald A. Chapman* for petitioner. *Eaton Adams, Robert O. Sullivan* and *Arthur J. Donnelly* for respondent. Reported below: 241 Minn. ——, 63 N. W. 2d 273.

No. 122. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 211 F. 2d 656.

No. 123. OSBORNE *v.* OWSLEY, SHERIFF. Supreme Court of Missouri. Certiorari denied. *John T. Barker* for petitioner. *David M. Proctor, Jr.* and *Richard K. Phelps* for respondent. Reported below: 364 Mo. 544, 264 S. W. 2d 332.

No. 124. LOCAL NO. 3, UNITED PACKINGHOUSE WORKERS OF AMERICA, CIO, *v.* WILSON & CO., INC. ET AL. C. A. 8th Cir. Certiorari denied. *Arthur J. Goldberg, Thomas E. Harris, Eugene Cotton* and *Allen Heald* for petitioner. *Solicitor General Sobeloff* and *George J. Bott* for the National Labor Relations Board; and *Francis X. Reilly, Jr.* for Wilson & Co., Inc., respondents. Reported below: 210 F. 2d 325.

No. 128. PROCTOR ELECTRIC CORP. *v.* MASLO MANUFACTURING CORP. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Ira Jewell Williams* and *Thomas Raeburn White* for petitioner. *Bertram Bennett* for respondent. Reported below: 376 Pa. 553, 103 A. 2d 743.

No. 129. SAN JUAN TRADING CO., INC. *v.* MEXICAN STEAMSHIP MARMEX ET AL. C. A. 1st Cir. Certiorari

denied. *L. E. Dubon* for petitioner. *James R. Beverley* for respondents. Reported below: 212 F. 2d 206.

No. 134. GULF-TIDE STEVEDORES, INC. ET AL. *v.* VORIS, DEPUTY COMMISSIONER. C. A. 5th Cir. Certiorari denied. *John R. Brown* and *E. D. Vickery* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman* for respondent. Reported below: 211 F. 2d 549.

No. 137. ILLINOIS COMMERCE COMMISSION *v.* ILLINOIS CENTRAL RAILROAD CO. Supreme Court of Illinois. Certiorari denied. *Latham Castle,* Attorney General of Illinois, and *Grenville Beardsley, John L. Davidson, Jr.* and *William C. Wines,* Assistant Attorneys General, for petitioner. *John W. Foster, Joseph H. Wright* and *Herbert J. Deany* for respondent. Reported below: 2 Ill. 2d 382, 118 N. E. 2d 435.

No. 138. EXCEL AUTO RADIATOR CO. *v.* BISHOP & BABCOCK MANUFACTURING CO. C. A. 6th Cir. Certiorari denied. *Benton Baker* and *Max W. Zabel* for petitioner. *John H. Watson, Jr., John T. Scott* and *Arthur H. Boettcher* for respondent. Reported below: 212 F. 2d 586.

No. 139. PAUL A. STRAUB & CO., INC. *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Certiorari denied. *John D. Rode* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, John R. Benney, Paul A. Sweeney* and *Herman Marcuse* for the United States. Reported below: 41 C. C. P. A. (Cust.) 209.

No. 141. FAMOUS REALTY, INC. *v.* MITCHELL, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. *L. Agnew Myers, Jr.* for petitioner. *Solicitor General*

Sobeloff, Bessie Margolin and *Sylvia S. Ellison* for respondent. Reported below: 211 F. 2d 198.

No. 142. UNITED MINE WORKERS OF AMERICA ET AL. *v.* PATTON ET AL., DOING BUSINESS AS LAUREL BRANCH COAL CO. C. A. 4th Cir. Certiorari denied. *Harrison Combs* and *M. E. Boiarsky* for petitioners. *Fred B. Greear* for respondents. Reported below: 211 F. 2d 742.

No. 143. KEARNEY-TRECKER EMPLOYEES LOCAL 1083, U. A. W.-C. I. O. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *Max Raskin* for petitioner. *Solicitor General Sobeloff* and *George J. Bott* for the National Labor Relations Board; and *Leon B. Lamfrom* and *Helen F. Humphrey* for the Kearney & Trecker Corporation, respondents. Reported below: 210 F. 2d 852.

No. 144. COLLINS *v.* COLLINS. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Craig T. Stockdale* for petitioner. Reported below: See 175 Pa. Super. 214, 103 A. 2d 494.

No. 146. MATHER *v.* JONATHAN WOODNER CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Nathan M. Lubar, Jack L. Friedlander* and *Leonard S. Melrod* for petitioner. *Louis M. Denit, Thomas S. Jackson* and *Martin R. Fain* for respondent. Reported below: 93 U. S. App. D. C. 234, 210 F. 2d 868.

No. 148. MARCUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Eugene A. Tappy* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 213 F. 2d 230.

No. 149. GLOVER ET AL. *v.* OFFICERS AND MINISTER OF THE CONGREGATIONAL CHURCH OF HARTFORD, KNOWN AS THE CENTER CHURCH. Supreme Court of Errors of Connecticut. Certiorari denied. *Edward McFadden, Jr.* for petitioners. *Valentine J. Sacco* for respondents.

No. 151. NILVA ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Ross O'Donoghue, Robert M. Scott* and *John W. Graff* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 212 F. 2d 115.

No. 154. JOHNSON ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. *John J. Burns* for petitioners. *Solicitor General Sobeloff* and *William H. Timbers* for the Securities and Exchange Commission; and *Daniel James* for the Electric Power & Light Corporation, respondents. Reported below: 210 F. 2d 585.

No. 155. LATTA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *C. Brewster Rhoads* and *Donald McDonald* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, John R. Benney, Ellis N. Slack* and *L. W. Post* for respondent. Reported below: 212 F. 2d 164.

No. 156. AIR DEVICES, INC. *v.* AIR FACTORS, INC. ET AL. C. A. 9th Cir. Certiorari denied. *James C. Ledbetter* for petitioner. *C. A. Miketta* for respondents. Reported below: 210 F. 2d 481.

No. 158. QUALITY EGG SHIPPERS, INC. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Irving M. Wolff* for petitioners. *Solicitor General So-*

beloff, Assistant Attorney General Olney, Beatrice Rosenberg and *Joseph A. Barry* for the United States. Reported below: 212 F. 2d 417.

No. 160. AGHNIDES *v.* GOODRIE ET AL. C. A. 7th Cir. Certiorari denied. *Albert L. Ely* for petitioner. *Harry W. Lindsey, Jr.* and *Albert J. Fihe* for respondents. Reported below: 210 F. 2d 859.

No. 165. FORT WORTH & DENVER RAILWAY CO. *v.* PRINE. C. A. 5th Cir. Certiorari denied. *L. A. White* for petitioner. *George S. McCarthy, John H. Merchant* and *J. O. Fitzjarrald* for respondent. Reported below: 211 F. 2d 697.

No. 168. FORTEE PROPERTIES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Irwin D. Shapiro* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Robert N. Anderson* for respondent. Reported below: 211 F. 2d 915.

No. 169. MARACHOWSKY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *David A. Canel* and *Jacob Geffs* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 213 F. 2d 235.

No. 170. SULLI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John R. Parkhill* and *Miles H. Draper* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 213 F. 2d 100.

No. 178. ROBERTS *v.* EATON ET AL. C. A. 2d Cir. Certiorari denied. *Henry H. Shepard* and *Murray C. Bernays* for petitioner. *Inzer B. Wyatt* and *Francis Elwood Barkman* for respondents. Reported below: 212 F. 2d 82.

No. 181. MCCULLAGH *v.* HOUSTON CHRONICLE PUBLISHING CO. C. A. 5th Cir. Certiorari denied. *Bennett B. Patterson* for petitioner. Reported below: 211 F. 2d 4.

No. 187. PORTFOLIO *v.* UNITED STATES. Court of Claims. Certiorari denied. *Jeremiah T. Mahoney* and *Francis T. Nemac* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Elizabeth B. Davis* for the United States. Reported below: 127 Ct. Cl. 536, 118 F. Supp. 367.

No. 188. NICHOLS ET AL. *v.* LONG ISLAND LIGHTING CO. ET AL. C. A. 2d Cir. Certiorari denied. *Harold G. Aron* for petitioners. *Solicitor General Sobeloff, William H. Timbers* and *Aaron Levy* for the Securities and Exchange Commission; and *David K. Kadane* for the Long Island Lighting Co., respondents. Reported below: 211 F. 2d 392.

No. 192. UNITED STATES EX REL. IMPASTATO *v.* O'ROURKE, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari denied. *James Daleo* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 211 F. 2d 609.

No. 193. MILLIKEN ET AL. *v.* GILL, DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 4th Cir. Certiorari denied. *Kenneth D. Thomas* for petitioners. *Solicitor*

General Sobeloff, Assistant Attorney General Holland and *Ellis N. Slack* for respondents. Reported below: 211 F. 2d 869.

No. 194. GREGORY RUN COAL CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Sidney B. Gambill* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Robert B. Ross* for respondent. Reported below: 212 F. 2d 52.

No. 259. COMMISSIONER OF INTERNAL REVENUE *v.* B. H. SWANEY & SONS, INC. ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Sobeloff* for petitioner. *Arch M. Cantrall* and *W. G. Stathers* for respondents. Reported below: 212 F. 2d 52.

No. 195. CONSER *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. Supreme Court of Missouri. Certiorari denied. *Francis H. Monek* and *Melvin L. Griffith* for petitioner. *Richmond C. Coburn* for respondent. Reported below: 266 S. W. 2d 587.

No. 196. HARRISON *v.* PARAMOUNT PICTURES, INC. ET AL. C. A. 3d Cir. Certiorari denied. *Harry Norman Ball* for petitioner. *Wm. A. Schnader* and *Earl G. Harrison* for Paramount Film Distributing Corp. et al., and *Louis G. Goffman* for Warner Bros. Pictures Distributing Corp. et al., respondents. Reported below: 211 F. 2d 405.

No. 197. HADJIPATERAS ET AL. *v.* AMERICAN TOBACCO CO. ET AL. C. A. 2d Cir. Certiorari denied. *Paul V. McNutt* for petitioners. *John W. R. Zisgen* and *Henry N. Longley* for respondents. Reported below: 211 F. 2d 666.

No. 198. SILVERMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Roy C. Frank* for petitioner. *Solici-*

tor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg and *Joseph A. Barry* for the United States. Reported below: 213 F. 2d 405.

No. 200. TEXAS COMPANY *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *John C. Crawley* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 213 F. 2d 479.

No. 202. PARMA WATER LIFTER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *A. T. Fredricks* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 211 F. 2d 258.

No. 205. COMMISSIONER OF INTERNAL REVENUE *v.* GOFF ET AL. C. A. 3d Cir. Certiorari denied. *Solicitor General Sobeloff* for petitioner. *Monte Appel* for respondents. Reported below: 212 F. 2d 875.

No. 206. COMMISSIONER OF INTERNAL REVENUE *v.* RAY ET UX. C. A. 5th Cir. Certiorari denied. *Solicitor General Sobeloff* for petitioner. *Irving L. Goldberg* for respondents. Reported below: 210 F. 2d 390.

No. 207. COMMISSIONER OF INTERNAL REVENUE *v.* MCCUE BROS. & DRUMMOND, INC. C. A. 2d Cir. Certiorari denied. *Solicitor General Sobeloff* for petitioner. *Murray F. Johnson* for respondent. Reported below: 210 F. 2d 752.

No. 208. WILEMON ET AL. *v.* CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT ET AL. Court of Civil Appeals of Texas, Eighth Supreme Judicial District. Certiorari denied. *M. M. Wade* for petitioners. *H. Bascom Thomas, Jr.* for respondents. Reported below: 264 S. W. 2d 543.

October 14, 1954. 348 U. S.

No. 211. LAGUANA *v.* ANSELL, ACTING TAX COMMISSIONER AND ACTING TREASURER, GOVERNMENT OF GUAM, ET AL. C. A. 9th Cir. Certiorari denied. *Albert A. Spiegel* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, I. Henry Kutz* and *A. M. Edwards* for respondents, and *Howard D. Porter,* Attorney General of Guam, for Ansell, respondent. Reported below: 212 F. 2d 207.

No. 212. LEVINE, EXECUTOR, *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *M. Jay Meckler* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 210 F. 2d 954.

No. 214. INDUSTRIAL COMMISSIONER OF NEW YORK *v.* SWORD LINE, INC. C. A. 2d Cir. Certiorari denied. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Francis R. Curran* and *Samuel Stern,* Assistant Attorneys General, for petitioner. *Paul D. Miller* for respondent. Reported below: 212 F. 2d 865.

No. 216. CHICAGO, BURLINGTON & QUINCY RAILROAD CO. *v.* BONNIER. Supreme Court of Illinois. Certiorari denied. *Eldon Martin* and *Andrew C. Scott* for petitioner. *James A. Dooley* for respondent. Reported below: 2 Ill. 2d 606, 119 N. E. 2d 254.

No. 217. BRENNAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George B. Young* and *John Paul Stevens* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: —— U. S. App. D. C. ——, 214 F. 2d 268.

No. 218. STANDARD GAS & ELECTRIC CO. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. *Paul D. Miller* and *Bernard Nemtzow* for petitioner. *Solicitor General Sobeloff, William H. Timbers* and *Ellwood L. Englander* for the Securities and Exchange Commission, respondent. Reported below: 212 F. 2d 407.

No. 221. MURPHY CORPORATION ET AL. *v.* FONTENOT, COLLECTOR OF REVENUE OF LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Clyde R. Brown* and *Clarence L. Yancey* for petitioners. Reported below: 225 La. 379, 73 So. 2d 180.

No. 222. BENSON ET AL., DOING BUSINESS AS BENSON SCAFFOLD MANUFACTURING CO., *v.* HUTTO ET AL. C. A. 6th Cir. Certiorari denied. *H. H. McCampbell, Jr.* for petitioners. *Jesse C. Parks, Jr.* for Hutto; and *Erma G. Greenwood* and *Russell R. Kramer* for the Newark Insurance Co., respondents. Reported below: 212 F. 2d 349.

No. 223. OHIO WATER SERVICE CO. *v.* MAHONING VALLEY SANITARY DISTRICT. Supreme Court of Ohio. Certiorari denied. *James E. Mitchell* for petitioner. *Frank Harrison* and *Henry J. Crawford* for respondent. Reported below: 161 Ohio St. 259, 119 N. E. 2d 61.

No. 224. CITY OF NILES *v.* MAHONING VALLEY SANITARY DISTRICT. Supreme Court of Ohio. Certiorari denied. *David C. Haynes* for petitioner. *Frank Harrison* and *Henry J. Crawford* for respondent. Reported below: 161 Ohio St. 259, 119 N. E. 2d 61.

No. 225. BAETICH *v.* HOBBY, SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d

Cir. Certiorari denied. *Samuel Gottlieb* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Herman Marcuse* for respondent. Reported below: 212 F. 2d 480.

No. 226. THEARD *v.* LOUISIANA STATE BAR ASSOCIATION. Supreme Court of Louisiana. Certiorari denied. *Charles J. Rivet* for petitioner. Reported below: 225 La. 98, 72 So. 2d 310.

No. 227. DOBRY FLOUR MILLS, INC. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. C. A. 10th Cir. Certiorari denied. *Duke Duvall* for petitioner. Reported below: 211 F. 2d 785.

No. 228. KAYE ET AL. *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Mayer Goldberg* and *George C. Dayton* for petitioners. Reported below: 72 So. 2d 400.

No. 229. RICKENBAKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *David L. Luce* for the United States. Reported below: 214 F. 2d 2.

No. 231. ESTATE OF SCADRON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Sylvia D. Levy* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *S. Dee Hanson* for respondent. Reported below: 212 F. 2d 188.

No. 234. REYNOLDS *v.* ROLL, DISTRICT ATTORNEY. District Court of Appeal of California, Second Appellate

District. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 122 Cal. App. 2d 826, 266 P. 2d 222.

No. 235. ROBINSON *v.* ALABAMA. Court of Appeals of Alabama. Certiorari denied. Reported below: 37 Ala. App. 403, 71 So. 2d 843.

No. 238. HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT No. 1 ET AL. *v.* ROBBINS ET AL. C. A. 5th Cir. Certiorari denied. *Thurman Arnold* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *Fred W. Smith* for Robbins et al.; and *Eugene T. Edwards* for Lovelady et al., and *Frederic K. Gray* for Thompson et al., respondents. Reported below: 213 F. 2d 425.

No. 239. HOMEDALE TRACTOR & EQUIPMENT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Oscar W. Worthwine* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Nancy M. Sherman* for respondent. Reported below: 211 F. 2d 309.

No. 240. CARROLL VOCATIONAL INSTITUTE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Owen George* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. *Jacob M. Lashly* and *Paul B. Rava* filed a brief, as *amici curiae,* for the General Trades School, Inc. et al., supporting petitioners. Reported below: 211 F. 2d 539.

No. 241. KLEIN ET AL., SURVIVING TRUSTEES, *v.* EQUITY INVESTMENT CO. C. A. 3d Cir. Certiorari denied. *Ed-*

ward H. Cushman for petitioners. *Joseph W. Henderson* and *Thomas F. Mount* for respondent. Reported below: 212 F. 2d 676.

No. 242. HILLCREA EXPORT & IMPORT CO., INC. ET AL. *v.* UNIVERSAL INSURANCE CO. C. A. 2d Cir. Certiorari denied. *Alfred B. Nathan* for petitioners. *Martin Detels* and *Vincent L. Leibell, Jr.* for respondent. Reported below: 212 F. 2d 206.

No. 243. BUTLER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO. Supreme Court of California. Certiorari denied. *Alvin Gershenson* for petitioner.

No. 244. RIVERCLIFF CO., INC. *v.* LINEBARGER ET AL., DOING BUSINESS AS LINEBARGER CONSTRUCTION CO., ET AL. Supreme Court of Arkansas. Certiorari denied. *William H. Donham* for petitioner. *E. Chas. Eichenbaum* and *Edward L. Wright* for respondents. Reported below: 223 Ark. 105, 264 S. W. 2d 842.

No. 245. KESSLER *v.* FAUQUIER NATIONAL BANK, ADMINISTRATOR, ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *Marcus Borchardt* for petitioner. *John A. K. Donovan, Cornelius H. Doherty* and *Philip N. Brophy* for respondents. Reported below: 195 Va. 1095, 81 S. E. 2d 440.

No. 247. UNITED STATES *v.* SOUTHEASTERN OIL FLORIDA, INC. ET AL. Court of Claims. Certiorari denied. *Solicitor General Sobeloff* for the United States. *J. Franklin Fort* for respondents. Reported below: 127 Ct. Cl. 409, 119 F. Supp. 731.

No. 248. UNITED STATES *v.* CLAPP. Court of Claims. Certiorari denied. *Solicitor General Sobeloff* for the

United States. *Charles D. Hamel* and *James P. Jones* for respondent. Reported below: 127 Ct. Cl. 505, 117 F. Supp. 576.

No. 253. O'Brien *v.* Equitable Life Assurance Society. C. A. 8th Cir. Certiorari denied. *Carll V. Kretsinger* for petitioner. *Henry I. Eager* and *Charles B. Blackmar* for respondent. Reported below: 212 F. 2d 383.

No. 254. Jensen *v.* United States. C. A. 8th Cir. Certiorari denied. *Alan Loth* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 213 F. 2d 781.

No. 255. Blackfeet and Gros Ventre Tribes of Indians *v.* United States. Court of Claims. Certiorari denied. *Ernest L. Wilkinson* and *Francis M. Goodwin* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Morton, Roger P. Marquis* and *Fred W. Smith* for the United States. Reported below: 127 Ct. Cl. 807, 119 F. Supp. 161.

No. 256. Ajamian *v.* Schlanger et al., trading as I. Schlanger & Co. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Isadore Glauberman* for respondents. Reported below: 14 N. J. 483, 103 A. 2d 9.

No. 257. Hoxsey Cancer Clinic et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *James H. Martin* for petitioners. *Solicitor General Sobeloff* for the United States. Reported below: 212 F. 2d 439.

No. 258. Funk *v.* Seaboard Air Line Railway Co. C. A. 5th Cir. Certiorari denied. *G. Seals Aiken* for

318107 O - 55 - 43

petitioner. *Robert S. Sams* for respondent. Reported below: 212 F. 2d 434.

No. 264. INTERSTATE COMMERCE COMMISSION *v.* ALLEN E. KROBLIN, INC. C. A. 8th Cir. Certiorari denied. *Edward M. Reidy* and *Allen Crenshaw* for petitioner. *Harry M. Reed* for respondent. Reported below: 212 F. 2d 555.

No. 265. BAYSEK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Joseph A. Rossi* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 212 F. 2d 446.

No. 266. HESS ET AL. *v.* DEWEY, COMMISSIONER OF TAXATION OF ALASKA. C. A. 9th Cir. Certiorari denied. *H. L. Faulkner* for petitioners. Reported below: 213 F. 2d 635.

No. 267. NEW YORK LIFE INSURANCE CO. *v.* JOHNSON, ADMINISTRATOR. C. A. 7th Cir. Certiorari denied. *Harold D. Burgess* and *William F. Columbus* for petitioner. Reported below: 212 F. 2d 256.

No. 268. VAUGHAN *v.* BRANDON, BRANDON, HORNSBY & HANDY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 209 F. 2d 954.

No. 269. SPRECKELS *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. *Isaac E. Ferguson, Daniel Schnabel* and *Royal M. Galvin* for petitioner. Reported below: 125 Cal. App. 2d 507, 270 P. 2d 513.

No. 272. ANDERSON ET AL. *v.* MCKAY, SECRETARY OF THE INTERIOR. United States Court of Appeals for

the District of Columbia Circuit. Certiorari denied. *Charles B. McInnis, Warren Woods, Roger H. Muzzall, Hulette F. Aby, Irene Kennedy* and *Ernest Callomon* for petitioners. *Solicitor General Sobeloff* and *Assistant Attorney General Morton* for respondent. Reported below: 94 U. S. App. D. C. —, 211 F. 2d 798.

No. 273. INTERNATIONAL ALUMINUM WINDOW CORP. ET AL. *v.* FERRI. Supreme Court of Florida. Certiorari denied. *William G. Wall* for petitioners. *E. F. P. Brigham* for respondent. Reported below: 72 So. 2d 31.

No. 275. DR. SALSBURY'S LABORATORIES *v.* I. D. RUSSELL CO. LABORATORIES ET AL. C. A. 8th Cir. Certiorari denied. *Giles Sutherland Rich* for petitioner. *Charles J. Merriam* for respondents. Reported below: 212 F. 2d 414.

No. 276. SUPERIOR OIL CO. ET AL. *v.* FONTENOT, COLLECTOR OF REVENUE OF LOUISIANA. C. A. 5th Cir. Certiorari denied. *Cullen R. Liskow* for petitioners. Reported below: 213 F. 2d 565.

No. 46. KUCZYNSKI *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied.

No. 72. BRADDOCK *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* and *Arthur F. Larrabee* for petitioner. Reported below: 41 Cal. 2d 794, 264 P. 2d 521.

No. 127. PARSONS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *O. B. Fisher, C. C. McDonald* and *Dan Moody* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Rudy G. Rice,* Assistant Attorney General, for respondent. Reported below: 160 Tex. Cr. R. —, 271 S. W. 2d 643.

No. 132. RUMSA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John O'C. FitzGerald* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 212 F. 2d 927.

No. 140. REDDING *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Woodrow Seals* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Rudy G. Rice, Katherine W. Conti* and *Horace Wimberly,* Assistant Attorneys General, for respondent. Reported below: 159 Tex. Cr. R. 535, 265 S. W. 2d 811.

No. 147. REESE ET AL. *v.* WOOD ET AL. Supreme Court of Louisiana. Certiorari denied. *Gerard Harold Schreiber* for petitioners. Reported below: 224 La. 975, 71 So. 2d 537.

No. 76. VENZEL *v.* UNITED STATES STEEL CO. C. A. 6th Cir. Motion for leave to file brief of International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-CIO, as *amicus curiae,* denied. Certiorari denied. *Arthur J. Goldberg* for petitioner. *James C. Davis* and *John J. Adams* for respondent. Reported below: 209 F. 2d 185.

No. 136. PEOPLES DEPOSIT BANK & TRUST CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE REED and MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application. *L. K. Olson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Ellis N. Slack* for the United States. Reported below: 212 F. 2d 86.

No. 166. D. L. PIAZZA CO. *v.* WEST COAST LINE, INC. ET AL. C. A. 2d Cir. Motion to strike the brief for the private respondents granted. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Edward B. Hayes* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Ralph S. Spritzer* and *Clarence G. Morse* for the United States and the Federal Maritime Board; and *Stanley W. Schaefer* for the West Coast Line, Inc. et al., respondents. Reported below: 210 F. 2d 947.

No. 180. PRICE *v.* ATCHISON, TOPEKA & SANTA FE RAILROAD CO. Supreme Court of California. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Clifton Hildebrand* for petitioner. *J. C. Gibson* and *R. S. Outlaw* for respondent. Reported below: 142 Cal. 2d 577, 268 P. 2d 457.

No. 182. RETAIL CLERKS INTERNATIONAL ASSOCIATION, A. F. L., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Motion for leave to file brief of Safeway Stores, Inc., as *amicus curiae,* denied. Certiorari denied. *Roland C. Davis, S. G. Lippman, J. Albert Woll* and *Herbert S. Thatcher* for petitioners. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Frederick U. Reel* for respondent. Reported below: 211 F. 2d 759.

No. 183. CAMINITO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Maurice Edelbaum* for petitioner. *Edward S. Silver* and *William I. Siegel* for respondent. Reported below: 291 N. Y. 541, 50 N. E. 2d 654.

No. 201. KUCHIN *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *James A. Dooley* for petitioner. *Otis Lowell Hastings* and *Drennan J. Slater* for respondent. Reported below: 210 F. 2d 863.

No. 219. JASON *v.* SUMMERFIELD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *George M. Johnson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman* for respondents. Reported below: 94 U. S. App. D. C. —, 214 F. 2d 273.

No. 189. KERN *v.* WILLIAMSON, TRUSTEE, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Carlos L. Israels* and *Leo T. Wolford* for petitioner. *Solicitor General Sobeloff, William H. Timbers, David Ferber* and *Henry L. Stern* for the Securities and Exchange Commission; and *Oscar S. Rosner* for the Green Committee, respondents. Reported below: 211 F. 2d 381.

No. 232. MONTANYE *v.* NEW YORK ET AL. Court of Appeals of New York. Certiorari denied. Reported below: 306 N. Y. 978, 120 N. E. 2d 232.

No. 237. PARRINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Vine H. Smith* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 212 F. 2d 919.

No. 260. THOMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *John J. Abt* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Tompkins, Harold D. Koffsky* and *Lawrence K. Bailey* for the United States. Reported below: 214 F. 2d 545.

No. 4, Misc. GILBERT *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Chief Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

No. 5, Misc. THOMPSON *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. 6, Misc. BERRYMAN *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *Don Eastvold,* Attorney General of Washington, and *Cyrus A. Dimmick,* Assistant Attorney General, for respondent.

No. 7, Misc. RHONE *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 8, Misc. DOUGLAS *v.* RAGEN, WARDEN. 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. 9, Misc. MOORE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Department. Certiorari denied.

No. 10, Misc. SPROUSE *v.* MISSOURI. 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. 11, Misc. MINER *v.* RAGEN, WARDEN. 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. 12, Misc. BROWN *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: 212 F. 2d 589.

No. 13, Misc. HASHMALL *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Jack B. Dworken* for petitioner. Reported below: 160 Ohio St. 565, 117 N. E. 2d 606.

No. 14, Misc. JENKINS *v.* MADIGAN, ACTING WARDEN. C. A. 7th Cir. Certiorari denied. *N. George Nasser* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for respondent. Reported below: 211 F. 2d 904.

No. 15, Misc. SHERMAN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 16, Misc. HANSEN *v.* WISCONSIN ET AL. Supreme Court of Wisconsin. Certiorari denied.

No. 17, Misc. LEWIS *v.* MAINE. Supreme Judicial Court of Maine. Certiorari denied. Reported below: 150 Me. 121, 104 A. 2d 838.

No. 19, Misc. PAULSON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 21, Misc. ROUSSEAU *v.* HURTADO, EXECUTRIX, ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 122 Cal. App. 2d 705, 265 P. 2d 580.

No. 23, Misc. FUNKHOUSER *v.* LOEW'S INCORPORATED. C. A. 8th Cir. Certiorari denied. *Richard B. McEntire* for petitioner. *Maurice J. O'Sullivan* and *Samuel D. Cohen* for respondent. Reported below: 208 F. 2d 185.

No. 24, Misc. SHELL *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 26, Misc. ARCHIE *v.* SHELL OIL CO., INC. ET AL. C. A. 5th Cir. Certiorari denied. *I. H. Spears* for petitioner. Reported below: 210 F. 2d 653.

No. 29, Misc. WILSON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 30, Misc. WEST *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 32, Misc. STEWART *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 33, Misc. LAIR *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 35, Misc. FAIR *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 36, Misc. COLLINS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 37, Misc. CAMPBELL *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 39, Misc. BUZZIE *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied.

No. 40, Misc. WALL *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 41, Misc. KALINOWSKI *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 42, Misc. HARGRAVES *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 43, Misc. FIRMSTONE *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 44, Misc. HUDSON *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Richardson Dilworth* for respondent.

No. 45, Misc. SALEMI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Rudolph Stand* for petitioner. *Frank S. Hogan* and *Charles W. Manning* for respondent. Reported below: 306 N. Y. 863, 118 N. E. 2d 917.

No. 46, Misc. WINSTON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 48, Misc. WEBER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 50, Misc. SENTERS *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 52, Misc. MEEHAN *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 124 Cal. App. 2d 589, 269 P. 2d 70.

No. 58, Misc. ROBINSON *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 59, Misc. ROOKS *v.* ELLIS, GENERAL MANAGER OF THE TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 61, Misc. FOSTER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 94 U. S. App. D. C. ——, 212 F. 2d 249.

No. 63, Misc. Ross *v.* Ohio. Supreme Court of Ohio. Certiorari denied. *George A. Meekison* for petitioner.

No. 64, Misc. Wagner *v.* Ragen, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 213 F. 2d 294.

No. 65, Misc. Spry *v.* Skeen, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 66, Misc. Hurt *v.* Balkcom, Warden. Supreme Court of Georgia. Certiorari denied. Petitioner *pro se.* *Eugene Cook,* Attorney General of Georgia, and *Robert H. Hall,* Assistant Attorney General, for respondent. Reported below: 210 Ga. 577, 82 S. E. 2d 3.

No. 70, Misc. Novak *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 71, Misc. Rowan *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 72, Misc. Biloche *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 73, Misc. Webb *v.* Illinois. Supreme Court of Illinois and Criminal Court of Cook County, Illinois. Certiorari denied.

No. 74, Misc. Meyer *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 75, Misc. Rodriguez *v.* New York. Supreme Court of New York, Appellate Division, First Department. Certiorari denied. Reported below: 283 App. Div. 790, 129 N. Y. S. 2d 239.

No. 79, Misc. HALL *v.* WILLIAMS ET AL. Supreme Court of Florida. Certiorari denied. *Walter Warren* for petitioner. *H. L. Pringle* for respondents. Reported below: 72 So. 2d 829.

No. 81, Misc. MACLAREN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 82, Misc. O'CONNELL *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 212 F. 2d 272.

No. 84, Misc. CASEY *v.* INDIANA. Circuit Court of LaPorte County, Indiana. Certiorari denied.

No. 85, Misc. WILLIAMS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 87, Misc. CLARK *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 88, Misc. DEFOE *v.* NATIONAL CAPITAL BANK. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 94 U. S. App. D. C. ——, 214 F. 2d 225.

No. 89, Misc. STREETER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 90, Misc. BARKEIJ *v.* LOCKHEED AIRCRAFT CORP. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *C. Blake Townsend* and *Herbert A. Huebner* for respondent. Reported below: 210 F. 2d 1.

No. 94, Misc. O'LEARY, RECEIVER, *v.* TURNER ET AL. C. A. 6th Cir. Certiorari denied. *Joseph O'Leary, pro se*. Reported below: 209 F. 2d 149.

No. 99, Misc. WILLIAMS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 100, Misc. HALL *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied. Reported below: 195 Va. lxxxvii.

No. 101, Misc. DUNBAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Gilbert S. Rosenthal* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 212 F. 2d 654.

No. 102, Misc. NAPIER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 103, Misc. BYRD *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 42 Cal. 2d 200, 266 P. 2d 505.

No. 104, Misc. HANLEY *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 105, Misc. ORR *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. Reported below: 225 S. C. 369, 82 S. E. 2d 523.

No. 107, Misc. WEITZ *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 108, Misc. BREWSTER *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 109, Misc. DeFoe *v.* National Capital Bank. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 114, Misc. Stephens *v.* United States Steel Corp. C. A. 5th Cir. Certiorari denied. *Edward H. Saunders* for petitioner. *Frontis H. Moore* for respondent. Reported below: 212 F. 2d 705.

No. 115, Misc. Stoner *v.* Randolph, Warden. Supreme Court of Illinois. Certiorari denied.

No. 117, Misc. Miller et al. *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frank D. Reeves* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 94 U. S. App. D. C. —, 212 F. 2d 809.

No. 120, Misc. Lemaster *v.* Ellis, General Manager, Texas Prison System, et al. Court of Criminal Appeals of Texas. Certiorari denied.

No. 125, Misc. Newton *v.* Bannan, Warden, et al. Supreme Court of Michigan. Certiorari denied.

No. 128, Misc. Cox *v.* Teets, Warden, et al. Supreme Court of California. Certiorari denied.

No. 129, Misc. Whitacre *v.* Skeen, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 130, Misc. RICHTER *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Richardson Dilworth* for respondent.

No. 135, Misc. LOVINGS *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *Ralph R. Bremers* for petitioner. *Clarence S. Beck,* Attorney General of Nebraska, and *Ralph D. Nelson,* Assistant Attorney General, for respondent. Reported below: 158 Neb. 134, 62 N. W. 2d 672.

No. 2, Misc. CATO *v.* CALIFORNIA. Supreme Court of California. Petition for writ of certiorari denied without prejudice to the petitioner's rights under the facts alleged to prosecute an appeal in the California state courts in accordance with principles announced in *People* v. *Slobodion,* 30 Cal. 2d 362, 181 P. 2d 868. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Chief Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

No. 53, Misc. SHEFFIELD *v.* LOUISIANA. Supreme Court of Louisiana. Petition for writ of certiorari denied without prejudice to petitioner to apply to the appropriate United States District Court for a writ of habeas corpus. *Eugene Stanley* for petitioner.

No. 111, Misc. CHRISTOFFEL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this appli-

cation. *David Scribner, David Rein* and *Joseph Forer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, 214 F. 2d 265.

No. 178, Misc. UNITED STATES EX REL. ELLIOTT *v.* HENDRICKS, DEPUTY COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Reported below: 213 F. 2d 922.

Rehearing Granted. (*See ante, p. 1.*)

Rehearing Denied.

No. 280, October Term, 1953. PHILLIPS PETROLEUM CO. *v.* WISCONSIN ET AL., 347 U. S. 672; and

No. 281, October Term, 1953. TEXAS ET AL. *v.* WISCONSIN ET AL., 347 U. S. 672. Motion for leave to file brief of Independent Petroleum Assn. et al., as *amici curiae,* denied. Motion in No. 281 for leave to file a supplemental petition for rehearing denied. Petitions for rehearing denied.

No. 605, October Term, 1953. PIERCE *v.* AMERICAN COMMUNICATIONS CO., INC., 347 U. S. 944. Motion for leave to file certified copies of court records denied. Motion for leave to file a second petition for rehearing denied.

No. 623, October Term, 1953. FERROLINE CORPORATION *v.* GENERAL ANILINE & FILM CORP., 347 U. S. 953. Second petition for rehearing denied.

No. 635, October Term, 1953. LEYRA *v.* DENNO, WARDEN, 347 U. S. 556. Rehearing denied.

318107 O - 55 - 44

No. 407, October Term, 1953. GALVAN *v.* PRESS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, 347 U. S. 522;

No. 476, October Term, 1953. BRANIFF AIRWAYS, INC. *v.* NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT ET AL., 347 U. S. 590;

No. 666, October Term, 1953. OHIO EX REL. HAWKE *v.* BROWN, SECRETARY OF STATE OF OHIO, 347 U. S. 972;

No. 698, October Term, 1953. HILLGREN *v.* KWIKSET LOCKS, INC. ET AL., 347 U. S. 989;

No. 701, October Term, 1953. BOWMAN, ADMINISTRATRIX, *v.* BOWMAN, 347 U. S. 1017;

No. 724, October Term, 1953. BRESLIN *v.* NEW YORK, 347 U. S. 1014;

No. 736, October Term, 1953. MCRAE *v.* WOODS, ACTING HOUSING EXPEDITER, 347 U. S. 1017;

No. 797, October Term, 1953. MILLER *v.* THORN ET UX., 347 U. S. 1017;

No. 509, Misc., October Term, 1953. WHEELER *v.* UNITED STATES, 347 U. S. 1019;

No. 521, Misc., October Term, 1953. NATION *v.* CALIFORNIA, 347 U. S. 969;

No. 555, Misc., October Term, 1953. HARDING *v.* CAVANAUGH ET AL., 347 U. S. 978;

No. 575, Misc., October Term, 1953. HUGHES *v.* HEINZE, WARDEN, 347 U. S. 1020;

No. 577, Misc., October Term, 1953. TATE *v.* CALIFORNIA, 347 U. S. 1020;

No. 589, Misc., October Term, 1953. NEIGUT *v.* UNITED STATES, 347 U. S. 1020;

No. 596, Misc., October Term, 1953. NEAL *v.* RANDOLPH, WARDEN, 347 U. S. 993; and

No. 727, October Term, 1953. SHELLHAMMER, GENERAL ADMINISTRATRIX, *v.* LEHIGH VALLEY RAILROAD CO., 347 U. S. 990. Petitions for rehearing denied.

No. 606, Misc., October Term, 1953. SANDERS *v.* SWOPE, WARDEN, 347 U. S. 1020. Petition for rehearing denied.

No. 384, Misc., October Term, 1953. CRABTREE *v.* UNITED STATES, 347 U. S. 961. Motion for leave to file petition for rehearing denied.

No. 502, Misc., October Term, 1953. PUFF *v.* UNITED STATES, 347 U. S. 963. Motion for leave to file a second petition for rehearing denied.

Case Dismissed Under Rule 60.

No. 370. BEN PEARSON, INC. *v.* RUST, TRUSTEE, ET AL. On petition for writ of certiorari to the Supreme Court of Arkansas. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Jay W. Dickey* for petitioner. *Gordon E. Young* for respondents. Reported below: 223 Ark. 697, 268 S. W. 2d 893.

OCTOBER 18, 1954.

Decision Per Curiam.

No. 130. INTERNATIONAL HARVESTER CO. *v.* MINNESOTA. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *G. Aaron Youngquist* and *Fred N. Furber* for appellant. Reported below: 241 Minn. ——, 63 N. W. 2d 547.

Probable Jurisdiction Noted.

No. 159. UNITED STATES *v.* BRAMBLETT. Appeal from the United States District Court for the District of Columbia. Probable jurisdiction noted. THE CHIEF JUSTICE took no part in the consideration or decision of this

question. *Solicitor General Sobeloff* for the United States. *Edward Bennett Williams* and *Murdaugh S. Madden* for appellee. Reported below: 120 F. Supp. 857.

No. 184. WILLIAMSON, ATTORNEY GENERAL, ET AL. *v.* LEE OPTICAL OF OKLAHOMA, INC. ET AL.; and

No. 185. LEE OPTICAL OF OKLAHOMA, INC. ET AL. *v.* WILLIAMSON, ATTORNEY GENERAL, ET AL. Appeals from the United States District Court for the Western District of Oklahoma. Probable jurisdiction noted. *Mac Q. Williamson,* Attorney General of Oklahoma, *Fred Hansen,* First Assistant Attorney General, and *James C. Harkin,* Assistant Attorney General, for appellants in No. 184. *Duke Duvall, John M. Phillips* and *Dick H. Woods* for appellants in No. 185. Reported below: 120 F. Supp. 128.

Certiorari Granted.

No. 179. COURTNEY ET AL. *v.* LOCKETT. Supreme Court of Kansas. Certiorari granted. *Payne H. Ratner* for petitioners. *Harold R. Fatzer,* Attorney General of Kansas, for respondent. Reported below: 175 Kan. 704, 267 P. 2d 190.

No. 301. ENGINE AIR SERVICE, INC. ET AL. *v.* HALPERT, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari granted. *James G. Moore* for petitioners. *Max Schwartz* for respondent. Reported below: 212 F. 2d 860.

No. 110, Misc. WILLIAMS *v.* GEORGIA. Supreme Court of Georgia. Certiorari granted. *Carter Goode* for petitioner. *Eugene Cook,* Attorney General of Georgia, and *Robert H. Hall,* Assistant Attorney General, for respondent. Reported below: 210 Ga. 665, 82 S. E. 2d 217.

Certiorari Denied.

No. 81. KWIKSET LOCKS, INC. *v.* HILLGREN. C. A. 9th Cir. Certiorari denied. *Fred H. Miller* for petitioner. *Hamer H. Jamieson* for respondent. Reported below: 210 F. 2d 483.

No. 174. PILLO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *C. Zachary Seltzer* for petitioner. *Grover C. Richman, Jr.*, Attorney General of New Jersey, and *Joseph A. Murphy*, Assistant Deputy Attorney General, for respondent. Reported below: 15 N. J. 99, 104 A. 2d 50.

No. 277. FIREMAN'S FUND INDEMNITY CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William Fisher* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 211 F. 2d 773.

No. 278. BORN *v.* LAUBE, ADMINISTRATOR, ET AL. C. A. 9th Cir. Certiorari denied. *Bailey E. Bell* for petitioner. Reported below: 213 F. 2d 407, 214 F. 2d 349.

No. 279. SAWYER *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. *Alfons B. Landa, Arthur D. Condon, Delmar W. Holloman* and *Warren E. Magee* for petitioner. *Vernon W. Thomson*, Attorney General of Wisconsin, and *William J. McCauley* for respondent. Reported below: 266 Wis. 494, 63 N. W. 2d 749.

No. 280. WELLS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John O. Collins* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *I. Henry Kutz* for the United States. Reported below: 214 F. 2d 380.

No. 284. BETTINGER ET AL. *v.* NORTHWESTERN NATIONAL CASUALTY CO. ET AL. C. A. 8th Cir. Certiorari denied. *Robert O. Sullivan* and *Arthur J. Donnelly* for petitioners. *Elmer Wiblishauser* for respondents. Reported below: 213 F. 2d 200.

No. 289. PRUDENCE-BONDS CORP. ET AL. *v.* CHEMICAL BANK & TRUST CO., TRUSTEE. C. A. 2d Cir. Certiorari denied. *Charles M. McCarty* for the Prudence-Bonds Corporation, *Geo. C. Wildermuth* for Castellano, *Samuel Silbiger* for Eddy, and *Aaron Schwartz* for Samson et al., petitioners. *John A. Wilson* and *Willard M. L. Robinson* for respondent. Reported below: 213 F. 2d 443.

No. 291. BERTELSEN *v.* COONEY. C. A. 5th Cir. Certiorari denied. *Irwin J. Askow* and *Harvey L. Hardy* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 213 F. 2d 275.

No. 292. FIRST TRUST & SAVINGS BANK OF ZANESVILLE *v.* FIDELITY-PHILADELPHIA TRUST CO. C. A. 3d Cir. Certiorari denied. *Israel Packel* and *James S. Clifford, Jr.* for petitioner. *Thomas B. K. Ringe* for respondent. Reported below: 214 F. 2d 320.

No. 293. UNITED STATES EX REL. LODUCA *v.* NEELLY, DIRECTOR OF IMMIGRATION AND NATURALIZATION. C. A. 7th Cir. Certiorari denied. *Francis Heisler* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 213 F. 2d 161.

No. 294. HULAHAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *C. Arthur Anderson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General*

Olney, Beatrice Rosenberg and *Richard J. Blanchard* for the United States. Reported below: 214 F. 2d 441.

No. 295. Bowes et al. *v.* City of Chicago et al. Supreme Court of Illinois. Certiorari denied. *Edward R. Johnston* and *Howard B. Bryant* for petitioners. *John J. Mortimer, James A. Velde, Robert J. Nolan* and *Ray Garrett, Jr.* for the City of Chicago, *Clarence H. Ross* for the Great Lakes Dredge & Dock Co., and *Philip A. Lozowick* for the Chicago Park District, respondents. Reported below: 3 Ill. 2d 175, 120 N. E. 2d 15.

No. 296. Gross Income Tax Division of Indiana et al. *v.* Warner Bros. Pictures Distributing Corp. Supreme Court of Indiana. Certiorari denied. *Edwin K. Steers,* Attorney General of Indiana, and *Carl M. Franceschini* and *Lloyd C. Hutchinson,* Deputy Attorneys General, for petitioners. *Joseph J. Daniels* and *Paul N. Rowe* for respondent. Reported below: 233 Ind. 345, 118 N. E. 2d 117.

No. 297. United States *v.* Katz et al. C. A. 1st Cir. Certiorari denied. *Solicitor General Sobeloff* for the United States. *Joseph C. Wells* for respondents. Reported below: 213 F. 2d 799.

No. 298. Western Maryland Railway Co. *v.* Pennsylvania. Supreme Court of Pennsylvania, Middle District. Certiorari denied. *William C. Purnell* for petitioner. *Frank F. Truscott,* Attorney General of Pennsylvania, and *George W. Keitel,* Deputy Attorney General, for respondent. Reported below: 377 Pa. 312, 105 A. 2d 336.

No. 299. Reed *v.* Reed et al. Supreme Court of Florida. Certiorari denied. *Ulysses Erwin Sibley* for petitioner. *W. D. Bell* and *R. K. Bell* for respondents. Reported below: 70 So. 2d 836.

No. 300. CAMPBELL *v.* COMMISSIONER OF PATENTS. United States Court of Customs and Patent Appeals. Certiorari denied. *Harvey L. Lechner* and *Edward H. Davis* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for respondent. Reported below: 41 C. C. P. A. (Pat.) 896, 212 F. 2d 606.

No. 303. METROPOLITAN PETROLEUM CORP. ET AL. *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Certiorari denied. *John W. Davis, Theodore Kiendl, Ralph M. Carson* and *Francis R. Kirkham* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, John R. Benney, Samuel D. Slade* and *Herman Marcuse* for the United States. Reported below: 42 C. C. P. A. (Cust.) 38.

No. 304. NATIONAL TEXTILE & MANUFACTURING CO., INC. *v.* PENNSYLVANIA RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Sidney Basil Levy* for petitioner. *John Vance Hewitt* for respondent. Reported below: 213 F. 2d 466.

No. 314. ROGERS *v.* REPUBLIC PICTURES CORP. ET AL. C. A. 9th Cir. Certiorari denied. *Norman S. Sterry* for petitioner. *Joseph P. Loeb* for respondents. Reported below: 213 F. 2d 662.

No. 315. AUTRY *v.* REPUBLIC PRODUCTIONS, INC. ET AL. C. A. 9th Cir. Certiorari denied. *Martin Gang* and *Milton A. Rudin* for petitioner. *Joseph P. Loeb* for respondents. Reported below: 213 F. 2d 667.

No. 146, Misc. BRADEN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 163, Misc. ALLEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 172, Misc. BANNING *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 213 F. 2d 771.

OCTOBER 19, 1954.

Case Dismissed Under Rule 60.

No. 126. LAUGHLIN *v.* WILSON ET AL. Appeal from the Supreme Court of Texas. Dismissed on motion of appellant pursuant to Rule 60 of the Rules of this Court. *Thurman Arnold* and *Clinton C. Small* for appellant. *Elton M. Hyder, Jr.* and *John D. Hyde* for appellees. Reported below: 153 Tex. ——, 265 S. W. 2d 805.

OCTOBER 25, 1954.

Decisions Per Curiam.

No. 312. GRAYSON-ROBINSON STORES, INC. *v.* LIONEL CORPORATION. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Sidney A. Diamond* for appellant. *Samuel Voltaggio* and *Anthony A. Calandra* for appellee. Reported below: 15 N. J. 191, 104 A. 2d 304.

No. 316. WESTERN AIR LINES, INC. *v.* CALIFORNIA. 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. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *Hugh W. Darling* and *D. P. Renda*

for appellant. *Everett C. McKeage* for appellee. Reported below: 42 Cal. 2d 621, 268 P. 2d 723.

No. 326. S. KLEIN ON THE SQUARE, INC. *v.* LIONEL CORPORATION. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Sidney A. Diamond* and *Murray Gartner* for appellant. Reported below: 307 N. Y. 229, 120 N. E. 2d 802.

Miscellaneous Orders.

No. 414. AIKEN *v.* RICHARDSON. Appeal from the Supreme Court of Georgia. Motion for a stay, referred to the Court by MR. JUSTICE BLACK, denied. *G. Seals Aiken, pro se.* Reported below: 210 Ga. 728, 82 S. E. 2d 646.

No. 131, Misc. ALLEN *v.* RAGEN, WARDEN;
No. 140, Misc. HARN *v.* BANNAN, WARDEN;
No. 152, Misc. GOULDING *v.* BANNAN, WARDEN; and
No. 156, Misc. ROEBUCK *v.* HIATT, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted.

No. 246. DIEHL *v.* LEHIGH VALLEY RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari granted. *Sheldon E. Bernstein* for petitioner. *Thomas Price Mikell* for the Lehigh Valley Railroad Co.; and *Clarence M. Mulholland* and *Richard R. Lyman* for System Federation No. 96, Railway Employes' Department, A. F. of L., et al., respondents. Reported below: 211 F. 2d 95.

No. 302. PARISSI *v.* TELECHRON, INC. ET AL. C. A. 2d Cir. Certiorari granted. *Charles P. Bauer* for petitioner. *Charles H. Walker* and *Charles E. Nichols* for respondents.

Certiorari Denied.

No. 252. Gore et al. *v.* United States Steel Corp. Supreme Court of New Jersey. Certiorari denied. *David Roskein* and *Edwin Brobston* for petitioners. *Josiah Stryker* for respondent. Reported below: 15 N. J. 301, 104 A. 2d 670.

No. 270. Chicago & North Western Railway Co. *v.* Margevich. Appellate Court of Illinois, First District. Certiorari denied. *Otis Lowell Hastings* and *Drennan J. Slater* for petitioner. *James A. Dooley* for respondent. Reported below: 1 Ill. App. 2d 162, 116 N. E. 2d 914.

No. 281. Specialties Development Corp. *v.* Randolph Laboratories, Inc.; and

No. 348. Randolph Laboratories, Inc. *v.* Specialties Development Corp. C. A. 3d Cir. Certiorari denied. *Floyd H. Crews* for Specialties Development Corp. *W. B. Morton* for Randolph Laboratories, Inc. Reported below: 213 F. 2d 873.

No. 286. Hirshon Trust et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Randolph E. Paul* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *Melva M. Graney* for respondent. Reported below: 213 F. 2d 523.

No. 287. Remington Rand, Inc. *v.* Bush et al. C. A. 2d Cir. Certiorari denied. *John W. Davis, Homer Cummings, Raymond E. Hackett, Francis J. McNamara* and *William R. Meagher* for petitioner. *Robert P. Butler* and *Valentine J. Sacco* for respondents. Reported below: 213 F. 2d 456.

No. 288. GREAT AMERICAN INDEMNITY CO. *v.* SALTZMAN. C. A. 8th Cir. Certiorari denied. *E. L. McHaney, Jr.* and *James M. McHaney* for petitioner. *Thomas B. Tinnon* for respondent. Reported below: 213 F. 2d 743.

No. 290. WILLIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. Wray Gill* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 213 F. 2d 624.

No. 305. ESTATE OF GODLEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Allen S. Hubbard* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *Melva M. Graney* for respondent. Reported below: 213 F. 2d 529.

No. 307. DRAPER & CO., INC. *v.* COMMODITY CREDIT CORP. C. A. 1st Cir. Certiorari denied. *Edward C. Park* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for respondent. Reported below: 213 F. 2d 36.

No. 310. WASHINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Don Eastvold,* Attorney General of Washington, and *Harold A. Pebbles,* Special Assistant Attorney General, for petitioner. *Solicitor General Sobeloff* and *Assistant Attorney General Morton* for the United States. Reported below: 214 F. 2d 33.

No. 317. GREENVILLE AVENUE STATE BANK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William L. Storey* for petitioner. *Solicitor General Sobeloff, Assist-*

ant Attorney General Olney, Beatrice Rosenberg and *Joseph A. Barry* for the United States. Reported below: 213 F. 2d 252.

No. 323. ASSINIBOINE INDIAN TRIBE *v.* UNITED STATES. Court of Claims. Certiorari denied. *Louis A. Gravelle, Raymond N. Beebe, Adrien F. Busick* and *Delmar W. Holloman* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *Fred W. Smith* for the United States. Reported below: 128 Ct. Cl. 617, 121 F. Supp. 906.

No. 324. GOODY *v.* RAXOR CORPORATION ET AL. Supreme Court of New York, County of New York. Certiorari denied. *Abraham M. Lowenthal* and *Malcolm S. Mason* for petitioner. Reported below: 307 N. Y. 229, 120 N. E. 2d 802.

No. 325. INSURANCE COMPANY OF NORTH AMERICA *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert B. Ely, III* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Gray Thoron* and *Samuel D. Slade* for the United States. Reported below: 128 Ct. Cl. 757, 121 F. Supp. 649.

No. 327. S. KLEIN ON THE SQUARE, INC. *v.* LIONEL CORPORATION. Court of Appeals of New York. Certiorari denied. *Sidney A. Diamond* and *Murray Gartner* for petitioner. *Harry A. Gottlieb* for respondent. Reported below: 307 N. Y. 229, 120 N. E. 2d 802.

No. 328. BROWNELL, ATTORNEY GENERAL, ET AL. *v.* ROTH. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Sobeloff* for petitioners. *J. Albert Woll, Herbert S. Thatcher* and *James A. Glenn* for respondent. Reported below: —— U. S. App. D. C. ——, 215 F. 2d 500.

No. 330. SHAFFER, TRUSTEE, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Thurman Arnold* and *Norman Diamond* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 128 Ct. Cl. 299, 121 F. Supp. 656.

No. 331. HOHENSEE *v.* MANCHESTER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 332. BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Sobeloff* for petitioner. *Samuel B. Stewart, Jr., Christopher M. Jenks* and *E. F. Colladay* for respondent. Reported below: —— U. S. App. D. C. ——, 214 F. 2d 855.

No. 285. CHESSMAN *v.* CALIFORNIA ET AL. Supreme Court of California. Petition for writ of certiorari denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Jerome A. Duffy* for petitioner. *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Chief Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondents.

No. 306. BRIGGS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *W. P. Sandridge* and *Leon L. Rice, Jr.* for Briggs, and *Roy L. Deal* for

Clark, petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce* and *Fred G. Folsom* for the United States. Reported below: 214 F. 2d 699.

No. 311. MARIENFELD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Harry C. Blanton* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce* and *Fred G. Folsom* for the United States. Reported below: 214 F. 2d 632.

No. 318. LANE ET AL., CONSTITUTING THE FLORIDA STATE RACING COMMISSION, *v.* VOLUSIA COUNTY KENNEL CLUB, INC. ET AL. Supreme Court of Florida. Petition for writ of certiorari denied for the reason that the judgment below is based on state grounds adequate to support it. *Richard W. Ervin,* Attorney General of Florida, *Fred M. Burns* and *George E. Owen,* Assistant Attorneys General, and *Robert H. Carlton* for petitioners. *Robert H. Anderson* and *D. P. S. Paul* for respondents. Reported below: 73 So. 2d 884.

No. 136, Misc. DAVIS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 141, Misc. MCGRIFF *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 147, Misc. BAYLESS *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 190, Misc. RUPP *v.* TEETS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 214 F. 2d 312.

NOVEMBER 3, 1954.

Case Dismissed Under Rule 60.

No. 414. AIKEN *v.* RICHARDSON. Appeal from the Supreme Court of Georgia. Dismissed on motion of appellant, consented to by appellee, under Rule 60 of the Rules of this Court. *G. Seals Aiken, pro se. Hugh M. Dorsey* for appellee. Reported below: 210 Ga. 728, 82 S. E. 2d 646.

NOVEMBER 6, 1954.

Order Granting Stay of Execution.

No. ——. IRVIN *v.* CHAPMAN, SUPERINTENDENT, RAIFORD STATE PENITENTIARY.

Upon consideration of the application of counsel,

It is ordered that execution of the sentence of death imposed upon the petitioner, Walter Irvin, be, and the same is hereby, stayed pending the filing and disposition of a petition for writ of certiorari to review the judgment of the Supreme Court of Florida entered November 5, 1954, provided the petition for writ of certiorari is filed on or before November 20, 1954. In the event certiorari is granted, this stay is to continue until final disposition of the case. *Thurgood Marshall, Jack Greenberg* and *Frank D. Reeves* for petitioner. Reported below: 75 So. 2d 591. [For order denying certiorari, see *post*, p. 915.]

NOVEMBER 8, 1954.

Decisions Per Curiam.

No. 118. GARCIA *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 347 U. S. 1011, to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the petition

for writ of habeas corpus upon the ground that the cause is moot. *Harry Wolpin* and *A. L. Wirin* for petitioner. *Solicitor General Sobeloff* for respondent. Reported below: 207 F. 2d 693.

No. 274. PHILLIPS PETROLEUM CO. *v.* CABOT CARBON CO. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for its reconsideration in the light of the latest order of the Corporation Commission of Oklahoma pertaining to the order in question. *Rayburn L. Foster, Harry D. Turner, R. M. Williams* and *Cecil C. Hamilton* for petitioner. *Robert M. Rainey* and *Streeter B. Flynn* for respondent. Reported below: 210 F. 2d 841.

No. 379. WEBB ET AL. *v.* STATE UNIVERSITY OF NEW YORK ET AL. Appeal from the United States District Court for the Northern District of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Clifford H. Searl* and *Daniel F. Mathews* for appellants. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, *John C. Crary, Jr.,* Assistant Attorney General, and *Irving I. Waxman* for appellees. Reported below: 125 F. Supp. 910.

No. 193, Misc. MARRON *v.* RAGEN, WARDEN. Appeal from the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1254 (2).*

*As amended by order entered December 6, 1954, *post,* p. 893.

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No. 209, Misc. SMITH *v.* WESTCHESTER COUNTY BAR ASSOCIATION. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was taken as a petition for writ of certiorari, as required by 28 U. S. C. § 2103, certiorari is denied. Reported below: 307 N. Y. 677, 120 N. E. 2d 851.

Miscellaneous Orders.

No. 320. MICHIGAN-WISCONSIN PIPE LINE CO. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL.; and

No. 321. NATURAL GAS PIPELINE CO. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Appeals from the Supreme Court of Oklahoma. Motion of Phillips Petroleum Company for leave to file motion to dismiss granted. *Jack T. Conn* and *Arthur R. Seder, Jr.* for appellant in No. 320. *Clarence H. Ross* and *Warren T. Spies* for appellant in No. 321. *D. H. Culton* and *Coleman Hayes* for appellants in Nos. 320 and 321. *Mac Q. Williamson,* Attorney General of Oklahoma, for the Corporation Commission, *T. Murray Robinson* and *Leon Shipp* for certain mineral owners in Texas County, Oklahoma; and *Rayburn L. Foster, Harry D. Turner, R. M. Williams* and *Cecil C. Hamilton* for the Phillips Petroleum Company, appellees. Reported below: 272 P. 2d 425.

No. 367. FEDERAL POWER COMMISSION *v.* OREGON ET AL. C. A. 9th Cir. Certiorari granted. Petition of Portland General Electric Co. for leave to intervene denied. *Solicitor General Sobeloff* and *Willard W. Gatchell* for petitioner. *Robert Y. Thornton,* Attorney General of Oregon, *E. G. Foxley,* Deputy Attorney General, and *Arthur G. Higgs,* Assistant Attorney General, for respondents. *Clarence D. Phillips* for the Portland General Electric Co. Reported below: 211 F. 2d 347.

No. 138, Misc. Ex parte Breeding;
No. 171, Misc. Summey *v.* Skeen, Warden;
No. 185, Misc. McGuinn *v.* Lindsay, Superintendent, District of Columbia Reformatory, et al.;
No. 186, Misc. Nicholson *v.* California;
No. 195, Misc. Ex parte King; and
No. 197, Misc. Ex parte Williams. Motions for leave to file petitions for writs of habeas corpus denied.

No. 139, Misc. Saunders *v.* Levin, U. S. District Judge, et al.; and
No. 194, Misc. Tubb *v.* United States. Motions for leave to file petitions for writs of mandamus denied.

No. 142, Misc. Cordts *v.* Ragen, Warden; and
No. 164, Misc. Ephraim *v.* Ragen, Warden. Motions for leave to file petitions for writs of certiorari denied.

Probable Jurisdiction Noted.

No. 191. Natural Gas Pipeline Co. *v.* Panoma Corporation et al. Appeal from the Supreme Court of Oklahoma. Probable jurisdiction noted. *D. H. Culton, Coleman Hayes, Clarence H. Ross, Warren T. Spies* and *S. A. L. Morgan* for appellant. *Mac Q. Williamson,* Attorney General of Oklahoma, for the Corporation Commission of Oklahoma, and *T. Murray Robinson* and *Leon Shipp* for the Panoma Corporation, appellees. Reported below: 271 P. 2d 354.

No. 321. Natural Gas Pipeline Co. *v.* Corporation Commission of Oklahoma et al. Appeal from the Supreme Court of Oklahoma. Probable jurisdiction noted. *Clarence H. Ross, Warren T. Spies, D. H. Culton* and *Coleman Hayes* for appellant. *Mac Q. Williamson,* Attorney General of Oklahoma, for the Corporation Com-

mission, *T. Murray Robinson* and *Leon Shipp* for certain mineral owners in Texas County, Oklahoma; and *Rayburn L. Foster, Harry D. Turner, R. M. Williams* and *Cecil C. Hamilton* for the Phillips Petroleum Company, appellees. Reported below: 272 P. 2d 425.

Certiorari Granted. (*See also Nos. 274 and 367, supra.*)

No. 333. PINO *v.* NICOLLS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari granted. *Jacob Spiegel* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 215 F. 2d 237.

No. 337. NORWOOD ET AL. *v.* KIRKPATRICK, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 3d Cir. Certiorari granted. *B. Nathaniel Richter* and *Ernest Ray White* for petitioners. *H. Francis De Lone* and *William H. Lowery* for respondent.

No. 375. CARROLL ET AL., DOING BUSINESS AS HARRY B. HOGAN PAINTING CO., ET AL. *v.* LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC CO. C. A. 8th Cir. Certiorari granted. *Shields M. Goodwin* for petitioners. *Edward L. Wright* for respondent. Reported below: 216 F. 2d 808.

No. 357. MANEJA ET AL. *v.* WAIALUA AGRICULTURAL CO., LTD.; and

No. 358. WAIALUA AGRICULTURAL CO., LTD. *v.* MANEJA ET AL. C. A. 9th Cir. Certiorari granted. The Solicitor General is invited to participate in oral argument on behalf of the Secretary of Labor, as *amicus curiae*. *Richard Gladstein* and *Norman Leonard* for Maneja et al. *Rufus G. Poole, Milton C. Denbo* and *Philip Levy* for

the Waialua Agricultural Co., Ltd. *Solicitor General Sobeloff* filed a memorandum for the Secretary of Labor, as *amicus curiae*. Reported below: 216 F. 2d 466.

Certiorari Denied. (*See also Misc. Nos. 193, 209, 142 and 164, supra.*)

No. 262. Fischer & Porter Co. *v.* Brooks Rotameter Co. C. A. 3d Cir. Certiorari denied. *Leonard L. Kalish* for petitioner. *J. Edward Shinn* for respondent. Reported below: 211 F. 2d 400.

No. 313. Arvey Corporation *v.* Fugate, Director of Revenue of Colorado. Supreme Court of Colorado. Certiorari denied. *Floyd E. Thompson* and *John R. Coen* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank A. Wachob,* Deputy Attorney General, and *Omer Griffin,* Assistant Attorney General, for respondent. Reported below: 129 Colo. 595, 272 P. 2d 652.

No. 329. Thomas Rigging Co. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *Allan L. Sapiro* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 211 F. 2d 153.

No. 334. Bower *v.* Eastern Air Lines, Inc. C. A. 3d Cir. Certiorari denied. *Oscar Brown* and *Samuel Kagle* for petitioner. *Walter B. Gibbons* and *W. Glen Harlan* for respondent. Reported below: 214 F. 2d 623.

No. 335. Linde *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Stephen H. Hart* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *L. W. Post* for respondent. Reported below: 213 F. 2d 1.

No. 336. METRAKOS *v.* CLEVELAND UNION TERMINALS CO. C. A. 6th Cir. Certiorari denied. *William J. Corrigan* and *Theodore T. Sindell* for petitioner. *Paul Lamb* for respondent. Reported below: 212 F. 2d 792.

No. 338. BRANYAN & PETERSON, INC. ET AL. *v.* THOMPSON, COMMISSIONER OF REVENUES FOR ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *William H. Daggett* for petitioners. *O. T. Ward* for respondent. Reported below: 223 Ark. 705, 268 S. W. 2d 376.

No. 339. ATLANTIC COAST LINE RAILROAD CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Charles Cook Howell* and *Frank G. Kurka* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Morton Hollander* for the United States. Reported below: 128 Ct. Cl. 747, 120 F. Supp. 917.

No. 340. HOPKINS, ADMINISTRATRIX, *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Charles Lakatos* for petitioner. *C. Brewster Rhoads* and *George G. Chandler* for respondent. Reported below: 212 F. 2d 623.

No. 341. HALL *v.* BATTLE, GOVERNOR, ET AL. Supreme Court of Appeals of Virginia and/or Circuit Court of the City of Richmond. Certiorari denied. *Bernard Cushman* and *Justus R. Moll* for petitioner. *J. Lindsay Almond, Jr.,* Attorney General of Virginia, and *C. F. Hicks,* Assistant Attorney General, for respondents.

No. 342. ALEXANDER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *L. N. D. Wells, Jr.* for petitioner. *John Ben Shepperd,* Attorney General of

Texas, and *Milton Richardson* and *W. Edmund Notestine*, Assistant Attorneys General, for respondent. Reported below: 160 Tex. Cr. R. ——, 274 S. W. 2d 81.

No. 343. American Federation of Musicians et al. *v.* Stein. C. A. 6th Cir. Certiorari denied. *Murray Gartner* for petitioners. *Jonathan J. Foley, Jr.* for respondent. Reported below: 213 F. 2d 679.

No. 344. Vaughan *v.* Petroleum Conversion Corp. et al. C. A. 2d Cir. Certiorari denied. *James A. Vaughan, pro se.* *Thomas Cooch* and *Morgan P. Ames* for respondents. Reported below: 211 F. 2d 499.

No. 345. Ling Share Yee et al. *v.* Acheson, Secretary of State. C. A. 3d Cir. Certiorari denied. *Samuel B. Waterman* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for respondent. Reported below: 214 F. 2d 4.

No. 346. Vulcan Furniture Manufacturing Corp. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Jess G. Schiffmann* and *Nolan P. Chipman* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 214 F. 2d 369.

No. 347. Hartford Accident & Indemnity Co. *v.* Foster et al., trading as J. M. Foster & Co. C. A. 3d Cir. Certiorari denied. *Philip L. Leidy* for petitioner. *William A. Schnader* and *Earl G. Harrison* for respondents. Reported below: 214 F. 2d 608.

No. 349. Roy *v.* Roy. Supreme Court of Florida. Certiorari denied. *John Alexander* and *Joseph Sitnick*

for petitioner. *Lucien H. Mercier, Harold A. Kertz* and *N. Meyer Baker* for respondent. Reported below: 73 So. 2d 294.

No. 350. SAPERSTEIN *v.* NEW YORK. Superior Court, Appellate Division, and the Supreme Court of New Jersey. Certiorari denied. *Max Mehler* and *Bennett Boskey* for petitioner. *Frank S. Hogan, Charles W. Manning* and *Charles V. Webb, Jr.* for respondent. Reported below: 15 N. J. 613, 106 A. 2d 41; 30 N. J. Super. 373, 104 A. 2d 842.

No. 352. HEARST CONSOLIDATED PUBLICATIONS, INC. *v.* STEVENSON. C. A. 2d Cir. Certiorari denied. *William J. Dempsey* for petitioner. *Frank H. Gordon* for respondent. Reported below: 214 F. 2d 902.

No. 354. LAMBERT ET AL., DOING BUSINESS AS LOW GAP COAL CO., *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 4th Cir. Certiorari denied. *Fred B. Greear* and *Robert T. Winston, Jr.* for petitioners. *Harrison Combs* and *M. E. Boiarsky* for respondents. Reported below: 214 F. 2d 487.

No. 355. HAINSWORTH *v.* HARRIS COUNTY COMMISSIONERS' COURT. Supreme Court of Texas. Certiorari denied. *Robert Wendell Hainsworth, pro se. Albert J. De Lange* for respondent. Reported below: 153 Tex. ——, 269 S. W. 2d 332.

No. 359. PENNSYLVANIA EX REL. TANNER *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Valera Grapp* and *Max V. Schoonmaker* for petitioner. Reported below: 378 Pa. 429, 106 A. 2d 401.

No. 360. Louisiana & Arkansas Railway Co. *v.* Johnson. C. A. 5th Cir. Certiorari denied. *M. Truman Woodward, Jr., Joseph R. Brown* and *Elizabeth R. Haak* for petitioner. *Robert Weinstein* for respondent. Reported below: 214 F. 2d 290.

No. 364. Kloiber et al. *v.* Pennsylvania. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Everett Kent* for petitioners. Reported below: 378 Pa. 412, 106 A. 2d 820.

No. 365. Povey *v.* Midvale Company. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Lester J. Schaffer* for petitioner. *Frederick H. Knight* for respondent.

No. 366. Knickerbocker Printing Corp. *v.* United States. C. A. 2d Cir. Certiorari denied. *Monroe Goldwater* and *James L. Goldwater* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *John F. Davis* for the United States. Reported below: 212 F. 2d 894.

No. 369. Leo J. Meyberg Co. *v.* Eureka Williams Corp. C. A. 9th Cir. Certiorari denied. *H. W. Glensor* for petitioner. *Maurice D. L. Fuller* and *Thomas E. Haven* for respondent. Reported below: 215 F. 2d 100.

No. 371. Guessefeldt *v.* Brownell, Successor to the Alien Property Custodian, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert F. Klepinger, William W. Barron* and *Charles R. Richey* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Townsend, James D. Hill* and *Irwin A. Seibel* for respondents. Reported below: —— U. S. App. D. C. ——, 213 F. 2d 24.

No. 383. BURO ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Reuben L. Haskell* for petitioners. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *John R. Davison,* Assistant Attorney General, for respondent. Reported below: 306 N. Y. 730, 117 N. E. 2d 909.

No. 353. COWLES PUBLISHING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *David A. Watts* and *William N. Haddad* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Nancy M. Sherman* for respondent. Reported below: 214 F. 2d 708.

No. 361. ST. LOUIS AMUSEMENT CO. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Russell Hardy* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Warren E. Baker* and *J. Smith Henley* for the United States and the Federal Communications Commission; and *Samuel I. Rosenman* and *Ambrose Doskow* for the Columbia Broadcasting System, Inc., respondents.

No. 51, Misc. FANNING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80, Misc. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 143, Misc. KUBUS *v.* SWENSON, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: —— Minn. ——, 65 N. W. 2d 177.

No. 145, Misc. SYKES *v.* PEPPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 213 F. 2d 871.

No. 149, Misc. OWENS *v.* MAYO, PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 151, Misc. BLACKMORN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 155, Misc. DRAISNER *v.* LISS REALTY CO., INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Everett M. Raffel* for petitioner. Reported below: —— U. S. App. D. C. ——, 211 F. 2d 808.

No. 157, Misc. WILLIAMS *v.* LOONEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 165, Misc. BOBO *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 167, Misc. KAMROWSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 169, Misc. LINDSEY *v.* ST. PAUL MERCURY INDEMNITY CO. C. A. 5th Cir. Certiorari denied. Reported below: 213 F. 2d 535.

No. 173, Misc. FRIDAY *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

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No. 175, Misc. PLUE *v.* CUMMINGS, WARDEN. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 179, Misc. GEACH *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 183, Misc. TILLMAN ET AL. *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 184, Misc. JONES *v.* NEW YORK. Supreme Court of New York, Appellate Division, Second Department. Certiorari denied.

No. 189, Misc. GARNER *v.* ILLINOIS. Criminal Court of Cook County. Certiorari denied.

No. 191, Misc. BROWN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 192, Misc. COOPER ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Joseph Linde* and *Nathan Kestnbaum* for petitioners. *John J. O'Brien* for respondent. Reported below: 307 N. Y. 253, 120 N. E. 2d 813.

No. 196, Misc. EMMINO *v.* NEW YORK. Supreme Court of New York, Appellate Division, Second Department. Certiorari denied.

No. 198, Misc. COE *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 200, Misc. TRENT *v.* BLALOCK, SUPERINTENDENT, SOUTHWESTERN STATE HOSPITAL. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 201, Misc. HORTON *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 202, Misc. BROCCOLI *v.* KINDELAN, WARDEN. Supreme Court of Rhode Island. Certiorari denied.

No. 205, Misc. GARRISON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 378 Pa. 344, 106 A. 2d 587.

No. 206, Misc. SAM *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 207, Misc. KOSTAL *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 123 Cal. App. 2d 120, 266 P. 2d 205.

No. 208, Misc. MARRON *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 210, Misc. WATSON *v.* SCHOOL DISTRICT OF McKEESPORT. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Ralph E. Powe* for petitioner. *Elder W. Marshall* for respondent. Reported below: 377 Pa. 495, 105 A. 2d 576.

No. 214, Misc. CAMPIGLIA *v.* NEW YORK. Supreme Court of New York, Appellate Division, Second Department. Certiorari denied. Reported below: 283 App. Div. 1075, 131 N. Y. S. 2d 897.

No. 215, Misc. STINCHCOMB *v.* CALIFORNIA ET AL. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 218, Misc. MacArthur *v.* California. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 125 Cal. App. 2d 212, 270 P. 2d 37.

No. 166, Misc. Aitchison *v.* Maryland. Court of Appeals of Maryland. Motion for leave to file brief of Kenneth C. Hitchcock et al., as *amici curiae,* denied. Certiorari denied. Petitioner *pro se. W. Giles Parker,* Assistant Attorney General of Maryland, for respondent. Reported below: 204 Md. 538, 105 A. 2d 495.

November 15, 1954.

Decisions Per Curiam.

No. 28. Rice *v.* Sioux City Memorial Park Cemetery, Inc. et al. Certiorari, 347 U. S. 942, to the Supreme Court of Iowa. Argued November 8–9, 1954. Decided November 15, 1954. *Per Curiam:* The judgment is affirmed by an equally divided Court. *Lowell C. Kindig* argued the cause for petitioner. With him on the brief was *Neil R. McCluhan. Jesse E. Marshall* argued the cause for respondents. With him on the brief was *H. C. Harper. Will Maslow, Leo Pfeffer, Shad Polier* and *Joseph B. Robison* filed a brief for the American Jewish Congress, as *amicus curiae.* Reported below: 245 Iowa 147, 60 N. W. 2d 110.

No. 404. Amsel et al., doing business as Amsel Dental Laboratory, *v.* Brooks et al., Members of the Dental Commission of Connecticut. Appeal from the Supreme Court of Errors of Connecticut. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Margaret Driscoll* and *John J. Darcy* for appellants. *William L. Beers,* Attorney General of Connecticut, and *Louis Weinstein,* Assistant

Attorney General, for appellees. Reported below: 141 Conn. 288, 106 A. 2d 152.

No. 418. West Virginia Motor Truck Association, Inc. et al. *v.* Public Service Commission of West Virginia et al. Appeal from the United States District Court for the Southern District of West Virginia. *Per Curiam:* The judgment is affirmed. Mr. Justice Reed took no part in the consideration or decision of this case. *Francis W. McInerny* and *David G. Macdonald* for appellants. *John G. Fox,* Attorney General of West Virginia, and *Amos A. Bolen* for appellees. Reported below: 123 F. Supp. 206.

Miscellaneous Orders.

No. 16. Silesian Holding Co. et al. *v.* Union Bank of Switzerland et al.; and

No. 17. Brownell, Attorney General, Successor to the Alien Property Custodian, *v.* Union Bank of Switzerland et al. On petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit. The motion to defer consideration of the petitions for writs of certiorari until March 1, 1955, is granted. *Horace G. Hitchcock* for the Silesian Holding Company, *William Gilligan* for the Silesian-American Corporation, and *Charles E. Scribner* for the Bondholders Protective Committee, petitioners in No. 16. *Ralph D. Ray* was also of counsel. *Robert L. Stern,* then Acting Solicitor General, and *William H. Timbers* for petitioner in No. 17. *Lawrence J. McKay* and *Dudley B. Tenney* for respondents. Reported below: 204 F. 2d 603.

No. 20. Ellis *v.* Dixon et al., Members of the Board of Education of the City of Yonkers. Certiorari, 347 U. S. 926, to the Appellate Division of the Supreme Court of New York, Second Department.

Argued October 18, 1954. This case is ordered restored to the docket for reargument before a full bench. Counsel are requested to argue both the merits and the jurisdiction of this Court. *Emanuel Redfield* for petitioner. *J. Raymond Hannon* and *John Preston Phillips* for respondents. *Seymour B. Quel, Daniel T. Scannell* and *Helen R. Cassidy* filed a brief for the City of New York on behalf of the Board of Education, as *amicus curiae,* urging affirmance. Reported below: 281 App. Div. 987, 120 N. Y. S. 2d 854.

Certiorari Granted.

No. 368. MARCELLE *v.* ESTATE OF LUPIA ET AL. C. A. 2d Cir. Certiorari granted. *Solicitor General Sobeloff* for petitioner. *Leon London* filed a waiver of the right to file a brief in opposition for respondents. Reported below: 214 F. 2d 942.

No. 374. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, *v.* PEDREIRO. C. A. 2d Cir. Certiorari granted. *Solicitor General Sobeloff* for petitioner. Reported below: 213 F. 2d 768.

No. 376. PETERS *v.* HOBBY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Thurman Arnold, Abe Fortas, Paul A. Porter* and *Milton V. Freeman* for petitioner. *Solicitor General Sobeloff* for respondents.

Certiorari Denied.

No. 308. BITTERLING *v.* MAPLE ISLAND FARM, INC. C. A. 8th Cir. Certiorari denied. *Warren E. Burger, R. J. Faricy* and *R. A. Moore* for petitioner. *M. J. Doherty* and *Pierce Butler* for respondent. Reported below: 209 F. 2d 867.

No. 372. THAYER COMPANY ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Reginald Heber Smith* for petitioners. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli, Norton J. Come* and *Irving M. Herman* for respondent. Reported below: 213 F. 2d 748.

No. 373. WISCONSIN ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 7th Cir. Certiorari denied. *Vernon W. Thomson,* Attorney General of Wisconsin, *Harold H. Persons* and *Roy G. Tulane,* Assistant Attorneys General, and *William E. Torkelson* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Melvin Richter, Willard W. Gatchell, John C. Mason* and *Louis C. Kaplan* for respondent. Reported below: 214 F. 2d 334.

No. 377. DUGGAN, TRUSTEE, ET AL. *v.* MAGIDSON, EXECUTRIX. C. A. 8th Cir. Certiorari denied. *Geo. O. Durham, Sherman Landau* and *E. M. Munger* for petitioners. Reported below: 212 F. 2d 748.

No. 397. JOYCE ET AL. *v.* DELL ET AL. Supreme Court of Minnesota. Certiorari denied. Petitioners *pro se. Michael J. Doherty* for respondents. Reported below: —— Minn. ——, 65 N. W. 2d 581.

No. 401. TEXAS GAS TRANSMISSION CORP. *v.* ATKINS, COMMISSIONER OF FINANCE AND TAXATION OF TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Edward P. Russell* for petitioner. *George F. McCanless,* Attorney General of Tennessee, *Allison B. Humphreys,* Solicitor General, and *Milton P. Rice,* Assistant Attorney General, for respondent. Reported below: 197 Tenn. 123, 270 S. W. 2d 384.

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No. 25, Misc. GICINTO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Homer A. Cope, Donald W. Browne* and *Walter A. Raymond* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 212 F. 2d 8.

No. 27, Misc. HOPWOOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States.

No. 134, Misc. WISE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 212 F. 2d 440.

Rehearing Denied.

No. 46. KUCZYNSKI *v.* BURKE, WARDEN, *ante*, p. 837;

No. 86. COLORADO INTERSTATE GAS CO. *v.* FEDERAL POWER COMMISSION, *ante*, p. 818;

No. 106. STAPLING MACHINES CO. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI, ET AL., *ante*, p. 802;

No. 188. NICHOLS ET AL. *v.* LONG ISLAND LIGHTING CO. ET AL., *ante*, p. 827;

No. 26, Misc. ARCHIE *v.* SHELL OIL CO., INC. ET AL., *ante*, p. 843;

No. 64, Misc. WAGNER *v.* RAGEN, WARDEN, *ante*, p. 846; and

No. 90, Misc. BARKEIJ *v.* LOCKHEED AIRCRAFT CORP., *ante*, p. 847. Petitions for rehearing denied.

NOVEMBER 22, 1954.

Decisions Per Curiam.

No. 351. LOUISIANA PUBLIC SERVICE COMMISSION ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Louisiana. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Fred S. LeBlanc,* Attorney General of Louisiana, *Joel B. Dickinson,* Assistant Attorney General, and *Robert A. Ainsworth, Jr.* for the Louisiana Public Service Commission, and *Louis A. Schwartz* for the New Orleans Traffic & Transportation Bureau et al., appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Harry McCall, William E. Davis, A. J. Dixon, Harold E. Spencer* and *Y. D. Lott* for the Arkansas & Louisiana Railway Co. et al., appellees. Reported below: 125 F. Supp. 180.

No. 286, Misc. MCVEIGH *v.* FLORIDA. Appeal from the Supreme Court of Florida. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Zach H. Douglas* for appellant. Reported below: 73 So. 2d 694.

Miscellaneous Orders.

Pursuant to the provisions of Title 28, U. S. C., § 42, It is ordered that MR. JUSTICE FRANKFURTER be, and he is hereby, temporarily assigned to the Second Circuit as Circuit Justice.

No. 261. GRANVILLE-SMITH *v.* GRANVILLE-SMITH. Certiorari, *ante,* p. 810, to the United States Court of Appeals for the Third Circuit. Leave to submit this case without oral argument is denied. The case is restored to the docket for argument and *Erwin N. Griswold, Esq.,* is invited to appear and present oral argument, as *amicus*

curiae, in support of the judgment below. *Abe Fortas, George H. T. Dudley* and *Milton V. Freeman* for petitioner. *Warren H. Young* for respondent. Reported below: 214 F. 2d 820.

No. 1. BROWN ET AL. *v.* BOARD OF EDUCATION OF TOPEKA ET AL., 347 U. S. 483;

No. 2. BRIGGS ET AL. *v.* ELLIOTT ET AL., 347 U. S. 483;

No. 3. DAVIS ET AL. *v.* COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL., 347 U. S. 483;

No. 4. BOLLING ET AL. *v.* SHARPE ET AL., 347 U. S. 497; and

No. 5. GEBHART ET AL. *v.* BELTON ET AL., 347 U. S. 483. In view of the absence of a full Court these cases, now scheduled for argument December 6, 1954, are continued.

Probable Jurisdiction Noted.

No. 233. INTERSTATE COMMERCE COMMISSION *v.* STONE'S EXPRESS, INC.; and

No. 363. ST. JOHNSBURY TRUCKING CO., INC. ET AL. *v.* STONE'S EXPRESS, INC. Appeals from the United States District Court for the District of Massachusetts. Probable jurisdiction noted. *Edward M. Reidy* for appellant in No. 233. *Sterry R. Waterman* and *S. Harrison Kahn* for appellants in No. 363. *Joseph Rotwein* for appellee. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Charles H. Weston* filed a memorandum for the United States in opposition to the motion to affirm in No. 233. Reported below: 122 F. Supp. 955.

Certiorari Granted.

No. 387. MITCHELL, SECRETARY OF LABOR, *v.* C. W. VOLLMER & CO., INC. C. A. 5th Cir. Certiorari granted. *Solicitor General Sobeloff* for petitioner. Reported below: 214 F. 2d 132.

No. 394. In re Levy. C. A. 5th Cir. Certiorari granted. *Bernard A. Golding* for petitioner. Reported below: 214 F. 2d 331.

Certiorari Denied.

No. 271. Seltenreich et al., doing business as Fairbanks Air Service, et al. *v.* Town of Fairbanks et al. C. A. 9th Cir. Certiorari denied. *Hubert A. Gilbert* for petitioners. *Theodore I. Seamon* for respondents. Reported below: 211 F. 2d 83.

No. 382. Barreiro *v.* Brownell, Attorney General. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for respondent. Reported below: 215 F. 2d 585.

No. 386. Kafes *v.* United States. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *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: 214 F. 2d 887.

No. 388. Talanker *v.* United States. C. A. 2d Cir. Certiorari denied. *Samuel Mezansky* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 215 F. 2d 580.

No. 389. Foreman & Clark, Inc. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *George R. Richter, Jr.* for petitioner. *Solicitor General Sobeloff, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 215 F. 2d 396.

No. 392. PURE FOODS, INC. *v.* MINUTE MAID CORP. C. A. 5th Cir. Certiorari denied. *William C. Martin* for petitioner. *J. Thomas Gurney* for respondent. Reported below: 214 F. 2d 792.

No. 396. MILCO UNDERGARMENT CO., INC. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Reginald S. Hemingway* for petitioners. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Samuel M. Singer* for respondent. Reported below: 212 F. 2d 801.

No. 398. LEWIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Robert N. Gorman* and *Charles E. Lester* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 215 F. 2d 84.

No. 384. UNITED STATES *v.* HUNTER. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Sobeloff* for the United States. Reported below: 214 F. 2d 356.

No. 118, Misc. JACKSON *v.* ALABAMA. Court of Appeals of Alabama. Certiorari denied. *H. A. Bradshaw* for petitioner. *Si Garrett,* Attorney General of Alabama, and *James L. Screws* and *Paul T. Gish, Jr.,* Assistant Attorneys General, for respondent. Reported below: 37 Ala. App. 519, 72 So. 2d 114.

No. 174, Misc. BROWN *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Maury Hughes* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Rudy G. Rice, Frank Pinedo* and *Katherine W. Conti,* Assistant Attorneys General, for respondent. Reported below: 160 Tex. Cr. R. ——, 267 S. W. 2d 819.

No. 219, Misc. MONAHAN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *George F. Hetfield* and *George L. Feaster* for petitioner. *Hyman Isaac* for respondent. Reported below: 16 N. J. 83, 106 A. 2d 287.

Rehearing Denied.

No. 11, Original. MISSISSIPPI *v.* LOUISIANA, *ante*, p. 805. Petition for rehearing of the motion for leave to intervene denied.

No. 736, October Term, 1953. MCRAE *v.* WOODS, ACTING HOUSING EXPEDITER, 347 U. S. 1017. Motion for leave to file a second petition for rehearing denied.

No. 79. LAS VEGAS MERCHANT PLUMBERS ASSOCIATION ET AL. *v.* UNITED STATES, *ante*, p. 817;

No. 85. ARTUKOVIC *v.* IVANCEVIC, CONSUL GENERAL OF THE FEDERAL PEOPLES' REPUBLIC OF YUGOSLAVIA, ET AL., *ante*, p. 818;

No. 88. WILLIAMS *v.* CAROLINA LIFE INSURANCE CO. ET AL., *ante*, p. 802;

No. 111. HARRIS ET AL. *v.* STANLEY, GOVERNOR, ET AL., *ante*, p. 803;

No. 151. NILVA ET AL. *v.* UNITED STATES, *ante*, p. 825;

No. 152. JAYNE ET AL., JUDGES OF THE CIRCUIT COURT OF WAYNE COUNTY, ET AL. *v.* CITY OF DETROIT ET AL., *ante*, p. 802;

No. 167. POMPROWITZ, DOING BUSINESS AS L. C. L. TRANSIT CO., ET AL. *v.* UNITED STATES ET AL., *ante*, p. 803;

No. 201. KUCHIN *v.* CHICAGO & NORTH WESTERN RAILWAY CO., *ante*, p. 840; and

No. 208. WILEMON ET AL. *v.* CITY AND COUNTY OF DALLAS LEVEE IMPROVEMENT DISTRICT ET AL., *ante*, p. 829. Petitions for rehearing denied.

No. 221. MURPHY CORPORATION ET AL. *v.* FONTENOT, COLLECTOR OF REVENUE OF LOUISIANA, *ante*, p. 831;

No. 245. KESSLER *v.* FAUQUIER NATIONAL BANK, ADMINISTRATOR, ET AL., *ante*, p. 834;

No. 257. HOXSEY CANCER CLINIC ET AL. *v.* UNITED STATES, *ante*, p. 835;

No. 272. ANDERSON ET AL. *v.* MCKAY, SECRETARY OF THE INTERIOR, *ante*, p. 836;

No. 279. SAWYER *v.* WISCONSIN, *ante*, p. 855;

No. 291. BERTELSEN *v.* COONEY, *ante*, p. 856;

No. 314. ROGERS *v.* REPUBLIC PICTURES CORP. ET AL., *ante*, p. 858;

No. 325. INSURANCE COMPANY OF NORTH AMERICA *v.* UNITED STATES, *ante*, p. 863;

No. 21, Misc. ROUSSEAU *v.* HURTADO, EXECUTRIX, ET AL., *ante*, p. 843;

No. 23, Misc. FUNKHOUSER *v.* LOEW'S INCORPORATED, *ante*, p. 843;

No. 45, Misc. SALEMI *v.* NEW YORK, *ante*, p. 845;

No. 81, Misc. MACLAREN *v.* NEW YORK, *ante*, p. 847; and

No. 82, Misc. O'CONNELL *v.* RAGEN, WARDEN, *ante*, p. 847. Petitions for rehearing denied.

NOVEMBER 29, 1954.

Case Dismissed Under Rule 60.

No. 243, Misc. WARD *v.* UNITED STATES. On motion for leave to file and petition for writ of habeas corpus. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court.

DECEMBER 6, 1954.

Decisions Per Curiam.

No. 120. REEVES *v.* ALABAMA. Certiorari, 347 U. S. 1012, to the Supreme Court of Alabama. Argued November 15–16, 1954. Decided December 6, 1954. *Per Curiam:* Judgment reversed. See *Canty* v. *Alabama,* 309 U. S. 629, and *Vernon* v. *Alabama,* 313 U. S. 547. *Jack Greenberg* argued the cause for petitioner. With him on the brief were *Thurgood Marshall, Robert L. Carter* and *Louis H. Pollak. Robert Straub,* Assistant Attorney General of Alabama, and *Robert B. Stewart* argued the cause for respondent. With them on the brief was *Si Garrett,* Attorney General. Reported below: 260 Ala. 66, 68 So. 2d 14.

No. 356. MOTOR FREIGHT EXPRESS ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Middle District of Pennsylvania. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *James H. Booser* and *Samuel A. Schreckengaust, Jr.* for appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Clarence D. Todd* and *Dale C. Dillon* for the Branch Motor Express Co., appellees. Reported below: 119 F. Supp. 298.

No. 378. WILLMUT GAS & OIL CO. ET AL. *v.* COVINGTON COUNTY. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Garner W. Green* for appellants. *E. L. Dent* for appellee. Reported below: —— Miss. ——, 71 So. 2d 184.

No. 381. MASTERS, INC. *v.* GENERAL ELECTRIC CO. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Joseph F. Ruggieri, Thurman Arnold* and *Norman Diamond* for appellant. *Thomas Kiernan* and *Edgar Barton* for appellee. Reported below: 307 N. Y. 229, 120 N. E. 2d 802.

No. 407. CHAPMAN ET AL. *v.* CITY OF SHREVEPORT. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Otis W. Bullock* for appellants. *J. N. Marcantel* and *W. Scott Wilkinson* for appellee. Reported below: 225 La. 859, 74 So. 2d 142.

No. 250, Misc. ADDINGTON *v.* TENNESSEE.* Appeal from the Supreme Court of Tennessee. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Fyke Farmer* for appellant. *Knox Bigham* for appellee.

No. 416. AMADIO *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is reversed and the case is remanded to the District Court with directions to dismiss the indictment on the ground that it does not come within the purview of the statute. *Bert C. Cheatham* and *Leon L. Sclawy* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 215 F. 2d 605.

*[See modification of this order, *post*, p. 924.]

No. 427. BARNES ET AL. *v.* AKRON, CANTON & YOUNGSTOWN RAILROAD CO. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court for disposition agreeable to the representation of counsel for respondents. *Alex Elson, Lester P. Schoene, Milton Kramer, Clarence M. Mulholland* and *Edward J. Hickey, Jr.* for petitioners. *Kenneth F. Burgess, D. Robert Thomas* and *Walter J. Cummings, Jr.* for the respondent railroads. Reported below: 215 F. 2d 423.

Miscellaneous Orders.

No. 193, Misc. MARRON *v.* RAGEN, WARDEN. The order entered in this case on November 8, 1954, *ante,* p. 867, is amended so as to read as follows: "*Per Curiam:* The appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1254 (2)."

No. 79, Misc. HALL *v.* WILLIAMS ET AL., *ante,* p. 847. The motion for damages is denied. *H. L. Pringle* for respondents.

No. 225, Misc. RICHTER *v.* SWENSON, WARDEN, ET AL. Supreme Court of Minnesota. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Reported below: —— Minn. ——, 66 N. W. 2d 17.

No. 121, Misc. EX PARTE JACKSON;
No. 199, Misc. NEGRON *v.* LOONEY, WARDEN;
No. 213, Misc. DIXON *v.* RAGEN, WARDEN;
No. 224, Misc. EX PARTE WATSON; and
No. 248, Misc. NEWSTEAD *v.* WEISMANTEL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 249, Misc. WEST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Motion for leave to file petition for writ of mandamus also denied.

No. 181, Misc. SMITH *v.* BANNAN, WARDEN. Motion for leave to file petition for writ of habeas corpus and petition for writ of certiorari denied.

No. 203, Misc. BROWN *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

No. 276, Misc. UNITED STATES EX REL. FITZGERALD *v.* RYAN, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Sobeloff* for the United States, and *Arthur H. Dean* for Ryan et al., respondents.

No. 241, Misc. FURMANSKI *v.* BANNAN, WARDEN; and No. 244, Misc. BAERCHUS *v.* DAY, WARDEN. Motions for leave to file petitions for writs of certiorari denied.

Certiorari Granted. (*See also Nos. 416 and 427, supra.*)

No. 402. WALTON *v.* CALIFORNIA. Superior Court of California, Appellate Department, County of Santa Clara. Certiorari granted. *Jay Darwin* for petitioner. *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

No. 405. IN RE MURCHISON ET AL. Supreme Court of Michigan. Certiorari granted. *James A. Cobb* and *George E. C. Hayes* for petitioners. *Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attor-

ney General, filed a brief opposing the petition. Reported below: 340 Mich. 140, 151, 65 N. W. 2d 296, 301.

No. 417. LEWYT CORPORATION (NOW KNOWN AS LEWYT MANUFACTURING CORPORATION) *v.* COMMISSIONER OF INTERNAL REVENUE. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to questions 1 and 2 presented by the application for the writ which read as follows:

"1. Whether, in the case of a taxpayer on the accrual basis, excess profits taxes paid within a taxable year constitute excess profits taxes 'paid or accrued within the taxable year' under Section 122 (d)(6), Section 122 (a) and Section 122 (b)(1) of the Internal Revenue Code of 1939 ('the Code') dealing with the computation of the net operating loss deduction.

"2. Whether under Section 122 (d)(6) and Section 122 (b)(1) of the Code the 'tax imposed by Subchapter E of Chapter 2' [the excess profits tax] 'accrued within the taxable year' is the excess profits tax computed on the basis of the facts existing at the end of such taxable year or whether it is the excess profits tax ultimately determined to be due after application of a carry-back arising in a later year and after giving effect to other circumstances arising in later years."

Seymour Sheriff for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *I. Henry Kutz* for respondent. Reported below: 215 F. 2d 518.

No. 180, Misc. BELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 213 F. 2d 629.

Certiorari Denied. (*See also Misc. Nos. 181, 225, 241, 244 and 249, supra.*)

No. 362. COOPER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Joseph Loeffler* for petitioner. *Edward D. E. Rollins,* Attorney General of Maryland, and *W. Giles Parker,* Assistant Attorney General, for respondent. Reported below: 205 Md. 162, 106 A. 2d 129.

No. 393. RUBENSTEIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Isaac Mellman* and *Robert G. Seaks* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, John H. Mitchell* and *Joseph M. Howard* for the United States. Reported below: 214 F. 2d 667.

No. 395. HALL *v.* FIRST NATIONAL BANK OF ATLANTA, EXECUTOR. Court of Appeals of Georgia. Certiorari denied. *Lucian J. Endicott* for petitioner. Reported below: 89 Ga. App. 853, 81 S. E. 2d 522.

No. 400. CHATTANOOGA STATION CO. *v.* MASSEY, ADMINISTRATRIX. C. A. 6th Cir. Certiorari denied. *Joe V. Williams, Jr.* for petitioner. Reported below: 210 F. 2d 167.

No. 403. EISTRAT *v.* BRUSH INDUSTRIAL LUMBER CO. ET AL. Supreme Court of California and District Court of Appeal of California, Second Appellate District. Certiorari denied. *Alvin H. Gershenson* for petitioner. *Wendell W. Schooling* for respondents. Reported below: 124 Cal. App. 2d 42, 268 P. 2d 181.

No. 409. HARRISON *v.* HARRISON. C. A. 4th Cir. Certiorari denied. *Louis B. Fine* for petitioner. *William C. Worthington* for respondent. Reported below: 214 F. 2d 571.

No. 410. Pacific Westbound Conference et al. *v.* Leval & Co., Inc. Supreme Court of Oregon. Certiorari denied. *Joseph J. Geary, Allan E. Charles* and *Tom Killefer* for petitioners. *Donald A. Schafer* for respondent. Reported below: 201 Ore. 390, 269 P. 2d 541.

No. 419. Barber et al. *v.* United States. C. A. 8th Cir. Certiorari denied. *Josiah E. Brill* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Robert N. Anderson* and *Louise Foster* for the United States. Reported below: 215 F. 2d 663.

No. 421. Chapman, doing business as Carl Chapman Fruit Co., *v.* Mitchell, Secretary of Labor. C. A. 5th Cir. Certiorari denied. *Claude L. Gray* and *J. Hardin Peterson, Sr.* for petitioner. *Solicitor General Sobeloff, Bessie Margolin* and *Joseph M. Stone* for respondent. Reported below: 214 F. 2d 360.

No. 422. Fort Mason Fruit Co. *v.* Mitchell, Secretary of Labor. C. A. 5th Cir. Certiorari denied. *Claude L. Gray* and *J. Hardin Peterson, Sr.* for petitioner. *Solicitor General Sobeloff, Bessie Margolin* and *Joseph M. Stone* for respondent. Reported below: 214 F. 2d 363.

No. 424. Edwards et al. *v.* Barkhausen et al., doing business as Doubleby Co., et al. Supreme Court of Illinois. Certiorari denied. *Irving Goodman* for petitioners. *Max Swiren, Ben W. Heineman* and *Joseph D. Block* for Barkhausen et al., respondents. Reported below: 3 Ill. 2d 254, 120 N. E. 2d 649.

No. 87. Van Hoff et al. *v.* Redevelopment Agency of the City and County of San Francisco et al. District Court of Appeal of California, First Appellate District. Certiorari denied. The Chief Justice took

no part in the consideration or decision of this application. *Martin J. Jarvis* for petitioners. *Dion R. Holm* and *John Elmer Barricklo* for respondents. Reported below: 122 Cal. App. 2d 777, 266 P. 2d 105.

No. 411. WRATHER ET AL. *v.* AMERICAN UNIVERSITY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *James C. Wilkes* for petitioners. *E. F. Colladay* and *D. C. Colladay* for American University, *Paul B. Cromelin, Thomas M. Raysor* and *John B. Olverson* for the Lucy Webb Hayes National Training School for Deaconesses and Missionaries, and *Clyde D. Garrett* and *Andrew T. Altmann* for the Equitable Life Insurance Co., respondents. Reported below: 94 U. S. App. D. C. —, 214 F. 2d 282.

No. 3, Misc. O'NEIL *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se. Don Eastvold,* Attorney General of Washington, and *E. P. Donnelly* and *Keith S. Bergman,* Assistant Attorneys General, for respondent.

No. 28, Misc. MICKENS *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se. J. Lindsay Almond, Jr.,* Attorney General of Virginia, and *Thomas M. Miller,* Assistant Attorney General, for respondent. Reported below: 195 Va. xc.

No. 38, Misc. HODGES *v.* SKEEN, WARDEN. 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 respondent.

No. 55, Misc. ROOKARD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: —— U. S. App. D. C. ——, 212 F. 2d 464.

No. 56, Misc. MEZO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *Latham Castle,* Attorney General of Illinois, for respondent.

No. 62, Misc. CAGE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Robert B. Johnstone* for petitioner. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 67, Misc. DELUCIA *v.* NEW JERSEY. 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.

No. 68, Misc. TARRENCE *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se.* *J. D. Buckman, Jr.,* Attorney General of Kentucky, and *H. D. Reed, Jr.,* Assistant Attorney General, for respondent. Reported below: 265 S. W. 2d 40.

No. 69, Misc. TARRENCE *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se.* *J. D. Buckman, Jr.,* Attorney General of Kentucky, and *H. D. Reed, Jr.,* Assistant Attorney General, for respondent. Reported below: 265 S. W. 2d 52.

No. 86, Misc. MOYLE *v.* TEETS, WARDEN, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Edmund G. Brown,* Attorney General, *Clarence A. Linn,* Chief Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for the State of California, respondent.

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No. 92, Misc. WOOD *v.* UTAH. Supreme Court of Utah. Certiorari denied. Petitioner *pro se*. *E. R. Callister*, Attorney General of Utah, and *Walter L. Budge* and *John W. Horsley*, Assistant Attorneys General, for respondent. Reported below: 2 Utah 2d 34, 268 P. 2d 998.

No. 96, Misc. DUNNE *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *Don Eastvold*, Attorney General of Washington, and *Keith S. Bergman* and *E. P. Donnelly*, Assistant Attorneys General, for respondent.

No. 127, Misc. WHITE *v.* HUMPHREY, WARDEN. C. A. 3d Cir. Certiorari denied. *H. Clay Espey* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 212 F. 2d 503.

No. 137, Misc. TRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 211 F. 2d 513.

No. 153, Misc. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 214 F. 2d 485.

No. 159, Misc. ASHLEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 42 Cal. 2d 246, 267 P. 2d 271.

No. 162, Misc. DANIELS *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 168, Misc. ELDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William H. Maness* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 213 F. 2d 876.

No. 170, Misc. CHENOWETH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 176, Misc. THOMPSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Herbert M. Wetzel* for petitioner.

No. 177, Misc. DIXON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 187, Misc. SEELY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 212, Misc. FUDGE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 222, Misc. SHANK *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 223, Misc. GARCIA *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Reported below: 124 Cal. App. 2d 822, 269 P. 2d 673.

No. 228, Misc. MEEKS *v.* IOWA. Supreme Court of Iowa. Certiorari denied. Reported below: 245 Iowa 1231, 65 N. W. 2d 76.

No. 229, Misc. BRADSHAW ET AL. *v.* MARKS ET AL. Supreme Court of Louisiana. Certiorari denied. *George M. Johnson* for petitioners. *Geo. Gunby* for respondents. Reported below: 225 La. 805, 74 So. 2d 36.

No. 230, Misc. CHIARELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 214 F. 2d 838.

No. 231, Misc. HARRIS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 232, Misc. MCCUNE *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 237, Misc. ROUX *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 239, Misc. CLARK *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 240, Misc. JOHNSON *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 246, Misc. OLSEN *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 251, Misc. POLLACK *v.* ASPBURY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. R. D. 454.

No. 252, Misc. HODGES *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 253, Misc. MILLS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Department. Certiorari denied.

No. 273, Misc. SUTTLES ET AL. *v.* DAVIS, COMMANDANT, U. S. DISCIPLINARY BARRACKS. C. A. 10th Cir. Certiorari denied. *Thomas Homer Davis* and *Elisha Scott* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 215 F. 2d 760.

No. 47, Misc. SCALF *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. Petitioner *pro se*. *John G. Fox,* Attorney General of West Virginia, and *T. D. Kauffelt,* Assistant Attorney General, for respondent.

Rehearing Denied.

No. 130. INTERNATIONAL HARVESTER CO. *v.* MINNESOTA, *ante,* p. 853;

No. 88, Misc. DEFOE *v.* NATIONAL CAPITAL BANK, *ante,* p. 847;

No. 109, Misc. DEFOE *v.* NATIONAL CAPITAL BANK, *ante,* p. 849; and

No. 215, Misc. STINCHCOMB *v.* CALIFORNIA ET AL., *ante,* p. 879. Petitions for rehearing denied.

JANUARY 3, 1955.

Case Dismissed Under Rule 60.

No. 472. WABASH RAILROAD CO. *v.* DRESCHER, ADMINISTRATRIX. On petition for writ of certiorari to the Supreme Court of Missouri. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Sam B. Sebree* for petitioner. *Guy W. Green* for respondent. Reported below: 270 S. W. 2d 843.

JANUARY 10, 1955.

Decisions Per Curiam.

No. 304, October Term, 1953. REMMER *v.* UNITED STATES, 347 U. S. 227. On motion for leave to file and petition for rehearing. *Per Curiam:* The motion for leave to file and the petition for rehearing are granted. This case is restored to the docket, and the whole record, including the findings and order of Judge Goodman, is remanded to the Court of Appeals for its consideration on the errors assigned when the case was before the Court of Appeals before, in order that the Court on the whole record may reconsider the case in the light of our recent decisions in *Holland* v. *United States,* 348 U. S. 121; *Friedberg* v. *United States,* 348 U. S. 142; *Smith* v. *United States,* 348 U. S. 147; and *United States* v. *Calderon,* 348 U. S. 160, and Judge Goodman's findings and order.

MR. JUSTICE BLACK would reverse the judgment of conviction and grant a new trial in view of the jury incident discussed in *Remmer* v. *United States,* 347 U. S. 227.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

John R. Golden, Leslie C. Gillen and *Spurgeon Avakian* for petitioner. Reported below: 205 F. 2d 277.

No. 12. GOLDBAUM ET AL. *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit;

No. 13. BANKS *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit;

No. 15. McFEE *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit;

No. 133. BROWN *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit;

No. 135. WATTS *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit;

No. 209. BEATY *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit;

No. 215. STRAUCH ET AL. *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit;

No. 249. BURDICK *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit; and

No. 622, October Term, 1953. MITCHELL *v.* UNITED STATES. On petition for rehearing. *Per Curiam:* In Nos. 12, 13, 15, 133, 135, 209, 215, and 249 the petitions for certiorari are severally granted. In No. 622, October Term, 1953, the petition for rehearing is granted, the order denying certiorari, 347 U. S. 1012, is vacated, and the petition for writ of certiorari is granted. The judgments are vacated and the cases are remanded to their respective Courts of Appeals for consideration in the light of *Holland* v. *United States,* 348 U. S. 121; *Friedberg* v. *United States,* 348 U. S. 142; *Smith* v. *United States,*

348 U. S. 147; and *United States* v. *Calderon*, 348 U. S. 160, decided by this Court December 6, 1954.

We have not considered the merits of these cases, nor have we determined their relation to our recent opinions, *supra*, believing that re-examination by the Courts of Appeals is desirable even in those cases remotely involving the principles laid down in the net worth decisions.

MR. JUSTICE BLACK dissents.

Irvin Goldstein for petitioners in No. 12. *Joseph B. Keenan, Alvin O. West* and *John W. Graff* for petitioner in No. 13. *Elden McFarland* for petitioner in No. 15. *Lee S. Jones* and *Helen R. Graft* for petitioner in No. 133. *Peyton Ford, Sumner M. Redstone, H. D. Reed* and *Frank A. Bruno* for petitioner in No. 135. *Llewellyn A. Luce* and *W. M. Nicholson* for petitioner in No. 209. *John J. Hooker* for petitioners in No. 215. *Robert M. Taylor* and *John C. Noonan* for petitioner in No. 249. *Temple W. Seay* for petitioner in No. 622 (October Term, 1953).

Robert L. Stern, then Acting Solicitor General, *Assistant Attorney General Holland* and *Ellis N. Slack* for the United States in Nos. 12, 13 and 15. With them were *Meyer Rothwacks* and *Joseph M. Howard* in No. 12, *Murray L. Schwartz* in No. 13, and *David L. Luce* and *Mr. Howard* in No. 15. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce* and *Joseph M. Howard* for the United States in Nos. 133, 135, 209, 215 and 249.

Reported below: No. 12, 204 F. 2d 74; No. 13, 204 F. 2d 666; No. 15, 206 F. 2d 872; No. 133, 209 F. 2d 260; No. 135, 212 F. 2d 275; No. 209, 213 F. 2d 712; No. 215, 213 F. 2d 805; No. 249, 214 F. 2d 768; No. 622 (October Term, 1953), 208 F. 2d 854.

No. 408. LACHMAN ET AL. *v.* CITY OF MIAMI BEACH. Appeal from the Supreme Court of Florida. *Per Curiam:* The motion to dismiss is granted and the appeal is dis-

missed for the want of a substantial federal question. *John M. Murrell* and *Raymond L. Wise* for appellants. *Thomas H. Anderson* for appellee. Reported below: 71 So. 2d 148.

No. 415. BELRIDGE OIL CO. *v.* CITY OF LOS ANGELES. 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. *Vernon Barrett* for appellant. *Roger Arnebergh* and *Bourke Jones* for appellee. Reported below: 42 Cal. 2d 823, 271 P. 2d 5.

No. 446. STAPLING MACHINES CO. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION OF MISSISSIPPI. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *Bernard Leonard Tighe, Jr.* for appellant. *John E. Stone* for appellee. Reported below: —— Miss. ——, 73 So. 2d 123.

Miscellaneous Orders.

No. 316, Misc. COLORADO *v.* KNOUS, CHIEF JUDGE, U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO. Motion for leave to file and petition for writ of prohibition or writ of mandamus. A rule is ordered to issue, returnable Monday, February 7th, requiring the respondent to show cause why the petition for writ of prohibition or for a writ of mandamus should not be granted. *Duke W. Dunbar,* Attorney General of Colorado, and *Frank A. Wachob,* Deputy Attorney General, for petitioner. *Frank Delaney* for respondent. Reported below: See 125 F. Supp. 18.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. The motion of the State of California for an allowance of time to file a brief in response to the briefs of Colorado, Wyo-

ming, Utah, and New Mexico is granted. California is allowed thirty days from this date to file its brief in response. THE CHIEF JUSTICE took no part in the consideration or decision of this motion. *Northcutt Ely* for the State of California, defendant.

No. —. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION *v.* NATIONAL LABOR RELATIONS BOARD. The motion for an order *nunc pro tunc* extending time within which to file petition for certiorari is denied. *Lloyd E. McMurray* for movant.

No. 22, Misc. CROCKARD *v.* DEPARTMENT OF CORRECTIONS OF MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petition for other relief also denied. Petitioner *pro se*. *Edmund E. Shepherd,* Solicitor General of Michigan, for respondent.

No. 264, Misc. BREWER *v.* MICHIGAN ET AL. Supreme Court of Michigan. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 310, Misc. KOALSKA *v.* SWENSON, WARDEN. Petition for writ of certiorari to the Supreme Court of Minnesota denied. Appeal dismissed and petition for writ of habeas corpus denied. Reported below: — Minn. —, 66 N. W. 2d 337.

No. 393, Misc. BARY ET AL. *v.* UNITED STATES. Application for reduction of bail, referred to the entire Court by MR. JUSTICE CLARK, denied. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit also denied. *Joseph Forer* and *David Rein* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Tompkins, Harold D. Koffsky* and *William S. Kenney* for the United States.

No. 254, Misc. LOVE *v.* UNITED STATES;
No. 298, Misc. BAXTER *v.* TEES, WARDEN; and
No. 314, Misc. LILYROTH *v.* RAGEN, WARDEN. Motions for leave to file petitions for writs of certiorari denied.

No. 301, Misc. BRIMAGE *v.* RAGEN, WARDEN. Motion for leave to file petition for writ of certiorari out of time denied.

No. 267, Misc. BOLESTA *v.* PERRY, U. S. DISTRICT JUDGE, ET AL.;
No. 269, Misc. EPHRAIM *v.* RAGEN, WARDEN;
No. 284, Misc. EX PARTE MCCOLLUM;
No. 294, Misc. HALL *v.* EIDSON, WARDEN, ET AL.;
No. 309, Misc. PACKER *v.* MARONEY, WARDEN, ET AL.;
No. 328, Misc. DUNN *v.* LOONEY, WARDEN; and
No. 330, Misc. SHORES *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 326, Misc. NEWSTEAD *v.* MAYFIELD, CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 435. REICHERT *v.* COMMISSIONER OF INTERNAL REVENUE. Leave to withdraw appearance of Winfield K. Denton, Esquire, granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. Petitioner *pro se*. *Solicitor General Sobeloff*, *Assistant Attorney General Holland* and *Ellis N. Slack* for respondent. Reported below: 214 F. 2d 19.

No. 442. FLYNN ET AL. *v.* UNITED STATES. Motion to defer consideration of petition denied. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. MR. JUSTICE BLACK is

of the opinion certiorari should be granted. *Harry Sacher* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Tompkins, Robert W. Ginnane* and *Harold D. Koffsky* for the United States. The motion to defer consideration was filed by counsel for appellants in cases then pending in various United States Courts of Appeals. Reported below: 216 F. 2d 354.

Certiorari Granted. (*See also Nos. 12, 13, 15, 133, 135, 209, 215 and 249, and No. 622, October Term, 1953, supra.*)

No. 451. FEDERAL COMMUNICATIONS COMMISSION *v.* ALLENTOWN BROADCASTING CORP. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Sobeloff* and *Warren E. Baker* for petitioner. *Donald C. Beelar* for respondent. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 454. MASTRO PLASTICS CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari granted. *Bernard H. Fitzpatrick* for petitioners. *Solicitor General Sobeloff, George J. Bott, David P. Findling, Dominick L. Manoli* and *Harvey B. Diamond* for respondent. Reported below: 214 F. 2d 462.

No. 463. UNITED STATES *v.* TWIN CITY POWER CO. ET AL. C. A. 4th Cir. Certiorari granted. *Solicitor General Sobeloff* for the United States. *David W. Robinson* for respondents. Reported below: 215 F. 2d 592.

No. 445. JEW SING *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. *Joseph S. Hertogs* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 215 F. 2d 906.

No. 457. Corn Products Refining Co. *v.* Commissioner of Internal Revenue. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to questions 1 and 2 presented in the petition for certiorari which read as follows:

1. "Are transactions in commodity futures which are not 'true hedges' capital asset transactions and thus subject to the limitations of Section 117 of the Internal Revenue Code of 1939, or do the resulting gains and losses from such transactions give rise to ordinary income and ordinary deductions? (1940) (1942)"

2. "Are commodity futures contracts 'securities' and thus subject to the 'wash sales' provisions of Section 118 of the Internal Revenue Code of 1939? (1940) (1942)"

Samuel A. McCain, Harry J. Rudick and *Jay O. Kramer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Harry Marselli* for respondent. Reported below: 215 F. 2d 513.

Certiorari Denied. (*See also Nos. 435 and 442 and Misc. Nos. 22, 254, 264, 298, 301, 310, 314 and 393, supra.*)

No. 71. Clark *v.* United States. C. A. 8th Cir. Certiorari denied. *Don O. Russell* and *Robert J. Callahan, Jr.* 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: 211 F. 2d 100.

No. 89. Stayback *v.* United States. C. A. 3d Cir. Certiorari denied. *Richard S. Doyle, John E. Toolan* and *Jules G. Körner, III* 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 313.

No. 100. BRYAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *C. J. Batter* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Fred E. Youngman* for respondent. Reported below: 209 F. 2d 822.

No. 309. MITCHELL ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Valentine Brookes* and *Arthur H. Kent* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, David L. Luce, Joseph M. Howard* and *Frederick B. Ugast* for the United States. Reported below: 213 F. 2d 951.

No. 380. COBRA MANUFACTURING CO. *v.* COFFMAN. C. A. 9th Cir. Certiorari denied. *Milton B. Safier* for petitioner. *George W. Jansen* for respondent. Reported below: 214 F. 2d 489.

No. 413. KINNEAR-WEED CORP. *v.* HUMBLE OIL & REFINING CO. C. A. 5th Cir. Certiorari denied. *William E. Kinnear* for petitioner. Reported below: 214 F. 2d 891.

No. 420. DOWELL ET AL. *v.* CITY OF TULSA ET AL. Supreme Court of Oklahoma. Certiorari denied. *E. O. Patterson* for petitioners. *Edmund Lashley* for respondents. Reported below: 273 P. 2d 859.

No. 423. MINNESOTA MINING & MANUFACTURING CO. *v.* GATEWAY DECORATORS, INC. C. A. 5th Cir. Certiorari denied. *T. J. Blackwell* for petitioner.

No. 425. FANCHON & MARCO, INC. *v.* PARAMOUNT PICTURES, INC. ET AL. C. A. 9th Cir. Certiorari denied. *Russell Hardy, Henry Schaefer, Jr.* and *James Wallace*

Kemp for petitioner. *Homer I. Mitchell, W. B. Carman* and *Warren M. Christopher* for Paramount Pictures, Inc. et al., and *Gurney E. Newlin* and *Hudson B. Cox* for Twentieth Century-Fox Film Corporation et al., respondents. Reported below: 215 F. 2d 167.

No. 426. ADAM, MELDRUM & ANDERSON CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Fred R. Tansill* and *Eugene Meacham* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *S. Dee Hanson* for respondent. Reported below: 215 F. 2d 163.

No. 428. PHILLIPS, TRUSTEE, *v.* TEXAS & NEW ORLEANS RAILROAD CO. C. A. 5th Cir. Certiorari denied. *Fred Much* for petitioner. *William R. Brown* for respondent. Reported below: 211 F. 2d 419.

No. 430. ALLEGHANY CORPORATION ET AL. *v.* JAMES FOUNDATION OF NEW YORK, INC. C. A. 2d Cir. Certiorari denied. *Orison S. Marden* and *Robert J. Bulkley* for petitioners. *A. Donald MacKinnon* for respondent. Reported below: 214 F. 2d 446.

No. 431. MOSES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Bernard S. Barron* and *George P. Halperin* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland* and *Ellis N. Slack* for respondent. Reported below: 214 F. 2d 912.

No. 433. CONSTANCE *v.* HARVEY, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. *Milton E. Ehrenreich* for petitioner. *Harvey M. Lifset* for respondent. Reported below: 215 F. 2d 571.

No. 434. GEORGIA KAOLIN CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Walter J. Blenko* and *Edgar J. Goodrich* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Morton* and *Ralph S. Spritzer* for the United States. Reported below: 214 F. 2d 284.

No. 437. MONROE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Henry Klepak* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, John H. Mitchell* and *Joseph M. Howard* for the United States. Reported below: 215 F. 2d 81.

No. 438. BEHRENDS *v.* WAIDE ET AL. Supreme Court of Illinois. Certiorari denied. *J. W. Templeman* for petitioner. Reported below: 3 Ill. 2d 239, 120 N. E. 2d 559.

No. 440. CITY OF DALLAS ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Brackley Shaw* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Emory T. Nunneley, Jr.* and *O. D. Ozment* for the Civil Aeronautics Board; and *Cecil A. Beasley, Jr.* and *Frederick A. Ballard* for the City of Fort Worth et al., respondents. Briefs of *amici curiae* supporting petitioners were filed by *Herman C. Wilson, Walter J. Mattison, J. Elliot Drinard, Dale H. Fillmore, Fred G. Stickel, III, J. W. Anderson, Barnett I. Shur, Alexander G. Brown, A. C. Van Soelen* and *Charles S. Rhyne* for the member municipalities of the National Institute of Municipal Law Officers; and *Leander I. Shelley* for the Airport Operators Council. Reported below: —— U. S. App. D. C. ——, 221 F. 2d 501.

No. 441. ILLINOIS EX REL. DALY ET AL. *v.* STRATTON, GOVERNOR, ET AL. Supreme Court of Illinois. Certiorari denied.

No. 443. BLUE RIDGE RURAL ELECTRICAL COOPERATIVE, INC. *v.* BYRD. C. A. 4th Cir. Certiorari denied. *James D. Poag* and *Wesley M. Walker* for petitioner. *Henry Hammer* for respondent. Reported below: 215 F. 2d 542.

No. 444. ARNAUD'S RESTAURANT, INC. ET AL. *v.* COTTER. C. A. 5th Cir. Certiorari denied. *Sidney G. Roos* and *Cicero C. Sessions* for petitioners. *Joseph M. Jones* filed a waiver of right to file a reply brief for respondent. Reported below: 212 F. 2d 883.

No. 449. ST. REGIS PAPER CO. *v.* STUART. C. A. 1st Cir. Certiorari denied. *Robert Proctor* and *Horace R. Lamb* for petitioner. *Reginald Heber Smith* for respondent. Reported below: 214 F. 2d 762.

No. 452. PELLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Albert W. Dilling* and *Kirkpatrick W. Dilling* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 214 F. 2d 597.

No. 453. ROBIQUE ET AL. *v.* LAMBERT, U. S. DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *G. Wray Gill* and *Gerard H. Schreiber* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Robert B. Ross* for respondent. Reported below: 214 F. 2d 3.

No. 455. IRVIN *v.* CHAPMAN, SUPERINTENDENT OF RAIFORD STATE PENITENTIARY. Supreme Court of Florida. Certiorari denied. *Thurgood Marshall, Jack*

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Greenberg and *Frank D. Reeves* for petitioner. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent. Reported below: 75 So. 2d 591.

No. 456. SCHMIDT *v.* SHELL ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. *James W. Harvey* for petitioner. *Ingemar E. Hoberg* for respondents. Reported below: 126 Cal. App. 2d 279, 272 P. 2d 82.

No. 459. LOPIPARO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Sidney M. Glazer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Joseph A. Barry* for the United States. Reported below: 216 F. 2d 87.

No. 461. GEROSA (SUBSTITUTED FOR JOSEPH), COMPTROLLER OF THE CITY OF NEW YORK, ET AL. *v.* UNITED PIECE DYE WORKS. Supreme Court of New York, New York County. Certiorari denied. *Stanley Buchsbaum* for petitioners. *Wilbur H. Friedman* for respondent. Reported below: 307 N. Y. 780, 836, 121 N. E. 2d 617, 122 N. E. 2d 329.

No. 462. SIGURDSON *v.* LANDON ET AL. C. A. 9th Cir. Certiorari denied. *Harry Wolpin* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondents. Reported below: 215 F. 2d 791.

No. 467. SCHIFFMAN *v.* WILKINSON, WARDEN. C. A. 9th Cir. Certiorari denied. *Moses Polakoff* and *Sheldon Lowe* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 216 F. 2d 589.

No. 469. DABOLL ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Toy R. Gregory* and *John W. Bonner* for petitioners. *Solicitor General Sobeloff, David P. Findling, Dominick L. Manoli* and *Samuel M. Singer* for respondent. Reported below: 216 F. 2d 143.

No. 491. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* KIFER. C. A. 10th Cir. Certiorari denied. *Robert E. Shelton* for petitioner. *Rex H. Holden* filed a waiver of right to file a brief in opposition for respondent. Reported below: 216 F. 2d 753.

No. 34, Misc. O'LEARY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 124, Misc. OWENS *v.* ABRAM, WARDEN, ET AL. Supreme Court of New Mexico. Certiorari denied. Petitioner *pro se*. *Richard H. Robinson,* Attorney General of New Mexico, *Fred M. Standley* and *Henry A. Kiker, Jr.,* Assistant Attorneys General, and *Dean S. Zinn* for Abram, respondent. Reported below: 58 N. M. 682, 274 P. 2d 630.

No. 133, Misc. BAILEY *v.* BLALOCK, SUPERINTENDENT, SOUTHWESTERN STATE HOSPITAL. Supreme Court of Appeals of Virginia. Certiorari denied. Reported below: 195 Va. lxxxv.

No. 227, Misc. WORLEY *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. *Carmack Cochran* and *John D. Whalley* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *James Q. Riordan* for the United States; and *Charles C. Trabue, Jr.* for Dunn, respondents. Reported below: 213 F. 2d 509.

No. 256, Misc. HAMPTON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 257, Misc. ROSS *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 258, Misc. MCCOY *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 259, Misc. ANDERSON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 126 Cal. App. 2d 702, 272 P. 2d 805.

No. 261, Misc. WORLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *James Q. Riordan* for the United States. Reported below: 213 F. 2d 509.

No. 262, Misc. HOOPER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 263, Misc. BIFIELD ET AL. *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied.

No. 265, Misc. ADAMS *v.* BERGAN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 266, Misc. NICKOLS *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 268, Misc. DEMARIOS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 271, Misc. CALDWELL *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 272, Misc. KANCAR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 307 N. Y. 782, 121 N. E. 2d 618.

No. 274, Misc. GREENE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 275, Misc. MASON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 277, Misc. OLLIS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 278, Misc. STEWART *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 280, Misc. FERRELL *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 281, Misc. MAGNER *v.* HOBBY, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. *Roderick B. Travis* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for respondent. Reported below: 215 F. 2d 190.

No. 282, Misc. DAVIDSON *v.* BUCKMAN, ATTORNEY GENERAL, ET AL. Court of Appeals of Kentucky. Certiorari denied. Reported below: 271 S. W. 2d 373.

No. 283, Misc. HOWLERY *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 285, Misc. SMITH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 287, Misc. KINCHELOE *v.* FARMER. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Edmund F. Ortmeyer* for respondent. Reported below: 214 F. 2d 604.

No. 288, Misc. HORN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 289, Misc. WOODS *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 290, Misc. LOUDEN *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 293, Misc. QUEVREAUX *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 295, Misc. BELL *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 296, Misc. BYRNE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 300, Misc. MEACHAM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 304, Misc. COYLE *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 321, Misc. KUSHNIC *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 322, Misc. MONROE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Department. Certiorari denied. Petitioner *pro se*. *Harold Roland Shapiro* for respondent. Reported below: 283 App. Div. 933, 130 N. Y. S. 2d 876.

No. 324, Misc. O'HALLORAN *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Richardson Dilworth* for respondent.

No. 325, Misc. STANISZEWSKI *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 343, Misc. HOWLERY *v.* CRIMINAL COURT OF COOK COUNTY. Criminal Court of Cook County, Illinois. Certiorari denied.

Rehearing Granted. (*See Nos. 304 and 622, October Term, 1953, supra.*)

Rehearing Denied.

No. 6. WATSON ET UX. *v.* EMPLOYERS LIABILITY ASSURANCE CORP., LTD. ET AL., *ante*, p. 66;

No. 258. FUNK *v.* SEABOARD AIR LINE RAILWAY CO., *ante*, p. 835;

No. 308. BITTERLING *v.* MAPLE ISLAND FARM, INC., *ante*, p. 882;

No. 341. HALL *v.* BATTLE, GOVERNOR, ET AL., *ante*, p. 872;

No. 342. ALEXANDER *v.* TEXAS, *ante*, p. 872;

No. 349. ROY *v.* ROY, *ante*, p. 873; and

No. 351. LOUISIANA PUBLIC SERVICE COMMISSION ET AL. *v.* UNITED STATES ET AL., *ante*, p. 885. Petitions for rehearing denied.

No. 377. DUGGAN, TRUSTEE, ET AL. *v.* MAGIDSON, EXECUTRIX, *ante*, p. 883;

No. 398. LEWIS *v.* UNITED STATES, *ante*, p. 888;

No. 121, Misc. EX PARTE JACKSON, *ante*, p. 893;

No. 153, Misc. JACKSON *v.* UNITED STATES, *ante*, p. 900;

No. 149, Misc. OWENS *v.* MAYO, PRISON CUSTODIAN, *ante*, p. 877;

No. 168, Misc. ELDER *v.* UNITED STATES, *ante*, p. 901;

No. 192, Misc. COOPER ET AL. *v.* NEW YORK, *ante*, p. 878;

No. 208, Misc. MARRON *v.* RAGEN, WARDEN, *ante*, p. 879;

No. 210, Misc. WATSON *v.* SCHOOL DISTRICT OF MCKEESPORT, *ante*, p. 879;

No. 213, Misc. DIXON *v.* RAGEN, WARDEN, *ante*, p. 893; and

No. 248, Misc. NEWSTEAD *v.* WEISMANTEL, WARDEN, *ante*, p. 893. Petitions for rehearing denied.

JANUARY 31, 1955.

Decisions Per Curiam.

No. 429. TRAXLER *v.* MISSISSIPPI. Appeal from and petition for writ of certiorari to the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. *Forrest B. Jackson* for appellant-petitioner. Reported below: 220 Miss. 354, 67 So. 2d 292.

No. 439. TOCCO *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Oregon. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Norman L. Easley* for

appellant. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees.

No. 460. MILLER *v.* PUBLIC SERVICE CO. OF COLORADO ET AL. Appeal from the Supreme Court of Colorado. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Harry A. Feder* for appellant. *William A. Bryans, III,* and *Gerhard A. Gesell* for the Public Service Co., appellee. Reported below: 129 Colo. 513, 272 P. 2d 283.

No. 464. STARY ET AL. *v.* CITY OF BROOKLYN ET AL. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Barnet Hodes, J. Herzl Segal* and *Scott W. Lucas* for appellants. *Michael L. Hearns* for appellees. Reported below: 162 Ohio St. 120, 121 N. E. 2d 11.

No. 473. GULF OIL CORP. *v.* JOSEPH, COMPTROLLER OF THE CITY OF NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *Matthew S. Gibson* for appellant. *Stanley Buchsbaum* for appellee. Reported below: 307 N. Y. 342, 121 N. E. 360.

No. 488. ANDERSON BROTHERS CORP. *v.* BOARD OF SUPERVISORS OF WASHINGTON COUNTY. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. THE CHIEF JUSTICE and MR. JUSTICE BLACK would dismiss for want of a substantial federal question. *Victor W. Bouldin* for appellant. *John E. Stone* for appellee. Reported below: —— Miss. ——, 73 So. 2d 105.

Miscellaneous Orders.

No. 468. BELL *v.* UNITED STATES. Certiorari, 348 U. S. 895, to the United States Court of Appeals for the Sixth Circuit. It is ordered that James R. Browning, Esquire, of Washington, D. C., a member of the bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 131. WHITEHOUSE ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL. Certiorari, 348 U. S. 809, to the United States Court of Appeals for the Seventh Circuit. The motion for leave to file brief of American Train Dispatchers' Association et al., as *amici curiae,* is granted. The Court calls this case to the attention of the National Mediation Board and expresses its readiness to accept any brief it might wish to submit.

No. 179. COURTNEY ET AL. *v.* LOCKETT. Certiorari, 348 U. S. 854, to the Supreme Court of Kansas. Schroeder substituted as party respondent for Lockett.

No. 204. SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND *v.* PECK, TAX COMMISSIONER OF OHIO. Appeal from the Supreme Court of Ohio. Probable jurisdiction noted, 348 U. S. 807. Bowers substituted as the party appellee for Peck. MR. JUSTICE BURTON took no part in the consideration or decision of this motion.

No. 250, Misc. ADDINGTON *v.* TENNESSEE. Appeal from the Supreme Court of Tennessee. Motion to modify the order entered in this case on December 6, 1954, 348 U. S. 892, granted and the order is modified so as to read as follows: "*Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. Insofar as the papers

whereon the appeal was taken seek review of rulings of the court below upon questions of the asserted denial of rights under the Federal Constitution which by themselves would not be subject to review by appeal, the papers are treated as a petition for writ of certiorari (28 U. S. C. § 2103), and certiorari is denied."

No. 217, Misc. MEDICH *v.* UNITED STATES;
No. 341, Misc. EPHRAIM *v.* RAGEN, WARDEN; and
No. 345, Misc. BALEY *v.* ABRAM, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States in No. 217, Misc.

No. 348, Misc. WINSTON *v.* UNITED STATES. Application denied.

No. 350, Misc. FINNIE *v.* UNITED STATES;
No. 353, Misc. WARREN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS; and
No. 363, Misc. JENNINGS *v.* SCHAEFER ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. ——. UCKELE *v.* UNITED STATES. Motion denied.

Probable Jurisdiction Noted.

No. 549. NUKK ET AL. *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Blanch Freedman* for appellants. *Solicitor General Sobeloff* for respondent. Reported below: 125 F. Supp. 498.

Certiorari Granted.

No. 399. DERECKTOR *v.* UNITED STATES. Court of Claims. Certiorari granted. *Seymour W. Miller* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 129 Ct. Cl. 103, 128 F. Supp. 136.

No. 470. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Henry C. Clausen* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Samuel D. Slade* and *Lester S. Jayson* for the United States. Reported below: 215 F. 2d 800.

Certiorari Denied. (*See also No. 429 and Misc. No. 250, supra.*)

No. 109. BEWLEY ET AL. *v.* HENDERSON. Court of Appeals of Kentucky. Certiorari denied. *Rodes K. Myers* for petitioners. *Marshall Funk* for respondent. Reported below: 264 S. W. 2d 680.

No. 458. PEREZ ET AL. *v.* TRIFILETTI ET AL. Supreme Court of Florida. Certiorari denied. *Morris P. Glushien* for petitioners. *Jeptha P. Marchant* and *Joseph A. Perkins* for respondents. Reported below: 74 So. 2d 100.

No. 471. BRASIER *v.* CITY OF LINCOLN ET AL. Supreme Court of Nebraska. Certiorari denied. *Herbert W. Baird* for petitioner. Reported below: 159 Neb. 12, 65 N. W. 2d 213.

No. 474. CALTEX (PHILIPPINES), INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Leo T. Kissam, Albert E. Van Dusen* and *Henry J. Kiernan* for petitioner. *Solicitor General Sobeloff, Assistant Attor-*

ney General Burger, Melvin Richter and *William W. Ross* for the United States. Reported below: 129 Ct. Cl. 605, 122 F. Supp. 830.

No. 475. FORD ET AL. *v.* HUGHES TOOL CO. C. A. 10th Cir. Certiorari denied. *Charles M. McKnight* and *Robert F. Davis* for petitioners. *George I. Haight, Robert F. Campbell* and *Edward A. Haight* for respondent. Reported below: 215 F. 2d 924.

No. 476. GRIFFIN, ADMINISTRATRIX, *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *G. Byron Dobbs* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Melvin Richter* for the United States. Reported below: 216 F. 2d 217.

No. 480. MCCAW ET AL. *v.* FASE, TAX COMMISSIONER OF HAWAII. C. A. 9th Cir. Certiorari denied. *Kenneth Davis* for petitioners. *Edward N. Sylva,* Attorney General of Hawaii, and *Rhoda V. Lewis,* Deputy Attorney General, for respondent. Reported below: 216 F. 2d 698.

No. 481. MCCAW ET AL. *v.* FASE, TAX COMMISSIONER OF HAWAII. C. A. 9th Cir. Certiorari denied. *Kenneth Davis* for petitioners. *Edward N. Sylva,* Attorney General of Hawaii, and *Rhoda V. Lewis,* Deputy Attorney General, for respondent. Reported below: 216 F. 2d 700.

No. 482. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* CROWLEY ET AL. Appellate Court of Illinois, First District. Certiorari denied. *Harlan L. Hackbert* for petitioner. *Ezra L. D'Isa* for respondents. Reported below: 1 Ill. App. 2d 481, 117 N. E. 2d 843.

No. 483. DANIEL LUMBER CO. ET AL. *v.* EMPRESAS HONDURENAS, S. A. C. A. 5th Cir. Certiorari denied. *Bennett B. Patterson* for petitioners. *J. D. Wheeler* for respondent. Reported below: 215 F. 2d 465.

No. 484. SEYMOUR SALES CO. ET AL. *v.* FEDERAL TRADE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *F. Joseph Donohue* and *Henry H. Koven* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Barnes, William J. Lamont, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: —— U. S. App. D. C. ——, 216 F. 2d 633.

No. 485. HALSETH, TRADING AS PERRY SALES CO., *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Samuel E. Hirsch* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Barnes, William J. Lamont, Earl W. Kintner* and *Robert B. Dawkins* for respondent.

No. 486. NOONAN *v.* NEW YORK LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. *Thomas H. Ryan* for petitioner. *Earl S. MacArthur* for respondent. Reported below: 215 F. 2d 905.

No. 487. CONTINENTAL OIL CO. *v.* WILLIAMS ET AL. C. A. 10th Cir. Certiorari denied. *Charles B. Cochran* for petitioner. *Duke Duvall* and *A. G. C. Bierer, Jr.* filed a waiver of right to file a brief in opposition for respondents. Reported below: 215 F. 2d 4.

No. 490. LEE KWOK DUN *v.* BROWNELL, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jack Wasserman* and *Nathaniel S. Ruvell* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for respondent. Reported below: —— U. S. App. D. C. ——, 217 F. 2d 21.

No. 492. Brown Land & Royalty Co., Inc. *v.* Pickett et al. Supreme Court of Louisiana. Certiorari denied. *Frank J. Looney* for petitioner. *Richard C. Cadwallader* for Pickett et al., respondents. Reported below: 226 La. 88, 75 So. 2d 18.

No. 493. Meyer et al. *v.* United States. Court of Claims. Certiorari denied. *Homer Cummings, Albert L. Reeves, Jr.* and *William D. Donnelly* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Melva M. Graney* for the United States. Reported below: 129 Ct. Cl. 214, 121 F. Supp. 898.

No. 496. Guyer *v.* Elger, Administratrix. C. A. 8th Cir. Certiorari denied. *Harry E. Wilmarth* for petitioner. *E. Marshall Thomas* for respondent. Reported below: 216 F. 2d 537.

No. 510. Wilson, Executor, et al. *v.* Simler. C. A. 10th Cir. Certiorari denied. *Porter R. Chandler, Fred E. Suits* and *John B. Dudley* for petitioners. *Leslie L. Conner* and *Charles W. Conner* for respondent.

No. 83, Misc. Taylor *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 331, Misc. Feldon *v.* King, Superintendent, California Medical Facility. C. A. 9th Cir. Certiorari denied.

No. 334, Misc. Cumberland *v.* Warden, Maryland Penitentiary. Court of Appeals of Maryland. Certiorari denied. Reported below: 205 Md. 646, 109 A. 2d 66.

No. 337, Misc. BERMAN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 338, Misc. PALMORE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 339, Misc. NOR WOODS *v.* TEETS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 342, Misc. FLYNN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Allan L. Sapiro* and *Marvin J. Colangelo* for petitioner. Reported below: 217 F. 2d 29.

No. 344, Misc. FORSYTHE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 346, Misc. PELTIER *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 349, Misc. FARMER *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 352, Misc. HALL *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 354, Misc. NASH *v.* CUMMINGS, WARDEN. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 355, Misc. DARDEN *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 356, Misc. LONGLEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 357, Misc. SCHWARTZ *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 358, Misc. IN RE FLETCHER. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* filed a brief in opposition for the United States. Reported below: 216 F. 2d 915.

No. 360, Misc. HENDRICKSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Richardson Dilworth* for respondent.

No. 361, Misc. HOWLERY *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 362, Misc. KEYS *v.* DAY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Richardson Dilworth* for respondent.

No. 365, Misc. WATKINS *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Reported below: 75 So. 2d 11.

No. 367, Misc. MOORE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 368, Misc. LOLLI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 369, Misc. SELTENRICH *v.* SIGLER, WARDEN. Supreme Court of Louisiana. Certiorari denied.

No. 394, Misc. NASH *v.* CITY OF NEW YORK. Court of Appeals of New York and the Appellate Division of the Supreme Court of New York, First Department. Cer-

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tiorari denied. Petitioner *pro se*. *Seymour B. Quel* for respondent. Reported below: 307 N. Y. 847, 122 N. E. 2d 399; 284 App. Div. 843, 131 N. Y. S. 2d 304.

Rehearing Denied.

No. 278. BORN *v.* LAUBE, ADMINISTRATOR, ET AL., *ante*, p. 855. Motion for leave to file petition for rehearing granted. Petition for rehearing denied.

No. 18. FRIEDBERG *v.* UNITED STATES, *ante*, p. 142;

No. 37. HOLLAND ET UX. *v.* UNITED STATES, *ante*, p. 121;

No. 121. MOORE *v.* MEAD'S FINE BREAD CO., *ante*, p. 115;

No. 329. THOMAS RIGGING CO. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 871;

No. 395. HALL *v.* FIRST NATIONAL BANK OF ATLANTA, EXECUTOR, *ante*, p. 896;

No. 403. EISTRAT *v.* BRUSH INDUSTRIAL LUMBER CO. ET AL., *ante*, p. 896;

No. 56, Misc. MEZO *v.* ILLINOIS, *ante*, p. 899;

No. 177, Misc. DIXON *v.* ILLINOIS, *ante*, p. 901;

No. 212, Misc. FUDGE *v.* CALIFORNIA, *ante*, p. 901; and

No. 273, Misc. SUTTLES ET AL. *v.* DAVIS, COMMANDANT, U. S. DISCIPLINARY BARRACKS, *ante*, p. 903. Petitions for rehearing denied.

FEBRUARY 7, 1955.

Decisions Per Curiam.

No. 32. CALIFORNIA EX REL. BROWN, ATTORNEY GENERAL, ET AL. *v.* ST. LOUIS UNION TRUST CO. Certiorari, 348 U. S. 808, to the St. Louis Court of Appeals of Missouri. Argued January 31, 1955. Decided February 7, 1955. *Per Curiam:* The writ of certiorari is dismissed as improvidently granted. *Walter H. Miller* argued the cause for petitioners. With him on the brief were *Ed-*

mund G. Brown, Attorney General of California, and *Elizabeth Miller,* Deputy Attorney General. *Milton Yawitz* argued the cause for respondent. With him on the brief was *Chas. D. Long.* Reported below: —— Mo. App. ——, 260 S. W. 2d 821.

No. 55. INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, *v.* NEBEKER. Certiorari, 348 U. S. 808, to the Supreme Court of Indiana. Argued February 1, 1955. Decided February 7, 1955. *Per Curiam:* Affirmed on the authority of *Freeman* v. *Hewit,* 329 U. S. 249. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *Lloyd C. Hutchinson,* Deputy Attorney General of Indiana, argued the cause for petitioner. With him on the brief were *Edwin K. Steers,* Attorney General, and *Carl M. Franceschini,* Deputy Attorney General. *Raymond O. Evans* argued the cause and filed a brief for respondent. Reported below: 233 Ind. 58, 116 N. E. 2d 104.

No. 179. COURTNEY ET AL. *v.* SCHROEDER. Certiorari, 348 U. S. 854, to the Supreme Court of Kansas. Argued February 4, 1955. Decided February 7, 1955. *Per Curiam:* The judgment is reversed and the case is remanded for proceedings not inconsistent with the opinion of this Court in *In re Oliver,* 333 U. S. 257. *Payne H. Ratner* argued the cause for petitioners. With him on the brief was *Keith Eales. Dale M. Stucky* argued the cause for respondent. With him on the brief were *Harold R. Fatzer,* Attorney General of Kansas, and *Warner Moore.* Reported below: 175 Kan. 704, 267 P. 2d 190.

No. 385. DANIMAN ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want

of a properly presented federal question. MR. JUSTICE BLACK would hold this case for the decision in No. 466, *Slochower* v. *Board of Higher Education of the City of New York* [probable jurisdiction noted, *post,* p. 935]. *Harold I. Cammer* and *Paxton Blair* for appellants. *Daniel T. Scannell* and *Helen R. Cassidy* for appellees. Reported below: 306 N. Y. 532, 119 N. E. 2d 373; 307 N. Y. 806, 121 N. E. 2d 629.

No. 489. DAVIS *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK. Appeal from the Supreme Court of New York, Albany County. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *William J. Hughes, Jr.* and *James F. Reilly* for appellant. *Jacob K. Javits,* Attorney General of New York, and *Henry S. Manley,* Acting Solicitor General, for appellee. Reported below: 307 N. Y. 786, 121 N. E. 2d 619.

No. 31, Misc. KAY *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The motion for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. Upon consideration of the Government's confession of error and examination of the record the judgment of the Court of Appeals is vacated and the case is remanded to the District Court for hearing on petitioner's motion to vacate the judgment. Petitioner *pro se. Solicitor General Sobeloff* for the United States. Reported below: 212 F. 2d 795.

No. 302, Misc. SHAMERY *v.* ILLINOIS. Appeal from the Supreme Court of Illinois. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C.

§ 1257 (2). Treating the papers whereon the appeal was taken as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied.

No. 312, Misc. MERRIFIELD *v.* KENTUCKY. Appeal from the Court of Appeals of Kentucky. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was taken as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. Appellant *pro se. J. D. Buckman, Jr.*, Attorney General of Kentucky, and *Zeb. A. Stewart,* Assistant Attorney General, for appellee. Reported below: 268 S. W. 2d 405.

No. 327, Misc. SENTNER ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. *Per Curiam:* The motion for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The order of the Court of Appeals insofar as it denies petitioners leave to proceed in forma pauperis is reversed and the case is remanded to that court for further proceedings. *Adkins* v. *DuPont Co.*, 335 U. S. 331. *Sydney L. Berger* for Sentner, petitioner. *Solicitor General Sobeloff, Assistant Attorney General Tompkins* and *Harold D. Koffsky* for the United States.

Miscellaneous Order.

No. 299, Misc. BLACKWELL *v.* RAGEN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted.

No. 466. SLOCHOWER *v.* BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK. Appeal from the Court of

Appeals of New York. Probable jurisdiction noted. *Ephraim S. London* for appellant. *Daniel T. Scannell* and *Helen R. Cassidy* for appellee. Reported below: 306 N. Y. 532, 119 N. E. 2d 373; 307 N. Y. 806, 121 N. E. 2d 629.

Certiorari Granted. (*See also Misc. Nos. 31 and 327, supra.*)

No. 504. UNITED STATES *v.* ANDERSON, CLAYTON & Co. Court of Claims. Certiorari granted. *Solicitor General Sobeloff* for the United States. *John C. White* for respondent. Reported below: 129 Ct. Cl. 295, 122 F. Supp. 837.

No. 226, Misc. MICHEL *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari granted. *Gerard H. Schreiber* for petitioner. *Fred S. LeBlanc,* Attorney General of Louisiana, and *Michael E. Culligan,* Assistant Attorney General, for respondent. Reported below: 225 La. 1040, 74 So. 2d 207.

Certiorari Denied. (*See also Misc. Nos. 302 and 312, supra.*)

No. 190. BABCOCK & WILCOX Co. *v.* PEDRICK, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. *John F. Dooling, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 212 F. 2d 645.

No. 495. CENTRAL MINE EQUIPMENT Co. *v.* BOWDIL COMPANY. C. A. 8th Cir. Certiorari denied. *John H. Sutherland* and *John H. Bruninga* for petitioner. *Bruce B. Krost* and *Charles M. Spence* for respondent. Reported below: 216 F. 2d 156.

No. 497. GLASSCOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Alexander Campbell* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 216 F. 2d 487.

No. 539. MASON *v.* SUMMER LAKE IRRIGATION DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Cleveland C. Cory* for respondents. Reported below: 216 F. 2d 609.

No. 523. UNITED INSURANCE CO. OF CHICAGO ET AL. *v.* MALONEY, INSURANCE COMMISSIONER OF CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Jesse H. Steinhart* for petitioners. *Edmund G. Brown,* Attorney General of California, and *Harold B. Haas,* Deputy Attorney General, for respondent. Reported below: 127 Cal. App. 2d 155, 273 P. 2d 579

No. 60, Misc. RANDALL *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 98, Misc. MCELHANEY *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 182, Misc. BALDWIN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, *William V. O'Connor,* Chief Deputy Attorney General,

and *Norman H. Sokolow,* Deputy Attorney General, for respondent. Reported below: 42 Cal. 2d 858, 270 P. 2d 1028.

No. 247, Misc. MAULDING *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. John Ben Shepperd,* Attorney General of Texas, and *J. Fred Jones,* Assistant Attorney General, for respondents.

No. 255, Misc. REEVES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 260, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Sam Elson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 215 F. 2d 1.

No. 279, Misc. ALLEN *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 297, Misc. GREEN *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 303, Misc. EDGERLY *v.* KENNELLY ET AL. C. A. 7th Cir. Certiorari denied. *Eugene T. Devitt* for petitioner. *John J. Mortimer, L. Louis Karton* and *Arthur Magid* for Kennelly et al., and *Thomas Dodd Healy, Harold Stickler* and *W. Donald McSweeney* for Gilbert, respondents. Reported below: 215 F. 2d 420.

No. 305, Misc. BUCKINGHAM *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Reported below: 45 Wash. 2d 116, 273 P. 2d 494.

No. 317, Misc. BROWN *v.* BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON, ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Thurgood Marshall, David Levinson* and *Jack Greenberg* for petitioner. *Richardson Dilworth* filed a brief for the State of Pennsylvania in opposition. *Eugene Cook,* Attorney General, *Robert H. Hall,* Assistant Attorney General, and *James W. Tracey, Jr.* and *Lamar W. Sizemore,* Deputy Assistant Attorneys General, for the State of Georgia, respondent. Reported below: 378 Pa. 504, 106 A. 2d 777.

No. 318, Misc. MARKHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 215 F. 2d 56.

No. 347, Misc. O'LEARY, ADMINISTRATRIX, *v.* UNITED STATES LINES CO. C. A. 1st Cir. Certiorari denied. *Samuel B. Horovitz* for petitioner. *G. Philip Wardner* for respondent. Reported below: 215 F. 2d 708.

Rehearing Denied.

No. 473, October Term, 1953. ALKER ET AL. *v.* BUTCHER & SHERRERD ET AL., 346 U. S. 925. Motion for leave to file a third petition for rehearing denied.

No. 672, October Term, 1953. FRAVER *v.* STUDEBAKER CORPORATION, 347 U. S. 968. Motion for leave to file petition for rehearing denied.

No. 402, Misc., October Term, 1953. POWELL *v.* UNITED STATES, 347 U. S. 961. Motion for leave to file a second petition for rehearing denied.

No. 165, Misc. Bobo *v.* California, *ante*, p. 877. Motion for leave to file petition for rehearing denied.

No. 227, Misc. Worley *v.* United States et al., *ante*, p. 917; and

No. 261, Misc. Worley *v.* United States, *ante*, p. 918. Rehearing denied.

February 14, 1955.

Decisions Per Curiam.

No. 80. Federal Trade Commission *v.* Rhodes Pharmacal Co., Inc. et al. Certiorari, 348 U. S. 812, to the United States Court of Appeals for the Seventh Circuit. Argued February 8, 1955. Decided February 14, 1955. *Per Curiam:* The Court finds that the order of the Commission is not ambiguous. The judgment of the Court of Appeals, insofar as it modified paragraph 1 (c) of the Commission's order, is reversed and the case is remanded to that court with instructions to restore the order of the Commission. *Daniel M. Friedman* argued the cause for petitioner. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Barnes, Charles F. Barber, Earl W. Kintner* and *Robert B. Dawkins. Edward Brodkey* argued the cause for respondents. With him on the brief were *Frank E. Gettleman* and *Arthur Gettleman.* Reported below: 208 F. 2d 382.

No. 125. Harsh *v.* Illinois Terminal Railroad Co. Certiorari, 348 U. S. 809, to the Supreme Court of Illinois. Argued February 8, 1955. Decided February 14, 1955. *Per Curiam:* Judgment reversed. *Lavender* v. *Kurn,* 327 U. S. 645. *Morris B. Chapman* argued the cause and filed a brief for petitioner. *Fred P. Schuman* and *Harold G. Talley* argued the cause for respondent. With them on

the brief were *George D. Burroughs* and *Gordon Burroughs*. Reported below: See 351 Ill. App. 272, 114 N. E. 2d 901.

No. 508. SOUTHERN BAKERS ASSOCIATION, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Georgia. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court with directions to dismiss the petition for review upon the ground that the cause is moot. *Harold L. Russell* for appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees. Reported below: 124 F. Supp. 600.

Miscellaneous Orders.

No. 313, Misc. UNITED STATES EX REL. TOUHY *v.* KIPP, U. S. MARSHAL, ET AL. Motion for leave to file petition for writ of habeas corpus denied. *Robert B. Johnstone* for petitioner.

No. 316, Misc. COLORADO *v.* KNOUS, CHIEF JUDGE, U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO. Motion for leave to file petition for writ of prohibition or mandamus denied. *Duke W. Dunbar,* Attorney General of Colorado, and *Frank A. Wachob,* Deputy Attorney General, for petitioner. *Frank Delaney* for respondent. Reported below: See 125 F. Supp. 18.

Probable Jurisdiction Noted.

No. 477. LIQUID CARBONIC CORP. *v.* UNITED STATES. Appeal from the United States District Court for the Eastern District of New York. Probable jurisdiction noted. MR. JUSTICE CLARK took no part in the consideration or decision of this question. *James F. Dwyer* for appellant. *Solicitor General Sobeloff* for the United States. Reported below: 123 F. Supp. 653.

Certiorari Denied.

No. 479. KANISCHER *v.* IRWIN OPERATING CO. C. A. 5th Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Dewey Knight* for respondent. Reported below: 215 F. 2d 300.

No. 494. GOLDMAN ET UX. *v.* FOGARTY. Probate Court of Essex County, Massachusetts. Certiorari denied. *Leo Pfeffer* for petitioners.

No. 498. ESTATE OF GOLDSTEIN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *J. V. Dillon* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Elizabeth B. Davis* for the United States. Reported below: 129 Ct. Cl. 264, 122 F. Supp. 677.

No. 499. UNITED STATES *v.* GENERAL MOTORS CORP., FRIGIDAIRE DIVISION; and

No. 511. GENERAL MOTORS CORP., FRIGIDAIRE DIVISION, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Solicitor General Sobeloff* for the United States. *Newell W. Ellison, Henry M. Hogan, Daniel M. Gribbon* and *Calvert Thomas* for the General Motors Corp., Frigidaire Division. Reported below: 128 Ct. Cl. 465, 121 F. Supp. 932.

No. 500. GEARON ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Walter F. Boye* and *Robert V. Smith* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, John R. Benney* and *Melvin Richter* for the United States. Reported below: 126 Ct. Cl. 548, 115 F. Supp. 910; 129 Ct. Cl. 315, 121 F. Supp. 652.

No. 503. UNITED STATES LINES CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Cletus Keating* and

Vernon S. Jones for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Herman Marcuse* for the United States. Reported below: 129 Ct. Cl. 466, 124 F. Supp. 375.

No. 505. BARTRON ET AL. *v.* DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION. C. A. 3d Cir. Certiorari denied. *Isadore Glauberman* for petitioners. *John H. Pursel* and *Robie L. Mitchell* for respondent. *Saul N. Schechter* filed a brief for the Town of Belvidere, New Jersey, et al., as *amici curiae,* urging that the petition for a writ of certiorari be granted. Reported below: 216 F. 2d 717.

No. 509. MARSMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Herbert W. Clark* and *Nelson T. Hartson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack, Hilbert P. Zarky* and *Louise Foster* for respondent. Reported below: 216 F. 2d 77.

No. 515. BOSTON METALS CO. *v.* COMPANIA DE ASTRAL, S. A. Court of Appeals of Maryland. Certiorari denied. *Nolan P. Chipman* for petitioner. *William A. Grimes* for respondent. Reported below: 205 Md. 237, 107 A. 2d 357, 108 A. 2d 372.

No. 516. KANE, ADMINISTRATRIX, *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CORP. Supreme Court of Missouri. Certiorari denied. *Ernest D. Martin* for petitioner. *H. M. Langworthy* for respondent. Reported below: 271 S. W. 2d 518.

No. 517. MCCATRON ET AL., DOING BUSINESS AS PRICE VALLEY LUMBER CO., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Oscar*

W. Worthwine for petitioners. *Solicitor General Sobeloff, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 216 F. 2d 212.

No. 531. Fialer's Limousines, Inc. et al. *v.* Public Utilities Commission of California et al. Supreme Court of California. Certiorari denied. *Allan P. Matthew* and *Walker W. Lowry* for Fialer's Limousines, Inc., and *Douglas Brookman* for Airline Ground Transportation Association, Inc., petitioners. *Everett C. McKeage* and *Halsey L. Rixford* for respondents. *Dion Holm,* for the City and County of San Francisco et al., and *Reginald L. Vaughan,* for Barrett Garages, Inc., filed a brief in opposition to the petition.

No. 520. Lardner *v.* Twentieth Century-Fox Film Corp. C. A. 9th Cir. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of this application. *Robert W. Kenny* for petitioner. *Irving M. Walker* for respondent. Reported below: 216 F. 2d 844.

No. 158, Misc. Downs *v.* California. District Court of Appeal of California, Third Appellate District. Certiorari denied. The Chief Justice took no part in the consideration or decision of this application. Petitioner *pro se. Edmund G. Brown,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent.

No. 204, Misc. In re Heilman. Supreme Court of Kansas. Certiorari denied. The Chief Justice took no part in the consideration or decision of this application. *Emmet A. Blaes* for petitioner. *John Berglund* for respondents. Reported below: 176 Kan. 5, 269 P. 2d 459.

No. 307, Misc. MARSHALL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 311, Misc. UNITED STATES EX REL. TOUHY *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. *Robert B. Johnstone* for petitioner.

FEBRUARY 16, 1955.

Case Dismissed Under Rule 60.

No. 378, Misc. LEEK *v.* STEINER, WARDEN. On petition for writ of certiorari to the Court of Appeals of Maryland. Dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court. Reported below: 205 Md. 641, 109 A. 2d 57.

FEBRUARY 28, 1955.

Decisions Per Curiam.

No. 230. MITCHELL, SECRETARY OF LABOR, *v.* JOYCE AGENCY, INC. Certiorari, 348 U. S. 813, to the United States Court of Appeals for the Seventh Circuit. Argued February 4, 7, 1955. Decided February 28, 1955. *Per Curiam:* The judgment of the Court of Appeals is reversed. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564; *Phillips Co.* v. *Walling,* 324 U. S. 490. The judgment of the District Court is affirmed, and the case is remanded to the District Court. The motion of the petitioner to make Goldblatt Bros., Inc., a party in this Court is denied without prejudice to the right of the petitioner to renew said motion in the District Court, or to take such other proceedings for enforcement of the judgment as the petitioner may deem advisable and proper in the circumstances. See *Walling* v. *Reuter, Inc.,* 321 U. S. 671. *Bessie Margolin*

argued the cause for petitioner. With her on the brief were *Solicitor General Sobeloff, Sylvia S. Ellison* and *Harold S. Saxe. Stanford Clinton* argued the cause for respondent. With him on the brief was *Robert A. Sprecher.* Reported below: 211 F. 2d 241.

No. 518. AIRCOOLED MOTORS, INC. *v.* WILLIAMS. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Henry S. Fraser* for appellant. Reported below: 307 N. Y. 332, 841, 121 N. E. 2d 251, 122 N. E. 2d 333.

No. 530. SMALLS ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. MR. JUSTICE REED, MR. JUSTICE BURTON, and MR. JUSTICE MINTON dissent. *Henry Hammer* for petitioners. Reported below: 216 F. 2d 842.

No. 532. IN RE ANASTAPLO. Appeal from the Supreme Court of Illinois. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. Reported below: 3 Ill. 2d 471, 121 N. E. 2d 826.

Miscellaneous Orders.

No. 9, Original. TEXAS *v.* NEW MEXICO ET AL. The report of the Special Master dated January 31, 1955, 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. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. The motion of California defendants for leave to file an amended answer is granted. The motion to join as parties the States of Colorado, New Mexico, Utah, and Wyoming is hereby referred to George I. Haight, Special Master, to hear the parties and report with all convenient speed his opinion and recommendation as to whether the motion should be granted. THE CHIEF JUSTICE took no part in the consideration or decision of these motions. *Ross F. Jones,* Attorney General, *Howard F. Thompson,* Special Assistant Attorney General, *John H. Moeur, Burr Sutter, Theodore Kiendl* and *Perry M. Ling* for the State of Arizona, complainant. *Edmund G. Brown,* Attorney General, *Northcutt Ely, Robert L. McCarty, Prentiss Moore* and *Gilbert F. Nelson,* Assistant Attorneys General, and *Charles E. Corker* and *Burton J. Gindler,* 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 Redwin* 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. *Harvey Dickerson,* Attorney General, *William N. Dunseath* and *John W. Barrett,* Deputy Attorneys General, *W. T. Mathews* and *William J. Kane,* Special Assistant Attorneys General, and *H. W. Edwards* for the State of Nevada, intervener. *Duke W. Dunbar,* Attorney General, and *Hatfield Chilson,* Special Assistant Attorney General, for the State of Colorado, and *Howard B. Black,* Attorney General, for the State of Wyoming. *Richard Robinson,* Attorney General, and *Fred E. Wilson,* Special Assistant Attorney General, for the State of New Mexico. *E. R. Callister,* Attorney General, and *Ken Chamberlain,* Assistant Attorney General, for the State of Utah.

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No. 371, Misc. McNees *v.* Bannan, Warden;
No. 373, Misc. Austin *v.* Eidson, Warden;
No. 385, Misc. Ex parte Howell; and
No. 386, Misc. Marshall *v.* United States. Motions for leave to file petitions for writs of habeas corpus denied.

No. 379, Misc. Pacheco *v.* Texas;
No. 392, Misc. Ex parte Fleischman; and
No. 432, Misc. In re Van Pelt. Motions for leave to file petitions for writs of mandamus denied.

No. 16. Silesian Holding Co. et al. *v.* Union Bank of Switzerland et al.; and
No. 17. Brownell, Attorney General, Successor to the Alien Property Custodian, *v.* Union Bank of Switzerland et al. On petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit. The motion to defer consideration of the petitions for certiorari until October 1, 1955, is granted. *Ralph D. Ray* filed the motion for the Silesian Holding Company. *Solicitor General Sobeloff* for petitioner in No. 17, *William Gilligan* for the Silesian-American Corporation, *Charles E. Scribner* for the Bondholders Protective Committee, and *Lawrence J. McKay* for respondents, filed written consents to the granting of the motion. See also 348 U. S. 881.

No. 157. Ryan Stevedoring Co., Inc. *v.* Pan-Atlantic Steamship Corp. Certiorari, 348 U. S. 813, to the United States Court of Appeals for the Second Circuit. The motion for leave to file brief of American Merchant Marine Institute, Inc., as *amicus curiae,* is denied. Mr. Justice Black and Mr. Justice Douglas would grant leave to file. The motion of the Government for leave to

appear and present oral argument, as *amicus curiae,* is granted. *Solicitor General Sobeloff* filed the motion for the Government.

No. 173. AMALGAMATED CLOTHING WORKERS OF AMERICA ET AL. *v.* RICHMAN BROTHERS CO. Certiorari, 348 U. S. 813, to the United States Court of Appeals for the Sixth Circuit. The motion of the Government for leave to appear and present oral argument, as *amicus curiae,* is granted. *Solicitor General Sobeloff* filed the motion for the Government.

No. 184. WILLIAMSON, ATTORNEY GENERAL, ET AL. *v.* LEE OPTICAL OF OKLAHOMA, INC. ET AL.; and

No. 185. LEE OPTICAL OF OKLAHOMA, INC. ET AL. *v.* WILLIAMSON, ATTORNEY GENERAL. Appeals from the United States District Court for the Western District of Oklahoma. Probable jurisdiction noted, 348 U. S. 854. The motion for leave to file brief of Pennsylvania Optical Co., as *amicus curiae,* is denied.

No. 236. PENNSYLVANIA *v.* NELSON. Certiorari, 348 U. S. 814, to the Supreme Court of Pennsylvania, Western District. The motion of the State of New Hampshire for leave to appear and present oral argument, as *amicus curiae,* is granted. The United States, having heretofore been requested to file a brief, is invited to argue orally. *Louis C. Wyman,* Attorney General, filed the motion for the State of New Hampshire.

Probable Jurisdiction Noted.

No. 512. S. HOWES CO., INC. *v.* W. P. MILLING CO. Appeal from the Supreme Court of Oklahoma. Probable jurisdiction noted. *A. Camp Bonds* and *Manly Fleischmann* for appellant. *Thomas L. Gibson* for appellee. Reported below: 277 P. 2d 655.

Certiorari Granted. (*See also No. 530, supra.*)

No. 436. UNITED GAS PIPE LINE CO. *v.* MOBILE GAS SERVICE CORP. ET AL.; and

No. 556. FEDERAL POWER COMMISSION *v.* MOBILE GAS SERVICE CORP. C. A. 3d Cir. Certiorari granted. *Thomas Fletcher* and *C. Huffman Lewis* for the United Gas Pipe Line Co. *Solicitor General Sobeloff* and *Willard W. Gatchell* for the Federal Power Commission. *William C. Chanler* and *Samuel M. Johnston* for the Mobile Gas Service Corporation. Reported below: 215 F. 2d 883.

No. 529. NEESE, ADMINISTRATOR, *v.* SOUTHERN RAILWAY CO. C. A. 4th Cir. Certiorari granted. *Henry Hammer* for petitioner. *Frank G. Tompkins, Jr.* and *Henry L. Walker* for respondent. Reported below: 216 F. 2d 772.

No. 396, Misc. PORET ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari granted. *Rudolph F. Becker, Jr.* for petitioners. Reported below: 226 La. 201, 75 So. 2d 333.

Certiorari Denied. (*See also No. 532, supra.*)

No. 506. TAMBLYN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *H. L. Anderton* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 216 F. 2d 345.

No. 507. DAVIS AIRFOILS, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Oscar A. Trippet, Lyle C. Newcomer* and *Edward Gallagher* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Paul A. Sweeney* for the United States. Reported below: 129 Ct. Cl. 514, 124 F. Supp. 350.

No. 514. CENTRAL STATES CORP. *v.* LUTHER, TRUSTEE. C. A. 10th Cir. Certiorari denied. *Martin W. Bell* for petitioner. *John F. Eberhardt* for respondent. Reported below: 215 F. 2d 38.

No. 519. ACKERMAN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Marjorie Hanson Matson, Harry S. Kalson* and *Murdaugh Stuart Madden* for petitioner. *Albert A. Fiok* for respondent.

No. 524. GALT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Frederick Bernays Wiener* and *Owen Rall* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Holland, Ellis N. Slack* and *Harry Marselli* for respondent. Reported below: 216 F. 2d 41.

No. 527. WOLF *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *David Rein* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 215 F. 2d 377.

No. 533. WAITUS *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *John Bolt Culbertson, Frank D. Reeves, Aubrey E. Robinson, Jr.* and *Charles T. Duncan* for petitioner. Reported below: —— S. C. ——, 83 S. E. 2d 629.

No. 535. SCHUMACHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Daniel Bartlett* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 216 F. 2d 780.

No. 537. UNITED STATES EX REL. KEEFE *v.* DULLES, SECRETARY OF STATE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Alan R. Vogeler* and *Merritt B. Curtis* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondents. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 540. DIXIE TERMINAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *John B. Hollister* for petitioner. *Solicitor General Sobeloff, David P. Findling* and *Dominick L. Manoli* for respondent.

No. 541. VINCENT ET AL. *v.* SUNI-CITRUS PRODUCTS CO. ET AL. C. A. 5th Cir. Certiorari denied. *Prentice E. Edrington* for petitioners. *Harry A. Toulmin, Jr., J. Thomas Gurney* and *M. F. Goldstein* for respondents. Reported below: 215 F. 2d 305.

No. 542. FIDELITY & CASUALTY CO. OF NEW YORK *v.* BANK OF ALTENBURG. C. A. 8th Cir. Certiorari denied. *Allen L. Oliver* for petitioner. *Rush H. Limbaugh* for respondent. Reported below: 216 F. 2d 294.

No. 545. SECURITIES AND EXCHANGE COMMISSION *v.* TRANSVISION, INC. C. A. 2d Cir. Certiorari denied. *Solicitor General Sobeloff* and *William H. Timbers* for petitioner. *Maxwell H. Goldstein* for respondent. *A. Alan Reich* filed a brief for the Statutory Creditors' Committee, as *amicus curiae,* in opposition to the petition for a writ of certiorari. Reported below: 217 F. 2d 243.

No. 546. LOU JOHNSON CO., INC. ET AL. *v.* MOIST COLD REFRIGERATOR CO., INC. C. A. 9th Cir. Certiorari denied. *Leonard S. Lyon, Frank H. Uriell, Charles L.*

Byron and *William E. Lucas* for petitioners. *John B. Cuningham, T. Roland Berner* and *Aaron Lewittes* for respondent. Reported below: 217 F. 2d 39.

No. 547. TRADERS AND GENERAL INSURANCE CO. *v.* EDWARDS ET AL. C. A. 10th Cir. Certiorari denied. *Rex H. Holden* for petitioner. *G. Ellis Gable* for respondents. Reported below: 216 F. 2d 441.

No. 550. FOGARTY ET AL. *v.* AUSTRIAN ET AL., TRUSTEES; and

No. 551. PASTERNAK, EXECUTOR, *v.* AUSTRIAN ET AL., TRUSTEES. C. A. 2d Cir. Certiorari denied. *Horace R. Lamb* and *Murray D. Welch* for petitioners in No. 550. *Harry J. Pasternak* for petitioner in No. 551. *Carl J. Austrian* and *Saul J. Lance* for respondents. *Solicitor General Sobeloff, William H. Timbers* and *David Ferber* filed a brief for the Securities and Exchange Commission, as *amicus curiae*. Reported below: 216 F. 2d 278.

No. 553. ARCHER ET VIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Henry J. Fox* and *Edward Feldman* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 217 F. 2d 548.

No. 557. MCINTIRE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *C. A. Summers* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 217 F. 2d 663.

No. 568. MARTENEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Emmet A. Blaes* and *A. Lewis Oswald* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 218 F. 2d 258.

No. 332, Misc. BRADLEY *v.* HOWARD UNIVERSITY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 351, Misc. SCASSERRA *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 364, Misc. POLLACK *v.* ASPBURY ET AL. C. A. 2d Cir. Certiorari denied.

No. 370, Misc. JOSEY *v.* UNITED STATES. C. A. 4th 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: 216 F. 2d 181.

No. 382, Misc. BATES *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 383, Misc. JOHNS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 205 Md. 644, 108 A. 2d 906.

No. 384, Misc. NORWOOD *v.* MAYO, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Reported below: 74 So. 2d 370.

No. 390, Misc. LESTER, ADMINISTRATOR, *v.* NATIONAL BROADCASTING CO., INC. ET AL. C. A. 9th Cir. Certiorari denied. *Harry Wolpin* for petitioner. *T. B. Cosgrove*, *John N. Cramer* and *Leonard A. Diether* for respondents. Reported below: 217 F. 2d 399.

No. 401, Misc. PIPPIN *v.* EDMONDSON, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 177 Kan. 123, 276 P. 2d 315.

No. 404, Misc. IN RE WILLNER. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. *Henry Waldman* for petitioner. *Jacob K. Javits,* Attorney General of New York, and *Henry S. Manley,* Solicitor General, for the Committee on Character and Fitness, Appellate Division of the Supreme Court of New York, First Department, respondent. Reported below: 283 App. Div. 934, 130 N. Y. S. 2d 876.

No. 408, Misc. CROMIE *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 409, Misc. IN RE GIBSON. C. A. 9th Cir. Certiorari denied. Reported below: 218 F. 2d 320.

No. 410, Misc. PRESLEY *v.* PEPPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 205 Md. 660, 109 A. 2d 922.

No. 424, Misc. MCDONALD *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 433, Misc. CRAIG *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 434, Misc. BRIDGES *v.* BANNAN, WARDEN, ET AL. Supreme Court of Michigan. Certiorari denied.

No. 436, Misc. FRANCE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 205 Md. 636, 109 A. 2d 65.

No. 437, Misc. BROWNING *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied.

Rehearing Denied.

No. 380. COBRA MANUFACTURING CO. *v.* COFFMAN, *ante,* p. 912;

No. 442. FLYNN ET AL. *v.* UNITED STATES, *ante,* p. 909;

No. 462. SIGURDSON *v.* LANDON ET AL., *ante,* p. 916;

No. 471. BRASIER *v.* CITY OF LINCOLN ET AL., *ante,* p. 926;

No. 492. BROWN LAND & ROYALTY CO., INC. *v.* PICKETT ET AL., *ante,* p. 929; and

No. 360, Misc. HENDRICKSON *v.* PENNSYLVANIA, *ante,* p. 931. Petitions for rehearing denied.

MARCH 7, 1955.

Decisions Per Curiam.

No. 105. O'NEILL *v.* BALTIMORE & OHIO RAILROAD CO. Certiorari, 348 U. S. 812, to the United States Court of Appeals for the Sixth Circuit. Argued March 2, 1955. Decided March 7, 1955. *Per Curiam:* The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with instructions to reinstate its order dated July 30, 1952. *C. Richard Grieser* argued the cause and filed a brief for petitioner. *Robert F. Ebinger* argued the cause for respondent. With him on the brief were *E. H. Burgess, Kenneth H. Ekin* and *Arvin J. Alexander.* Reported below: 211 F. 2d 190.

No. 368. MARCELLE *v.* ESTATE OF LUPIA ET AL. Certiorari, 348 U. S. 882, to the United States Court of Appeals for the Second Circuit. Argued March 4, 1955. Decided March 7, 1955. *Per Curiam:* We reject the construction placed upon the statute by the Fifth Circuit and approve the construction placed thereon by the Second Circuit, whose judgment is affirmed. *Lee A. Jackson*

argued the cause for petitioner. With him on the brief were *Solicitor General Sobeloff, Assistant Attorney General Holland, Marvin E. Frankel, Ellis N. Slack* and *Walter Akerman, Jr. Leon London* filed a brief for respondents. Reported below: 214 F. 2d 942.

No. 525. BECKER *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Mortensen* v. *United States,* 322 U. S. 369. *Leonard F. Schmitt* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 217 F. 2d 555.

Miscellaneous Orders.

No. 412. WILLIAMS *v.* GEORGIA. Certiorari, 348 U. S. 854, to the Supreme Court of Georgia. Eugene Gressman, Esquire, of Washington, D. C., is invited to appear and present oral argument, as *amicus curiae,* in support of the petitioner.

No. 23. MCALLISTER *v.* UNITED STATES, 348 U. S. 19. The application for an order of modification of the judgment is denied.

No. 157. RYAN STEVEDORING CO., INC. *v.* PAN-ATLANTIC STEAMSHIP CORP. Certiorari, 348 U. S. 813, to the United States Court of Appeals for the Second Circuit. The motion for leave to file brief of Association of American Ship Owners, as *amicus curiae,* is denied.

No. 184. WILLIAMSON, ATTORNEY GENERAL, ET AL. *v.* LEE OPTICAL OF OKLAHOMA, INC. ET AL. Appeal from

the United States District Court for the Western District of Oklahoma. Probable jurisdiction noted, 348 U. S. 854. The motion of American Committee on Optics and Visual Physiology and others for leave to join in brief of the Guild of Prescription Opticians of America, Inc., as *amici curiae,* is granted. *Herbert A. Bergson* for movants.

No. 451. FEDERAL COMMUNICATIONS COMMISSION *v.* ALLENTOWN BROADCASTING CORP. Certiorari, 348 U. S. 910, to the United States Court of Appeals for the District of Columbia Circuit. The motion for leave to file brief of Easton Publishing Co., as *amicus curiae,* is denied.

No. 333. PINO *v.* NICOLLS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 348 U. S. 870, to the United States Court of Appeals for the First Circuit. Landon, present District Director, Immigration and Naturalization Service, substituted for Nicolls.

Certiorari Granted. (*See also Nos. 525, supra, and 534, ante, p. 373.*)

No. 522. NATIONAL LABOR RELATIONS BOARD *v.* WARREN CO., INC. C. A. 5th Cir. Certiorari granted. *Solicitor General Sobeloff* for petitioner. *John Wesley Weekes* for respondent. Reported below: 214 F. 2d 481.

No. 555. REA *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. *Joseph A. Sommer* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Gray Thoron, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 218 F. 2d 237.

Certiorari Denied.

Nos. 432 and 570. LOCAL 63, TEXTILE WORKERS UNION OF AMERICA, C. I. O. *v.* CHENEY BROTHERS. Supreme Court of Errors of Connecticut. Certiorari denied. *Louise Blackmar Hart Hunt* for petitioner. *William K. Cole* for respondent. Reported below: 141 Conn. 606, 109 A. 2d 240.

No. 554. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wm. C. Pierce* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Sydney Brodie* for the United States. Reported below: 216 F. 2d 683.

No. 571. SAWYER *v.* STEVENS, SECRETARY OF THE ARMY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Paul A. Sweeney* and *Benjamin Forman* for respondents. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 319, Misc. BILLEAUDEAU ET AL. *v.* TEMPLE ASSOCIATES, INC. C. A. 5th Cir. Certiorari denied. *Albert Tate, Jr.* for petitioners. *Ward R. Burke* for respondent. Reported below: 213 F. 2d 707.

No. 403, Misc. GRAHAM ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petition should be granted. *William Strong* for petitioners. *Edmund G. Brown,* Attorney General of California, *William V. O'Connor,* Chief Deputy Attorney General, and *William E. James,* Deputy Attorney General, for respondent. Reported below: 43 Cal. 2d 319, 273 P. 2d 249.

Rehearing Denied.

No. 353. COWLES PUBLISHING CO. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 876. Motion for leave to file petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 539. MASON *v.* SUMMER LAKE IRRIGATION DISTRICT ET AL., *ante*, p. 937. Rehearing denied.

No. 257, October Term, 1953. JONES *v.* LYKES BROTHERS STEAMSHIP CO., INC., 346 U. S. 857. Motion for leave to file second petition for rehearing denied.

MARCH 14, 1955.

Decisions Per Curiam.

No. 246. DIEHL *v.* LEHIGH VALLEY RAILROAD CO. ET AL. Certiorari, 348 U. S. 860, to the United States Court of Appeals for the Third Circuit. Argued February 28, March 1, 1955. Decided March 14, 1955. *Per Curiam:* Upon the facts disclosed in the opinion of the Court of Appeals for the Third Circuit, 211 F. 2d 95, the applicable Acts of Congress, and the opinion of this Court in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, the judgment of the Court of Appeals is reversed. MR. JUSTICE REED dissents for the reasons given in the opinion of the Court of Appeals for the Third Circuit. *Harry Montgomery Leet* argued the cause for petitioner. With him on the brief was *Sheldon E. Bernstein*. *Richard R. Lyman* argued the cause for respondents. With him on a brief were *Clarence M. Mulholland* and *Edward J. Hickey, Jr.* for the System Federation No. 96, Railway Employes' Department, A. F. of L., et al., respondents. *Thomas Price Mikell* and *Harry E. Sprogell* filed a brief for the

Lehigh Valley Railroad Co., respondent. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* filed a memorandum for the United States, as *amicus curiae,* urging reversal.

No. 538. CALVARESI ET AL. *v.* UNITED STATES; and No. 548. SMALDONE ET AL. *v.* UNITED STATES. On petitions for writs of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* In the interests of justice and in the exercise of the supervisory powers of this Court, certiorari is granted and the cases are severally reversed and remanded to the District Court for retrial before a different judge. *A. X. Erickson, W. H. Erickson* and *Albert E. Sherlock* for petitioners in No. 538. *Peyton Ford, Alan Y. Cole* and *F. E. Dickerson* for petitioners in No. 548. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 216 F. 2d 891.

No. 567. MONTANA EX REL. JOHNSON *v.* STATE BOARD OF LAND COMMISSIONERS ET AL. On petition for writ of certiorari to the Supreme Court of Montana. *Per Curiam:* Certiorari is granted. The decision below is reversed insofar as it holds that the 1953 Montana Statute, Montana Rev. Codes, 1947 (Cum. Supp. 1953), § 81–1702 (2), is inconsistent with federal law. The case is accordingly remanded to the Montana Supreme Court for proceedings not inconsistent with this order. *William J. Jameson, Dean Acheson, Charles A. Horsky* and *W. Graham Claytor, Jr.* for petitioner. *Arnold H. Olsen,* Attorney General of Montana, and *William F. Crowley,* Assistant Attorney General, for respondents. *Russell E. Smith* for the Governor of Montana, respondent. Briefs of *amici curiae* in support of the petition were filed by

Leslie R. Burgum, Attorney General, and *C. L. Young* for the State of North Dakota, and *Phil W. Saunders,* Attorney General, and *Ralph A. Dunham* for the State of South Dakota. Reported below: 128 Mont. ——, 279 P. 2d 393.

Miscellaneous Orders.

No. 11, Original. MISSISSIPPI *v.* LOUISIANA. 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. 186. GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, ET AL. *v.* AMERICAN TOBACCO CO., INC. Certiorari, 348 U. S. 813, to the Court of Appeals of Kentucky. The motion of the Government for leave to appear and present oral argument, as *amicus curiae,* is granted. *Solicitor General Sobeloff* filed the motion for the Government.

No. 132, Misc. FAUBERT *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Petitioner *pro se. Thomas M. Kavanagh,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondents. Reported below: 214 F. 2d 311.

No. 221, Misc. EX PARTE WASHINGTON. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Solicitor General Sobeloff* for the United States, respondent.

Certiorari Granted. (*See also Nos. 538, 548 and 567, supra.*)

No. 616. SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *v.* UNITED STATES

EX REL. ACCARDI. C. A. 2d Cir. Certiorari granted. *Solicitor General Sobeloff* for petitioner. *Jack Wasserman* for respondent. Reported below: 219 F. 2d 77.

Certiorari Denied. (*See also No. 132, Misc., supra.*)

No. 536. ST. JOE PAPER CO. ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO.;

No. 544. CONN ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO.;

No. 552. LYNCH ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO.; and

No. 573. ATLANTIC COAST LINE RAILROAD CO. *v.* ST. JOE PAPER CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *William D. Mitchell, Edward E. Watts, Jr.* and *Dinsmore Adams* for petitioners in No. 536 and the St. Joe Paper Co. et al., respondents in No. 573. *Henry P. Adair, Fred H. Kent* and *Donald Russell* for the DuPont Trustees et al., and *Giles J. Patterson* and *John R. Turney* for the St. Joe Paper Co., petitioners in No. 536 and respondents in No. 573. *Clifton S. Thomson* and *Chester Bedell* for Aird et al., *Clarence M. Mulholland* and *Edward J. Hickey, Jr.* for the Railway Labor Executives' Association, *Harold J. Gallagher, Walter H. Brown, Jr.* and *James B. McDonough, Jr.* for the Seaboard Air Line Railroad Co., and *Sidney S. Alderman* and *Henry L. Walker* for the Southern Railway System et al., petitioners in No. 536. *Howard P. Macfarlane* and *George W. Erickson* for Conn et al., and *Miller Walton* for Welbon et al., petitioners in No. 544. *J. Turner Butler, John T. G. Crawford* and *Willard P. Scott* for petitioners in No. 552. *Edward W. Bourne, Charles Cook Howell, Charles Cook Howell, Jr.* and *Richard B. Gwathmey* for the Atlantic Coast Line Railroad Co. Reported below: 216 F. 2d 832.

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No. 558. JOHN HANCOCK MUTUAL LIFE INSURANCE CO. *v.* BEARDSLEE. C. A. 7th Cir. Certiorari denied. *Owen Rall* for petitioner. *Irving M. Greenfield* and *Irving D. Levin* for respondent. Reported below: 216 F. 2d 457.

No. 562. STOW MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Roy C. McHenry* for petitioner. *Solicitor General Sobeloff, David P. Findling, Dominick L. Manoli* and *Rosanna A. Blake* for respondent. Reported below: 217 F. 2d 900.

No. 563. EDWARD S. WAGNER CO., INC. *v.* MITCHELL, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. *Irwin N. Wilpon* for petitioner. *Solicitor General Sobeloff, Stuart Rothman, Bessie Margolin* and *Sylvia S. Ellison* for respondent. Reported below: 217 F. 2d 303.

No. 569. UNITED STATES EX REL. CIRCELLA *v.* SAHLI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Thomas M. Tracey* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 216 F. 2d 33.

No. 574. ROSCOE BIFOCAL CO., INC. *v.* SIMON, GENERAL PARTNER OF RAY SIMON OPTICAL CO. C. A. 7th Cir. Certiorari denied. *Max Chill* for petitioner. *Norman H. Nachman* for respondent. Reported below: 216 F. 2d 339.

No. 578. THOMPSON, TRUSTEE, ET AL. *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. C. A. 8th Cir. Certiorari denied. *Thos. T. Railey, Geo. W. Holmes* and *Toll R.*

Ware for petitioners. *James L. Homire, John E. McCullough* and *Alvin J. Baumann* for respondent. Reported below: 218 F. 2d 166.

No. 245, Misc. BENNETT *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. 366, Misc. HOLLIDAY *v.* ABRAM, WARDEN. Supreme Court of New Mexico. Certiorari denied. Petitioner *pro se*. *Richard H. Robinson,* Attorney General of New Mexico, *Fred M. Standley* and *Santiago E. Campos,* Assistant Attorneys General, and *Dean S. Zinn* for respondent.

No. 469, Misc. Voss *v.* TENNESSEE. Supreme Court of Tennessee, Middle District. Certiorari denied. *James Clarence Evans* for petitioner. *Nat Tipton* and *Knox Bigham,* Assistant Attorneys General of Tennessee, for respondent. Reported below: —— S. W. 2d ——.

Rehearing Denied.

No. 41. PREMIER OIL REFINING COMPANY OF TEXAS *v.* UNITED STATES, *ante,* p. 254;

No. 43. TEE-HIT-TON INDIANS *v.* UNITED STATES, *ante,* p. 272; and

No. 475. FORD ET AL. *v.* HUGHES TOOL CO., *ante,* p. 927. Petitions for rehearing denied.

No. 520. LARDNER *v.* TWENTIETH CENTURY-FOX FILM CORP., *ante,* p. 944. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

MARCH 28, 1955.*

Decisions Per Curiam.

No. 450. BATES *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. *Per Curiam:* The petition for certiorari is granted. Petitioner's claim to exemption as a conscientious objector has been denied by the National Appeal Board without his Selective Service file ever having been referred to the Department of Justice for inquiry, hearing, and recommendation. The procedure prescribed by § 6 (j) of the Universal Military Training and Service Act, 62 Stat. 612, as amended, 50 U. S. C. App. § 456 (j), has not been complied with, and the judgment of conviction is accordingly reversed. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 216 F. 2d 130.

No. 521. MOORE *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for certiorari is granted. Petitioner and witnesses tendered by him declined, because of religious scruples against oath-taking, to use the word "solemnly" in affirming to tell the truth. The trial court refused to permit them to testify. There is no requirement that the word "solemnly" be used in the affirmation, and the judgment of conviction is therefore reversed and the case remanded for a new trial. *Francis Heisler* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 217 F. 2d 428.

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*MR. JUSTICE HARLAN took no part in the consideration or decision of the cases in which orders were this day announced.

No. 526. SIMON *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Simmons* v. *United States,* 348 U. S. 397. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 218 F. 2d 127.

No. 560. ABC FREIGHT FORWARDING CORP. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Nathaniel T. Helman* for appellant. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Harry C. Ames, David Axelrod, James L. Givan, Robert E. Quirk* and *S. S. Eisen* for the Acme Fast Freight, Inc. et al., appellees. Reported below: 125 F. Supp. 926.

No. 565. BRADLEY *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Gonzales* v. *United States,* 348 U. S. 407. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 218 F. 2d 657.

No. 564. MCRAE *v.* UNITED STATES. Appeal from the United States District Court for the District of Colorado. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. Petitioner *pro se. Solicitor General Sobeloff* for the United States.

Miscellaneous Orders.

No. 357. MANEJA ET AL. *v.* WAIALUA AGRICULTURAL CO., LTD.; and

No. 358. WAIALUA AGRICULTURAL CO., LTD. *v.* MANEJA ET AL. Certiorari, 348 U. S. 870, to the United States Court of Appeals for the Ninth Circuit. The motion for leave to file brief of American Farm Bureau Federation, as *amicus curiae,* is granted. *Paul E. Mathias* for movant.

No. 394. IN RE LEVY. Certiorari, 348 U. S. 887, to the United States Court of Appeals for the Fifth Circuit. The motion for leave to file brief of the Houston Bar Association, as *amicus curiae,* is granted. *Leroy Denman Moody* for movant.

No. 478, Misc. RADIO CORPORATION OF AMERICA *v.* IGOE, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus or other appropriate relief denied. *Adlai E. Stevenson* and *John T. Cahill* for petitioner. *Thomas C. McConnell* for respondents.

No. 377, Misc. IN RE HUNT. Application for certificate of probable cause denied.

No. 400, Misc. ELLIOTT *v.* SUPREME COURT OF MICHIGAN;

No. 415, Misc. CRABTREE *v.* UNITED STATES; and

No. 453, Misc. BANKS *v.* DENMAN, CHIEF JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 418, Misc. FOXALL *v.* RAGEN, WARDEN, ET AL.; and

No. 446, Misc. JAMES *v.* UNITED STATES. Motions for leave to file petitions for writs of certiorari denied.

No. 448, Misc. DAMPHER *v.* ILLINOIS; and

No. 460, Misc. POWERS *v.* TEXAS ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. —. IN RE JONES;

No. —. IN RE HAWKE;

No. —. IN RE COLLINS; and

No. —. IN RE BALTZEGAR. Rules are ordered to issue, returnable on Thursday, April 14, 1955, requiring L. Barrett Jones, of Jackson, Mississippi; George S. Hawke, of Cincinnati, Ohio; William B. Collins, of Westfield, N. J.; and J. B. Baltzegar, of Norway, S. C., to show cause why judgments for costs should not be entered against them.

Certiorari Granted. (*See also Nos. 450, 521, 526 and 565, supra.*)

No. 586. LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. The petition for writ of certiorari to the Superior Court of Massachusetts is granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. Does the Labor Management Relations Act oust State courts of jurisdiction of a suit by a railroad to enjoin a union and union representatives from engaging in peaceably conducted strikes or attempts to induce such strikes by the employees of interstate motor carriers for the purpose of persuading such carriers to agree to restrict their use of interstate railroad transportation facilities and to give some portion of such interstate carriage work to their employees who are all represented by the union?"

John D. O'Reilly, Jr. for petitioners. *William T. Griffin* for respondent. Reported below: 331 Mass. 720, 122 N. E. 2d 759.

No. 617. SEARS, ROEBUCK & Co. *v.* MACKEY ET AL. C. A. 7th Cir. Certiorari granted. *Frank H. Marks* for petitioner. *John Paul Stevens* for Mackey, respondent. Reported below: 218 F. 2d 295.

Certiorari Denied. (*See also Misc. Nos. 418 and 446, supra.*)

No. 390. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 215 F. 2d 782.

No. 391. TOMLINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 216 F. 2d 12.

No. 447. UNITED STATES *v.* CLOSE. C. A. 7th Cir. Certiorari denied. *Solicitor General Sobeloff* for the United States. *Hayden C. Covington* for respondent. Reported below: 215 F. 2d 439.

No. 448. UNITED STATES *v.* HINKLE. C. A. 9th Cir. Certiorari denied. *Solicitor General Sobeloff* for the United States. *Hayden C. Covington* for respondent. Reported below: 216 F. 2d 8.

No. 501. WATERMAN STEAMSHIP CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Walter P. Hickey* and *L. de Grove Potter* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Burger, Leavenworth Colby* and *Herman Marcuse* for the United States. Reported below: 129 Ct. Cl. 455, 124 F. Supp. 622.

No. 502. WATERMAN STEAMSHIP CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Walter P. Hickey* and *L. de Grove Potter* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 129 Ct. Cl. 460, 124 F. Supp. 634.

No. 513. LYKES BROS. STEAMSHIP CO., INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Joseph M. Rault* and *Walter Carroll* for petitioner. *Solicitor General Sobeloff* for the United States. Reported below: 129 Ct. Cl. 455, 124 F. Supp. 622.

No. 543. BROWNING *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *M. Gabriel Nahas, Jr.* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *Will D. Davis,* Assistant Attorney General, for respondent. Reported below: 160 Tex. Cr. R. —, 276 S. W. 2d 522.

No. 559. RIDGEWAY *v.* RIDGEWAY. Supreme Court of Ohio. Certiorari denied. *Alexander H. Martin* for petitioner. *Kent H. Meyers* for respondent. Reported below: 162 Ohio St. 119, 120 N. E. 2d 719.

No. 572. SNEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *C. Carter Lee* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 217 F. 2d 912.

No. 576. BYRNES *v.* MUTUAL LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. *John Alan Appleman* and *Allan K. Perry* for petitioner. *Denison Kitchel* for respondent. Reported below: 217 F. 2d 497.

No. 580. WARNER BROTHERS PICTURES, INC. ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC. ET AL. C. A. 9th

Cir. Certiorari denied. *R. W. Perkins* for petitioners. *Joe Crider, Jr.* for the Columbia Broadcasting System, Inc. et al.; and *Abraham Marcus* for Hammett, respondents. Reported below: 216 F. 2d 945.

No. 590. F. P. NEWPORT CORP., LTD. *v.* SAMPSELL, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Norman A. Bailie* and *Richard A. Turner* for Sampsell, respondent. Reported below: 216 F. 2d 344.

No. 591. IHLER ET UX. *v.* ROSEN. Supreme Court of Wisconsin. Certiorari denied. *John R. Foley* for petitioners. *James A. Smith* for respondent. Reported below: 267 Wis. 220, 64 N. W. 2d 845.

No. 596. BROWN ET AL. *v.* BRITTON. Supreme Court of Florida. Certiorari denied. *Morris E. White* for petitioners. Reported below: 75 So. 2d 753.

No. 597. CLEARY *v.* CHICAGO TITLE & TRUST CO. Supreme Court of Illinois. Certiorari denied. *John O'C. FitzGerald* for petitioner. *Joseph B. Fleming* and *Thomas M. Thomas* for respondent. Reported below: 4 Ill. 2d 57, 122 N. E. 2d 227.

No. 606. LENZNER ET AL. *v.* CITY OF TRENTON. Supreme Court of New Jersey. Certiorari denied. *Robert T. McCracken* and *George G. Chandler* for petitioners. *Louis Josephson* for respondent. Reported below: 16 N. J. 465, 109 A. 2d 409.

No. 615. RUBIN ET AL. *v.* CHICAGO, SOUTH SHORE & SOUTH BEND RAILROAD ET AL. C. A. 7th Cir. Certiorari denied. *William Henning Rubin* for petitioners. *Kenneth F. Burgess* and *Walter J. Cummings, Jr.* for the Chicago, South Shore & South Bend Railroad, respondent. Reported below: 217 F. 2d 177.

No. 634. AETNA CASUALTY & SURETY CO. *v.* PITTS. C. A. 2d Cir. Certiorari denied. *William S. O'Connor* for petitioner. *Jules Chopak* for respondent. Reported below: 218 F. 2d 58.

No. 635. IN RE HOLMES. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Thomas D. McBride* for petitioner. *Richardson Dilworth* for the State of Pennsylvania. Reported below: 379 Pa. 599, 109 A. 2d 523.

No. 599. SHAFFER *v.* SEAS SHIPPING CO., INC. C. A. 3d Cir. Certiorari denied. *Paul M. Goldstein* and *Herman Moskowitz* for petitioner. *Thomas E. Byrne, Jr.* for respondent. Reported below: 218 F. 2d 442.

No. 592. RADIO CORPORATION OF AMERICA *v.* IGOE, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied. *Adlai E. Stevenson* and *John T. Cahill* for petitioner. *Thomas C. McConnell* for respondent. Reported below: 217 F. 2d 218.

No. 220, Misc. CULVER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 233, Misc. SKLADD *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Thomas M. Kavanagh,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 340, Misc. BOZELL *v.* LINDSAY ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor*

General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg and *Robert G. Maysack* for respondents. Reported below: 215 F. 2d 190.

No. 372, Misc. BARNETT *v.* CITY OF MEMPHIS ET AL. Supreme Court of Tennessee. Certiorari denied. *Nell Sanders Aspero* for petitioner. *Marion G. Evans* for the Board of Education of the Memphis City Schools, respondent. Reported below: 196 Tenn. 590, 269 S. W. 2d 906.

No. 375, Misc. MUNROE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 376, Misc. YANKOVICH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 380, Misc. PENNENGA *v.* NEW YORK. Suffolk County Court, New York. Certiorari denied.

No. 388, Misc. MORTON *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for respondent. Reported below: 217 F. 2d 13.

No. 389, Misc. BEAN *v.* NEW YORK. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 284 App. Div. 922, 134 N. Y. S. 2d 483.

No. 405, Misc. DIMAGGIO *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 284 App. Div. 871, 134 N. Y. S. 2d 589.

No. 406, Misc. BELL *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 411, Misc. ARNOLD *v.* CUMMINGS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 412, Misc. HUDSON *v.* DAY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 413, Misc. LEE *v.* KINDELAN, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 217 F. 2d 647.

No. 417, Misc. HILDERBRAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 423, Misc. DANIELS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 425, Misc. BENJAMIN ET AL. *v.* MCINTOSH. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Carliner* for petitioners. *Mark P. Friedlander* for respondent. Reported below: —— U. S. App. D. C. ——, 219 F. 2d 27.

No. 439, Misc. VITI *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 441, Misc. SIMS *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 443, Misc. MULLREED *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 447, Misc. BREMER *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 449, Misc. SALKELD *v.* RAGEN, WARDEN. Circuit Court of Marion County, Illinois. Certiorari denied.

No. 450, Misc. FORD *v.* NEW YORK. County Court of Erie County, New York. Certiorari denied.

No. 451, Misc. COLLINS *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 454, Misc. LUJAN *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 456, Misc. MOODY *v.* ROBBINS, WARDEN. Supreme Judicial Court of Maine. Certiorari denied.

No. 457, Misc. JEROME *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 461, Misc. HENSON *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 217 F. 2d 134.

No. 462, Misc. SORIMPT *v.* DELMORE, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 465, Misc. PRIEGEL *v.* TEETS, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 466, Misc. SPENCER *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 467, Misc. MILLER *v.* TEETS, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 471, Misc. DAVIS *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 473, Misc. CORNES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 475, Misc. PIKE *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 476, Misc. CORBO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 307 N. Y. 928, 123 N. E. 2d 574.

No. 477, Misc. PHILLIPS *v.* INDIANA. Circuit Court of St. Joseph County, Indiana. Certiorari denied.

No. 452, Misc. RUPP *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *A. J. Zirpoli* for petitioner. *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

Rehearing Denied.

No. 125. HARSH *v.* ILLINOIS TERMINAL RAILROAD CO., *ante,* p. 940;

No. 479. KANISCHER *v.* IRWIN OPERATING CO., *ante,* p. 942;

No. 495. CENTRAL MINE EQUIPMENT CO. *v.* BOWDIL COMPANY, *ante,* p. 936;

No. 505. BARTRON ET AL. *v.* DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION, *ante,* p. 943;

No. 508. SOUTHERN BAKERS ASSOCIATION, INC. ET AL. *v.* UNITED STATES ET AL., *ante,* p. 941; and

No. 317, Misc. BROWN *v.* BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON, ET AL., *ante,* p. 939. Petitions for rehearing denied.

APRIL 4, 1955.

Decisions Per Curiam.

No. 186. GENERAL DRIVERS, WAREHOUSEMEN, AND HELPERS, LOCAL UNION NO. 89, ET AL. *v.* AMERICAN TOBACCO CO., INC. Certiorari, 348 U. S. 813, to the Court of Appeals of Kentucky. Argued March 31–April 1, 1955. Decided April 4, 1955. *Per Curiam:* The judgment is reversed. *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383. *Herbert S. Thatcher* and *William S. Tyson* argued the cause for petitioners. *J. Albert Woll, David Previant* and *Ralph H. Logan* were with *Mr. Thatcher* on the brief. By special leave of Court, *Dominick L. Manoli* argued the cause for the National Labor Relations Board, as *amicus curiae*, urging reversal. With him on the brief were *Solicitor General Sobeloff, David P. Findling* and *Norton J. Come*. *Nelson Helm* argued the cause for respondent. With him on the brief was *Francis E. Koch*. Reported below: 264 S. W. 2d 250.

No. 394. IN RE LEVY. Certiorari, 348 U. S. 887, to the United States Court of Appeals for the Fifth Circuit. Argued March 31, 1955. Decided April 4, 1955. *Per Curiam:* The record in this case discloses no sufficient grounds for the failure and refusal of the District Court to grant petitioner's application for admission to the bar of that Court. The judgment of the Court of Appeals is accordingly reversed with direction to remand the cause to the District Court for appropriate action in accordance with this order. *Bernard A. Golding* argued the cause for petitioner. *Leroy Denman Moody* filed a brief for the Houston Bar Association, as *amicus curiae*, urging affirmance. Reported below: 214 F. 2d 331.

No. 566. WARD TRANSPORT, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Colorado. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Nuel D. Belnap* and *Albert L. Vogl* for appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Walter R. McFarland* and *Eldon Martin* for the Atchison, Topeka & Santa Fe Railway Co. et al., appellees. Reported below: 125 F. Supp. 363.

No. 577. PAINTERS' DISTRICT COUNCIL No. 22, BROTHERHOOD OF PAINTERS, DECORATORS & PAPERHANGERS OF AMERICA (A. F. L.), ET AL. *v.* AUSTIN ET AL. Appeal from the Supreme Court of Michigan. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was taken as a petition for writ of certiorari, as required by 28 U. S. C. § 2103, certiorari is denied. *Edward N. Barnard* for appellants. Reported below: 339 Mich. 462, 64 N. W. 2d 550.

No. 581. TERRY *v.* CITY OF PORTLAND ET AL. Appeal from the Supreme Court of Oregon. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. The motion of the appellees to adjudge as damages double costs is denied. *Wilber Henderson* for appellant. *Alexander G. Brown* for appellees. Reported below: —— Ore. ——, 269 P. 2d 544.

No. 594. AMERICAN CIVIL LIBERTIES UNION ET AL. *v.* CITY OF CHICAGO ET AL. Appeal from the Supreme Court of Illinois. *Per Curiam:* The appeal is dismissed for want of a final judgment. MR. JUSTICE BLACK, MR. JUSTICE

318107 O - 55 - 52

DOUGLAS and MR. JUSTICE HARLAN dissent. *Leon Despres* for appellants. Reported below: 3 Ill. 2d 334, 121 N. E. 2d 585.

Miscellaneous Orders.

No. 337. NORWOOD ET AL. *v.* KIRKPATRICK, CHIEF JUDGE, U. S. DISTRICT COURT. Certiorari, 348 U. S. 870, to the United States Court of Appeals for the Third Circuit. The motion for leave to file brief of Dining Car Employees Union, as *amicus curiae,* is denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this motion.

No. 357. MANEJA ET AL. *v.* WAIALUA AGRICULTURAL CO., LTD.; and

No. 358. WAIALUA AGRICULTURAL CO., LTD. *v.* MANEJA ET AL. Certiorari, 348 U. S. 870, to the United States Court of Appeals for the Ninth Circuit. The motion for leave to file supplemental brief on behalf of the Secretary of Labor, as *amicus curiae,* in response to brief filed by the American Farm Bureau Federation is granted. *Solicitor General Sobeloff, Stuart Rothman* and *Bessie Margolin* for movant.

No. 470, Misc. IN RE JUDD. Motion for leave to file petition for writ of certiorari denied.

Certiorari Denied. (*See also No. 577 and Misc. No. 470, supra.*)

No. 561. DISTRICT OF COLUMBIA *v.* RANDLE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon E. West, Chester H. Gray, Milton D. Korman* and *Harry L. Walker* for petitioner. *Alvin L. Newmyer* and *Alvin L. Newmyer, Jr.* for respondent. Reported below: 94 U. S. App. D. C. —, 217 F. 2d 669.

No. 582. Olliff *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *Pat M. Baskin* for petitioner. Reported below: 160 Tex. Cr. R. —, 276 S. W. 2d 839.

No. 583. Pennsylvania ex rel. Kuntz *v.* Stackhouse et ux. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Thomas D. McBride* for petitioner. *Edwin E. Lippincott, II* for respondents. Reported below: See 176 Pa. Super. 361, 108 A. 2d 73.

No. 585. Dolcin Corporation et al. *v.* Federal Trade Commission. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Michael F. Markel* and *Wayne K. Hill* for petitioners. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Daniel M. Friedman, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: — U. S. App. D. C. —, 219 F. 2d 742.

No. 598. Skinner *v.* United States. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 215 F. 2d 767.

No. 603. Denton et al., doing business as Marden Manufacturing Co., *v.* National Labor Relations Board. C. A, 5th Cir. Certiorari denied. *Burr Tracy Ansell* and *A. R. Surles, Jr.* for petitioners. *Solicitor General Sobeloff, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 217 F. 2d 567.

No. 609. Cato *v.* Silling. Supreme Court of Appeals of West Virginia. Certiorari denied. *J. Campbell Palmer III* for petitioner. *J. B. Fisher* for respondent.

No. 612. ALSUP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Webb M. Mize* and *R. W. Thompson, Jr.* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 219 F. 2d 72.

No. 613. KALPAKOFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 217 F. 2d 748.

No. 620. ROGERS *v.* ALTON. District Court of Appeal of California, First Appellate District. Certiorari denied. *R. A. Rogers pro se. Robert Emmett Halsing* for respondent. Reported below: 127 Cal. App. 2d 667, 274 P. 2d 487.

No. 478. OBEAR-NESTER GLASS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Henry C. Lowenhaupt* and *Louis F. Oberdorfer* for petitioner. *Solicitor General Sobeloff* for respondent. Reported below: 217 F. 2d 56.

No. 97, Misc. NEAL *v.* BECKSTEAD, SHERIFF, ET AL. C. A. 10th Cir. Certiorari denied. *Herbert Monte Levy* and *David I. Shapiro* for petitioner. *E. R. Callister,* Attorney General of Utah, and *Walter L. Budge* and *Morgan W. Lewis, Jr.,* Assistant Attorneys General, for respondents. Reported below: 214 F. 2d 133.

No. 270, Misc. NEAL *v.* GRAHAM, WARDEN. Supreme Court of Utah. Certiorari denied. *Herbert Monte Levy* for petitioner. *E. R. Callister,* Attorney General of Utah, and *Walter L. Budge* and *Morgan W. Lewis, Jr.,* Assistant Attorneys General, for respondent.

No. 419, Misc. McBride *v.* Teets, Warden. Supreme Court of California. Certiorari denied.

No. 468, Misc. Swails *v.* Louisiana. Supreme Court of Louisiana. Certiorari denied. Reported below: 226 La. 441, 76 So. 2d 523.

No. 472, Misc. Gennaitte *v.* Heinze, Warden, et al. Supreme Court of California. Certiorari denied.

No. 474, Misc. Bolden *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 486, Misc. Wilson *v.* Delaware. Supreme Court of Delaware. Certiorari denied. *Louis L. Redding* for petitioner. *Joseph Donald Craven,* Attorney General of Delaware, for respondent. Reported below: 48 Del. ——, 109 A. 2d 381.

Rehearing Denied.

No. 506. Tamblyn *v.* United States, *ante,* p. 950; and

No. 386, Misc. Marshall *v.* United States, *ante,* p. 948. Petitions for rehearing denied. Mr. Justice Harlan took no part in the consideration or decision of these applications.

April 5, 1955.

Case Dismissed Under Rule 60.

No. 512. S. Howes Co., Inc. *v.* W. P. Milling Co. Appeal from the Supreme Court of Oklahoma. Probable jurisdiction noted, 348 U. S. 949. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *A. Camp Bonds* and *Manly Fleischmann* for appellant. *Thomas L. Gibson* for appellee.

INDEX

I. In General.

1. *Admiralty Clause—Marine insurance—Federal jurisdiction.*—Marine insurance policy was maritime contract within admiralty jurisdiction. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 310.

318107 O - 55 - 53

I. In General.

1. *Federal courts—Admiralty—Scope of review.*—Reviewing courts may not set aside judgment of admiralty court not "clearly erroneous." McAllister v. United States, 19.

2. *Federal courts—Appeal—Denial of stay pending arbitration.*—Order of district court, in action for accounting, refusing stay pending arbitration, not appealable; not "final decision" under 28 U. S. C. § 1291; not refusal of interlocutory injunction under 28 U. S. C. § 1292 (1). Baltimore Contractors, Inc. v. Bodinger, 176.

3. *Federal question.*—Priority as between federal tax lien and state attachment lien is federal question determinable finally by federal courts. United States v. Acri, 211.

II. Supreme Court.

1. *Review—Finality of judgment—Counterclaim.*—Judgment dismissing counterclaim reviewable, though on certiorari counterclaim was reduced to mere demand for setoff. National City Bank v. Republic of China, 356.

2. *Review of Courts of Appeals—Decision holding state law unconstitutional.*—Appeal proper to review Court of Appeals' decision holding state law invalid under Federal Constitution. Watson v. Employers Liability Assurance Corp., 66.

III. Courts of Appeals.

1. *Natural Gas Act—Federal Power Commission—Scope of review.*—Court of Appeals may not, *sua sponte*, consider objection to rate reduction order which company had not urged before Commission in application for rehearing nor invalidate order imposing condition

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