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UNITED STATES REPORTS

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1956

JUNE 10 THROUGH JULY 11, 1957

(END OF TERM)

WALTER WYATT
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, CHIEF JUSTICE.
HUGO L. BLACK, ASSOCIATE JUSTICE.
FELIX FRANKFURTER, ASSOCIATE JUSTICE.
WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE.
HAROLD H. BURTON, ASSOCIATE JUSTICE.
TOM C. CLARK, ASSOCIATE JUSTICE.
JOHN M. HARLAN, ASSOCIATE JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
CHARLES E. WHITTAKER, ASSOCIATE JUSTICE.

RETIRED

STANLEY REED, ASSOCIATE JUSTICE.*
SHERMAN MINTON, ASSOCIATE JUSTICE.

HERBERT BROWNELL, JR., ATTORNEY GENERAL.
J. LEE RANKIN, SOLICITOR GENERAL.
JOHN T. FEY, CLERK.
WALTER WYATT, REPORTER OF DECISIONS.
T. PERRY LIPPITT, MARSHAL.
HELEN NEWMAN, LIBRARIAN.

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*By order entered July 8, 1957, MR. JUSTICE REED (retired) was designated and assigned to perform judicial duties in the United States Court of Claims. See *post*, p. 944.

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, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.*

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, HAROLD H. BURTON, Associate Justice.*

For the Seventh Circuit, TOM C. CLARK, Associate Justice.*

For the Eighth Circuit, CHARLES E. WHITTAKER, Associate Justice.

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

For the Tenth Circuit, CHARLES E. WHITTAKER, Associate Justice.

March 25, 1957.

(For next previous allotment, see 352 U. S., p. v.)

*By order of June 24, 1957, the Court temporarily assigned MR. JUSTICE BLACK to the Ninth and District of Columbia Circuits, MR. JUSTICE FRANKFURTER to the Second and Seventh Circuits, and MR. JUSTICE BRENNAN to the Fourth and Sixth Circuits. See *post*, p. 934.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1956.

REID, SUPERINTENDENT, DISTRICT OF COLUMBIA JAIL, *v.* COVERT.

ON REHEARING.*

No. 701, October Term, 1955. Argued May 3, 1956; decided June 11, 1956; rehearing granted November 5, 1956; reargued February 27, 1957.—Decided June 10, 1957.

Article 2 (11) of the Uniform Code of Military Justice, providing for the trial by court-martial of "all persons . . . accompanying the armed forces" of the United States in foreign countries, cannot constitutionally be applied, in capital cases, to the trial of civilian dependents accompanying members of the armed forces overseas in time of peace. *Kinsella* v. *Krueger,* 351 U. S. 470, and *Reid* v. *Covert,* 351 U. S. 487, withdrawn. Pp. 3–78.

Judgment below in No. 701, October Term, 1955, affirmed. 137 F. Supp. 806, reversed and remanded.

MR. JUSTICE BLACK, in an opinion joined by THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN, concluded that:

1. When the United States acts against its citizens abroad, it can do so only in accordance with all the limitations imposed by the Constitution, including Art. III, § 2, and the Fifth and Sixth Amendments. Pp. 5–14.

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*Together with No. 713, October Term, 1955, *Kinsella, Warden,* v. *Krueger,* also on rehearing; argued, decided, rehearing granted, reargued, and decided on the same dates.

2. Insofar as Art. 2 (11) of the Uniform Code of Military Justice provides for the military trial of civilian dependents accompanying the armed forces in foreign countries, it cannot be sustained as legislation which is "necessary and proper" to carry out obligations of the United States under international agreements made with those countries; since no agreement with a foreign nation can confer on Congress or any other branch of the Government power which is free from the restraints of the Constitution. Pp. 15–19.

3. The power of Congress under Art. I, § 8, cl. 14, of the Constitution, "To make Rules for the Government and Regulation of the land and naval Forces," taken in conjunction with the Necessary and Proper Clause, does not extend to civilians—even though they may be dependents living with servicemen on a military base. Pp. 19–40.

4. Under our Constitution, courts of law alone are given power to try civilians for their offenses against the United States. Pp. 40–41.

MR. JUSTICE FRANKFURTER, concurring in the result, concluded that, in capital cases, the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by the power of Congress under Article I to regulate the "land and naval Forces," when considered in connection with the specific protections afforded civilians by Article III and the Fifth and Sixth Amendments. Pp. 41–64.

MR. JUSTICE HARLAN, concurring in the result, concluded that, where the offense is capital, Art. 2 (11) of the Uniform Code of Military Justice cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace. Pp. 65–78.

Solicitor General Rankin reargued the cause for appellant in No. 701 and petitioner in No. 713. With him on the brief were *Assistant Attorney General Olney, Roger Fisher, Beatrice Rosenberg, Carl B. Klein* and *William M. Burch II.*

Frederick Bernays Wiener reargued the cause for appellee in No. 701 and respondent in No. 713. With him on the brief was *Adam Richmond.*

MR. JUSTICE BLACK announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join.

These cases raise basic constitutional issues of the utmost concern. They call into question the role of the military under our system of government. They involve the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the Bill of Rights. These cases are particularly significant because for the first time since the adoption of the Constitution wives of soldiers have been denied trial by jury in a court of law and forced to trial before courts-martial.

In No. 701 Mrs. Clarice Covert killed her husband, a sergeant in the United States Air Force, at an airbase in England. Mrs. Covert, who was not a member of the armed services, was residing on the base with her husband at the time. She was tried by a court-martial for murder under Article 118 of the Uniform Code of Military Justice (UCMJ).[1] The trial was on charges preferred by Air Force personnel and the court-martial was composed of Air Force officers. The court-martial asserted jurisdiction over Mrs. Covert under Article 2 (11) of the UCMJ,[2] which provides:

> "The following persons are subject to this code:
>
> . . . . .
>
> "(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law,

[1] 50 U. S. C. § 712.

[2] 50 U. S. C. § 552 (11).

all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States . . . ."

Counsel for Mrs. Covert contended that she was insane at the time she killed her husband, but the military tribunal found her guilty of murder and sentenced her to life imprisonment. The judgment was affirmed by the Air Force Board of Review, 16 CMR 465, but was reversed by the Court of Military Appeals, 6 USCMA 48, because of prejudicial errors concerning the defense of insanity. While Mrs. Covert was being held in this country pending a proposed retrial by court-martial in the District of Columbia, her counsel petitioned the District Court for a writ of habeas corpus to set her free on the ground that the Constitution forbade her trial by military authorities. Construing this Court's decision in *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, as holding that "a civilian is entitled to a civilian trial" the District Court held that Mrs. Covert could not be tried by court-martial and ordered her released from custody. The Government appealed directly to this Court under 28 U. S. C. § 1252. See 350 U. S. 985.

In No. 713 Mrs. Dorothy Smith killed her husband, an Army officer, at a post in Japan where she was living with him. She was tried for murder by a court-martial and despite considerable evidence that she was insane was found guilty and sentenced to life imprisonment. The judgment was approved by the Army Board of Review, 10 CMR 350, 13 CMR 307, and the Court of Military Appeals, 5 USCMA 314. Mrs. Smith was then confined in a federal penitentiary in West Virginia. Her father, respondent here, filed a petition for habeas corpus in a District Court for West Virginia. The petition charged that the court-martial was without jurisdiction because Article 2 (11) of the UCMJ was unconstitutional insofar as it authorized the trial of civilian dependents accom-

panying servicemen overseas. The District Court refused to issue the writ, 137 F. Supp. 806, and while an appeal was pending in the Court of Appeals for the Fourth Circuit we granted certiorari at the request of the Government, 350 U. S. 986.

The two cases were consolidated and argued last Term and a majority of the Court, with three Justices dissenting and one reserving opinion, held that military trial of Mrs. Smith and Mrs. Covert for their alleged offenses was constitutional. 351 U. S. 470, 487. The majority held that the provisions of Article III and the Fifth and Sixth Amendments which require that crimes be tried by a jury after indictment by a grand jury did not protect an American citizen when he was tried by the American Government in foreign lands for offenses committed there and that Congress could provide for the trial of such offenses in any manner it saw fit so long as the procedures established were reasonable and consonant with due process. The opinion then went on to express the view that military trials, as now practiced, were not unreasonable or arbitrary when applied to dependents accompanying members of the armed forces overseas. In reaching their conclusion the majority found it unnecessary to consider the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces" under Article I of the Constitution.

Subsequently, the Court granted a petition for rehearing, 352 U. S. 901. Now, after further argument and consideration, we conclude that the previous decisions cannot be permitted to stand. We hold that Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities.

I.

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely

a creature of the Constitution.[3] Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.[4] When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government. It was recognized long before Paul successfully invoked his right as a Roman citizen to be tried in strict accordance with Roman law. And many centuries later an English historian wrote:

> "In a Settled Colony the inhabitants have all the rights of Englishmen. They take with them, in the first place, that which no Englishman can by expatriation put off, namely, allegiance to the Crown, the duty of obedience to the lawful commands of the Sovereign, and obedience to the Laws which Parliament may think proper to make with reference to such a Colony. But, on the other hand, they take with them all the rights and liberties of British Subjects; all the rights and liberties as against the Prerogative of the Crown, which they would enjoy in this country." [5]

The rights and liberties which citizens of our country enjoy are not protected by custom and tradition alone, they have been jealously preserved from the encroach-

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[3] *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326; *Ex parte Milligan,* 4 Wall. 2, 119, 136–137; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 477; *Ex parte Quirin,* 317 U. S. 1, 25.

[4] *Marbury* v. *Madison,* 1 Cranch 137, 176–180; *Hawaii* v. *Mankichi,* 190 U. S. 197, 236–239 (Harlan, J., dissenting).

[5] 2 Clode, Military Forces of the Crown, 175.

ments of Government by express provisions of our written Constitution.[6]

Among those provisions, Art. III, § 2 and the Fifth and Sixth Amendments are directly relevant to these cases. Article III, § 2 lays down the rule that:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Fifth Amendment declares:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . ."

And the Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

The language of Art. III, § 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home. After declaring that *all* criminal trials must be by jury, the section states that when a crime is "not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." If

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[6] Cf. *Barron* v. *Baltimore*, 7 Pet. 243, 250.

this language is permitted to have its obvious meaning,[7] § 2 is applicable to criminal trials outside of the States as a group without regard to where the offense is committed or the trial held.[8] From the very first Congress, federal statutes have implemented the provisions of § 2 by providing for trial of murder and other crimes committed outside the jurisdiction of any State "in the district where the offender is apprehended, or into which he may first be brought." [9] The Fifth and Sixth Amendments, like Art. III, § 2, are also all inclusive with their sweeping references to "no person" and to "all criminal prosecutions."

This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States.[10] While it has been suggested that only

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[7] This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning. See, *e. g.*, *Ogden* v. *Saunders*, 12 Wheat. 213, 302–303; *Lake County* v. *Rollins*, 130 U. S. 662, 670–671. In *United States* v. *Sprague*, 282 U. S. 716, 731–732, the Court said:

"The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. . . . The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended."

[8] According to Madison, the section was intended "to provide for trial by jury of offences committed out of any State." 3 Madison Papers (Gilpin ed. 1841) 1441.

[9] 1 Stat. 113–114. With slight modifications this provision is now 18 U. S. C. § 3238.

[10] See, *e. g.*, *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313 (Due Process of Law); *Downes* v. *Bidwell*, 182 U. S. 244, 277 (First Amendment, Prohibition against Ex Post Facto Laws or Bills of

those constitutional rights which are "fundamental" protect Americans abroad,[11] we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. Moreover, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.[12] As Blackstone wrote in his Commentaries:

> ". . . the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! . . . [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his

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Attainder); *Mitchell* v. *Harmony*, 13 How. 115, 134 (Just Compensation Clause of the Fifth Amendment); *Best* v. *United States*, 184 F. 2d 131, 138 (Fourth Amendment); *Eisentrager* v. *Forrestal*, 84 U. S. App. D. C. 396, 174 F. 2d 961 (Right to Habeas Corpus), rev'd on other grounds *sub nom. Johnson* v. *Eisentrager*, 339 U. S. 763; *Turney* v. *United States*, 126 Ct. Cl. 202, 115 F. Supp. 457, 464 (Just Compensation Clause of the Fifth Amendment).

[11] See *Dorr* v. *United States*, 195 U. S. 138, 144–148.

[12] The right to trial by jury in a criminal case is twice guaranteed by the Constitution. It is common knowledge that the fear that jury trial might be abolished was one of the principal sources of objection to the Federal Constitution and was an important reason for the adoption of the Bill of Rights. The Sixth Amendment reaffirmed the right to trial by jury in criminal cases and the Seventh Amendment insured such trial in civil controversies. See 2 Elliot's Debates (2d ed. 1836) *passim*; 3 *id. passim*.

> liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." [13]

Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience.

The keystone of supporting authorities mustered by the Court's opinion last June to justify its holding that Art. III, § 2, and the Fifth and Sixth Amendments did not apply abroad was *In re Ross,* 140 U. S. 453. The *Ross* case is one of those cases that cannot be understood except in its peculiar setting; even then, it seems highly unlikely that a similar result would be reached today. Ross was serving as a seaman on an American ship in Japanese waters. He killed a ship's officer, was seized and tried before a consular "court" in Japan. At that time, statutes authorized American consuls to try American citizens charged with committing crimes in Japan and certain other "non-Christian" countries.[14] These

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[13] 3 Blackstone's Commentaries 379. As to the importance of trial by jury, see also *Ex parte Milligan,* 4 Wall. 2, 122–123; *Thompson* v. *Utah,* 170 U. S. 343, 349–350; *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 16, 18–19; 2 Kent's Commentaries, 3–10; The Federalist, No. 83 (Hamilton); 2 Wilson's Works (Andrews ed. 1896) 222.

De Tocqueville observed:

"The institution of the jury . . . places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government. . . . He who punishes the criminal is . . . the real master of society. . . . All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury." 1 De Tocqueville, Democracy in America (Reeve trans. 1948 ed.), 282–283.

[14] Rev. Stat. §§ 4083–4130 (1878).

statutes provided that the laws of the United States were to govern the trial except:

> ". . . where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies." [15]

The consular power approved in the *Ross* case was about as extreme and absolute as that of the potentates of the "non-Christian" countries to which the statutes applied. Under these statutes consuls could and did make the criminal laws, initiate charges, arrest alleged offenders, try them, and after conviction take away their liberty or their life—sometimes at the American consulate. Such a blending of executive, legislative, and judicial powers in one person or even in one branch of the Government is ordinarily regarded as the very acme of absolutism.[16] Nevertheless, the Court sustained Ross' conviction by the consul. It stated that constitutional

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[15] *Id.*, § 4086.

[16] Secretary of State Blaine referred to these consular powers as "greater than ever the Roman law conferred on the pro-consuls of the empire, to an officer who, under the terms of the commitment of this astounding trust, is practically irresponsible." S. Exec. Doc. No. 21, 47th Cong., 1st Sess. 4. Seward, at a time when he was Consul-General, declared: "[t]here is no reason, *excepting the absence of appropriate legislation,* why American citizens in China, charged with grave offenses, should not have the privilege of a trial by jury as elsewhere throughout the world where the institution of civilization prevails." *Id.*, at 7.

protections applied "only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad." [17] Despite the fact that it upheld Ross' conviction under United States laws passed pursuant to asserted constitutional authority, the Court went on to make a sweeping declaration that "[t]he Constitution can have no operation in another country." [18]

The *Ross* approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases.[19] That approach is obviously erroneous if the United States Government, which has no power except that granted by the Constitution, can and does try citizens for crimes committed abroad.[20] Thus the *Ross* case rested, at least in substantial part, on a fundamental misconception and the most that can be said in support of the result reached there is that the consular court jurisdiction had a long history antedating the adoption of the Constitution. The Congress has recently buried the consular system of trying Americans.[21] We are not willing to jeopardize the lives and liberties of Americans by disinterring it. At best, the *Ross* case should be left as a relic from a different era.

The Court's opinion last Term also relied on the "Insular Cases" to support its conclusion that Article III and the Fifth and Sixth Amendments were not applicable

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[17] *In re Ross, supra,* at 464.

[18] *Ibid.*

[19] See cases cited in note 10, *supra.*

[20] See, *e. g., Kawakita* v. *United States,* 343 U. S. 717; *United States* v. *Flores,* 289 U. S. 137; *United States* v. *Bowman,* 260 U. S. 94; *Chandler* v. *United States,* 171 F. 2d 921, cert. denied, 336 U. S. 918.

[21] 70 Stat. 773.

to the trial of Mrs. Smith and Mrs. Covert.[22] We believe that reliance was misplaced. The "Insular Cases," which arose at the turn of the century, involved territories which had only recently been conquered or acquired by the United States. These territories, governed and regulated by Congress under Art. IV, § 3,[23] had entirely different cultures and customs from those of this country. This Court, although closely divided,[24] ruled that certain constitutional safeguards were not applicable to these territories since they had not been "expressly or impliedly incorporated" into the Union by Congress. While conceding that "fundamental" constitutional rights applied everywhere,[25] the majority found that it would disrupt long-established practices and would be inexpedient to require a jury trial after an indictment by a grand jury in the insular possessions.[26]

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[22] *Downes* v. *Bidwell,* 182 U. S. 244; *Hawaii* v. *Mankichi,* 190 U. S. 197; *Dorr* v. *United States,* 195 U. S. 138; *Balzac* v. *Porto Rico,* 258 U. S. 298.

[23] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . . ."

[24] *Downes* v. *Bidwell,* 182 U. S. 244, the first of the "Insular Cases" was decided over vigorous dissents from Mr. Chief Justice Fuller, joined by Justices Harlan, Brewer, and Peckham, and from Mr. Justice Harlan separately. The four dissenters took the position that all the restraints of the Bill of Rights and of other parts of the Constitution were applicable to the United States Government wherever it acted. This was the position which the Court had consistently followed prior to the "Insular Cases." See, *e. g., Thompson* v. *Utah,* 170 U. S. 343; *Callan* v. *Wilson,* 127 U. S. 540.

[25] As to the great significance of the right to trial by jury see text at note 13, *supra,* and the authorities referred to in that note.

[26] Later the Court held that once a territory become "incorporated" all of the constitutional protections became "applicable." See, *e. g., Rassmussen* v. *United States,* 197 U. S. 516, 520–521.

The "Insular Cases" can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians. Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes.[27] But we have no authority, or inclination, to read exceptions into it which are not there.[28]

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[27] It may be said that it is difficult to amend the Constitution. To some extent that is true. Obviously the Founders wanted to guard against hasty and ill-considered changes in the basic charter of government. But if the necessity for alteration becomes pressing, or if the public demand becomes strong enough, the Constitution can and has been promptly amended. The Eleventh Amendment was ratified within less than two years after the decision in *Chisholm* v. *Georgia,* 2 Dall. 419. And more recently the Twenty-First Amendment, repealing nationwide prohibition, became part of the Constitution within ten months after congressional action. On the average it has taken the States less than two years to ratify each of the twenty-two amendments which have been made to the Constitution.

[28] In 1881, Senator Carpenter, while attacking the consular courts "as a disgrace to this nation" because they deprived citizens of the

II.

At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents.[29] For its part, the United States agreed that these military courts would be willing and able to try and to punish all offenses against the laws of Great Britain by such persons. In all material respects, the same situation existed in Japan when Mrs. Smith

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"fundamental and essential" rights to indictment and trial by jury, declared:

"If we are too mean as a nation to pay the expense of observing the Constitution in China, then let us give up our concessions in China and come back to as much of the Constitution as we can afford to carry out." 11 Cong. Rec. 410.

[29] Executive Agreement of July 27, 1942, 57 Stat. 1193. The arrangement now in effect in Great Britain and the other North Atlantic Treaty Organization nations, as well as in Japan, is the NATO Status of Forces Agreement, 4 U. S. Treaties and Other International Agreements 1792, T. I. A. S. 2846, which by its terms gives the foreign nation primary jurisdiction to try dependents accompanying American servicemen for offenses which are violations of the law of both the foreign nation and the United States. Art. VII, §§ 1 (b), 3 (a). The foreign nation has exclusive criminal jurisdiction over dependents for offenses which only violate its laws. Art. VII, § 2 (b). However, the Agreement contains provisions which require that the foreign nations provide procedural safeguards for our nationals tried under the terms of the Agreement in their courts. Art. VII, § 9. Generally, see Note, 70 Harv. L. Rev. 1043.

Apart from those persons subject to the Status of Forces and comparable agreements and certain other restricted classes of Americans, a foreign nation has plenary criminal jurisdiction, of course, over all Americans—tourists, residents, businessmen, government employees and so forth—who commit offenses against its laws within its territory.

killed her husband.[30] Even though a court-martial does not give an accused trial by jury and other Bill of Rights protections, the Government contends that Art. 2 (11) of the UCMJ, insofar as it provides for the military trial of dependents accompanying the armed forces in Great Britain and Japan, can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

Article VI, the Supremacy Clause of the Constitution, declares:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . ."

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in "pursuance" of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolu-

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[30] See Administrative Agreement, 3 U. S. Treaties and Other International Agreements 3341, T. I. A. S. 2492.

tionary War, would remain in effect.[31] It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.[32] In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.[33] For example, in *Geofroy* v. *Riggs,* 133 U. S. 258, 267, it declared:

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the

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[31] See the references collected in 4 Farrand, Records of the Federal Convention (Rev. ed. 1937), 123.

[32] See the discussion in the Virginia Convention on the adoption of the Constitution, 3 Elliot's Debates (1836 ed.) 500–519.

[33] *E. g., United States* v. *Minnesota,* 270 U. S. 181, 207–208; *Holden* v. *Joy,* 17 Wall. 211, 242–243; *The Cherokee Tobacco,* 11 Wall. 616, 620–621; *Doe* v. *Braden,* 16 How. 635, 657. Cf. *Marbury* v. *Madison,* 1 Cranch 137, 176–180. We recognize that executive agreements are involved here but it cannot be contended that such an agreement rises to greater stature than a treaty.

government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.[34] It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

There is nothing in *Missouri* v. *Holland,* 252 U. S. 416, which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.[35]

In summary, we conclude that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs.

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[34] In *Whitney* v. *Robertson,* 124 U. S. 190, the Court stated, at p. 194: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [I]f the two are inconsistent, the one last in date will control the other . . . ." *Head Money Cases,* 112 U. S. 580; *Botiller* v. *Dominguez,* 130 U. S. 238; *Chae Chan Ping* v. *United States,* 130 U. S. 581. See *Clark* v. *Allen,* 331 U. S. 503, 509–510; *Moser* v. *United States,* 341 U. S. 41, 45.

[35] See *United States* v. *Darby,* 312 U. S. 100, 124–125, and the authorities collected there.

Covert. Since their court-martial did not meet the requirements of Art. III, § 2 or the Fifth and Sixth Amendments we are compelled to determine if there is anything *within* the Constitution which authorizes the military trial of dependents accompanying the armed forces overseas.

III.

Article I, § 8, cl. 14 empowers Congress "To make Rules for the Government and Regulation of the land and naval Forces." It has been held that this creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights.[36] But if the language of Clause 14 is given its natural meaning,[37] the power granted does not extend to civilians—even though they may be dependents living with servicemen on a military base.[38] The term "land and naval Forces" refers to per-

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[36] *Dynes* v. *Hoover,* 20 How. 65; *Ex parte Reed,* 100 U. S. 13.

[37] See note 7, *supra.*

[38] Colonel Winthrop, who has been called the "Blackstone of Military Law," made the following statement in his treatise:
"Can [the power of Congress to raise, support, and govern the military forces] be held to include the raising or constituting, and the governing *nolens volens,* in time of *peace,* as a part of the army, of a class of persons who are under no contract for military service, . . . who render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity . . . . In the opinion of the author, such a range of control is certainly beyond the power of Congress under [the Constitution. The Fifth Amendment] clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military . . . and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law." Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 106.

sons who are members of the armed services and not to their civilian wives, children and other dependents. It seems inconceivable that Mrs. Covert or Mrs. Smith could have been tried by military authorities as members of the "land and naval Forces" had they been living on a military post in this country. Yet this constitutional term surely has the same meaning everywhere. The wives of servicemen are no more members of the "land and naval Forces" when living at a military post in England or Japan than when living at a base in this country or in Hawaii or Alaska.

The Government argues that the Necessary and Proper Clause when taken in conjunction with Clause 14 allows Congress to authorize the trial of Mrs. Smith and Mrs. Covert by military tribunals and under military law. The Government claims that the two clauses together constitute a broad grant of power "without limitation" authorizing Congress to subject all persons, civilians and soldiers alike, to military trial if "necessary and proper" to govern and regulate the land and naval forces. It was on a similar theory that Congress once went to the extreme of subjecting persons who made contracts with the military to court-martial jurisdiction with respect to frauds related to such contracts.[39] In the only judicial test a Circuit Court held that the legislation was patently unconstitutional. *Ex parte Henderson,* 11 Fed. Cas. 1067, No. 6,349.

It is true that the Constitution expressly grants Congress power to make all rules necessary and proper to govern and regulate those persons who are serving in the "land and naval Forces." But the Necessary and Proper

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[39] 12 Stat. 696. For debates showing sharp attacks on the constitutionality of this legislation see Cong. Globe, 37th Cong., 3d Sess. 952–958. The legislation was subsequently repealed. Rev. Stat. (1878 ed.) §§ 1342, 5596.

Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—"the land and naval Forces." Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States. And to protect persons brought before these courts, Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards. By way of contrast the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law.[40] Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.

Nothing said here contravenes the rule laid down in *McCulloch* v. *Maryland,* 4 Wheat. 316, at 421, that:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

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[40] As the Government points out in its brief on rehearing:

"The clause granting Congress power to make rules for the government and regulation of the land and naval forces was included in the final draft of the Constitution without either discussion or debate. . . . Neither the original draft presented to the convention nor the draft submitted by the 'Committee of Detail' contained the clause. 5 Elliot's Debates 130, 379."

In *McCulloch* this Court was confronted with the problem of determining the scope of the Necessary and Proper Clause in a situation where no specific restraints on governmental power stood in the way. Here the problem is different. Not only does Clause 14, by its terms, limit military jurisdiction to members of the "land and naval Forces," but Art. III, § 2 and the Fifth and Sixth Amendments require that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions—safeguards which cannot be given in a military trial. In the light of these as well as other constitutional provisions, and the historical background in which they were formed, military trial of civilians is inconsistent with both the "letter and spirit of the constitution."

Further light is reflected on the scope of Clause 14 by the Fifth Amendment. That Amendment which was adopted shortly after the Constitution reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces,* or in the Militia, when in actual service in time of War or public danger; . . . ." (Emphasis added.)

Since the exception in this Amendment for "cases arising in the land or naval forces" was undoubtedly designed to correlate with the power granted Congress to provide for the "Government and Regulation" of the armed services, it is a persuasive and reliable indication that the authority conferred by Clause 14 does not encompass persons who cannot fairly be said to be "in" the military service.

Even if it were possible, we need not attempt here to precisely define the boundary between "civilians" and members of the "land and naval Forces." We recognize

that there might be circumstances where a person could be "in" the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform. But the wives, children and other dependents of servicemen cannot be placed in that category, even though they may be accompanying a serviceman abroad at Government expense and receiving other benefits from the Government.[41] We have no difficulty in saying that such persons do not lose their civilian status and their right to a civilian trial because the Government helps them live as members of a soldier's family.

The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. The idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of regulating the armed forces would have seemed incredible to those men, in whose lifetime the right of the military to try *soldiers* for any offenses in time of peace had only been grudgingly conceded.[42] The Founders envisioned the

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[41] Most of the benefits received by dependents accompanying servicemen overseas are also enjoyed by those accompanying servicemen in this country—for example, quarters, commissary privileges, medical benefits, free transportation of household effects and so forth.

[42] In the Mutiny Acts, first passed in 1688, 1 Will. & Mar., c. 5, the English Parliament reluctantly departed from the Common Law, see note 44, *infra,* and granted the Army authority in time of peace to try soldiers—initially for only the offenses of mutiny and desertion in time of civil insurrection. In the beginning this limited court-martial jurisdiction was granted only for periods of four months; later it was granted from year to year. See 1 Clode, Military Forces of the Crown, 19–21, 55–61, 76–78, 142–166, 499–501, 519–520.

Initially the Mutiny Acts did not apply to the American Colonies. In 1713, Parliament, for the first time, authorized the trial of soldiers by courts-martial during peacetime in the overseas dominions. 12

army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders.[43] They were familiar with the history of Seventeenth Century England, where Charles I tried to govern through the army and without Parliament. During this attempt, contrary to the Common Law, he used courts-martial to try soldiers for certain non-military offenses.[44]

Anne, c. 13, § 43; 1 Geo. I, c. 34. See the British War Office, Manual of Military Law (7th ed. 1929), 10–14. For colonial reaction to military trial of soldiers in this country in the period preceding the revolution see text at note 49 and the authorities referred to there.

It was not until 1863 that Congress first authorized the trial of soldiers, *in wartime,* for civil crimes such as murder, arson, rape, etc., by courts-martial. 12 Stat. 736. Previously the soldiers had been turned over to state authorities for trial in state courts. In *Coleman* v. *Tennessee,* 97 U. S. 509, this Court declined to construe the 1863 statute as depriving civilian courts of a concurrent jurisdiction to try soldiers for crimes. The Court said: "With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect." *Id.,* at 514.

[43] Washington warned that "Mercenary Armies . . . have at one time or another subverted the liberties of allmost all the Countries they have been raised to defend . . . ." 26 Writings of Washington (Fitzpatrick ed.) 388. Madison in The Federalist, No. 41, cautioned: "[T]he liberties of Rome proved the final victim to her military triumphs; and . . . the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments."

[44] The Common Law made no distinction between the crimes of soldiers and those of civilians in time of peace. All subjects were tried alike by the same civil courts so "if a life-guardsman deserted, he could only be sued for breach of contract, and if he struck his officer he was only liable to an indictment or an action of battery." 2 Campbell, Lives of the Chief Justices (1st ed. 1849), 91. In time of

This court-martialing of soldiers in peacetime evoked strong protests from Parliament.[45] The reign of Charles I was followed by the rigorous military rule of Oliver Cromwell. Later, James II used the Army in his fight

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war the Common Law recognized an exception that permitted armies to try soldiers "in the field." The pages of English history are filled with the struggle of the common-law courts and Parliament against the jurisdiction of military tribunals. See, for example, 8 Richard II, c. 5; 13 Richard II, cc. 2, 5; 1 Henry IV, c. 14; 18 Henry VI, c. 19; 3 Car. I, c. 1. See 3 Rushworth, Historical Collections, App. 76–81.

During the Middle Ages the Court of the Constable and Marshal exercised jurisdiction over offenses committed by soldiers in time of war and over cases "of Death or Murder committed beyond the Sea." Hale, History and Analysis of the Common Law of England (1st ed. 1713), 37–42. As time passed the jurisdiction of this court was steadily narrowed by Parliament and the common-law courts so that Lord Chief Justice Hale (1609–1676) could write that the court "has been long disused upon great Reasons." Hale, *supra*, 42. As the Court of the Constable and Marshal fell into disuse and disrepute jurisdiction over soldiers in time of war was assumed by commissions appointed by the King or by military councils.

In *Mostyn* v. *Fabrigas*, 1 Cowp. 161, at 176, Lord Mansfield observed that "tradesmen who followed the train [of the British Army at Gibraltar], were not liable to martial law." (The distinction between the terms "martial law" and "military law" is of relatively recent origin. Early writers referred to all trials by military authorities as "martial law.")

[45] In 1627, the Petition of Right, 3 Car. I, c. 1 (Pickering, Vol. VII, p. 319, 1763) protested:

"nevertheless of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny or other outrage or misdemeanor whatsoever, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of

against Parliament and the people. He promulgated Articles of War (strangely enough relied on in the Government's brief) authorizing the trial of soldiers for non-military crimes by courts-martial.[46] This action hastened the revolution that brought William and Mary to the throne upon their agreement to abide by a Bill of Rights which, among other things, protected the right of trial by jury.[47] It was against this general background that two of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone—men who exerted considerable influence on the Founders—expressed sharp hostility to any expansion of the jurisdiction of military courts. For instance, Blackstone went so far as to assert:

> "For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance;

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such offenders, and them to cause to be executed and put to death according to the law martial:

. . . . . .

"[Your Majesty's subjects] do therefore humbly pray your most excellent Majesty . . . that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed, or put to death contrary to the laws and franchise of the land." See also 1 Clode, Military Forces of the Crown, 18–20, 424–425.

[46] These Articles are set out in Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 920. James II also removed Lord Chief Justice Herbert and Sir John Holt (later Lord Chief Justice) from the bench for holding that military trials in peacetime were illegal and contrary to the law of the land. See 2 Campbell, Lives of the Chief Justices (1st ed. 1849), 90–93, 129.

[47] 1 Will. & Mar., c. 2.

> and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land." [48]

The generation that adopted the Constitution did not distrust the military because of past history alone. Within their own lives they had seen royal governors sometimes resort to military rule. British troops were quartered in Boston at various times from 1768 until the outbreak of the Revolutionary War to support unpopular royal governors and to intimidate the local populace. The trial of *soldiers* by courts-martial and the interference of the military with the civil courts aroused great anxiety and antagonism not only in Massachusetts but throughout the colonies. For example, Samuel Adams in 1768 wrote:

> ". . . [I]s it not enough for us to have seen soldiers and mariners forejudged of life, and executed within the body of the county by martial law? Are citizens

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[48] 1 Blackstone's Commentaries 413. And Hale in much the same vein wrote:

"*First*, That in Truth and Reality [martial law] is not a Law, but something indulged rather than allowed as a Law; the Necessity of Government, Order and Discipline in an Army, is that only which can give those Laws a Countenance, ...

"*Secondly*, This indulged Law was only to extend to Members of the Army, or to those of the opposite Army, and never was so much indulged as intended to be (executed or) exercised upon others; for others who were not listed under the Army had no Colour of Reason to be bound by Military Constitutions, applicable only to the Army; whereof they were not Parts, but they were to be order'd and govern'd according to the Laws to which they were subject, though it were a Time of War.

"*Thirdly*, That the Exercise of Martial Law, whereby any Person should lose his Life or Member, or Liberty, may not be permitted in Time of Peace, when the Kings Courts are open for all Persons to receive Justice, according to the Laws of the Land." Hale, History and Analysis of the Common Law of England (1st ed. 1713), 40–41.

> to be called upon, threatened, ill-used at the will of the soldiery, and put under arrest, by pretext of the law military, in breach of the fundamental rights of subjects, and contrary to the law and franchise of the land? . . . Will the spirits of people as yet unsubdued by tyranny, unawed by the menaces of arbitrary power, submit to be governed by military force? No! Let us rouse our attention to the common law,—which is our birthright, our great security against all kinds of insult and oppression . . . ." [49]

Colonials had also seen the right to trial by jury subverted by acts of Parliament which authorized courts of admiralty to try alleged violations of the unpopular

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[49] 1 Wells, The Life and Public Services of Samuel Adams, 231. See also Dickerson, Boston Under Military Rule; Report of Boston Committee of Correspondence (November 20, 1772), "A List of Infringements and Violations of Rights," in Morison, The American Revolution 1764–1788, 91; Declaration and Resolves of the First Continental Congress in 1 Journals of the Continental Congress (Ford ed.) 63–73.

In June 1775, General Gage, then Royal Governor of Massachusetts Colony, declared martial law in Boston and its environs. The Continental Congress denounced this effort to supersede the course of the common law and to substitute the law martial. Declaration of Causes of Taking Up Arms, in 2 American Archives, Fourth Series (Force ed.), 1865, 1868.

In November 1775, Norfolk, Virginia, also was placed under martial law by the Royal Governor. The Virginia Assembly denounced this imposition of the "most execrable of all systems, the law martial," as in "direct violation of the Constitution, and the laws of this country." 4 *id.*, 81–82.

And the Constitution adopted by the Provincial Congress of South Carolina on March 26, 1776, protested: ". . . governors and others bearing the royal commission in the colonies [have] . . . dispensed with the law of the land, and substituted the law martial in its stead; . . . ." Thorpe, The Federal and State Constitutions, 3242.

"Molasses" and "Navigation" Acts.[50] This gave the admiralty courts jurisdiction over offenses historically triable only by a jury in a court of law and aroused great resentment throughout the colonies.[51] As early as 1765 delegates from nine colonies meeting in New York asserted in a "Declaration of Rights" that trial by jury was the "inherent and invaluable" right of every citizen in the colonies.[52]

With this background it is not surprising that the Declaration of Independence protested that George III had "affected to render the Military independent of and superior to the Civil Power" and that Americans had been deprived in many cases of "the benefits of Trial by Jury." [53] And those who adopted the Constitution embodied their profound fear and distrust of military power, as well as their determination to protect trial by jury, in the Constitution and its Amendments.[54] Perhaps they

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[50] 4 Geo. III, c. 15; 8 Geo. III, c. 22.

[51] See 4 Benedict, American Admiralty (6th ed. 1940), §§ 672–704; Harper, The English Navigation Laws, 184–196; 9 John Adams, Works, 318–319.

Jefferson in 1775 protested: "[Parliament has] extended the jurisdiction of the courts of admiralty beyond their antient limits thereby depriving us of the inestimable right of trial by jury in cases affecting both life and property and subjecting both to the arbitrary decision of a single and dependent judge." 2 Journals of the Continental Congress (Ford ed.) 132.

[52] 43 Harvard Classics 147, 148.

[53] State constitutions adopted during this period generally contained provisions protecting the right to trial by jury and warning against the military. See Thorpe, The Federal and State Constitutions, (Delaware) 569, (Maryland) 1688, (Massachusetts) 1891–1892, (North Carolina) 2787–2788, (Pennsylvania) 3083, (South Carolina) 3257, (Virginia) 3813–3814.

[54] See Art. I, §§ 8, 9; Art. II, § 2; Art. III; Amendments II, III, V, VI of the Constitution. See Madison, The Debates in the Federal

were aware that memories fade and hoped that in this way they could keep the people of this Nation from having to fight again and again the same old battles for individual freedom.

In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were "necessary and proper" for the regulation of the "land and naval Forces." Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority. The Constitution does not say that Congress can regulate "the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces." There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America.

On several occasions this Court has been faced with an attempted expansion of the jurisdiction of military courts. *Ex parte Milligan,* 4 Wall. 2, one of the great landmarks in this Court's history, held that military authorities were without power to try civilians not in the military or naval service by declaring martial law in an area where the civil

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Convention of 1787, in Documents Illustrative of the Formation of The Union of The American States, H. R. Doc. No. 398, 69th Cong., 1st Sess. 564–571, 600-602; Warren, The Making of the Constitution (1947 ed.), 482–484, 517–521. The Federalist, Nos. 26, 27, 28, 41; Elliot's Debates (2d ed. 1836) *passim.*

administration was not deposed and the courts were not closed.[55] In a stirring passage the Court proclaimed:

> "Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service." [56]

In *Duncan* v. *Kahanamoku,* 327 U. S. 304, the Court reasserted the principles enunciated in *Ex parte Milligan* and reaffirmed the tradition of military subordination to civil authorities and institutions. It refused to sanction the military trial of civilians in Hawaii during wartime despite government claims that the needs of defense made martial law imperative.

Just last Term, this Court held in *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, that military courts could not constitutionally try a discharged serviceman for an offense which he had allegedly committed while in the armed forces. It was decided (1) that since Toth was a civilian he could not be tried by military court-martial,[57]

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[55] Cf. *Ex parte Merryman,* 17 Fed. Cas. 144, No. 9,487. And see the account of the trial of Theobald Wolfe Tone, 27 Howell's State Trials 614.

[56] 4 Wall., at 122–123.

[57] 350 U. S., at 22–23. Cf. *United States ex rel. Flannery* v. *Commanding General,* 69 F. Supp. 661, rev'd by stipulation in unreported

and (2) that since he was charged with murder, a "crime" in the constitutional sense, he was entitled to indictment by a grand jury, jury trial, and the other protections contained in Art. III, § 2 and the Fifth, Sixth, and Eighth Amendments. The Court pointed out that trial by civilian courts was the rule for persons who were not members of the armed forces.

There are no supportable grounds upon which to distinguish the *Toth* case from the present cases. Toth, Mrs. Covert, and Mrs. Smith were all civilians. All three were American citizens. All three were tried for murder. All three alleged crimes were committed in a foreign country. The only differences were: (1) Toth was an ex-serviceman while they were wives of soldiers; (2) Toth was arrested in the United States while they were seized in foreign countries. If anything, Toth had closer connection with the military than the two women for his crime was committed while he was actually serving in the Air Force. Mrs. Covert and Mrs. Smith had never been members of the army, had never been employed by the army, had never served in the army in any capacity. The Government appropriately argued in *Toth* that the constitutional basis for court-martialing him was clearer than for court-martialing wives who are accompanying their husbands abroad.[58] Certainly Toth's conduct as a soldier bears a closer relation to the maintenance of order and discipline in the armed forces than the conduct of these wives. The fact that Toth was arrested here while the

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order of the Second Circuit, No. 20235, April 18, 1946. And see *Ex parte Van Vranken*, 47 F. 888; *Antrim's Case*, 5 Phila. 278, 288; *Jones* v. *Seward*, 40 Barb. (N. Y.) 563, 569–570; *Smith* v. *Shaw*, 12 Johns. (N. Y.) 257.

[58] Brief for respondent, p. 31, *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11: "Indeed, we think the constitutional case is, if anything, clearer for the court-martial of Toth, who was a soldier at the time of his offense, than it is for a civilian accompanying the armed forces."

wives were arrested in foreign countries is material only if constitutional safeguards do not shield a citizen abroad when the Government exercises its power over him. As we have said before, such a view of the Constitution is erroneous. The mere fact that these women had gone overseas with their husbands should not reduce the protection the Constitution gives them.

The *Milligan, Duncan* and *Toth* cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians. In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed.

There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces "in the field" during *time of war*.[59] To the extent that these cases can be justified, insofar as they involved trial of persons who were not "members" of the armed forces, they must rest on the Government's "war powers." In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.[60] But neither Japan

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[59] *Perlstein* v. *United States*, 151 F. 2d 167, cert. granted, 327 U. S. 777, dismissed as moot, 328 U. S. 822; *Hines* v. *Mikell*, 259 F. 28; *Ex parte Jochen*, 257 F. 200; *Ex parte Falls*, 251 F. 415; *Ex parte Gerlach*, 247 F. 616; *Shilman* v. *United States*, 73 F. Supp. 648, reversed in part, 164 F. 2d 649, cert. denied, 333 U. S. 837; *In re Berue*, 54 F. Supp. 252; *McCune* v. *Kilpatrick*, 53 F. Supp. 80; *In re Di Bartolo*, 50 F. Supp. 929.

[60] See, *e. g.*, American Articles of War of 1775, Art. XXXII in Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 953, 956.

We have examined all the cases of military trial of civilians by the

nor Great Britain could properly be said to be an area where active hostilities were under way at the time Mrs. Smith and Mrs. Covert committed their offenses or at the time they were tried.[61]

The Government urges that the concept "in the field" should be broadened to reach dependents accompanying the military forces overseas under the conditions of world tension which exist at the present time. It points out how the "war powers" include authority to prepare defenses and to establish our military forces in defensive posture about the world. While we recognize that the "war powers" of the Congress and the Executive are

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British or American Armies prior to and contemporaneous with the Constitution that the Government has advanced or that we were able to find by independent research. Without exception these cases appear to have involved trials during wartime in the area of battle—"in the field"—or in occupied enemy territory. Even in these areas there are only isolated instances of military trial of "dependents" accompanying the armed forces. Apparently the normal method of disciplining camp followers was to expel them from the camp or to take away their ration privileges.

[61] Experts on military law, the Judge Advocate General and the Attorney General have repeatedly taken the position that "in the field" means in an area of actual fighting. See, *e. g.*, Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 100–102; Davis, Military Law (3d ed. 1915), 478–479; Dudley, Military Law and the Procedures of Courts-Martial (2d ed. 1908), 413–414; 14 Op. Atty. Gen. 22; 16 *id.*, 48; Dig. Op. JAG (1912) 151; *id.* (1901) 56, 563; *id.* (1895) 76, 325–326, 599–600; *id.* (1880) 49, 211, 384. Cf. *Walker* v. *Chief Quarantine Officer,* 69 F. Supp. 980, 987.

Article 2 (10) of the UCMJ, 50 U. S. C. § 552 (10), provides that in *time of war* persons serving with or accompanying the armed forces in the field are subject to court-martial and military law. We believe that Art. 2 (10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of "in the field." The Government does not attempt—and quite appropriately so—to support military jurisdiction over Mrs. Smith or Mrs. Covert under Art. 2 (10).

broad,[62] we reject the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way.[63] The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists. Military trial of civilians "in the field" is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights. We agree with Colonel Winthrop, an expert on military jurisdiction, who declared: *"a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."* [64] (Emphasis not supplied.)

As this Court stated in *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, the business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes. Traditionally, military justice has been a rough form of justice emphasizing summary procedures,

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[62] Even during time of war the Constitution must be observed. *Ex parte Milligan,* 4 Wall. 2, at 120, declares:
"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."
Also see *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156; *United States* v. *Commodities Trading Corp.,* 339 U. S. 121, 125.

[63] *Madsen* v. *Kinsella,* 343 U. S. 341, is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the Army or not.

[64] Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 107.

speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.

Courts-martial are typically *ad hoc* bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of "command influence." [65] In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.[66]

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[65] See Hearings before a Subcommittee of the Senate Committee on Armed Services on S. 857 and H. R. 4080, 81st Cong., 1st Sess.; *Beets* v. *Hunter,* 75 F. Supp. 825, rev'd on other grounds, 180 F. 2d 101, cert. denied, 339 U. S. 963; *Shapiro* v. *United States,* 107 Ct. Cl. 650, 69 F. Supp. 205. Cf. Keeffe, JAG Justice in Korea, 6 Catholic U. of Amer. L. Rev. 1.

The officer who convenes the court-martial also has final authority to determine whether charges will be brought in the first place and to pick the board of inquiry, the prosecutor, the defense counsel, and the law officer who serves as legal adviser to the court-martial.

[66] Speaking of the imperative necessity that judges be independent, Hamilton declared:

". . . [L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; . . . nothing can contribute so much to its firmness and independence as permanency in office, this quality

We recognize that a number of improvements have been made in military justice recently by engrafting more and more of the methods of civilian courts on courts-martial. In large part these ameliorations stem from the reaction of civilians, who were inducted during the two World Wars, to their experience with military justice. Notwithstanding the recent reforms, military trial does not give an accused the same protection which exists in the civil courts. Looming far above all other deficiencies of the military trial, of course, is the absence of trial by jury before an independent judge after an indictment by a grand jury. Moreover the reforms are merely statutory; Congress—and perhaps the President—can reinstate former practices, subject to any limitations imposed by the Constitution, whenever it desires.[67] As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials.[68]

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may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security." The Federalist, No. 78.

[67] The chief legal officers of the armed services have already recommended to Congress that certain provisions of the UCMJ which were designed to provide protection to an accused should be repealed or limited in the interest of military order and efficiency. Joint Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury (1954). See Walsh, Military Law: Return to Drumhead Justice?, 42 A. B. A. J. 521.

[68] Cf. *Burns* v. *Wilson*, 346 U. S. 137, 146, 148, 150; Note, 70 Harv. L. Rev. 1043, 1050–1053. But see *Jackson* v. *Taylor*, 353 U. S. 569; *In re Grimley*, 137 U. S. 147, 150. The exception in the Fifth Amendment, of course, provides that grand jury indictment is not required in cases subject to military trial and this exception has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable. *Ex parte Quirin*, 317 U. S. 1, 40. In *Swaim* v. *United States*, 165 U. S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an

It must be emphasized that every person who comes within the jurisdiction of courts-martial is subject to military law—law that is substantially different from the law which governs civilian society. Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms.[69] It emphasizes the iron hand of discipline more that it does the even scales of justice. Moreover, it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war.[70] In any event, Congress has given the President broad discretion to provide the rules governing military trials.[71] For example, in these very cases a technical manual issued under the President's name with regard to the defense of insanity in military trials was of critical importance in the convictions of Mrs. Covert and Mrs. Smith. If the President can provide

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increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional. Cf. *Kepner* v. *United States*, 195 U. S. 100.

[69] For example, Art. 134, UCMJ, 50 U. S. C. § 728 provides:

"Though not specifically mentioned in this [Code], all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces . . . shall be taken cognizance of . . . and punished at the discretion of [a court-martial]."

In 1942 the Judge Advocate General ruled that a civilian employee of a contractor engaged in construction at an Army base could be tried by court-martial under the predecessor of Article 134 for advising his fellow employees to slow down at their work. Dig. Op. JAG, 1941 Supp., 357.

[70] See *Ex parte Quirin*, 317 U. S. 1, 28–29; *United States* v. *Eliason*, 16 Pet. 291, 301; *Swaim* v. *United States*, 165 U. S. 553. Cf. General Orders, No. 100, Official Records, War of Rebellion, Ser. III, Vol. III, April 24, 1863; 15 Op. Atty. Gen. 297 and Note attached.

[71] Art. 36, UCMJ, 50 U. S. C. § 611.

rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

In summary, "it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." [72] In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual.

It is urged that the expansion of military jurisdiction over civilians claimed here is only slight, and that the practical necessity for it is very great.[73] The attitude appears to be that a slight encroachment on the Bill of Rights and other safeguards in the Constitution need cause little concern. But to hold that these wives could be tried by the military would be a tempting precedent. Slight encroachments create new boundaries from which legions of power can seek new territory to capture. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional

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[72] *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 17.

[73] According to the Government's figures almost 95% of the civilians tried abroad by army courts-martial during the six-year period from 1949–1955 were tried for minor offenses. In this country "petty offenses" by civilians on military reservations are tried by civilian commissioners unless the alleged offender chooses trial in the Federal District Court. 18 U. S. C. § 3401.

practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." [74] Moreover we cannot consider this encroachment a slight one. Throughout history many transgressions by the military have been called "slight" and have been justified as "reasonable" in light of the "uniqueness" of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military.

We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. The country has remained true to that faith for almost one hundred seventy years. Perhaps no group in the Nation has been truer than military men themselves. Unlike the soldiers of many other nations, they have been content to perform their military duties in defense of the Nation in every period of need and to perform those duties well without attempting to usurp power which is not theirs under our system of constitutional government.

Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny. And under our Constitution courts of law alone are given power to try civilians for

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[74] *Boyd* v. *United States*, 116 U. S. 616, 635.

their offenses against the United States. The philosophy expressed by Lord Coke, speaking long ago from a wealth of experience, is still timely:

> "God send me never to live under the Law of Conveniency or Discretion. Shall the Souldier and Justice Sit on one Bench, the Trumpet will not let the Cryer speak in *Westminster-Hall.*" [75]

In No. 701, *Reid* v. *Covert,* the judgment of the District Court directing that Mrs. Covert be released from custody is

Affirmed.

In No. 713, *Kinsella* v. *Krueger,* the judgment of the District Court is reversed and the case is remanded with instructions to order Mrs. Smith released from custody.

Reversed and remanded.

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

MR. JUSTICE FRANKFURTER, concurring in the result.

These cases involve the constitutional power of Congress to provide for trial of civilian dependents accompanying members of the armed forces abroad by court-martial in capital cases. The normal method of trial of federal offenses under the Constitution is in a civilian tribunal. Trial of offenses by way of court-martial, with all the characteristics of its procedure so different from the forms and safeguards of procedure in the conventional courts, is an exercise of exceptional jurisdiction, arising from the power granted to Congress in Art. I, § 8, cl. 14, of the Constitution of the United States "To make Rules for the Government and Regula-

[75] 3 Rushworth, Historical Collections, App. 81.

tion of the land and naval Forces." *Dynes* v. *Hoover,* 20 How. 65; see *Toth* v. *Quarles,* 350 U. S. 11; Winthrop, Military Law and Precedents (2d ed. 1896), 52. Article 2 (11) of the Uniform Code of Military Justice, 64 Stat. 107, 109, 50 U. S. C. § 552 (11), and its predecessors were passed as an exercise of that power, and the agreements with England and Japan recognized that the jurisdiction to be exercised under those agreements was based on the relation of the persons involved to the military forces. See the agreement with Great Britain, 57 Stat. 1193, E. A. S. No. 355, and the United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. VI, c. 31; and the 1952 Administrative Agreement with Japan, 3 U. S. Treaties and Other International Agreements 3341, T. I. A. S. 2492.

Trial by court-martial is constitutionally permissible only for persons who can, on a fair appraisal, be regarded as falling within the authority given to Congress under Article I to regulate the "land and naval Forces," and who therefore are not protected by specific provisions of Article III and the Fifth and Sixth Amendments. It is of course true that, at least regarding the right to a grand jury indictment, the Fifth Amendment is not unmindful of the demands of military discipline.[1] Within the scope of appropriate construction, the phrase "except in cases arising in the land and naval Forces" has been assumed also to modify the guaranties of speedy and public trial

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[1] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . ."

Article 2 of the Uniform Code of Military Justice provides: "The following persons are subject to this code: . . . (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States . . . ."

by jury. And so, the problem before us is not to be answered by recourse to the literal words of this exception. The cases cannot be decided simply by saying that, since these women were not in uniform, they were not "in the land and naval Forces." The Court's function in constitutional adjudications is not exhausted by a literal reading of words. It may be tiresome, but it is nonetheless vital, to keep our judicial minds fixed on the injunction that "it is a *constitution* we are expounding." *M'Culloch* v. *Maryland,* 4 Wheat. 316, 407. Although Winthrop, in his treatise, states that the Constitution "clearly distinguishes the military from the civil class as separate communities" and "recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations . . . ," Winthrop, Military Law and Precedents (2d ed. 1896), 145, this Court, applying appropriate methods of constitutional interpretation, has long held, and in a variety of situations, that in the exercise of a power specifically granted to it, Congress may sweep in what may be necessary to make effective the explicitly worded power. See *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, especially 289 *et seq.; Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Railroad Commission* v. *Chicago, Burlington & Quincy R. Co.,* 257 U. S. 563, 588. This is the significance of the Necessary and Proper Clause, which is not to be considered so much a separate clause in Art. I, § 8, as an integral part of each of the preceding 17 clauses. Only thus may be avoided a strangling literalness in construing a document that is not an enumeration of static rules but the living framework of government designed for an undefined future. *M'Culloch* v. *Maryland,* 4 Wheat. 316; *Hurtado* v. *California,* 110 U. S. 516, 530–531.

Everything that may be deemed, as the exercise of an allowable judgment by Congress, to fall fairly within the

conception conveyed by the power given to Congress "To make Rules for the Government and Regulation of the land and naval Forces" is constitutionally within that legislative grant and not subject to revision by the independent judgment of the Court. To be sure, every event or transaction that bears some relation to "the land and naval Forces" does not *ipso facto* come within the tolerant conception of that legislative grant. The issue in these cases involves regard for considerations not dissimilar to those involved in a determination under the Due Process Clause. Obviously, the practical situations before us bear some relation to the military. Yet the question for this Court is not merely whether the relation of these women to the "land and naval Forces" is sufficiently close to preclude the necessity of finding that Congress has been arbitrary in its selection of a particular method of trial. For, although we must look to Art. I, § 8, cl. 14, as the immediate justifying power, it is not the only clause of the Constitution to be taken into account. The Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be dissevered from the rest of the Constitution. Our conclusion in these cases therefore must take due account of Article III and the Fifth and Sixth Amendments. We must weigh all the factors involved in these cases in order to decide whether these women dependents are so closely related to what Congress may allowably deem essential for the effective "Government and Regulation of the land and naval Forces" that they may be subjected to court-martial jurisdiction in these capital cases, when the consequence is loss of the protections afforded by Article III and the Fifth and Sixth Amendments.

We are not concerned here even with the possibility of some alternative non-military type of trial that does

not contain all the safeguards of Article III and the Fifth and Sixth Amendments. We must judge only what has been enacted and what is at issue. It is the power actually asserted by Congress under Art. I, § 8, cl. 14, that must now be adjudged in the light of Article III and the Fifth and Sixth Amendments. In making this adjudication, I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is in question. The Court has not before it, and therefore I need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents. Nor do we have before us a case involving a non-capital crime. This narrow delineation of the issue is merely to respect the important restrictions binding on the Court when passing on the constitutionality of an Act of Congress. "In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Steamship Co.* v. *Emigration Commissioners,* 113 U. S. 33, 39.

We are also not concerned here with the substantive aspects of the grant of power to Congress to "make Rules for the Government and Regulation of the land and naval Forces." What conduct should be punished and what constitutes a capital case are matters for congressional discretion, always subject of course to any specific restrictions of the Constitution. These cases involve the validity of procedural conditions for determining the commission of a crime in fact punishable by death. The taking of life is irrevocable. It is in capital cases especially

that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights. Thus, in *Powell* v. *Alabama,* 287 U. S. 45, 71, the fact "above all that they stood in deadly peril of their lives" led the Court to conclude that the defendants had been denied due process by the failure to allow them reasonable time to seek counsel and the failure to appoint counsel. I repeat. I do not mean to imply that the considerations that are controlling in capital cases involving civilian dependents are constitutionally irrelevant in capital cases involving civilians other than dependents or in non-capital cases involving dependents or other civilians. I do say that we are dealing here only with capital cases and civilian dependents.

The Government asserts that civilian dependents are an integral part of our armed forces overseas and that there is substantial military necessity for subjecting them to court-martial jurisdiction. The Government points out that civilian dependents go abroad under military auspices, live with military personnel in a military community, enjoy the privileges of military facilities, and that their conduct inevitably tends to influence military discipline.

The prosecution by court-martial for capital crimes committed by civilian dependents of members of the armed forces abroad is hardly to be deemed, under modern conditions, obviously appropriate to the effective exercise of the power to "make Rules for the Government and Regulation of the land and naval Forces" when it is a question of deciding what power is granted under Article I and therefore what restriction is made on Article III and the Fifth and Sixth Amendments. I do not think that the proximity, physical and social, of these women to the "land and naval Forces" is, with due regard to all that has been put before us, so clearly demanded by the effective "Government and Regulation"

of those forces as reasonably to demonstrate a justification for court-martial jurisdiction over capital offenses.

The Government speaks of the "great potential impact on military discipline" of these accompanying civilian dependents. This cannot be denied, nor should its implications be minimized. But the notion that discipline over military personnel is to be furthered by subjecting their civilian dependents to the threat of capital punishment imposed by court-martial is too hostile to the reasons that underlie the procedural safeguards of the Bill of Rights for those safeguards to be displaced. It is true that military discipline might be affected seriously if civilian dependents could commit murders and other capital crimes with impunity. No one, however, challenges the availability to Congress of a power to provide for trial and punishment of these dependents for such crimes.[2] The method of trial alone is in issue. The Government suggests that, if trial in an Article III court subject to the restrictions of the Fifth and Sixth Amendments is the only alternative, such a trial could not be held abroad practicably, and it would often be equally impracticable to transport all the witnesses back to the United States for trial. But, although there is no need to pass on that issue in this case, trial in the United States is obviously not the only practical alternative and other alternatives may raise different constitutional questions. The Government's own figures for the Army show that the total number of civilians (all civilians "serving with, employed by, or accompanying the armed forces" overseas and not merely civilian dependents) for whom general courts-martial for alleged

[2] Article III, § 2, cl. 3, provides that "The Trial of all Crimes . . . when not committed within any State . . . shall be at such Place or Places as the Congress may by Law have directed." Since 1790, 1 Stat. 113–114, Congress has provided for such trial in the district where the offender is found (apprehended) or first brought. See 18 U. S. C. § 3238.

murder were deemed advisable [3] was only 13 in the 7 fiscal years, 1950–1956. It is impossible to ascertain from the figures supplied to us exactly how many persons were tried for other capital offenses, but the figures indicate that there could not have been many. There is nothing to indicate that the figures for the other services are more substantial. It thus appears to be a manageable problem within the procedural restrictions found necessary by this opinion.

A further argument is made that a decision adverse to the Government would mean that only a foreign trial could be had. Even assuming that the NATO Status of Forces Agreement, 4 U. S. Treaties and Other International Agreements 1792, T. I. A. S. 2846, covering countries where a large part of our armed forces are stationed, gives jurisdiction to the United States only through its military authorities, this Court cannot speculate that any given nation would be unwilling to grant or continue such extraterritorial jurisdiction over civilian dependents in capital cases if they were to be tried by some other manner than court-martial. And, even if such were the case, these civilian dependents would then

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[3] Under Article 19 of the Uniform Code of Military Justice, 64 Stat. 114, 50 U. S. C. § 579, a special court-martial may impose any punishment not forbidden by the Code "except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months." Under Art. 20, 64 Stat. 114, 50 U. S. C. § 580, a summary court-martial may impose any punishment not forbidden by the Code "except death, dismissal, dishonorable or bad-conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to certain specified limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay." In order to impose a punishment in excess of these limits, a general court-martial must be convened under Art. 18, 64 Stat. 114, 50 U. S. C. § 578.

merely be in the same position as are so many federal employees and their dependents and other United States citizens who are subject to the laws of foreign nations when residing there.[4] See also the NATO Status of Forces Agreement, *supra,* Art. VII, §§ 2, 3.

The Government makes the final argument that these civilian dependents are part of the United States military contingent abroad in the eyes of the foreign nations concerned and that their conduct may have a profound effect on our relations with these countries, with a consequent effect on the military establishment there. But the argument that military court-martials in capital cases are necessitated by this factor assumes either that a military court-martial constitutes a stronger deterrent to this sort of conduct or that, in the absence of such a trial, no punishment would be meted out and our foreign policy thereby injured. The reasons why these considerations carry no conviction have already been indicated.

I therefore conclude that, in capital cases, the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments.

Since the conclusion thus reached differs from what the Court decided last Term, a decent respect for the judicial process calls for re-examination of the two grounds that then prevailed. The Court sustained its action on the

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[4] A Report of the Joint Committee on Reduction of Nonessential Federal Expenditures on Federal Personnel and Pay indicates that the executive agencies of the Federal Government, excluding the Department of Defense, alone employed 51,027 persons outside the continental United States in February 1957, excluding employees of the Panama Canal. S. Com. Print No. 157, 85th Cong., 1st Sess. Although these figures include "some foreign nationals," they nevertheless indicate a substantial number of United States citizens subject to foreign law. See 103 Cong. Rec. 5313–5316.

authority of the cases dealing with the power of Congress to "make all needful Rules and Regulations" for the Territories, reinforced by *In re Ross,* 140 U. S. 453, in which this Court, in 1891, sustained the criminal jurisdiction of a consular court in Japan.[5] These authorities grew out of, and related to, specific situations very different from those now here. They do not control or even embarrass the problem before us.

Legal doctrines are not self-generated abstract categories. They do not fall from the sky; nor are they pulled out of it. They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots. Doctrines like those expressed by the *Ross* case and the series of cases beginning with *American Insurance Co.* v. *Canter,* 1 Pet. 511, must be placed in their historical setting. They cannot be wrenched from it and mechanically transplanted into an alien, unrelated context without suffering mutilation or distortion. "If a precedent involving a black horse is applied to a case involving a white horse, we are not excited. If it were an elephant or an animal *ferae naturae* or a chose in action, then we would venture into thought. The difference might make a difference. We really are concerned about precedents chiefly when their facts differ somewhat from the facts in the case at bar. Then there is a gulf or hiatus that has to be bridged by a concern for principle and a concern for practical results and practical wisdom." Thomas Reed Powell, Vagaries and Varieties in Constitutional Interpretation,

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[5] Having based the constitutionality of Article 2 (11) on these grounds, the Court concluded, "we have no need to examine the power of Congress 'To make Rules for the Government and Regulation of the land and naval Forces' under Article I of the Constitution." 351 U. S. 470, 476.

36. This attitude toward precedent underlies the whole system of our case law. It was thus summarized by Mr. Justice Brandeis: "It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen." *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 619 (dissenting). Especially is this attitude to be observed in constitutional controversies.

The territorial cases relied on by the Court last Term held that certain specific constitutional restrictions on the Government did not automatically apply in the acquired territories of Florida, Hawaii, the Philippines, or Puerto Rico. In these cases, the Court drew its decisions from the power of Congress to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States," for which provision is made in Art. IV, § 3. The United States from time to time acquired lands in which many of our laws and customs found an uncongenial soil because they ill accorded with the history and habits of their people. Mindful of all relevant provisions of the Constitution and not allowing one to frustrate another—which is the guiding thought of this opinion—the Court found it necessary to read Art. IV, § 3, together with the Fifth and Sixth Amendments and Article III in the light of those circumstances. The question arose most frequently with respect to the establishment of trial by jury in possessions in which such a system was wholly without antecedents. The Court consistently held with respect to such "Territory" that congressional power under Art. IV, § 3, was not restricted by the requirement of Art. III, § 2, cl. 3, and the Sixth Amendment of providing trial by jury.

> "If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the

United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to Statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition." *Dorr* v. *United States,* 195 U. S. 138, 148.[6]

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[6] In *Hawaii* v. *Mankichi,* 190 U. S. 197, the Court rested its decision on an interpretation of the joint resolution of Congress annexing the Hawaiian Islands. The Court held that the act of annexation did not of its own force require indictment by grand jury and a trial by a Sixth Amendment jury. Implicit in this holding was the assumption that such indictment and trial were not constitutionally required in Hawaii. This assumption was based on a recognition

The "fundamental right" test is the one which the Court has consistently enunciated in the long series of cases—*e. g., American Ins. Co.* v. *Canter,* 1 Pet. 511; *De Lima* v. *Bidwell,* 182 U. S. 1; *Downes* v. *Bidwell,* 182 U. S. 244; *Dorr* v. *United States,* 195 U. S. 138, *Balzac* v. *Porto Rico,* 258 U. S. 298—dealing with claims of constitutional restrictions on the power of Congress to "make all needful Rules and Regulations" for governing the unincorporated territories. The process of decision appropriate to the problem led to a detailed examination of the relation of the specific "Territory" to the United States. This examination, in its similarity to analysis in terms of "due process," is essentially the same as that to be made in the present cases in weighing congressional power to make "Rules for the Government and Regulation of the land and naval Forces" against the safeguards of Article III and the Fifth and Sixth Amendments.

The results in the cases that arose by reason of the acquisition of exotic "Territory" do not control the present cases, for the territorial cases rest specifically on Art. IV, § 3, which is a grant of power to Congress to deal with "Territory" and other Government property. Of course the power sought to be exercised in Great Britain and Japan does not relate to "Territory."[7] The Court's

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that the act should not be construed as "imposing upon the islands every provision of a Constitution, which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made . . . ." *Id.,* at 215–216.

[7] For a statement of the applicable law before the question arose with respect to lands outside the continental limits of the United States, see *Thompson* v. *Utah,* 170 U. S. 343, 347: "It is equally beyond question that the provisions of the National Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the Territories of the United States." But see *Mormon Church* v. *United States,* 136 U. S. 1, 44: "Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the

opinions in the territorial cases did not lay down a broad principle that the protective provisions of the Constitution do not apply outside the continental limits of the United States. This Court considered the particular situation in each newly acquired territory to determine whether the grant to Congress of power to govern "Territory" was restricted by a specific provision of the Constitution. The territorial cases, in the emphasis put by them on the necessity for considering the specific circumstances of each particular case, are thus relevant in that they provide an illustrative method for harmonizing constitutional provisions which appear, separately considered, to be conflicting.

The Court last Term relied on a second source of authority, the consular court case, *In re Ross,* 140 U. S. 453. Pursuant to a treaty with Japan, Ross, a British subject but a member of the crew of a United States ship, was tried and convicted in a consular court in Yokohama for murder of a fellow seaman while the ship was in Yokohama harbor. His application for a writ of habeas corpus to a United States Circuit Court was denied, 44 F. 185, and on appeal here, the judgment was affirmed. This Court set forth the ground of the Circuit Court, "the long and uniform acquiescence by the executive, administrative and legislative departments of the government in the validity of the legislation," 140 U. S., at 461, and then stated:

> "The Circuit Court might have found an additional ground for not calling in question the legislation of Congress, in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries . . . for the

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Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

trial of their own subjects or citizens for offences committed in those countries, as well as for the settlement of civil disputes between them; and in the uniform recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the most important subjects for treaty stipulations. . . .

. . . . . .

"The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

"We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out . . . .

". . . By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. . . . The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private

> American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. . . ." 140 U. S., at 462–464.

One observation should be made at the outset about the grounds for decision in *Ross*. Insofar as the opinion expressed a view that the Constitution is not operative outside the United States—and apparently Mr. Justice Field meant by "United States" all lands over which the United States flag flew, see John W. Burgess, How May the United States Govern Its Extra-Continental Territory?, 14 Pol. Sci. Q. 1 (1899)—it expressed a notion that has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution—for example, proceedings before American military tribunals, whether in Great Britain or in the United States, are subject to the applicable restrictions of the Constitution. See opinions in *Burns* v. *Wilson,* 346 U. S. 137.

The significance of the *Ross* case and its relevance to the present cases cannot be assessed unless due regard is accorded the historical context in which that case was decided. *Ross* is not rooted in any abstract principle or comprehensive theory touching constitutional power or its restrictions. It was decided with reference to a very particular, practical problem with a long history. To be mindful of this does not attribute to Mr. Justice Field's opinion some unavowed historical assumption. On behalf of the whole Court, he spelled out the considerations that controlled it:

> "The practice of European governments to send officers to reside in foreign countries, authorized to

exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. . . . In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offences. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people." 140 U. S., at 462–463.

"It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in the assimilation of its system of judicial pro-

> cedure to that of Christian countries, as well as in the improvement of its penal statutes; but the system of consular tribunals . . . is of the highest importance, and their establishment in other than Christian countries, where our people may desire to go in pursuit of commerce, will often be essential for the protection of their persons and property." *Id.*, at 480.[8]

It is important to have a lively sense of this background before attempting to draw on the *Ross* case. Historians have traced grants of extraterritorial rights as far back as the permission given by Egypt in the 12th or 13th century B. C. to the merchants of Tyre to establish factories on the Nile and to live under their own law and practice their own religion. Numerous other instances of persons living under their own law in foreign lands existed in the later pre-Christian era and during the Roman Empire and the so-called Dark and Middle Ages—Greeks in

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[8] This feeling about the "non-Christian" nations of the world was widely shared. In his "Jubilee of the Constitution," delivered on the 50th anniversary of the inauguration of George Washington, John Quincy Adams said:

"The Declaration of Independence recognised the European law of nations, as practised among Christian nations, to be that by which they considered themselves bound, and of which they claimed the rights. This system is founded upon the principle, that the state of nature between men and between nations, is a state of peace. But there was a Mahometan law of nations, which considered the state of nature as a state of war—an Asiatic law of nations, which excluded all foreigners from admission within the territories of the state . . . . With all these different communities, the relations of the United States were from the time when they had become an independent nation, variously modified according to the operation of those various laws. It was the purpose of the Constitution of the United States to *establish justice* over them all." Adams, Jubilee of the Constitution, 73. See also the views of Secretary of State Hamilton Fish, quoted in 351 U. S., at 484–485.

Egypt, all sorts of foreigners in Rome, inhabitants of Christian cities and states in the Byzantine Empire, the Latin kingdoms of the Levant, and other Christian cities and states, Mohammedans in the Byzantine Empire and China, and many others lived in foreign lands under their own law. While the origins of this extraterritorial jurisdiction may have differed in each country, the notion that law was for the benefit of the citizens of a country and its advantages not for foreigners appears to have been an important factor. Thus, there existed a long-established custom of extraterritorial jurisdiction at the beginning of the 15th century when the complete conquest of the Byzantine Empire by the Turks and the establishment of the Ottoman Empire substantially altered political relations between Christian Europe and the Near East. But commercial relations continued, and in 1535 Francis I of France negotiated a treaty with Suleiman I of Turkey that provided for numerous extraterritorial rights, including criminal and civil jurisdiction over all disputes among French subjects. 1 Ernest Charrière, Négociations de la France dans le Levant 283. Other nations and eventually the United States in 1830, 8 Stat. 408, later negotiated similar treaties with the Turks. (For a more complete history of the development of extraterritorial rights and consular jurisdiction see 1 Calvo, Le Droit International Théorique et Pratique (5th ed., Rousseau, 1896), 2–18, 2 *id.*, 9–12; Hinckley, American Consular Jurisdiction in the Orient, 1–9; 1 Miltitz, Manuel des Consuls *passim;* Ravndal, The Origin of the Capitulations and of the Consular Institution, S. Doc. No. 34, 67th Cong., 1st Sess. 5–45, 56–96; Shih Shun Liu, Extraterritoriality, 23–66, 118 Studies in History, Economics and Public Law, Columbia University (1925); Twiss, The Law of Nations (Rev. ed. 1884), 443–457.)

The emergence of the nation-state in Europe and the growth of the doctrine of absolute territorial sovereignty changed the nature of extraterritorial rights. No longer were strangers to be denied the advantages of local law. Indeed, territorial sovereignty meant the exercise of sovereignty over all residents within the borders of the state, and the system of extraterritorial consular jurisdiction tended to die out among Christian nations in the 18th and 19th centuries. But a new justification was found for the continuation of that jurisdiction in those countries whose systems of justice were considered inferior, and it was this strong feeling with respect to Moslem and Far Eastern countries that was reflected, as we have seen, in the *Ross* opinion.

Until 1842, China had asserted control over all foreigners within its territory, Shih Shun Liu, *op. cit. supra,* 76–89, but, as a result of the Opium War, Great Britain negotiated a treaty with China whereby she obtained consular offices in five open ports and was granted extraterritorial rights over her citizens. On July 3, 1844, Caleb Cushing negotiated a similar treaty on behalf of the United States. 8 Stat. 592. In a letter to Secretary of State Calhoun, he explained: "I entered China with the formed *general* conviction that the United States ought not to concede to any foreign state, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations,—in a word, a Christian state." Quoted in 7 Op. Atty. Gen. 495, 496–497. Later treaties continued the extraterritorial rights of the United States, and the Treaty of 1903 contained the following article demonstrating the purpose of those rights:

> "The Government of China having expressed a strong desire to reform its judicial system and to bring it into accord with that of Western nations, the

> United States agrees to give every assistance to such reform and will also be prepared to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant it in doing so." 33 Stat. 2208, 2215.

The first treaty with Japan was negotiated by Commodore Perry in 1854. 11 Stat. 597. It opened two ports, but did not provide for any exercise of judicial powers by United States officials. Under the Treaty of 1857, 11 Stat. 723, such power was given, and later treaties, which opened up further Japanese cities for trade and residence by United States citizens, retained these rights. The treaty of 1894, effective on July 17, 1899, however, ended these extraterritorial rights and Japan, even though a "non-Christian" nation, came to occupy the same status as Christian nations. 29 Stat. 848. The exercise of criminal jurisdiction by consuls over United States citizens was also provided for, at one time or another, in treaties with Borneo, 10 Stat. 909, 910; Siam, 11 Stat. 683, 684; Madagascar, 15 Stat. 491, 492; Samoan Islands, 20 Stat. 704; Korea, 23 Stat. 720, 721; Tonga Islands, 25 Stat. 1440, 1442, and, by virtue of most-favored-nation clauses, in treaties with Tripoli, 8 Stat. 154; Persia, 11 Stat. 709; the Congo, 27 Stat. 926; and Ethiopia, 33 Stat. 2254. The exercise of criminal jurisdiction was also provided for in a treaty with Morocco, 8 Stat. 100, by virtue of a most-favored-nation clause and by virtue of a clause granting jurisdiction if "any . . . citizens of the United States . . . shall have any disputes with each other." The word "disputes" has been interpreted by the International Court of Justice to comprehend criminal as well as civil disputes. *France* v. *United States,* I. C. J. Reports 1952, pp. 176, 188–189. The treaties with Algiers, 8 Stat. 133, 224, 244; Tunis, 8 Stat.

157; and Muscat, 8 Stat. 458, contained similar "disputes" clauses.[9]

The judicial power exercised by consuls was defined by statute and was sweeping:

> "Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies." Rev. Stat. § 4086.

The consuls, then, exercised not only executive and judicial power, but legislative power as well.

The number of people subject to the jurisdiction of these courts during their most active periods appears to

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[9] On August 1, 1956, the President approved Public Law 856, 84th Cong., 2d Sess., providing for the relinquishment by the President, at such time as he deemed appropriate, of the consular jurisdiction of the United States in Morocco, the only foreign country where United States consuls continued to exercise such jurisdiction. 70 Stat. 773. The jurisdiction was relinquished on October 6, 1956. N. Y. Times, Oct. 8, 1956, p. 1, col. 6.

have been fairly small. In the Chronicle & Directory for China, Japan, & the Philippines, for the year 1870, there is a listing of the total number of foreign, not just United States, residents in these three places. The list is 81 pages long, with a total of some 4,500 persons. (Pp. 54–134.) This same publication gives the following information about Japan: "The number of foreigners settled in Japan is as yet very small. At the end of the year 1862, the foreign community at Kanagawa, the principal of the three ports of Japan open to aliens, consisted of . . . thirty-eight Americans . . . and in the latter part of 1864 the permanent foreign residents at Kanagawa had increased to 300, not counting soldiers, of which number . . . about 80 [were] Americans . . . . At Nagasaki, the second port of Japan thrown open to foreign trade by the government, the number of alien settlers was as follows on the 1st of January, 1866:— . . . American citizens 32 . . . . A third port opened to European and American traders, that of Hakodadi, in the north of Japan, was deserted, after a lengthened trial, by nearly all the foreign merchants settled there . . . ." (Appendix, p. 353.) The Statesman's Yearbook of 1890 shows: China at the end of 1888: 1,020 Americans (p. 411); Japan in 1887: 711 Americans (p. 709); Morocco, 1889 estimate: "The number of Christians is very small, not exceeding 1,500." (P. 739.) The Statesman's Yearbook of 1901 shows: China at the end of 1899: 2,335 Americans (p. 484); Japan, December 31, 1898, just before the termination of our extraterritorial rights: 1,165 Americans (p. 809); Morocco: "The number of Christians does not exceed 6,000; the Christian population of Tangier alone probably amounts to 5,000." (P. 851.) These figures of course do not include those civilians temporarily in the country coming within consular jurisdiction.

The consular court jurisdiction, then, was exercised in countries whose legal systems at the time were considered so inferior that justice could not be obtained in them by our citizens. The existence of these courts was based on long-established custom and they were justified as the best possible means for securing justice for the few Americans present in those countries. The *Ross* case, therefore, arose out of, and rests on, very special, confined circumstances, and cannot be applied automatically to the present situation, involving hundreds of thousands of American citizens in countries with civilized systems of justice. If Congress had established consular courts or some other non-military procedure for trial that did not contain all the protections afforded by Article III and the Fifth and Sixth Amendments for the trial of civilian dependents of military personnel abroad, we would be forced to a detailed analysis of the situation of the civilian dependent population abroad in deciding whether the *Ross* case should be extended to cover such a case. It is not necessary to do this in the present cases in view of our decision that the form of trial here provided cannot constitutionally be justified.

The Government, apparently recognizing the constitutional basis for the decision in *Ross,* has, on rehearing, sought to show that civilians in general and civilian dependents in particular have been subject to military order and discipline ever since the colonial period. The materials it has submitted seem too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication. What has been urged on us falls far too short of proving a well-established practice—to be deemed to be infused into the Constitution—of court-martial jurisdiction, certainly not in capital cases, over such civilians in time of peace.

1 HARLAN, J., concurring in result.

MR. JUSTICE HARLAN, concurring in the result.

I concur in the result, on the narrow ground that where the offense is capital, Article 2 (11)[1] cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace.

Since I am the only one among today's majority who joined in the Court's opinions of June 11, 1956, which sustained the court-martial jurisdiction in these cases, 351 U. S. 470, 487, I think it appropriate to state the reasons which led to my voting, first, to rehear these cases, 352 U. S. 901, and, now, to strike down that jurisdiction.

I.

The petitions for rehearing which were filed last summer afforded an opportunity for a greater degree of reflection upon the difficult issues involved in these cases than, at least for me, was possible in the short interval between the argument and decision of the cases in the closing days of last Term.[2] As a result I became satisfied that this court-martial jurisdiction could in any event not be sustained upon the reasoning of our prior opinion. In essence, that reasoning was this: (1) Under *In re Ross,* 140 U. S. 453, and the *Insular Cases,*[3] the requirement of a trial by an Article III court and the other specific safeguards of Article III and the Fifth and Sixth Amendments are not applicable to the trial of American citizens outside the United States; (2) there is thus no express constitutional prohibition against the use of courts-

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[1] 50 U. S. C. § 552 (11).

[2] The cases were argued on May 3, 1956, and decided on June 11, 1956.

[3] *Downes* v. *Bidwell,* 182 U. S. 244; *Hawaii* v. *Mankichi,* 190 U. S. 197; *Dorr* v. *United States,* 195 U. S. 138; *Balzac* v. *Porto Rico,* 258 U. S. 298.

martial for such trials abroad; (3) the choice of a court-martial in cases such as these was "reasonable," because of these women's connection with the military, and therefore satisfied due process; (4) the court-martial jurisdiction was thus constitutional. I have since concluded that this analysis was not sound, for two reasons:

(1) The underlying premise of the prior opinion, it seems to me, is that under the Constitution the mere absence of a prohibition against an asserted power, plus the abstract reasonableness of its use, is enough to establish the existence of the power. I think this is erroneous. The powers of Congress, unlike those of the English Parliament, are constitutionally circumscribed. Under the Constitution Congress has only such powers as are expressly granted or those that are implied as reasonably necessary and proper to carry out the granted powers. Hence the constitutionality of the statute here in question must be tested, not by abstract notions of what is reasonable "in the large," so to speak, but by whether the statute, as applied in these instances, is a reasonably necessary and proper means of implementing a power granted to Congress by the Constitution. To say that the validity of the statute may be rested upon the inherent "sovereign powers" of this country in its dealings with foreign nations seems to me to be no more than begging the question. As I now see it, the validity of this court-martial jurisdiction must depend upon whether the statute, as applied to these women, can be justified as an exercise of the power, granted to Congress by Art. I, § 8, cl. 14 of the Constitution, "To make Rules for the Government and Regulation of the land and naval Forces." I can find no other constitutional power to which this statute can properly be related. I therefore think that we were wrong last Term in considering that we need not decide

the case in terms of the Article I power. In my opinion that question squarely confronts us.

(2) I also think that we were mistaken in interpreting *Ross* and the *Insular Cases* as standing for the sweeping proposition that the safeguards of Article III and the Fifth and Sixth Amendments automatically have no application to the trial of American citizens outside the United States, no matter what the circumstances. Aside from the questionable wisdom of mortgaging the future by such a broad pronouncement, I am satisfied that our prior holding swept too lightly over the historical context in which this Court upheld the jurisdiction of the old consular and territorial courts in those cases. I shall not repeat what my brother FRANKFURTER has written on this subject, with which I agree. But I do not go as far as my brother BLACK seems to go on this score. His opinion, if I understand it correctly, in effect discards *Ross* and the *Insular Cases* as historical anomalies. I believe that those cases, properly understood, still have vitality, and that, for reasons suggested later, which differ from those given in our prior opinions, they have an important bearing on the question now before us.

II.

I come then to the question whether this court-martial jurisdiction can be justified as an exercise of Congress' Article I power to regulate the armed forces.

At the outset, I cannot accept the implication of my brother BLACK's opinion that this Article I power was intended to be unmodified by the Necessary and Proper Clause of the Constitution,[4] and that therefore this power

[4] Article I, § 8, cl. 18 of the Constitution provides that Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

is incapable of expansion under changing circumstances. The historical evidence, in fact, shows quite the opposite. True, the records of the time indicate that the Founders shared a deep fear of an unchecked military branch. But what they feared was a military branch unchecked by the *legislature,* and susceptible of use by an arbitrary *executive* power.[5] So far as I know, there is no evidence at all that the Founders intended to limit the power of the *people,* as embodied in the legislature, to make such laws in the regulation of the land and naval forces as are necessary to the proper functioning of those forces. In other words, there is no indication that any special limitation on the power of Congress, as opposed to the power of the executive, was subsumed in the grant of power to govern the land and naval forces. Alexander Hamilton, indeed, stated exactly the opposite: [6]

> "The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be

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[5] Thus, proposals to limit the size of the standing army in times of peace to a specific number of men in the Constitution were defeated at the Constitutional Convention. See 5 Elliot's Debates 442–443 ("no room for . . . distrust of the representatives of the people"). See also The Federalist, No. 24: "[T]he whole power of raising armies was lodged in the *Legislature,* not in the *Executive;* . . . this legislature was to be a popular body, consisting of the representatives of the people periodically elected . . . ."

[6] The Federalist, No. 23.

imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

. . . . . .

". . . Shall the Union be constituted the guardian of the common safety? Are fleets and armies and revenues necessary to this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. . . .

. . . . . .

"Every view we may take of the subject, as candid inquirers after truth, will serve to convince us, that it is both unwise and dangerous to deny the federal government an unconfined authority, as to all those objects which are intrusted to its management. . . . A government, the constitution of which renders it unfit to be trusted with all the powers which a free people *ought to delegate to any government,* would be an unsafe and improper depositary of the *national interests.* Wherever *these* can with propriety be confided, the coincident powers may safely accompany them."

No less an authority than Chief Justice Marshall, in *McCulloch* v. *Maryland,* 4 Wheat. 316, has taught us that the Necessary and Proper Clause is to be read with *all* the powers of Congress, so that "where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *Id.,* at 423.

I think it no answer to say, as my brother BLACK does, that "having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of [Art. I] Clause 14." For that simply begs the question as to whether there is such a collision, an issue to which I address myself below.

For analytical purposes, I think it useful to break down the issue before us into two questions: First, is there a rational connection between the trial of these army wives by court-martial and the power of Congress to make rules for the governance of the land and naval forces; in other words, is there any initial power here at all? Second, if there is such a rational connection, to what extent does this statute, though reasonably calculated to subserve an enumerated power, collide with other express limitations on congressional power; in other words, can this statute, however appropriate to the Article I power looked at in isolation, survive against the requirements of Article III and the Fifth and Sixth Amendments? I recognize that these two questions are ultimately one and the same, since the scope of the Article I power is not separable from the limitations imposed by Article III and the Fifth and Sixth Amendments. Nevertheless I think it will make for clarity of analysis to consider them separately.

A.

I assume, for the moment, therefore, that we may disregard other limiting provisions of the Constitution, and examine the Article I power in isolation. So viewed, I do not think the courts-martial of these army wives can be said to be an arbitrary extension of congressional power.

It is suggested that historically the Article I power was intended to embody a rigid and unchangeable self-limitation, namely, that it could apply only to those

in the actual service of the armed forces.[7] I cannot agree that this power has any such rigid content. First of all, the historical evidence presented by the Government convinces me that, at the time of the adoption of the Constitution, military jurisdiction was not thought to be rigidly limited to uniformed personnel. The fact is that it was traditional for "retainers to the camp" to be subjected to military discipline, that civilian dependents encamped with the armies were traditionally regarded as being in that class, and that the concept was not strictly limited to times of war.[8] Indeed, the British, who are no less sensitive than we to maintaining the supremacy of civil justice, have recently enacted a law comparable to the statute involved here.[9]

Thinking, as I do, that Article I, still taking it in isolation, must be viewed as supplemented by the Necessary and Proper Clause, I cannot say that the court-martial jurisdiction here involved has no rational connection with the stated power. The Government, it seems to me, has

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[7] To be sure, the opinion does "recognize that there might be circumstances where a person could be 'in' the armed services for purposes of [Art. I, § 8] Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." It continues, however, to state categorically that "wives, children and other dependents of servicemen cannot be placed in that category . . . ."

[8] The essential element was thought to be, not so much that there be war, in the technical sense, but rather that the forces and their retainers be "in the field." The latter concept, in turn, would seem to have extended to any area where the nature of the military position and the absence of civil authority made military control over the whole camp appropriate. See, in general, Blumenthal, Women Camp Followers of the American Revolution. The British history is the same. See, in particular, Samuel, Historical Account of the British Army and of the Law Military, pp. 691–692.

[9] Army Act, 1955, 3 & 4 Eliz. II, c. 18, § 209; and see Fifth Schedule, *id.*, at 219.

made a strong showing that the court-martial of civilian dependents abroad has a close connection to the proper and effective functioning of our overseas military contingents. There is no need to detail here the various aspects of this connection, which have been well dealt with in the dissenting opinion of my brother CLARK. Suffice it to say that to all intents and purposes these civilian dependents are part of the military community overseas,[10] are so regarded by the host country, and must be subjected to the same discipline if the military commander is to have the power to prevent activities which would jeopardize the security and effectiveness of his command.[11] The matter has been well summarized by General Palmer, Commander of the Eighth Army, stationed in Japan:

> "Jurisdiction by courts-martial over all civilians accompanying the Army overseas is essential because of the manner in which U. S. Armed Forces personnel

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[10] These dependents are taken abroad only because their presence is deemed necessary to the morale and proper functioning of our armies overseas. They are transported at government expense, carry passports identifying them as service dependents, are admitted to the host country without visas, use military payment certificates, and receive the benefit of army postal facilities and privileges. They enjoy the tax exemptions and customs benefits of the military. They are treated at service hospitals, their children go to schools maintained by the Government, and they share with the military the recreational facilities provided by the Government. They are housed and furnished heat, light, fuel, water, and telephone service by the military, as well as receiving transportation, food, and clothing from military sources.

[11] This necessity is particularly acute with regard to peculiarly "military" and "local" offenses which must be dealt with swiftly and effectively. Thus security regulations at these military installations must be enforced against civilian dependents as well as servicemen; the same is true of base traffic violations, black marketeering, and misuse of military customs and post-exchange privileges.

> live in their overseas military communities. In this command, almost all personnel serving in or accompanying the U. S. Armed Forces live in or near separate, closely-knit U. S. military communities which are basically under the control, administration and supervision of the local U. S. Commander who is in turn responsive to the normal military chain of command. This responsibility which is vested in the military commander extends to the administration and supervision of the operation and use of all facilities and major activities of the community including the proper control of occupants and users which is inherent in such supervision overseas. In the absence of a supporting judicial system responsive to the same government as the military, such as is the case existing in the United States and overseas possessions, and as the law enforcement requirement stems primarily from the immediate unalterable responsibilities of the overseas commander and his subordinate commanders, it is essential that the commander be vested with the law enforcement authority commensurate with his responsibilities."

It seems to me clear on such a basis that these dependents, when sent overseas by the Government, become *pro tanto* a part of the military community. I cannot say, therefore, that it is irrational or arbitrary for Congress to subject them to military discipline. I do not deal now, of course, with the problem of alternatives to court-martial jurisdiction; all that needs to be established at this stage is that, viewing Art. I, § 8, cl. 14 in isolation, subjection of civilian dependents overseas to court-martial jurisdiction can in no wise be deemed unrelated to the power of Congress to make all necessary and proper laws to insure the effective governance of our overseas land and naval forces.

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B.

I turn now to the other side of the coin. For no matter how practical and how reasonable this jurisdiction might be, it still cannot be sustained if the Constitution guarantees to these army wives a trial in an Article III court, with indictment by grand jury and jury trial as provided by the Fifth and Sixth Amendments.

We return, therefore, to the *Ross* question: to what extent do these provisions of the Constitution apply outside the United States?

As I have already stated, I do not think that it can be said that these safeguards of the Constitution are never operative without the United States, regardless of the particular circumstances. On the other hand, I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. For *Ross* and the *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous. To take but one example: *Balzac* v. *Porto Rico,* 258 U. S. 298, is not good authority for the proposition that jury trials need never be provided for American citizens tried by

the United States abroad; but the case *is* good authority for the proposition that there is no rigid rule that jury trial must *always* be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous. In other words, what *Ross* and the *Insular Cases* hold is that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial *should* be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas.

I think the above thought is crucial in approaching the cases before us. Decision is easy if one adopts the constricting view that these constitutional guarantees as a totality do or do not "apply" overseas. But, for me, the question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it. The question is one of judgment, not of compulsion. And so I agree with my brother FRANKFURTER that, in view of *Ross* and the *Insular Cases*, we have before us a question analogous, ultimately, to issues of due process; one can say, in fact, that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is "due" a defendant in the particular circumstances of a particular case.

On this basis, I cannot agree with the sweeping proposition that a full Article III trial, with indictment and trial by jury, is required in every case for the trial of a civilian dependent of a serviceman overseas. The Government, it seems to me, has made an impressive showing that at least for the run-of-the-mill offenses committed by dependents overseas, such a requirement would

be as impractical and as anomalous as it would have been to require jury trial for Balzac in Porto Rico.[12] Again, I need not go into details, beyond stating that except for capital offenses, such as we have here, to which, in my opinion, special considerations apply, I am by no means ready to say that Congress' power to provide for trial by court-martial of civilian dependents overseas is limited by Article III and the Fifth and Sixth Amendments.

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[12] The practical circumstances requiring some sort of disciplinary jurisdiction have already been adverted to, *supra*, pp. 71–73. These circumstances take on weight when viewed in light of the alternatives available to Congress—certainly a crucial question in weighing the need for dispensing with particular constitutional guarantees abroad. What are these alternatives? (1) One is to try all offenses committed by civilian dependents abroad in the United States. But the practical problems in the way of such a choice are obvious and overwhelming. To require the transportation home for trial of every petty black marketeer or violator of security regulations would be a ridiculous burden on the Government, quite aside from the problems of persuading foreign witnesses to make the trip and of preserving evidence. It can further be deemed doubtful in the extreme whether foreign governments would permit crimes punishable under local law to be tried thousands of miles away in the United States. (2) Civilian trial overseas by the United States also presents considerable difficulties. If juries are required, the problem of jury recruitment would be difficult. Furthermore, it is indeed doubtful whether some foreign governments would accede to the creation of extraterritorial United States civil courts within their territories—courts which by implication would reflect on the fairness of their own tribunals and which would smack unpleasantly of consular courts set up under colonial "capitulations." (3) The alternative of trial in foreign courts, in at least some instances, is no more palatable. Quite aside from the fact that in some countries where we station troops the protections granted to criminal defendants compare unfavorably with our own minimum standards, the fact would remain that many of the crimes involved—particularly breaches of security—are not offenses under foreign law at all, and thus would go completely unpunished. Add to this the undesirability of foreign police carrying out investigations in our military installations abroad, and it seems to me clear that this alternative does not commend itself.

Where, if at all, the dividing line should be drawn among cases not capital, need not now be decided. We are confronted here with capital offenses alone; and it seems to me particularly unwise now to decide more than we have to. Our far-flung foreign military establishments are a new phenomenon in our national life, and I think it would be unfortunate were we unnecessarily to foreclose, as my four brothers would do, our future consideration of the broad questions involved in maintaining the effectiveness of these national outposts, in the light of continuing experience with these problems.

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, compare *Powell* v. *Alabama,* 287 U. S. 45, with *Betts* v. *Brady,* 316 U. S. 455; nor is it negligible, being literally that between life and death. And, under what I deem to be the correct view of *Ross* and the *Insular Cases,* it is precisely the kind of distinction which plays a large role in the process of weighing the competing considerations which lead to sound judgment upon the question whether certain safeguards of the Constitution should be given effect in the trial of an American citizen abroad. In fact, the Government itself has conceded that one grave offense, treason, presents a special case: "The gravity of this offense is such that we can well assume that, whatever difficulties may be involved in trial far from the scene of the offense . . . the trial should be in our courts." I see no reason for not applying the same principle to any case where a civilian

dependent stands trial on pain of life itself. The number of such cases would appear to be so negligible that the practical problems of affording the defendant a civilian trial would not present insuperable problems.

On this narrow ground I concur in the result in these cases.

MR. JUSTICE CLARK, with whom MR. JUSTICE BURTON joins, dissenting.

The Court today releases two women from prosecution though the evidence shows that they brutally killed their husbands, both American soldiers, while stationed with them in quarters furnished by our armed forces on its military installations in foreign lands. In turning these women free, it declares unconstitutional an important section of an Act of Congress governing our armed forces. Furthermore, four of my brothers would specifically overrule and two would impair the long-recognized vitality of an old and respected precedent in our law, the case of *In re Ross,* 140 U. S. 453 (1891), cited by this Court with approval in many opinions and as late as 1929 by a unanimous Court [1] in *Ex parte Bakelite Corp.,* 279 U. S. 438, 451. And, finally, the Court reverses, sets aside, and overrules two majority opinions and judgments of this Court in these same cases, reported in 351 U. S., at 470 and 487, and entered on June 11, 1956, less than 12 months ago. In substitute therefor it enters no opinion whatever for the Court. It is unable to muster a majority. Instead, there are handed down three opinions. But, worst of all, it gives no authoritative guidance as to what, if anything, the Executive or the Congress may do to remedy the distressing situation in which they now find themselves.

[1] The Court was composed of Chief Justice Taft and Associate Justices Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, and Stone. Mr. Justice Van Devanter wrote the opinion for the Court.

MR. JUSTICE BURTON and I remain convinced that the former opinions of the Court are correct and that they set forth valid constitutional doctrine under the long-recognized cases of this Court. The opinions were neither written nor agreed to in haste and they reflect the consensus of the majority reached after thorough discussion at many conferences. In fact, the cases were here longer both before and after argument than many of the cases we decide. We adhere to the views there expressed since we are convinced that through them we were neither "mortgaging the future," as is claimed, nor foreclosing the present, as does the judgment today. We do not include a discussion of the theory upon which those former judgments were entered because we are satisfied with its handling in the earlier opinions. See 351 U. S., at 470 and 487.

I.

Before discussing the power of the Congress under Art. I, § 8, cl. 14, of the Constitution it is well to take our bearings. These cases do not involve the jurisdiction of a military court-martial sitting within the territorial limits of the United States. Nor are they concerned with the power of the Government to make treaties or the legal relationship between treaties and the Constitution. Nor are they concerned with the power of Congress to provide for the trial of Americans sojourning, touring, or temporarily residing in foreign nations. Essentially, we are to determine only whether the civilian dependents of American servicemen may constitutionally be tried by an American military court-martial in a foreign country for an offense committed in that country. Congress has provided in Article 2 (11) of the Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. § 552 (11), that they shall be so tried in those countries with which we have an implementing treaty. The question therefore is whether

this enactment is reasonably related to the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces." U. S. Const., Art. I, § 8, cl. 14.

Historically, the military has always exercised jurisdiction by court-martial over civilians accompanying armies in time of war. Over 40 years ago this jurisdiction was declared by Congress to include "all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States." [2] Art. of War 2 (d), 39 Stat. 651. Article 2 (11) of the present Uniform Code of Military Justice was taken without material change from this provision of the Articles of War. At the time of enactment of the earlier provision Congress was plainly concerned with the maintenance of discipline and morale of American expeditionary forces composed of both military and civilian personnel. As pointed out in the Senate Report to the Sixty-fourth Congress at the time Article 2 (d) was adopted:

> "The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, . . . where such forces so

[2] An interesting and authoritative treatment of court-martial jurisdiction over camp followers is found in Blumenthal, Women Camp Followers of the American Revolution (1952). It points out many instances where women, not in the armed services, were subjected to a court-martial long after the war had ended. This was not taken to be an "astronomical doctrine" either in our forces or abroad.

accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906–7 in Cuba." S. Rep. No. 130, 64th Cong., 1st Sess. 37–38.

Since that time the power of Congress to make civilians amenable to military jurisdiction under such circumstances has been considered and sustained by this Court and other federal courts in a number of cases. In *Madsen* v. *Kinsella,* 343 U. S. 341 (1952), we sustained the jurisdiction of a military commission to try a civilian wife for the murder of her husband in Germany in 1949. Unlike Mrs. Smith, the petitioner in *Madsen* contended that a military court-martial had *exclusive* jurisdiction to try her pursuant to Article of War 2 (d), the predecessor of Article 2 (11). In upholding the constitutionality of trial by a military commission, we pointed out that its jurisdiction was concurrent with that of the military court-martial, 343 U. S., at 345, and that the jurisdiction of both stemmed directly from Article 2 (d), 343 U. S., at 361.

It is contended that no holding on the validity of court-martial jurisdiction over civilians was necessary to our decision in *Madsen* and that the case itself is distinguishable because occupied territory was involved and hence the action of Congress could be supported under the War Power. It is true that our reference to concurrent court-martial jurisdiction—when both petitioner and the Government agreed to it—was a concomitant to that decision, but our recognition of the power of Congress to authorize military trial of civilians under the circumstances provided for in Article 2 (d) was essential to the judgment. 343 U. S., at 361. *Madsen* was factually very similar to the present case, and in terms of the relevant considerations involved it is practically indistinguishable. In *Madsen,* as here, the crime involved was murder of a serviceman by a dependent wife living as a civilian with

our armed forces in a foreign country. In both cases jurisdiction was exercised by a military tribunal pursuant to an Act of Congress authorizing such jurisdiction over all persons accompanying the armed forces outside the territorial jurisdiction of the United States. The distinction that in one case the trial was by court-martial and in the other by a military commission is insubstantial. The contention that jurisdiction could be sustained in *Madsen* under the War Power of Congress but that this power is unavailable to authorize jurisdiction in *Smith* is likewise without merit.[3] Aside from the fact that this Court has never restricted so narrowly the action that Congress might take under the War Power, see *Ashwander* v. *T. V. A.*, 297 U. S. 288 (1936), and *Silesian-American Corp.* v. *Clark*, 332 U. S. 469 (1947), there is as much, if not more, justification for employment of the War Power in Japan in 1952 as in Germany in 1949. At the time Mrs. Smith's crime was committed, Japan was the logistics and aviation base for actual hostilities then being waged in Korea, just across the Sea of Japan. And in 1949, Germany, after four years of peaceful and uneventful occupation, could hardly be considered an area where Congress could act only under its War Power. But the salient feature common to both countries was that the problems of maintaining control, morale, and discipline of our military contingents located there were substantially identical. These problems were not appreciably affected by the fact that one instance occurred during an occupation and the other shortly after a peace treaty had been signed.

Earlier, in *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313 (1946), this Court had recognized the "well-established

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[3] In this connection see "Madsen v. Kinsella—Landmark and Guidepost in Law of Military Occupation," by John M. Raymond, Assistant Legal Adviser, Department of State, 47 Am. J. Int'l L. 300 (1953).

power of the military" to exercise jurisdiction over persons directly connected with the armed forces, and this power has been repeatedly recognized in cases decided in the lower federal courts. See *United States ex rel. Mobley* v. *Handy,* 176 F. 2d 491 (1949); *Perlstein* v. *United States,* 151 F. 2d 167 (1945); *Grewe* v. *France,* 75 F. Supp. 433 (1948); *In re Berue,* 54 F. Supp. 252 (1944); *Hines* v. *Mikell,* 259 F. 28 (1919); *Ex parte Jochen,* 257 F. 200 (1919); *Ex parte Falls,* 251 F. 415 (1918); *Ex parte Gerlach,* 247 F. 616 (1917). See also *United States* v. *Burney,* 6 U. S. C. M. A. 776, 21 C. M. R. 98 (1956).

In considering whether Article 2 (11) is reasonably necessary to the power of Congress to provide for the government of the land and naval forces we note, as relevant, certain other considerations. As a nation we have found it necessary to the preservation of our security in the present day to maintain American forces in 63 foreign countries throughout the world. In recent years the services have recognized that the presence of wives and families at many of these foreign bases is essential to the maintenance of the morale of our forces. This policy has received legislative approval and the tremendous expense to the Government involved in the transportation and accommodation of dependents overseas is considered money well spent. It is not for us to question this joint executive and legislative determination. The result, however, has been the creation of American communities of mixed civilian and military population on military bases throughout the world. These civilians are dependent on the military for food, housing, medical facilities, transportation, and protection. Often they live in daily association in closely knit groups nearly isolated from their surroundings. It cannot be denied that disciplinary problems have been multiplied and complicated by this influx of civilians onto military bases, and Congress has provided that military personnel and civilians

alike shall be governed by the same law administered by the same courts.

Concerning the effect of civilian activities under such circumstances on the discipline and morale of the armed services, we have found no better statement than that of Judge Latimer of the United States Court of Military Appeals where the constitutionality of Article 2 (11) was upheld in the recent case of *United States* v. *Burney,* 6 U. S. C. M. A. 776, 21 C. M. R. 98 (1956). Referring to the combat readiness of an overseas command, Judge Latimer stated:

> "[I]t is readily ascertainable that black market transactions, trafficking in habit-forming drugs, unlawful currency circulation, promotion of illicit sex relations, and a myriad of other crimes which may be perpetrated by persons closely connected with one of the services, could have a direct and forceful impact on the efficiency and discipline of the command. One need only view the volume of business transacted by military courts involving, for instance, the sale and use of narcotics in the Far East, to be shocked into a realization of the truth of the previous statement. If the Services have no power within their own system to punish that type of offender, then indeed overseas crime between civilians and military personnel will flourish and that amongst civilians will thrive unabated and untouched. A few civilians plying an unlawful trade in military communities can, without fail, impair the discipline and combat readiness of a unit. At best, the detection and prosecution of crime is a difficult and time-consuming business, and we have grave doubts that, in faraway lands, the foreign governments will help the cause of a military commander by investigating the seller or user of habit-forming drugs, or assist him in de-

terring American civilians from stealing from their compatriots, or their Government, or from misusing its property." 6 U. S. C. M. A., at 800, 21 C. M. R., at 122.

In addition, it is reasonable to provide that the military commander who bears full responsibility for the care and safety of those civilians attached to his command should also have authority to regulate their conduct. Moreover, all members of an overseas contingent should receive equal treatment before the law. In their actual day-to-day living they are a part of the same unique communities, and the same legal considerations should apply to all. There is no reason for according to one class a different treatment than is accorded to another. The effect of such a double standard on discipline, efficiency, and morale can easily be seen.

In *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11 (1955), the Court recognized this necessity. There Art. I, § 8, cl. 14, was "given its natural meaning" and "would seem to restrict court-martial jurisdiction to persons who are actually members *or part* of the armed forces." (Emphasis added.) *Id.,* at 15. The Court went on to say:

"It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians. . . . Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new

expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury." *Id.*, at 22–23.

These women were as much "a part" of the military installation as were their husbands. Upon attack by an enemy they would be so treated; all foreign governments so recognized them at all times; and, in addition, it has been clearly shown, unlike in *Toth,* that "the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed" by excluding them from the provisions of the Uniform Code. Every single one of our major military commanders over the world has filed a statement to this effect in this case. We should not substitute our views as to this necessity for the views of those charged with the responsibility of the protection of such far-flung outposts of the free world. The former minority, however, repudiates this underlying basis of the opinion in *Toth,* namely, that where disciplinary measures are necessary to the regulation of the armed forces the Congress does have constitutional power to make rules. In my opinion the rules it has made are necessary to the regulation of the land and naval forces and the means chosen, the Uniform Code, is in no way an unreasonable one.

There remains the further consideration of whether this provision is " *'the least possible power adequate to the end proposed.'* " *United States ex rel. Toth* v. *Quarles, supra,* at 23. This is the strict standard by which we determine the scope of constitutional power of Congress to authorize trial by court-martial. A study of the problem clearly indicates that the use of the Uniform Code of Military Justice was really the only practicable alternative available.

While it was conceded before this Court that Congress could have established a system of territorial or consular

courts to try offenses committed by civilian dependents abroad, the action of four of my brothers who would overrule and two who would impair the vitality of *In re Ross, supra,* places this alternative in jeopardy. Territorial courts have been used by our Government for over a century and have always received the sanction of this Court until today. However, in the light of all of the opinions of the former minority here, the use of a system of territorial or consular courts is now out of the question. Moreover, Congress probably had concluded to abandon this system before the Uniform Code was adopted, since a short time thereafter the jurisdiction of the last of our territorial or consular courts was terminated. 70 Stat. 773.

Another alternative the Congress might have adopted was the establishment of federal courts pursuant to Article III of the Constitution. These constitutional courts would have to sit in each of the 63 foreign countries where American troops are stationed at the present time. Aside from the fact that the Constitution has never been interpreted to compel such an undertaking, it would seem obvious that it would be manifestly impossible. The problem of the use of juries in common-law countries alone suffices to illustrate this. Obviously the jury could not be limited to those who live within the military installation. To permit this would be a sham. A jury made up of military personnel would be tantamount to the personnel of a court-martial to which the former minority objects. A jury composed of civilians residing on the military installation is subject to the same criticism. If the jury is selected from among the local populace, how would the foreign citizens be forced to attend the trial? And perchance if they did attend, language barriers in non-English-speaking countries would be nigh insurmountable. Personally, I would much prefer, as did Mrs. Madsen, that my case be tried before a

military court-martial of my own countrymen. Moreover, we must remember that the agreement of the foreign country must be obtained before any American court could sit in its territory. In noncommon-law countries, if such courts were permitted to sit—a doubtful possibility—our jury system would be tossed about like a cork on unsettled waters.

Likewise, trial of offenders by an Article III court in this country, perhaps workable in some cases, is equally impracticable as a general solution to the problem. The hundreds of petty cases involving black-market operations, narcotics, immorality, and the like, could hardly be brought here for prosecution even if the Congress and the foreign nation involved authorized such a procedure. Aside from the tremendous waste of the time of military personnel and the resultant disruptions, as well as the large expenditure of money necessary to bring witnesses and evidence to the United States, the deterrent effect of the prosecution would be *nil* because of the delay and distance at which it would be held. Furthermore, compulsory process is an essential to any system of justice. The attendance of foreign nationals as witnesses at a judicial proceeding in this country could rest only on a voluntary basis and depositions could not be required. As a matter of international law such attendance could never be compelled and the court in such a proceeding would be powerless to control this vital element in its procedure. In short, this solution could only result in the practical abdication of American judicial authority over most of the offenses committed by American civilians in foreign countries.

The only alternative remaining—probably the alternative that the Congress will now be forced to choose—is that Americans committing offenses on foreign soil be tried by the courts of the country in which the offense is committed. Foreign courts have exclusive jurisdiction

under the principles of international law and many nations enjoy concurrent jurisdiction with the American military authorities pursuant to Article VII of the Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty.[4] Where the American military authorities do have jurisdiction, it is only by mutual agreement with the foreign sovereign concerned and pursuant to carefully drawn agreements conditioned on trial by the American military authorities. Typical of these agreements was the one concluded between the United States and Japan on February 28, 1952, and in force at the time one of these cases arose. Under this and like agreements, the jurisdiction so ceded to the United States military courts will surely be withdrawn if the services are impotent to exercise it. It is clear that trial before an American court-martial in which the fundamentals of due process are observed is preferable to leaving American servicemen and their dependents to the widely varying standards of justice in foreign courts throughout the world. Under these circumstances it is untenable to say that Congress could have exercised a lesser power adequate to the end proposed.

II.

My brothers who are concurring in the result seem to find some comfort in that for the present they void an Act of Congress only as to capital cases. I find no distinction in the Constitution between capital and other cases. In fact, at argument all parties admitted there could be no valid difference. My brothers are careful not to say that they would uphold the Act as to offenses less than capital. They unfortunately leave that decision for

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[4] NATO Status of Forces Agreement, T. I. A. S. 2846 (signed in London on July 19, 1951), 4 U. S. Treaties and Other International Agreements 1792.

another day. This is disastrous to proper judicial administration as well as to law enforcement. The Congress and the Executive Department are entitled to know whether a court-martial may be constitutionally utilized to try an offense less than capital. If so, then all that is necessary is to eliminate capital punishment insofar as Article 2 (11) offenses are concerned. I deeply regret that the former minority does not, now that it has become the majority, perform the high duty that circumstance requires. Both the Congress and the Executive are left only to conjecture as to whether they should "sack" Article 2 (11) and require all dependents to return and remain within this country or simply eliminate capital punishment from all offenses under the Article. The morale of our troops may prevent the former and certainly the abstention of this Court prohibits the latter. All that remains is for the dependents of our soldiers to be prosecuted in foreign courts, an unhappy prospect not only for them but for all of us.

Syllabus.

SMITH, SPECIAL ADMINISTRATOR, *v.* SPERLING ET AL.

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

No. 316. Argued March 27–28, 1957.—Decided June 10, 1957.

This is a stockholder's derivative suit brought in a Federal District Court in California on grounds of diversity of citizenship by a citizen of New York against two Delaware corporations and the directors of one of them, who are citizens of California. The complaint alleged fraudulent wastage of the assets of Warner Bros., the plaintiff's corporation, for the benefit of a son-in-law of one of its directors and the son-in-law's corporation. It alleged that a demand on the directors of Warner Bros. to institute the suit was not made because it would have been futile, since all or a majority of them had approved the contracts involved. The District Court found that (1) the contracts were made in good faith and without fraud, (2) the stockholders, officers or directors were not "antagonistic to the financial interests" of Warner Bros., (3) none of the directors "wrongfully participated" in the acts complained of, and (4) if a demand had been made on Warner Bros. to institute suit, the management would not have been disqualified "from faithfully doing their duty," but that "such a demand would have been futile." On these grounds, the District Court realigned Warner Bros. as a party plaintiff and dismissed the bill for want of diversity jurisdiction. *Held:* It erred in doing so, and the judgment is reversed and the cause remanded. Pp. 92–98.

(a) In considering the issue of federal diversity jurisdiction, the District Court should have considered only the face of the pleadings and the nature of the controversy without attempting to adjudicate the merits of the charges of wrongdoing. Pp. 94–98.

(b) Federal law governs the question of federal jurisdiction; but local law will govern the decision on the merits. Pp. 95–96.

(c) There is "antagonism" between a corporation and its stockholder whenever the management is aligned against the stockholder and defends a course of action which the stockholder attacks, even though the management acts in good faith. Pp. 95, 96–98.

(d) Absent collusion, there is diversity jurisdiction when the real collision of issues is between citizens of different States. P. 97.

(e) On the record in this case, it is evident that there is such a collision here. Pp. 97–98.

(f) Diversity jurisdiction having once vested, it was not lost merely because the original plaintiff died while the suit was pending and the special administrator substituted for him was a citizen of California. P. 93, n. 1.

(g) The bill meets the requirements of Rule 23 (b) of the Rules of Civil Procedure that the stockholder show with particularity what efforts he made to get those who control the corporation to take action, "and the reasons for his failure to obtain such action or the reasons for not making such effort." P. 94, n. 2.

237 F. 2d 317, reversed and remanded.

Herman H. Levy argued the cause for petitioner. With him on the brief was *Morris J. Pollack.*

Eugene D. Williams and *Oliver B. Schwab* argued the cause for respondents. On the briefs were *Mr. Williams* and *Ralph E. Lewis* for Warner Bros. Pictures, Inc., et al., and *Mr. Schwab, Marvin Sears* and *Norman Altman* for United States Pictures, Inc., et al., respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit was filed in a Federal District Court in California by reason of diversity of citizenship. It is a stockholder's derivative suit. The first cause of action, the only one involved here, is based on alleged fraudulent wastage of assets of Warner Bros. Pictures, Inc. (which we will call Warner Bros.) for the benefit of one Sperling, a son-in-law of a director of Warner Bros., and United States Pictures, Inc. (which we will call United), the son-in-law's corporation. Extended allegations are made concerning various agreements between Warner Bros. and United which, it is charged, are unfair to Warner Bros. Demand on the directors of Warner Bros. to institute this action was not made because, it is averred, such a demand would be futile since, *inter alia,* all or a majority of the

board of directors approved the contracts. The plaintiff is a citizen of New York; [1] the defendant directors are citizens of California; and Warner Bros. and United are Delaware corporations.

The complaint joined Warner Bros. as a defendant. It was urged before the District Court, and it is claimed here, that since the cause of action sought to be enforced is one that belongs to the corporation and since the corporation is not "antagonistic" to the stockholder within the meaning of that term as used in *Doctor* v. *Harrington,* 196 U. S. 579, 588, Warner Bros. should be realigned as plaintiff. In that event there would be no diversity of citizenship since Delaware corporations would be on both sides of the lawsuit. *Strawbridge* v. *Curtiss,* 3 Cranch 267.

The District Court held a hearing on the issue—a hearing that lasted 15 days. It found:

(1) that the contracts in controversy were made in good faith and without fraud; that they were considered by the

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[1] While the action was pending plaintiff died and for him a special administrator has been substituted. The latter is a citizen of California.

Had the suit been originally commenced by the decedent's representative, it would have been the citizenship of the representative which would have been determinative of jurisdiction in this diversity case. See *Chappedelaine* v. *Dechenaux,* 4 Cranch 306; *Childress* v. *Emory,* 8 Wheat. 642, 669; *Mexican Central R. Co.* v. *Eckman,* 187 U. S. 429, 434; *Mecom* v. *Fitzsimmons Drilling Co.,* 284 U. S. 183, 186. But jurisdiction, once attached, is not impaired by a party's later change of domicile. *Mollan* v. *Torrance,* 9 Wheat. 537. As Chief Justice Marshall said in that case: "It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Id.,* p. 539. The rationale, that jurisdiction is tested by the facts as they existed when the action is brought, is applied to a situation where a party dies and a non-diverse representative is substituted. *Dunn* v. *Clarke,* 8 Pet. 1 (1834).

directors to be in the best interests of Warner Bros. and that, in approving them, they exercised their best business judgment;

(2) that Warner Bros. was not under the domination or control of the Warners on the board; and that the stockholders, officers, or directors were not "antagonistic to the financial interests" of Warner Bros.;

(3) that neither all nor a majority nor any of the directors and officers of Warner Bros. "wrongfully participated" in the acts complained of; that the board was not dominated or controlled by the Warners and Sperling or by any one or more of them;

(4) that if demand had been made on Warner Bros. to institute suit, the management would not have been disqualified "from faithfully doing their duty" as officers and directors but that "such a demand would have been futile." [2]

For these reasons the District Court realigned Warner Bros. as a party plaintiff and dismissed the bill. 117 F. Supp. 781. The Court of Appeals affirmed. 237 F. 2d 317. The case is here on a writ of certiorari. 352 U. S. 865.

This is a corporate cause of action brought by a stockholder. Whether it is a proper case for assertion by a stockholder of that cause of action is not the question here. Such was the problem involved in *Hawes* v. *Oakland,* 104 U. S. 450, upon which so much reliance is placed in supporting the court below. Here we assume that this corporate cause of action may be enforced by the stock-

[2] The bill therefore meets the requirements of Rule 23 (b) of the Rules of Civil Procedure that the stockholder show with particularity what efforts he made to get those who control the corporation to take action, "and the reasons for his failure to obtain such action or the reasons for not making such effort." And see *Hawes* v. *Oakland,* 104 U. S. 450; *Delaware & Hudson Co.* v. *Albany & S. R. Co.,* 213 U. S. 435.

holder. We are concerned only with a question of federal diversity jurisdiction.

The gist of the findings of the District Court is that since there was no fraud on the part of the directors in making the contracts but only an exercise of independent business judgment, the management was not antagonistic to the financial interests of the corporation. That is an issue that goes to the merits, not to the question of jurisdiction. There will, of course, be antagonism between the stockholder and the management where the dominant officers and directors are guilty of fraud or misdeeds. But wrongdoing in that sense is not the sole measure of antagonism. There is antagonism whenever the management is aligned against the stockholder and defends a course of conduct which he attacks. The charge normally is cast in terms of fraud, breach of trust, or illegality. See *Doctor* v. *Harrington, supra; Venner* v. *Great Northern R. Co.*, 209 U. S. 24; *Koster* v. (*American*) *Lumbermens Mutual Casualty Co.*, 330 U. S. 518, 522, 523. The answer, of course, always denies the charge of wrongdoing. To stop and try the charge of wrongdoing is to delve into the merits. That does not seem to us to be the proper course. It is a time-consuming, wasteful exertion of energy on a preliminary issue in the case. The instant case is a good illustration, for it has been over eight years in the courts on this question of jurisdiction.

Since our decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the law which governs the merits in these derivative actions is local law. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 555–556. The result, then, of the approach followed by the court below is to have more than a preliminary trial on matters going to the merits of the controversy. Obviously federal law would govern the preliminary trial on the issues of wrongdoing, for that matter goes to the question of federal jurisdiction. Yet should the District Court decide those issues in favor of

the stockholder, a second trial on the merits will require that the same issues be tried out according to the set of rules supplied by local law.

It seems to us that the proper course is not to try out the issues presented by the charges of wrongdoing but to determine the issue of antagonism on the face of the pleadings and by the nature of the controversy. The bill and answer normally determine whether the management is antagonistic to the stockholder, as *Central R. Co.* v. *Mills,* 113 U. S. 249, and *Doctor* v. *Harrington, supra,* indicate.[3] The management may refuse or fail to act for any number of reasons. Fraud may be one; the reluctance to take action against a close business associate may be another; honest belief in the wisdom of the course of action which the management has approved may be still another; and so on. As the Court said in *Delaware & Hudson Co.* v. *Albany & S. R. Co.,* 213 U. S. 435, 451,

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[3] The Court in *Doctor* v. *Harrington, supra,* at p. 587, said, "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court."

The complaint in that case charged fraud by a dominant director and stockholder to his advantage and to the detriment of the minority stockholders. The answer denied the fraud. The Court did not stop, as the District Court did in the instant case, to inquire if transactions complained of were colorable or were sustained by sound business judgment. After reviewing the earlier decisions, the Court concluded, "The case at bar is brought within the doctrine of those cases by the allegations of the bill." *Id.,* p. 588. The leading case cited by the Court was *Hawes* v. *Oakland,* 104 U. S. 450, where in determining whether a proper case for a derivative action had been made out, the Court looked *only to the nature of the charges contained in the bill. Id.,* pp. 461–462.

where the management was deemed to be antagonistic to the stockholder, "The attitude of the directors need not be sinister. It may be sincere." Whenever the management refuses to take action to undo a business transaction or whenever, as in this case, it so solidly approves it that any demand to rescind would be futile, antagonism is evident. The cause of action, to be sure, is that of the corporation. But the corporation has become through its managers hostile and antagonistic to the enforcement of the claim.

Collusion to satisfy the jurisdictional requirements of the District Courts may, of course, always be shown; [4] and it will always defeat jurisdiction. Absent collusion, there is diversity jurisdiction when the real collision of issues, *Indianapolis* v. *Chase National Bank,* 314 U. S. 63, 69, or as stated in *Helm* v. *Zarecor,* 222 U. S. 32, 36, "the actual controversy," is between citizens of different States. This is a practical not a mechanical determination and is resolved by the pleadings and the nature of the dispute.

Here it is plain that the stockholder and those who manage the corporation are completely and irrevocably opposed on a matter of corporate practice and policy. A trial may demonstrate that the stockholder is wrong and the management right. It may show a dispute that lies in the penumbra of business judgment, unaffected by fraud. But that issue goes to the merits, not to jurisdiction. There is jurisdiction if there is real collision be-

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[4] 28 U. S. C. § 1359 provides:

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

Collusion is shown, for example, where the neglect or refusal of the directors to take the desired action on the part of the corporation is simulated so that it may be made to appear that the diversity of citizenship necessary for federal jurisdiction exists. *Detroit* v. *Dean,* 106 U. S. 537; *Quincy* v. *Steel,* 120 U. S. 241.

tween the stockholder and his corporation. That there is such a collision is evident here.

The judgment must therefore be reversed and the case remanded to the District Court.

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER join, dissenting.†

The Court holds that, collusion aside, whenever a corporation refuses to bring a suit and a derivative suit is brought by a stockholder on its behalf, the corporation is always to be aligned as a defendant for purposes of determining diversity jurisdiction. The Court thus makes the exception the rule, and by confounding the requirements for establishing a substantive cause of action with the requirements of diversity jurisdiction, it overturns a half-century's precedents in this Court. The scope and significance of this undoing cannot be appreciated without a brief review of the history of the jurisdictional adjudications—which control the present cases—and of the wholly different precedents establishing the substantive rules that govern stockholders' suits when there is unquestionable jurisdiction in the constitutional sense. It will also be necessary to set forth generous portions of the opinions of the Court in prior cases to demonstrate that not only do they not support the Court's view but that they are being overturned by it.

The present cases involve the jurisdiction of the federal courts, and that question alone. No aspect of the substantive cause of action is before us. At the outset, two guiding principles governing this litigation must be kept clearly in mind: (1) These are constitutional cases, involving the "judicial power" of the United States over

† [This opinion applies also to No. 149, *Swanson* v. *Traer*, *post*, p. 114.]

controversies "between citizens of different States." (2) These are stockholders' suits; the stockholder sues not in his own right but in the right and on behalf of the corporation.

The contrasting difference between a stockholder's suit for his corporation and a suit by him against it, is crucial. In the former, he has no claim of his own; he merely has a personal controversy with his corporation regarding the business wisdom or legal basis for the latter's assertion of a claim against third parties. Whatever money or property is to be recovered would go to the corporation, not a fraction of it to the stockholder. When such a suit is entertained, the stockholder is in effect allowed to conscript the corporation as a complainant on a claim that the corporation, in the exercise of what it asserts to be its uncoerced discretion, is unwilling to initiate. This is a wholly different situation from that which arises when the corporation is charged with invasion of the stockholder's independent right. Thus, for instance, if a corporation rearranges the relationship of different classes of security holders to the detriment of one class, a stockholder in the disadvantaged class may proceed against the corporation as a defendant to protect his own legal interest.

The basic principles of diversity jurisdiction, often stated, obviously bear repeating:

> "To sustain diversity jurisdiction there must exist an 'actual,' *Helm* v. *Zarecor,* 222 U. S. 32, 36, 'substantial,' *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U. S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge* v. *Curtiss,* 3 Cranch 267. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own

> determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 180." *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69.

The initial and leading case dealing with the alignment of parties for jurisdictional purposes in a stockholder's suit is *Doctor* v. *Harrington*, 196 U. S. 579. That was a suit by stockholders against two individuals alleged to control the company in question and a third-party corporation. Realigning the corporation as a plaintiff, the Circuit Court held that there was no diversity, and it dismissed the bill for lack of jurisdiction. This Court reversed. After stating that Equity Rule 94 (now Rule 23 (b) of the Federal Rules of Civil Procedure) contemplated suits "brought by a stockholder in a corporation founded on rights which may properly be asserted by the corporation," the Court went on to indicate what must have been the basis for aligning the corporation in that case as a defendant:

> "And the decisions of this court establish that such a suit, when between citizens of different States, involves a controversy cognizable in a Circuit Court of the United States. The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court." 196 U. S., at 587.

The Court then went on to discuss these other "conditions of jurisdiction," *i. e.*, the complainants' compliance with the substantive and procedural requirements of Equity Rule 94. In refusing to realign, the Court did not state that mere refusal to sue on the part of the corporation was a sufficient reason to align the corporation as a defendant. The Court referred to "antagonistic" control and the stockholder's "interests, and the interests of the corporation" being made "subservient to some illegal purpose."

This question of what constitutes "antagonistic" control is the crux of the present cases. The District Court in No. 316, in the course of its thorough opinion, stated:

> "For a corporation to be 'in antagonistic hands,' . . . or to have a 'hostile attitude,' . . . such as would permit alignment on the side against its presumptive financial interests, surely requires more than a mere argument or difference of opinion between the corporation and the suing stockholder as to the desirability of bringing the suit. Patently, if difference of opinion were all the 'controversy' required to be shown between the stockholder and his corporation in order to preclude alignment of the latter with the plaintiff-stockholder, then there can be no occasion for all the pages of discussion of corporate domination or control, since every stockholder's derivative suit is by definition predicated upon the assumption that the corporation has refused to sue." 117 F. Supp. 781, 802.

This has been the view that this Court has consistently taken since *Doctor* v. *Harrington*. Three years later, *Doctor* v. *Harrington* was reaffirmed and its basis made clear in *Venner* v. *Great Northern R. Co.*, 209 U. S. 24. That was a stockholder's suit brought in a state court

against the Great Northern Railroad and its President, James J. Hill, with an allegation that the "railroad and its board of directors were under his absolute control." *Id.*, at 29. Both defendants were citizens of the same State. They removed the case into the federal court and the plaintiff, claiming that the corporation should be realigned, sought remand to the state court on the ground that the federal court lacked jurisdiction. The Court, if such was its thought, obviously would have said *simpliciter* that since the corporation refused to sue, the corporation must be aligned as a defendant. It did not do so. The whole thought of Mr. Justice Moody's opinion is completely contrary.

> "Let it be assumed for the purposes of this decision that the court may disregard the arrangement of parties made by the pleader, and align them upon the side where their interest in and attitude to the controversy really places them, and then may determine the jurisdictional question in view of this alignment. [Citing the *Removal Cases,* 100 U. S. 457, and other cases.] If this rule should be applied it would leave the parties here where the pleader has arranged them. It would doubtless be for the financial interests of the defendant railroad that the plaintiff should prevail. But that is not enough. Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant. . . ." *Id.*, at 31–32.

To make explicit the case's relation to the prior case of *Doctor* v. *Harrington,* the Court continued:

> "The case of *Doctor* v. *Harrington* is precisely in point on this branch of the case, and is conclusive. In that case the plaintiffs, stockholders in a corporation, brought an action in the Circuit Court against the corporation and Harrington, another stockholder, 'who directed the management of the affairs of the corporation, dictated its policy, and selected its directors.' It was alleged that Harrington fraudulently caused the corporation to make its promissory note without consideration, obtained a judgment on the note, and sold, on execution, for much less than their real value, the assets of the corporation to persons acting for his benefit. On the face of the pleadings there was the necessary diversity of citizenship, but it was insisted that the corporation, because its interest was the same as that of the plaintiff, should be regarded as a plaintiff. The court below so aligned the corporation defendant, and, as that destroyed the diversity of citizenship, dismissed the suit for want of jurisdiction. This court reversed the decree, saying [the quotation is of the part of the Court's opinion in *Doctor,* quoted *supra,* p. 100]. There was therefore in the case at bar the diversity of citizenship which confers jurisdiction." *Id.,* at 32–33.

The jurisdictional doctrine of *Doctor* v. *Harrington,* as reaffirmed and elaborated in *Venner* v. *Great Northern R. Co.,* was accepted without question only ten years ago in *Koster* v. *Lumbermens Mutual Co.,* 330 U. S. 518. The Court in that case summarized the jurisdictional doctrine of alignment of parties in stockholders' suits:

> "The cause of action which such a plaintiff brings before the court is not his own but the corporation's.

> It is the real party in interest and he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual, because it is disabled from protecting itself. If, however, such a case as this were treated as other actions, the federal court would realign the parties for jurisdictional purposes according to their real interests. In this case, which is typical of many, this would put [the corporation] on the plaintiff's side. . . . and jurisdiction would be ousted. *Indianapolis* v. *Chase National Bank,* 314 U. S. 63. But jurisdiction is saved in this class of cases by a special dispensation because the corporation is in antagonistic hands. *Doctor* v. *Harrington,* 196 U. S. 579." *Id.,* at 522–523.

Mr. Justice Jackson's opinion for the Court throws further light on what is meant by "antagonistic hands" by characterizing "the real party in interest," the corporation, as "disabled from protecting itself." That cannot mean anything else except what the *Venner* case, quoting from *Doctor* v. *Harrington,* set forth as the reason for disablement, *viz.,* that the very individuals who have a stranglehold over the corporation are the people against whom suit is sought to be brought and, therefore, in any sense that has any meaning, they are the defendants for that reason. And it is not merely that the obvious sense of the foregoing paragraph quoted from *Koster* gives the significance to *Doctor* v. *Harrington* that *Venner* gave it. That meaning is reinforced by the Court's succeeding reference to a stockholder's interest in "bringing faithless managers to book." *Id.,* at 524.

In the District Court in No. 316, *Smith* v. *Sperling,* Judge Mathes made an exhaustive survey of all the precedents relating to the jurisdictional test to be applied in stockholders' suits, 117 F. Supp. 781, aff'd, 237 F. 2d

317, and stated the jurisdictional test to be derived from the cases as follows:

> "If the corporation has suffered actionable wrong and is 'in antagonistic hands'—*i. e.* so dominated that it is incapacitated to act in keeping with its own financial interests—then a federal court should not, because of such disability, align the corporation with the plaintiff-stockholder in determining whether diversity jurisdiction exists." 117 F. Supp., at 801.

The Court of Appeals for the Seventh Circuit took the same view in No. 149, *Swanson* v. *Traer,* 230 F. 2d 228, 237.

The jurisdictional rules that the Court has laid down for over half a century—emerging from all the cases and not merely from *Doctor* v. *Harrington* standing by itself—do not represent a capricious or formalistic determination as to when there is or is not diversity jurisdiction. On the contrary, they represent a true appreciation of the nature of the stockholder's suit and a faithful application of well-settled principles of diversity jurisdiction: when a suit is brought that is in fact and in law the corporation's, the corporation from the nature of the cause of action is a plaintiff and must appear among the plaintiffs, except when the corporation is in fact the tool of the very people against whom a judgment is sought. In the latter circumstances the corporation is merely a compendious name for the controlling defendants who are hiding behind it.

The Court, purporting to interpret this half-century of precedents, sweeps them away. In so doing, it greatly expands the diversity jurisdiction. "Antagonism" is a difficult standard to meet and is a more unusual situation. Refusal to sue provides automatic entry. Moreover, whenever the corporation and the real defendants are of the same citizenship, there would be no diversity juris-

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diction unless antagonism could be shown. No similar restriction on jurisdiction is made because of possible non-diverseness of the stockholder and the corporation defendant because it is generally not too difficult to find a non-diverse stockholder to institute suit.

The Court professes to do no more than to apply well-settled precedents. But the well-settled precedents that are applied have absolutely "nothing to do with the case." The Court has found support in the line of cases that deal solely with substantive requirements or with the procedural rules for establishing compliance with those requirements. These have nothing to do with the constitutional jurisdiction of the federal courts in diversity suits.

Prior to the Judiciary Act of 1875, 18 Stat. 470, there was only very limited federal question jurisdiction in the District Courts. See Hart and Wechsler, The Federal Courts and the Federal System, 727–730. Moreover, diversity jurisdiction was established on the basis of the alignment set forth in the pleadings. *Removal Cases,* 100 U. S. 457, 469. If a corporation desiring to bring suit could not come within the requirements of diversity jurisdiction, the only way its suit could be tried in the federal courts, prior to the vast enlargement of their jurisdiction by the Act of 1875, was by virtue of a suit brought on its behalf by a stockholder of the requisite citizenship. This was the procedure followed in the important case of *Dodge* v. *Woolsey,* the Court noting that any suspected issue of contrivance should have been alleged and proved by the defendant. 18 How. 331, 346.

The result of this practice was described by Mr. Justice Miller for the Court in the leading case of *Hawes* v. *Oakland,* 104 U. S. 450, 452.

> "Since the decision of this court in *Dodge* v. *Woolsey* . . . the frequency with which the most ordi-

nary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

"This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their natural, their lawful, and their appropriate forum. . . . A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company . . . for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the contro-

> versy could have no standing in that court. . . . the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction." *Id.*, at 452–453.

The Court in *Hawes* v. *Oakland* was not concerned at all with control of the corporation by allegedly wrongdoing directors for purposes of aligning the parties. The Court was concerned with imposition on the jurisdiction of the federal judiciary in the general run of stockholders' actions, and more particularly, in the usual situation where the defendants would not be directors at all but third parties having nothing to do with the management of the corporation.

The Court in *Hawes,* therefore, announced restrictions upon a stockholder attempting to bring "a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff." *Id.*, at 460. Not only must a complainant show some *ultra vires* or fraudulent action by the directors but he must also demonstrate that he was a shareholder at the time of the transaction complained of (or acquired shares thereafter by operation of law), that he has made efforts to induce the desired action by the directors and, if necessary, by the stockholders, and that "the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance . . . ." *Id.*, at 461. These rules were codified that Term in Equity Rule 94, see 104 U. S. IX, now Rule 23 (b) of the Federal Rules of Civil Procedure. Their history and purpose indicate the character of the

requirements laid down by the Court. They do not define the constitutional jurisdiction of the Court; they are the allegations in any event requisite to the Court's proceeding to consider the case. In *Hawes* itself, the Court, after finding that the stockholder had not complied with the requisites for suit, dismissed the action, not for want of jurisdiction, but for want of equity. The argument that compliance with the rule was a jurisdictional requirement was made and rejected in *Venner* v. *Great Northern R. Co.*, 209 U. S., at 33–34: "this argument overlooks the purpose and nature of the rule. . . . Neither the rule nor the decision from which it was derived deals with the question of the jurisdiction of the courts, but only prescribes the manner in which the jurisdiction shall be exercised."

Compliance with Rule 94 was the issue in *Delaware & Hudson Co.* v. *Albany & S. R. Co.*, 213 U. S. 435. In that case, the lower court certified to this Court questions concerning maintenance of a stockholders' suit in the face of failure to allege demand for relief upon the directors and stockholders of the corporation. The Court held that such a demand would have been futile in view of the control of the defendant corporation by the other corporate defendant. It was during the course of its discussion of the futility of making a demand in such a situation that the Court stated what is relied upon by the Court in the present case—that the "attitude of the directors need not be sinister. It may be sincere." *Id.*, at 451. Of course, the Court in that case was quite correct. But it was not concerned with, or adverting to, jurisdictional alignment, any more than it was talking about jurisdictional alignment in *Hawes*, also now relied upon by the Court. Both cases involved the preliminary requirements for stating a cause of action under the Rules. (For a similar discussion of what stockholders must allege with respect to the attitude of directors, but in a case where there was clearly

federal question jurisdiction, see *Ashwander* v. *TVA*, 297 U. S. 288, 318–323, and 341–344.)*

Further confusion is introduced by the fact that both problems—jurisdictional alignment and compliance with Rule 94—may be present in the same case. This was true in *Doctor* v. *Harrington,* where the Court was not very careful in making explicit separation of the two issues; it was also true of *Venner* v. *Great Northern R. Co., supra,* where the Court was very careful to separate the two issues. Such separation of very different concepts is of course essential when one characterizes the attitude of the directors. It is one thing when suit is against a third party to hold that a demand on the directors need not be made if such demand would for any reason be futile, and that sincere opposition by directors would make such a demand futile. It is quite something else to state that, since sincere opposition is sufficient for that purpose, it is also sufficient to demonstrate that the corporation is "disabled from protecting itself" and should therefore be aligned as a defendant. That, as we have seen, is factually false and is contrary to what this Court for 52 years has laid down as the controlling rules governing diversity jurisdiction.

One final matter of general importance should be discussed before applying the general principles adduced to the facts of the present cases. The Court states: "[T]he proper course is not to try out the issues presented by the charges of wrongdoing but to determine the issue of antagonism on the face of the pleadings and by the nature of the controversy." Of course the charges of wrongdoing need not be determined to ascertain the jurisdiction of

*The confusion between these two lines of cases—the jurisdictional alignment cases and the cases dealing with the problems with which former Equity Rule 94 was concerned—is fully treated in the opinion of District Judge Mathes in No. 316. See 117 F. Supp. 781, 792–809.

the federal courts. What must be determined when directors or other persons alleged to control the corporation are joined as defendants is the relation of these people to the corporation. And while in certain cases the issues may be determined from the face of the pleadings, the courts are not so limited. The Court speaks of making "a practical not a mechanical determination," but a more mechanical determination could hardly be imagined. If anything had been regarded as settled until today about federal jurisdiction, it was that "It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 180." *Indianapolis* v. *Chase National Bank,* 314 U. S. 63, 69. Of course, this may take time and may not always be easy of determination. I had not thought up to now that such considerations should lead us to disregard our constitutional obligation, for, as the District Court in No. 316 stated, "It is more than costly error therefore—it is an unconstitutional invasion of the jurisdiction of the state courts—for a federal court to sustain federal jurisdiction of a civil action between private persons where 'the matter in controversy' exceeds the sum or value of $3,000 . . . but does not arise 'under the Constitution, laws or treaties of the United States,' . . . and diversity of citizenship as to 'the matter in controversy' does not exist. U. S. Const. Art. III; 28 U. S. C. § 1332. . . ." 117 F. Supp., at 808.

The proceedings in each of the present cases have followed different paths. In No. 316, *Smith* v. *Sperling,* the District Court held a hearing to determine the presence of the special circumstances that this Court's decisions indicated would require alignment of the corporation as a defendant. It did not find such circumstances and, aligning the corporation as a plaintiff, it dismissed the cause of action for lack of the requisite diversity. 117

F. Supp. 781. On appeal, the Court of Appeals for the Ninth Circuit affirmed this aspect of the case. 237 F. 2d 317. I find no justification for overturning the findings and conclusions of the District Court made after extended hearing and analysis and affirmed by the Court of Appeals. I would therefore affirm.

In No. 149, *Swanson* v. *Traer,* the District Court dismissed plaintiffs' complaint on the merits because it did not appear that they had "laid a foundation sufficient to support a derivative stockholders' suit." On appeal, the Court of Appeals for the Seventh Circuit affirmed, but on the ground that necessary realignment of the corporation as a plaintiff destroyed diversity and required dismissal of the suit for lack of jurisdiction. 230 F. 2d 228. Examining the pleadings, the position taken by the corporation in the litigation, especially the affidavit and statement by counsel for the corporation, the Court of Appeals concluded that "in their business judgment, both the directors and Mr. Busch [the corporation's counsel] were of the sincere opinion that the filing of such a suit would not be for the best interests of the corporation and its stockholders. The named plaintiffs disagreed. This difference of opinion is not of itself evidence of antagonism on the part of the Railway Company." *Id.,* at 237.

The court stated that the allegation of the complaint that "several members" of the corporation's board of directors at the time suit was filed had been a part of the alleged conspiracy was insufficient to allege antagonism by a majority of the board. The court was also impressed by a lengthy, detailed affidavit filed by the corporation's counsel, retained after the transactions complained of, who stated that he had reviewed the transaction pursuant to the direction of the board of directors and had advised against suit. The facts relied on by the Court of Appeals are not without weight in support of its conclusion. The plaintiffs' general allegations, how-

ever, imply hostility on the part of the whole board of directors, and, in this state of the record, plaintiffs should have been given an opportunity to substantiate their allegations at a hearing before the District Court, as was the indicated course of proceeding when the matter initially came before the District Court. For this reason, I would remand the case for such a hearing.

SWANSON ET AL. *v.* TRAER ET AL.

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

No. 149. Argued March 27, 1957.—Decided June 10, 1957.

This is a stockholders' derivative suit brought in a Federal District Court in Illinois on grounds of diversity of citizenship by citizens of Nevada against an Illinois corporation, certain individual citizens of Illinois, a Delaware corporation and an Indiana corporation. The complaint alleged a conspiracy to defraud the Illinois corporation through sales to it of certain properties in which some of the directors were personally interested. It also averred a demand on the directors to bring suit, their refusal to do so, and the futility of making any demand on the stockholders. The Court of Appeals concluded that there was no such hostility to the plaintiffs as to make the Illinois corporation "antagonistic" to its stockholders, and it realigned that corporation as a party plaintiff and affirmed dismissal of the suit, on the ground that there was no diversity jurisdiction. *Held:* The judgment is reversed and the cause remanded. Pp. 115–117.

(a) The management is definitely and distinctly opposed to the institution of this litigation; it is, therefore, "antagonistic" to the stockholders; and the corporation was properly made a defendant. *Smith* v. *Sperling, ante,* p. 91. P. 116.

(b) Whether the stockholders may sue on behalf of their corporation is a question of local law on which the Court of Appeals did not rule; and the case is remanded to it for consideration of that question. Pp. 116–117.

230 F. 2d 228, reversed and remanded.

James E. Doyle argued the cause for petitioners. With him on the brief were *Avern B. Scolnik, Philip F. La Follette* and *William H. Bowman.*

James E. S. Baker and *Marland Gale* argued the cause for respondents. On the brief with *Mr. Baker* were *Kenneth F. Burgess, Calvin P. Sawyier, Thomas L. Marshall,*

Charles F. Short, Jr. and *Wesley G. Hall* for Traer et al. On the brief with *Mr. Gale* was *C. Frank Reavis* for the National City Lines, Inc., et al., respondents.

Francis X. Busch and *James J. Magner* filed a brief for the Chicago North Shore & Milwaukee Railway, respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, a companion case to No. 316, *Smith* v. *Sperling, ante,* p. 91, presents another aspect of the problem of realignment of parties in a stockholders' derivative suit that is brought in a Federal District Court on the basis of diversity of citizenship. Plaintiff-stockholders are citizens of Nevada and stockholders in the Chicago North Shore & Milwaukee Ry. Co., an Illinois corporation. It was made a defendant along with individuals, who are citizens of Illinois, a Delaware corporation, and an Indiana corporation. The complaint charged a conspiracy to defraud the Railway Co. The alleged fraud consisted of a series of sales of transit properties to the Railway Co., properties in which it is charged some of the directors were personally interested. The complaint averred a demand on the directors to bring suit, a refusal on their part, and the futility of making any demand on the stockholders.

Answers were filed and motions made to dismiss. The District Court dismissed the bill on the ground that no showing had been made that the refusal of the management to act to redress the alleged wrong was not a decision entrusted to the good-faith judgment of the directors. In other words, the District Court concluded that the controversy did not fall within the exceptional group of cases where the stockholder may dispute the management and take the reins of corporate litigation in his own hands.

On appeal, the Court of Appeals did not reach that question. Though it appeared from the record that the directors were opposed to the bringing of the suit, the Court of Appeals concluded that there was no such hostility to the plaintiffs as to make it "antagonistic" within the meaning of the cases. It accordingly realigned the corporation as a party plaintiff. Since there were then Illinois citizens on each side of the litigation, the requisite diversity was not present and the orders dismissing the bill were affirmed. 230 F. 2d 228. The case is here on a writ of certiorari. 352 U. S. 865.

For the reasons stated in *Smith* v. *Sperling, supra,* we think this case is an instance where the management—for good reasons or for bad—is definitely and distinctly opposed to the institution of this litigation. The management is, therefore, antagonistic to the stockholders as that conception has been used in the cases. It follows that the corporation was properly made a defendant.

There remains for consideration the question ruled on by the District Court and which the Court of Appeals did not reach, *viz.* whether this suit is of that exceptional character which stockholders may bring.

As we stated in *Smith* v. *Sperling, ante,* p. 91, since our decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the question whether in these diversity suits a stockholder may sue on behalf of his corporation is governed by local law. See *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 555–556. The classical description of those situations is contained in *Hawes* v. *Oakland,* 104 U. S. 450, 460:

> "Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;
>
> "Or such a fraudulent transaction completed or contemplated by the acting managers, in connection

with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity."

Whether local law follows that definition or adopts another and whether this case falls within the one provided by local law is a question on which the Court of Appeals has not ruled. We therefore remand the case to it for consideration of the question.

Reversed.

[For opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE BURTON, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER, see *ante*, p. 98.]

CURCIO *v.* UNITED STATES.

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

No. 260. Argued March 28, 1957.—Decided June 10, 1957.

In the circumstances of this case, the custodian of a union's books and records, who had failed to produce them before a federal grand jury pursuant to subpoena, could, on the ground of his privilege against self-incrimination under the Fifth Amendment, lawfully refuse to answer questions asked by the grand jury as to the whereabouts of such books and records; and his conviction of criminal contempt for refusing to answer such questions is reversed. Pp. 118–128.

(a) Though the custodian of the books and records of a corporation or a labor union may not, on grounds of possible self-incrimination, refuse to produce them pursuant to subpoena, he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony. Pp. 122–128.

(b) In the circumstances of this case, the questions which petitioner refused to answer were incriminating. P. 121, n. 2.

234 F. 2d 470, reversed and remanded.

Samuel Mezansky argued the cause for petitioner. With him on the brief was *Daniel H. Greenberg.*

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Rankin, Assistant Attorney General Olney* and *Carl H. Imlay.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The issue in this case is whether the custodian of a union's books and records may, on the ground of his Fifth Amendment privilege against self-incrimination, refuse to

answer questions asked by a federal grand jury as to the whereabouts of such books and records which he has not produced pursuant to subpoena. For the reasons hereafter stated, we hold that the privilege against self-incrimination attaches to such questions.

In April 1956, a special grand jury in the United States District Court for the Southern District of New York was investigating racketeering in the garment and trucking industries in New York City. This investigation followed widespread charges of racketeering in labor unions, including specific charges that seven local unions had been recently chartered by a faction of the International Brotherhood of Teamsters to gain control of the Teamsters' New York Joint Council, and that these "phantom unions" were controlled by a group of gangsters, ex-convicts and labor racketeers.

Petitioner, Joseph Curcio, the secretary-treasurer of Local 269 of the International Brotherhood of Teamsters, one of the alleged "phantom unions," was subpoenaed to appear before the grand jury, and to produce the union's books and records. There were two subpoenas—a personal subpoena *ad testificandum* and a subpoena *duces tecum* addressed to him in his capacity as secretary-treasurer of Local 269. On several days he appeared before the grand jury but failed to produce the demanded books and records. He testified that he was the secretary-treasurer of Local 269; that the union had books and records; but that they were not then in his possession. He refused, on the ground of self-incrimination, to answer any questions pertaining to the whereabouts, or who had possession, of the books and records he had been ordered to produce.

The District Court, after a hearing in which petitioner attempted to justify his claim of privilege, directed petitioner to answer 15 questions pertaining to the where-

abouts of the books and records.[1] It ruled that petitioner's claim of privilege was improper because he had not made a sufficient showing that his answers might

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[1] The questions were as follows:

"I am going to ask you certain questions, including some that were put to you on Thursday, which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records? . . . .

"Mr. Curcio, have you ever had possession of the books and records of this local? . . . .

"Did you have custody and control of these records last Thursday? . . . .

"Do you have possession of those records or any of them today? . . . .

"Do you have custody and control of any of those records today? . . . .

"Where are any of those records today, if you know? . . . .

"Who has any of those records today, if you know? . . . .

"Where were any of these records or all of these records a week ago Thursday? . . . .

"Where were any or all of these records a week ago Saturday? . . . .

"Where were any or all of these records a week ago last Monday? . . . .

"Where were any or all of these records yesterday? . . . .

"Where are any or all of these records today? . . . .

"Who, if you know, had any or all of these records a week ago last Saturday? . . . .

"Who had any or all of these records a week ago yesterday? . . . .

"Who has any or all of these records today? . . . ."

The above questions were selected by the Government from 225 that were asked petitioner before the grand jury. He was directed by the foreman of the grand jury to answer these 15, and, upon his refusal to do so under claim of his privilege against self-incrimination, the District Court advised him that it proposed to ask him those questions itself, and that his failure to answer them would constitute contempt of court. The District Judge thereupon asked petitioner these questions in open court in the presence of the grand jury. Petitioner refused to answer each of them, and stated that he refused to do so because his answers might tend to incriminate him.

incriminate him. When petitioner persisted in his refusal to answer, the District Court summarily adjudged him guilty of criminal contempt, and sentenced him to six months' confinement unless he sooner purged himself by answering the questions. This conviction related solely to petitioner's failure to answer questions asked pursuant to the personal subpoena *ad testificandum*. He has not been charged with failing to produce the books and records demanded in the subpoena *duces tecum*.

The Court of Appeals affirmed the conviction. 234 F. 2d 470. It held that petitioner had failed to show that his answers to the 15 questions might incriminate him; that the privilege against self-incrimination did not attach to questions put to a custodian relating to the whereabouts of union books; and that petitioner had been accorded a fair hearing. We granted certiorari to determine whether petitioner's claim of privilege was properly denied. 352 U. S. 820.

In the courts below, the Government contended that petitioner had not made a sufficient showing that answering the 15 questions might tend to incriminate him. The Government no longer so contends. In its brief it now says, "We make no claim that, if petitioner's personal privilege did apply to questions concerning the union records, he failed to make an adequate showing of possible incrimination." There is substantial ground for the Government's concession.[2]

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[2] The grand jury was investigating union racketeering. The newspapers had featured charges that petitioner's union was one of seven "phantom locals" of the International Brotherhood of Teamsters and that it was dominated by gangsters and racketeers. Petitioner conceded that he had a prison record and it was charged that the president of Local 269 was Johnny DioGuardia, allegedly one of the key figures in union racketeering in the New York area. In this context, the questions were incriminating. See 18 U. S. C. §§ 1503 and 1951. "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a

We turn, therefore, to the remaining issue—whether petitioner's personal privilege against self-incrimination attaches to questions relating to the whereabouts of the union books and records which he did not produce pursuant to subpoena.

It is settled that a corporation is not protected by the constitutional privilege against self-incrimination. A corporate officer may not withhold testimony or documents on the ground that his corporation would be incriminated. *Hale* v. *Henkel,* 201 U. S. 43. Nor may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production. *Wilson* v. *United States,* 221 U. S. 361; *Essgee Co.* v. *United States,* 262 U. S. 151. Even after the dissolution of a corporation and the transfer of its books to individual stockholders, the transferees may not invoke their privilege with respect to the former corporate records. *Grant* v. *United States,* 227 U. S. 74; *Wheeler* v. *United States,* 226 U. S. 478. The foregoing cases stand for the principle that the books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian.

In *United States* v. *White,* 322 U. S. 694, this principle was applied to an unincorporated association, a labor union. Stating that the privilege against self-incrimination had the historic function of "protecting only the natural individual from compulsory incrimination through his own testimony or personal records" (*id.,* at 701), the Court held that "the papers and effects which

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responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman* v. *United States,* 341 U. S. 479, 486–487. See also, *Trock* v. *United States,* 351 U. S. 976; *Emspak* v. *United States,* 349 U. S. 190; *Singleton* v. *United States,* 343 U. S. 944; *Greenberg* v. *United States,* 343 U. S. 918.

the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity" (*id.*, at 699).

> "But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." *Id.*, at 699.

The Government now contends that the representative duty which required the production of union records in the *White* case requires the giving of oral testimony by the custodian in this case. From the fact that the custodian has no privilege with respect to the union books in his possession, the Government reasons that he also has no privilege with respect to questions seeking to ascertain the whereabouts of books and records which have been subpoenaed but not produced. In other words, when the custodian fails to produce the books, he must, according to the Government, explain or account under oath for their nonproduction, even though to do so may tend to incriminate him.

The Fifth Amendment suggests no such exception. It guarantees that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." A custodian, by assuming the duties of his office, under-

takes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.

In the *Wilson* case, *supra,* which is the leading case for the proposition that corporate officers may not invoke their personal privilege against self-incrimination to prevent the production of corporate records, Mr. Justice Hughes, speaking for the Court, drew the distinction sharply. He said, "They [the custodians of corporate records] may decline to utter upon the witness stand a single self-criminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers." 221 U. S., at 385. In the *White* case, *supra,* the Court was careful to point out that "The subpoena duces tecum was directed to the union and demanded the production only of its official documents and records" (322 U. S., at 704), that "He [White, the custodian of the union's records] had not been subpoenaed personally to testify" (*id.,* at 695–696), and that "there was no effort or indicated intention to examine him personally as a witness" (*id.,* at 696). And in *Shapiro* v. *United States,* 335 U. S. 1, 27, holding that the privilege against self-incrimination did not apply to records required to be kept by food licensees under wartime OPA regulations, the Court said, "Of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege." There is no hint in these decisions that a custodian of corporate or association books waives his constitutional privilege as to oral testimony by assuming the duties of his office. By accepting custodianship of records he "has voluntarily assumed a duty which overrides his claim of

privilege" *only* with respect to the production of the records themselves. *Wilson* v. *United States,* 221 U. S. 361, 380.

United States v. *Austin-Bagley Corp.,* 31 F. 2d 229, and cases following it [3] are relied upon by the Government. Those cases, holding that a corporate officer who has been required by subpoena to produce corporate documents may also be required, by oral testimony, to identify them, are distinguishable and we need not pass on their validity. The custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself. The custodian is subjected to little, if any, further danger of incrimination. However, in the instant case, the Government is seeking to compel the custodian to do more than identify documents already produced. It seeks to compel him to disclose, by his oral testimony, the whereabouts of books and records which he has failed to produce. It even seeks to make the custodian name the persons in whose possession the missing books may be found. Answers to such questions are more than "auxiliary to the production" of unprivileged corporate or association records.[4]

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[3] *Pulford* v. *United States,* 155 F. 2d 944, 947; *Lumber Products Assn.* v. *United States,* 144 F. 2d 546, 553; *Carolene Products Co.* v. *United States,* 140 F. 2d 61, 66–67; *United States* v. *Illinois Alcohol Co.,* 45 F. 2d 145, 149. See also, *United States* v. *Lay Fish Co.,* 13 F. 2d 136, 137.

[4] The leading case of *United States* v. *Austin-Bagley Corp., supra,* at 233, 234, explains the scope and limitations of this doctrine. In that case, the secretary-treasurer of a corporation, who was charged with conspiracy to violate the National Prohibition Act, was called to the stand by the Government and compelled to identify the

The Government cites but one federal case, *United States* v. *Field*, 193 F. 2d 92, as directly supporting its position.[5] In that case, the trustees of a bail fund were held in contempt for failure to produce records of the fund pursuant to a subpoena. After affirming the convictions on that ground, the Court of Appeals for the Second Circuit went on to consider, by way of dictum, other contentions raised by the trustees. One of their contentions was that questions about the location and production of records were improper. The court, relying on several cases in which a custodian was compelled to identify records which he had already produced, said that the questions pertaining to the location of the records "were

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minutes of the corporation. Circuit Judge Learned Hand, for the Court of Appeals, upheld this procedure, stating:

"That the production of the books and documents could be compelled, even if they contained entries incriminating the accused, is now well-settled law. . . . However, the availability of the documents does not necessarily determine that of the testimony by which they may be authenticated. Conceivably it might be possible to force their production, and yet their possessor be protected from proving by his oath that they were what they purport to be. . . .

"While, therefore, we do not disguise the fact that there is here a possible, if tenuous, distinction, we think that the greater includes the less, and that, since the production can be forced, it may be made effective by compelling the producer to declare that the documents are genuine. . . . Hence it appears to us that the case [*Heike* v. *United States*, 227 U. S. 131] determines that testimony auxiliary to the production is as unprivileged as are the documents themselves. By accepting the office of custodian the holder not only exposes himself to producing the documents, but to making their use possible without requiring other proof than his own."

[5] The Government also cites *Bleakley* v. *Schlesinger*, 294 N. Y. 312, 62 N. E. 2d 85, holding that a corporation officer who fails to produce corporate records pursuant to a subpoena must give a reasonable explanation or suffer the penalty for nonproduction. But cf. *Bradley* v. *O'Hare*, 2 App. Div. 2d 436, 156 N. Y. S. 2d 533, where questions put to a union official relating to the whereabouts of union records were held privileged.

proper under the precedents." *Id.*, at 97. The cases cited, however, do not support the court's dictum.[6]

The Government suggests that subpoenaed corporate and association records will be obtained more readily for law-enforcement purposes if their custodian is threatened with summary commitment for contempt in failing to testify as to their whereabouts, rather than with prosecution for disobedience of the subpoena to produce the records themselves. We need not concern ourselves with the relative efficacy of those procedures.[7] There is a great

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[6] Moreover, prior and subsequent decisions of the same court, in which two of the same judges participated, contradict the statement contained in the *Field* case. In *United States* v. *Daisart Sportswear, Inc.*, 169 F. 2d 856, 861–862, the court stated that "we do not believe that the principle of the Austin-Bagley case, supra, may be projected so that a corporate officer may be compelled to testify as to any and all phases of the corporation's activities, without at the same time obtaining a grant of immunity for the incriminating matter he is compelled to disclose." And further, that "the production of records must be distinguished from oral testimony as to what the records would contain, had they been produced." *Id.*, at 862. Subsequently, in *United States* v. *Patterson*, 219 F. 2d 659, 662, the court, in reversing a contempt conviction for refusal to produce records, approved the trial court's ruling that questions relating to the whereabouts of the records were privileged. "The defendant can here legally be jailed only for a contempt in failing to produce the sought-after books when they are fairly shown to be presently within his power and control. He cannot legally be jailed for contempt for invoking his constitutionally protected privilege not to be a witness against himself."

See also, *Lopiparo* v. *United States*, 216 F. 2d 87, where the trial court upheld the custodian's claim of privilege with respect to oral testimony pertaining to corporate records.

[7] In this case petitioner might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*. See *Nilva* v. *United States*, 352 U. S. 385; *United States* v. *Fleischman*, 339 U. S. 349; *United States* v. *White*, 322 U. S. 694; *Wilson* v. *United States*, 221 U. S. 361.

From a memorandum filed by the Government, it appears that

difference between them. The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment.

Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court with instructions to enter a judgment of acquittal.

Reversed and remanded.

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petitioner later did produce for the grand jury certain books and records of the union when threatened with a commitment for contempt for his failure to comply with a subsequent subpoena *duces tecum* issued to him in his representative capacity. The Government suggested that this subsequent compliance had rendered this proceeding moot, but we believe that it did not do so because the order for petitioner's commitment was for criminal, not civil, contempt.

BRITISH TRANSPORT COMMISSION *v.* UNITED STATES ET AL.

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

No. 247. Argued April 29, 1957.—Decided June 10, 1957.

Under the Limited Liability Act, 46 U. S. C. §§ 181–196, the United States filed a proceeding in a Federal District Court for exoneration from, or limitation of liability for, loss or damage resulting from a collision in the North Sea between one of its ships and a ship owned by the British Transport Commission. The Commission and others filed claims in the proceeding. While the proceeding was pending, some of the claimants against the American ship filed cross-claims against the British ship, and the United States asserted a "set-off" and a "cross-claim" against the British ship in answer to the latter's claim. *Held:* the claimants against the British ship may implead the Commission to respond to any damages for losses suffered by them in the collision, and the court having jurisdiction of the limitation proceeding may proceed to settle all questions appropriate to, and seasonably raised in, that proceeding by parties thereto. Pp. 130–143.

(a) Whether it be by analogy to Admiralty Rule 56 or by virtue of Admiralty Rule 44, or by admiralty's general rules heretofore promulgated by this Court, it is a necessary concomitant of jurisdiction in a factual situation such as this that the court have power to adjudicate all of the demands made and arising out of the same disaster. Pp. 135–139.

(b) Fairness in litigation requires that those who seek affirmative recovery in a court should be subject therein to like exposure for the damage resulting from their acts connected with the identical incident. Pp. 141–143.

(c) In the final analysis, the manifest advantages of this cross-claim procedure serve the best interests of all the parties before a court of the United States who find themselves the unfortunate victims of maritime disaster. P. 143.

230 F. 2d 139, affirmed.

Dean Acheson argued the cause for petitioner. With him on the brief were *Edwin Longcope* and *Charles A. Horsky.*

Assistant Attorney General Doub argued the cause for the United States, respondent. With him on the brief were *Solicitor General Rankin, Samuel D. Slade* and *William W. Ross.*

Wilbur E. Dow, Jr. argued the cause for Haslam et al., respondents. With him on the brief were *John W. Oast, Jr.* and *C. Lydon Harrell, Jr.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The British Transport Commission, owner of the overnight ferry, *Duke of York,* questions the power of a District Court sitting in an admiralty limitation proceeding to permit the parties to cross-claim against each other for damages arising out of the same maritime collision. The United States, as owner of the U. S. N. S. *Haiti Victory,* had filed the original proceeding in which the Commission along with others filed claims. While the proceeding was pending some of the claimants against the *Haiti* filed cross-claims against the *Duke* and, in addition, the United States asserted a "set-off" and "cross-claim" against the *Duke* in answer to the latter's claim. The District Court dismissed all of the cross-claims on the ground that "a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other." The Court of Appeals reversed holding that "As a practical matter as well as an equitable one, the claimants herein should be allowed to implead the Commission." 230 F. 2d 139, 144. Because the question is an important one of admiralty jurisdiction we granted certiorari, limited to the limitation proceeding question. 352 U. S. 821. We agree with the Court of Appeals.

On May 6, 1953, in the North Sea, the Naval Transport, *Haiti Victory,* owned by the United States, rammed the overnight channel ferry, *Duke of York,* owned by

petitioner. The bow of the *Duke* broke away from the vessel and sank as a result of a deep cut on her port side just forward of the bridge inflicted by the *Haiti.* While the *Haiti* suffered only minor damage the *Duke's* loss was claimed to be $1,500,000. In addition several of the 437 persons aboard the *Duke* were killed, many were injured, and many of them lost their baggage. The *Haiti* returned to the United States and, thereafter, this proceeding was filed under §§ 183–186 of the Limited Liability Act, R. S. §§ 4281–4289, as amended, 46 U. S. C. §§ 181–196, for exoneration from, or limitation of, liability for loss or damage resulting from the collision. The United States as petitioner further alleged that the collision was "caused by the fault and neglect of the *SS Duke of York* and the persons in charge of her . . . and occurred without fault on the part of the petitioner . . . ."

The *Duke* filed a claim in the proceeding for $1,500,000 and in addition an answer in which it claimed, *inter alia,* that the damages resulting from the collision were "not caused or contributed to by any fault or negligence on the part of this claimant . . . but were done, occasioned or incurred with the privity or knowledge of and were caused by the Petitioner and its managing officers and supervising agents and the master of the *Haiti Victory* . . . which will be shown on the trial." The United States answered that the collision "was occasioned by either the sole fault of the *Duke of York* or the joint fault of both the *Duke of York* and the *Haiti Victory";* it alleged damage to the *Haiti* in the sum of $65,000, and that in addition it "has also been subjected to claims by passengers and members of the crews of both vessels filed herein, which presently approximate $809,714 for personal injury and death, and $45,975 for property damage other than that claimed by the *Duke of York;* all of which damage it prays to set off and recoup against the claimant,

British Transport Commission, as owner of the *Duke of York* . . . ." Various of the claimants against the *Haiti* in the meanwhile filed impleading petitions against the *Duke* alleging the collision was "caused or contributed to by the fault and negligence of the *S. S. 'Duke of York'* . . ." setting out, as did the United States, the particular acts upon which the claim of negligence was based. The District Court dismissed all of these cross-claims holding that the Act offers "a forum for the complete adjudication and recovery of all claims . . . against the petitioner only. . . . To permit one claimant to prosecute another claimant in the limitation litigation would be unfair. The latter has intervened under compulsion, the court enjoining his resort to any other tribunal. Therefore, his responsibility should not be enlarged beyond that incident to his claim. Obedience to the injunction should not expose him to an attack to which, in regular course, he would be subject only in the jurisdiction of his residence or other place of voluntary entrance."

On a hearing "restricted to the issues of the asserted liabilities of the two vessels, *Duke of York* and *Haiti Victory,* for the collision," the court exonerated the *Haiti* from all liability, holding the *Duke* solely to blame for the collision. 131 F. Supp. 712. This finding was subsequently affirmed by the Court of Appeals and is not before us.[1] In reversing the dismissal of the cross-claims

[1] The United States had not filed a cross-claim against the *Duke* for damage to its vessel because, as it alleges, its counsel felt that it had waived recovery of any claim against a vessel of the British Government by virtue of the "Knock for Knock" Agreement, 56 Stat. 1780, E. A. S. 282, Dec. 4, 1942. Subsequently, while the appeal was pending, the British Government advised that it did not consider the *Duke* as a government vessel. Consequently, following the Court of Appeals decision, the United States filed a cross-claim against the *Duke* in the proceedings before the District Court.

the Court of Appeals reasoned that "Modern codes of procedure have reflected two facets: (1) all rights, if this can fairly be done, should be decided in a single legal proceeding; (2) parties who submit themselves to the jurisdiction of a court in a legal proceeding should be bound by that court's decision on all questions, appropriate to and seasonably raised in, that proceeding. Those ideas, we think, can reasonably be deduced from the spirit, if not the letter, of the 56th Admiralty Rule." 230 F. 2d, at 145.

The excellent coverage this Court's cases have given the historical incidents forming the background that went into the adoption of the Limited Liability Act relieves us of any minute recitation of that history. See *Norwich Co.* v. *Wright,* 13 Wall. 104 (1872); *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.,* 109 U. S. 578 (1883); *The Main* v. *Williams,* 152 U. S. 122 (1894); *Just* v. *Chambers,* 312 U. S. 383 (1941). The history shows that although the Act was patterned on earlier English statutes its foundations sprang from the roots of the general maritime law of medieval Europe. "The real object of the act . . . was to limit the liability of vessel owners to their interest in the *adventure," The Main* v. *Williams, supra,* at 131, and thus "to encourage ship-building and to induce capitalists to invest money in this branch of industry," *Norwich Co.* v. *Wright, supra,* at 121.

The Congress by the provisions of the Act left the form and modes of procedure to the judiciary. Twenty years after passage of the Act this Court adopted some general rules with respect to admiralty practice. See 13 Wall. xii and xiii. Rule 56 first came into the General Admiralty Rules as Rule 59.[2] As will be noted, it was originally

[2] Rule 56 was adopted as Rule 59 in 1883 as a codification of the decision in *The Hudson,* 15 F. 162 (1883). The Rule then provided in part:

"In a suit for damage by collision, if the claimant of any vessel

fashioned to accommodate cross-libels in marine collision cases, but acting upon the same inherent power to bring into the proceeding other parties whose presence would enable the court to do substantial justice in regard to the entire matter, the courts soon began to extend the practice by analogy to cases other than collision. See, *e. g.*, *The Alert,* 40 F. 836 (1889); 3 Moore, Federal Practice (2d ed. 1948), 450–456. As it is expressed in 2 Benedict, Admiralty (6th ed. 1940), § 349, at 534, "the 'equity of the rule' was given wide extension and the principle . . . was applied by analogy to require the appearance of any additional respondent who might be responsible for the claim or a part thereof." In the 1920 revision the 59th Rule became the 56th General Admiralty Rule and, as amended by this Court, authorized either a claimant or respondent to bring in any other vessel or person "partly or wholly liable . . . by way of remedy over, contribution or otherwise, growing out of the same matter." 254 U. S. 707.[3] The present-day limitation proceeding,

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proceeded against, or any respondent proceeded against *in personam,* shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued . . . ." 112 U. S. 743.

The remainder of Rule 59 in its original form is substantially similar to the last two sentences of the present Rule 56.

[3] The present Rule 56 provides:

"In any suit, whether *in rem* or *in personam,* the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time

therefore, springs from the 1851 Act and this Court's rules. Neither source indicates that admiralty limitation precluded other ordinary admiralty procedures. In fact, as Mr. Justice Bradley put it in *The Scotland,* 105 U. S. 24, 33 (1881), "we may say, once for all, that [the rules] were not intended to restrict parties claiming the benefit of the law, but to aid them. . . . The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the ship-owners in such a case. They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt." Accord, *Ex parte Slayton,* 105 U. S. 451 (1882).

It is the Commission's contention that Rule 56 is wholly inapplicable to the adjudication of a claim of one co-claimant against another in a limitation proceeding. The rule, it says, refers to libels and the use of the word "claimant" includes only the claimant of the vessel in-

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during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant." 254 U. S. 707.

volved and not to those making claims against the vessel. But we have seen that Rule 56 has long been held to encompass cross-claims between parties in libel actions. This Court has held that limitation of liability petitions may also be determined by appropriate pleading in libel actions. See *The North Star,* 106 U. S. 17 (1882), and the discussion *infra.* It may therefore be said that a limitation proceeding not only provides concourse but serves the function of a cross-libel to determine the rights between petitioner and claimants as well; and equitable rights between the limitation petitioner and a claimant have long been recognized as encompassed in Rule 50.[4] *Moore-McCormack Lines, Inc.* v. *McMahon,* 235 F. 2d 142 (1956). It appears then that had this proceeding started out as a libel the Commission admittedly would have no complaint. And as we have pointed out, the Rules were not promulgated as technicalities restricting the parties as well as the admiralty court in the adjudication of relevant issues before it. There should therefore be no requirement that the facts of a case be tailored to fit the exact language of a rule. The initial petition filed in the limitation proceeding alleged that the *Duke* was wholly or partly at fault and asked for a "set-off" or "cross-claim" against it; the Commission entered the case not only to prove its claim but to contest this allegation of negligence against the *Duke.* The claimants are all

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[4] Rule 50 provides:

"Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs." 254 U. S. 702.

present in the litigation. The United States has now filed a cross-claim or cross-libel against the Commission, it already being a party to the suit and before the court. The question is not what "tag" we put on the proceeding, or whether it is a "suit" under Rule 56 or a libel *in personam,* or whether the pleading is of an offensive or defensive nature, but rather whether the Court has jurisdiction of the subject matter and of the parties. It is sufficient to say as did Chief Justice Taft for a unanimous Court in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207 (1927), "that all the ease with which rights can be adjusted in equity is intended to be given to the [limitation] proceeding. It is the administration of equity in an admiralty court. . . . It looks to a complete and just disposition of a many cornered controversy . . . ." *Id.,* at 216. See also the opinion of Chief Justice Hughes for a unanimous Court in *Just* v. *Chambers,* 312 U. S. 383, 386–387 (1941). We do not believe that the analogy to equity is shadowy. The claimants in this proceeding have just claims arising out of the collision of the *Haiti* and the *Duke.* They have as much interest in the potential liability resulting from that marine disaster as has the equity receiver in perfecting the *res* of the estate. The scope of the proceeding is not limited to a determination of the petitioner's fault nor to its interest in the *Haiti.* In fact, here the fault of the disaster, a matter of legitimate interest to the claimants, has been adjudicated against the Commission and it admits this judgment is *res judicata* in all courts. Why does it not follow that the claimants, scattered as they are in eight countries of the world but all present in this proceeding, should recover judgment for their damages? Why should each be required to file a secondary action in the courts of another country merely to prove the amount of his due when the same evidence is already before the admiralty court here?

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Logic and efficient judicial administration require that recovery against all parties at fault is as necessary to the claimants as is the fund which limited the liability of the initial petitioner. Otherwise this proceeding is but a "water haul" for the claimants, a result completely out of character in admiralty practice. Furthermore, the Commission entered this proceeding voluntarily without compulsion. It filed an answer asking that justice be done regarding the subject matter, the collision; it denied all fault on its part and affirmatively sought to place all blame on the *Haiti;* it claimed damage in the sum of $1,500,000; and it contested the *Haiti's* claim of limitation or exoneration. In all of these respects judgment went against the Commission—it lost. Now having lost, it claims that the court has wholly lost jurisdiction while had it won, jurisdiction to enter judgment on all claims would have continued. It asserts that neither the *Haiti,* which was damaged to the extent of some $65,000, nor any of the other 115 claimants may prove their losses against it. But reason compels the conclusion that if the court had power to administer justice in the event the Commission had won, it should have like power when it lost. Whether it is by analogy to Rule 56 or by virtue of Rule 44,[5] or by admiralty's general rules heretofore promulgated by this Court, we hold it a necessary concomitant of jurisdiction in a factual situation such as this one that the Court have power to adjudicate all of the demands made and arising out of the same disaster. This too reflects the basic policy of the Federal Rules of Civil Procedure.

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[5] Rule 44 provides:

"In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules." 254 U. S. 698.

Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices.

It is true that no case of this Court has passed on the question directly. However, examination of the practice of American admiralty courts indicates that cross-libel procedures have been resorted to between co-parties in a limitation *concursus* at least since *The North Star,* 106 U. S. 17 (1882). While initially that case was not a limitation proceeding, this Court held that both parties could have obtained a limitation of liability if entitled to it without the necessity of separate suits. In *The Manitoba,* 122 U. S. 97 (1887), both the libelant and the cross-libelant sought and received the benefit of liability limitation. Thereafter, in *The City of Boston,* 182 F. 171 (1909), a District Court allowed the filing of cross-claims in the limitation proceeding there begun. It is of interest to note that while there was no express rule at the time permitting such procedure it was granted "following the analogy of admiralty rule 59 [now Rule 56]." It was thought that "the same claim for contribution which . . . might [be recovered] in an independent suit" could properly be adjudicated by a cross-claim although there was no "reported precedent for the allowance of such a claim in limited liability proceedings." *In re Eastern Dredging Co.,* 182 F. 179, 183 (1909). In 1919 the Second Circuit decided *The Adah,* 258 F. 377, in which Judge Hough declared that "Whether it was necessary, in absolving the Adah, to fix blame on some one else, is a question we need not decide." But where the parties enter the limitation proceeding, the court held "It is enough that they did come in, and made parties of themselves. . . . Having become parties, they are bound by the decree entered in the suit wherein they are parties." *Id.,* at 381. And this was but the echo of

Mr. Justice Bradley in *The Scotland, supra,* where he said, "when parties choose to resort to [a nation's] forum for redress" they cannot "complain of the determination of their rights by that law . . . ." 105 U. S., at 31–32. Later in *In re United States Steel Products Co.,* 24 F. 2d 657 (1928), the Second Circuit squarely decided that cross-claims were properly considered in limitation proceedings. The United States' claim in limitation was "a right of suit in admiralty against the Steel Inventor," *id.,* at 659, the court said, which subjected it to cross-suit, citing *United States* v. *The Thekla,* 266 U. S. 328 (1924). See also *The Steel Inventor,* 43 F. 2d 958 (1930). And as recently as *Moore-McCormack Lines, Inc.* v. *McMahon,* 235 F. 2d 142 (1956), the Second Circuit unanimously reaffirmed the principles of these cases. It reasoned that since all of the claims arose out of the same incident they should be determined in a single cause, thus effectuating an "economy of trial litigation" so much desired in judicial administration.

Petitioner points to cases from the Second Circuit in which cross-claims were not permitted.[6] But we find none apposite to this case, other than perhaps *New Jersey Barging Corp.* v. *T. A. D. Jones & Co.,* 135 F. Supp. 97 (1955). That case held that the impleading of the claimant would convert a proceeding to limit the petitioners' liability to a proceeding by other claimants against the impleaded claimant. While it is sufficient to say that *New Jersey Barging Corp.* has subsequently, in effect, been overruled by the Second Circuit in *Moore-McCormack Lines, Inc.* v. *McMahon, supra,* we might add that it is easily distinguishable from the situation here.

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[6] *Algoma C. & H. B. R. Co.* v. *Great Lakes Transit Corp.,* 86 F. 2d 708 (1936); *New Jersey Barging Corp.* v. *T. A. D. Jones & Co.,* 135 F. Supp. 97 (D. C. S. D. N. Y. 1955); *Petition of Texas Co.,* 81 F. Supp. 758 (D. C. S. D. N. Y. 1948); *Poling Bros. No. 5—Tom Wogan,* 1937 A. M. C. 1513 (D. C. E. D. N. Y.).

No answer was filed and no effort was made toward an affirmative defense, the claimant only having forwarded his statement of asserted damage by mail. Nor do we think *Algoma C. & H. B. R. Co.* v. *Great Lakes Transit Corp.*, 86 F. 2d 708 (1936), affords petitioner comfort. There Judge Learned Hand held that the railroad, in filing a limitation proceeding, had improperly laid venue. While there is some dicta in the opinion indicating that the petitioner in a limitation proceeding could recover nothing affirmatively, we agree with Judge Knox's interpretation of that case in his opinion in *The Clio—The Springhill*, 1948 A. M. C. 75, 77. In *Algoma* the original limitation petitioner had filed no counterclaim in its proceeding. Therefore nothing could be recovered affirmatively. The case therefore does not stand for the proposition that it would not be permissible for a counterclaim to be filed. The view that the counterclaim would be permissible is supported by *The Steel Inventor, supra,* and *In re United States Steel Products Co., supra,* in both of which Judge Hand participated.

Petitioner also depends heavily on *Department of Highways* v. *Jahncke Service, Inc.*, 174 F. 2d 894 (1949), an opinion of the Fifth Circuit. We believe it inapposite also. There Jahncke's barges tore loose in a windstorm and damaged the Department of Highways' bridge. Jahncke petitioned for limitation and the Department, after filing its claim and answer, then attempted to implead the Town of Madisonville, the owner of some other barges, which also had struck the bridge. Obviously there was no connection, other than the same wind and water, between Madisonville's barges which were independently moored and Jahncke's. Madisonville had filed no claim in Jahncke's limitation proceeding, the damages arising from a distinctly separate incident.

Petitioner points to the many dire consequences that may flow from exposing claimants to cross-claims. While

these predictions are entirely speculative and not before us, we comment on those which petitioner believes to be the more serious. First it says foreign claimants will be frightened away and will not file claims in American limitation proceedings. This result is more, says petitioner, "than just robbing Peter to pay Paul." But if petitioner prevailed both Peter and Paul would be robbed. While it is true that no compulsion could be exerted on foreign claimants to file claims and some would not do so thus preventing the determination of fault from being *res judicata* as to them; and while an injunction against suits being filed in foreign jurisdictions would be ineffective unless comity required its recognition; and assuming all this would encourage the filing of foreign suits and the levying of attachments on any offending American vessel while in a foreign port, or for that matter against any vessel of the same American owner; still this would have little practical effect on the operation of our limitation law. Most foreign claimants are foreign shipowners whose vessels visit American ports and are subject to like action by claimants living here. Self-protection would balance things out. But even if it did not, of what good is a judgment as to fault, even if *res judicata,* if a claimant recovers nothing? The proceeding here would become entirely abortive. Petitioner's theory makes the claimants no more than pawns in a game between the offending shipowners in which all that the claimants win after the successful battle is the right to fight another day for their due and in another court. It appears to us, therefore, that fairness in litigation requires that those who seek affirmative recovery in a court should be subject therein to like exposure for the damage resulting from their acts connected with the identical incident. The claimants here ask no more. That no foreign country permits such impleading should not force litigants in United States courts to forego such procedures. Foreign

limitation of liability procedures are for the most part different from ours where not only fault but claims are determined as part and parcel of the limitation action itself. We conclude that in the final analysis the manifest advantages of this cross-claim procedure serve the best interests of all of the parties before a court of the United States who find themselves the unfortunate victims of maritime disaster.

Other questions of procedural detail raised by the petitioner we leave to the trial courts. This has been the policy of this Court in the past in admiralty practice.

Affirmed.

Opinion of MR. JUSTICE BRENNAN, dissenting, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN join, announced by MR. JUSTICE FRANKFURTER.

In terms, Admiralty Rule 56 authorizes cross-claim practice only in libel proceedings. The instant proceeding, however, is not a libel, but a limitation proceeding. I do not pause to examine the arguments marshalled by the Court in favor of cross-claim practice in limitation proceedings, for, in my opinion, if such practice is desirable, it should be introduced by amending the Admiralty Rules, and not by a decision in a particular litigation which was commenced by the original litigants without knowledge on their part or the Admiralty Bar that such a practice obtained in limitation proceedings.

It is inequitable, in the circumstances of this case, to apply to the British Commission a practice first announced today. The contracts of passage between the Commission and its co-claimants were not entered into under American law. The *Duke of York* was a passenger ferry operating on a fixed schedule between the Hook of Holland and Harwich, England. The 437 passengers aboard at the time of the collision held tickets for trans-

portation across the North Sea from a railroad station in Holland to a railroad station in Harwich. Those tickets were contracts of passage containing provisions for exoneration from liability more favorable than are allowed by American law. There is no challenge to the statement in a footnote to the Commission's brief that

> "Under English law the amount at which liability may be limited is far lower than in the United States, generally £15 per ton of tonnage. Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) Sec. 503. Furthermore, the English rules of liability are substantially different from those applied in our courts. *A carrier under English law may by appropriate contract and notice limit its liability for negligence, and periods of limitation for the assertion of damage or loss are different.* See Collision Claims—Difference Between British and U. S. Law, Lloyds List and Shipping Gazette, July 14, 1953." (Emphasis added.)

And see *Adler* v. *Dickson,* [1954] 2 Lloyd's List L. R. 267 (C. A.). There is at least a substantial prospect that in the American courts these more favorable English rules of liability may not be fully recognized and applied. Congress has said that provisions or limitations exonerating a shipowner from liability for negligence or from liability beyond a stipulated amount are against the public policy of the United States, and shall be null and void and of no effect. See, *e. g.,* R. S. § 4283, as amended, 49 Stat. 1480, 46 U. S. C. § 183 (c); Note, 65 Yale L. J. 553; *Moore* v. *American Scantic Line,* 30 F. Supp. 843.

The British Commission could not have been compelled to enter the limitation proceeding, but did so voluntarily. We may reasonably infer that its decision to participate was based upon its understanding of the issues it would be called upon to face. The notice of

those issues gave not the slightest hint that the Commission would be required to answer to other claimants who might enter the proceedings. The notice was:

> "Notice is given that the United States of America has filed a petition pursuant to Title 46, U. S. Code, sections 183–189 and 789, *claiming the right to exoneration from or limitation of liability for all claims arising on the voyage of the USNS HAITI VICTORY from New York City to Bremerhaven, Germany, terminating on May 8, 1953, at Bremerhaven.* All persons having such claims must file them, under oath, as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the United States Court House at Granby Street, Post Office Building, Norfolk, Virginia, and serve on or mail to the petitioner's proctors . . . at . . . a copy on or before October 15, 1953, or be defaulted. Personal attendance is not required. Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy." (Emphasis added.)

Plainly this notice told the Commission only that if it chose to enter this proceeding it must be prepared to contest the claims of the United States to exoneration from or limitation of liability for claims arising out of the collision. That issue did not in anywise draw in the Commission's defenses against claims of the *Duke of York's* passengers. The Commission therefore had no information to alert it that it might hazard its defenses under its contracts of passage if it entered the proceeding. The Commission thus had no fair opportunity to weigh that factor in reaching the very practical decision whether to enter the American proceeding or to stay out and meet

all claimants on its home grounds. It is a fundamental of American justice that a litigant shall have fair notice of what he will be called upon to meet. In holding that, although the Commission was not given such notice, it must litigate the cross-claims here, the Court, in my view, denies equity in the name of equity.

I would reverse the judgment of the Court of Appeals and direct affirmance of the decree of the District Court.

Syllabus.

LAKE TANKERS CORP. *v.* HENN, ADMINISTRATRIX.

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

No. 445. Argued May 6, 1957.—Decided June 10, 1957.

Petitioner brought this proceeding in a Federal District Court under the Limited Liability Act, 46 U. S. C. §§ 181–196, to limit its liability for claims growing out of a collision between petitioner's tug and barge and a pleasure yacht. Suits previously brought in state courts, by respondent for the death of her husband, and by four other claimants for personal injuries and the loss of the yacht, originally involved claims for damages aggregating more than the value of petitioner's vessels and their pending freight; but the aggregate amount recoverable on such claims was reduced by stipulations and admiralty court orders to an amount less than the value of the vessels and their pending freight. The value of the vessels was undisputed; the claims were fixed; there was no contention that there might be further claims; the fund indubitably was sufficient to pay all claims in full; and the admiralty court had dissolved its injunction against respondent's suit in the state court. *Held:* In this situation, a *concursus* beyond that required by the orders heretofore entered in the limitation proceeding is not necessary, and respondent may proceed with her suit in the state court to determine petitioner's obligation to respond in damages for the loss of her husband's life—subject to the continuing jurisdiction of the federal court to protect petitioner's right to limited liability. Pp. 148–154.

(a) Where the fund paid into the proceedings by the offending owner exceeds the claims made against it, there is no necessity for the maintenance of the concourse. P. 152.

(b) The Act is not one of immunity from liability, and it confers no privilege on the shipowner other than that granting him limited liability. Pp. 152–153.

(c) In view of the reservation to such suitors of their common-law remedies by 28 U. S. C. § 1333, respondent must not be thwarted in her attempt to employ her common-law remedy in the state court, where she may obtain trial by jury. P. 153.

(d) *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, distinguished. Pp. 153–154.

232 F. 2d 573, 235 F. 2d 783, affirmed.

Eugene Underwood argued the cause for petitioner. With him on the brief was *H. Barton Williams.*

Frank C. Mason argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

This admiralty limitation proceeding resulted from a maritime disaster in 1954. The aggregate amount of all of the claims filed in the proceeding and for which the petitioner could be held liable if found at fault is less than the value of petitioner's vessels and their pending freight. The question presented is whether the respondent, the principal claimant, may, under these circumstances, proceed with her action in a state court, subject to the continuing jurisdiction of the federal court to protect petitioner's right to limited liability, to determine the obligation of the petitioner to respond in damages for the loss of the life of her husband. We agree with the disposition of the District Court as modified by the Court of Appeals.

Respondent's husband was a passenger on the pleasure yacht, *Blackstone,* which was involved in a collision on the Hudson River on July 10, 1954, with petitioner's tug, *Eastern Cities,* push-towing petitioner's barge, *L. T. C. No. 38.* The *Blackstone* capsized and respondent's husband was drowned. The other 10 persons on board the yacht were rescued. Respondent, as her husband's administratrix, brought suit against the petitioner in a New York state court claiming $500,000 damages for the loss of her husband's life. She alleged that the loss was caused by Lake Tankers' negligent operation of both its tug and its barge. Actions by four other claimants were also commenced in the New York state courts against the petitioner for damages for personal injuries and for loss of the *Blackstone.*

Thereafter, Lake Tankers Corporation filed this proceeding in admiralty in the United States District Court for the Southern District of New York for exoneration from or limitation of liability. As required by the statute authorizing limitation proceedings[1] the petitioner filed approved security. While the first bond was only in the amount of $118,542.21, representing the petitioner's interest in its tug alone, thereafter a bond covering the barge in the amount of $165,000 was filed. Appropriate restraining orders were issued enjoining the prosecution or filing of any claims against Lake Tankers except in the limitation proceeding. There is no dispute in regard to the adequacy or correctness of the amount of the two bonds.

After petitioner instituted the limitation proceeding the respondent filed a claim for $250,000 in it covering the same loss asserted in her state court case. The 10 survivors, including those who had filed suits in the state court, also filed their claims in the limitation proceeding. These totaled only $9,525. All of the claimants, including respondent, have relinquished all right to any damage in excess of the amounts set forth in their respective claims in the limitation proceeding and expressly limited their recovery to those amounts. The respondent has amended her claim further by allocating $100,000 of her alleged damage to the tug and the remaining $150,000 to the barge. She has also filed stipulations agreeing neither to increase these claims, nor to enter into a judgment in excess of these amounts, and she has waived any claim of *res judicata* relative to the issue of the petitioner's right to limit liability if that issue should be passed on in the state court proceeding. The District Court on application then vacated the restraining order since the total fund exceeded the amount of the claims.

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[1] R. S. § 4285, as amended, 46 U. S. C. § 185.

137 F. Supp. 311. The Court of Appeals for the Second Circuit affirmed, entering an order, to which respondent has also agreed, with respect to the state court suit, as follows:

> " 'If claimant obtains a judgment in her state court suit for an amount in excess of $100,000, an injunction will issue permanently enjoining her from collecting such excess unless the judgment rests on a special verdict allocating the amount as between the libelant as owner of the tug and as owner of the barge respectively. Thus if the judgment exceeds $100,000 and the jury finds libelant liable solely as owner of the tug, she will be enjoined from collecting any excess. If the jury finds that the libelant is liable solely as owner of the barge, she will be enjoined from collecting any amount in excess of $150,000.' " 232 F. 2d 573, 577.

On rehearing the Second Circuit, sitting *en banc,* reaffirmed its decision. 235 F. 2d 783. We granted certiorari to pass upon the important jurisdictional question presented. 352 U. S. 914.

This Court has recently considered the cases which discuss the historical background of the Limited Liability Act, R. S. §§ 4281–4289, as amended, 46 U. S. C. §§ 181–196, in *British Transport Commission* v. *United States, ante,* p. 129. It was there pointed out that the Act was adopted primarily to encourage the development of American merchant shipping. The first section of the Act here involved contains its fundamental provision which declares that the liability for any damage arising from a disaster at sea which is occasioned without the privity or knowledge of the shipowner shall in no case exceed the value of the vessel at fault together with her pending freight, 46 U. S. C. § 183. As Mr. Justice Van Devanter stated for a unanimous Court in *White* v.

Island Transportation Co., 233 U. S. 346, 351 (1914), "The succeeding sections are in the nature of an appendix and relate to the proceedings by which the first is to be made effective. Therefore, they should be so construed as to bring them into correspondence with it." Among these sections dealing with the mechanics of effecting such limitation of liability is § 184 covering those incidents where "the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of [the claimants]." In that event, the section continues, "they shall receive compensation from the owner of the vessel in proportion to their respective losses; and *for that purpose*" the owners "may take the appropriate proceedings in any court . . . ." (Emphasis added.) The succeeding section provides that in such an event the owner "may petition a district court of the United States . . . for limitation of liability within the provisions of this chapter . . . ." It further declares that upon compliance with its requirements "all claims and proceedings against the owner with respect to the matter in question shall cease." This provision is implemented by Rule 51 of our Admiralty Rules which spells out in more detail the manner in which the owner of any vessel who "shall desire to claim the benefit of limitation of liability . . ." shall proceed. It is, therefore, crystal clear that the operation of the Act is directed at misfortunes at sea where the losses incurred exceed the value of the vessel and the pending freight. And, as is pointed out in *British Transport Commission, supra,* where the fund created pursuant to the Act is inadequate to cover all damages and the owner has sought the protection of the Act the issues arising from the disaster could be litigated within the limitation proceeding. Otherwise the purpose of the Act, *i. e.,* limitation of the owner's liability, might be frustrated. Only in this manner may there be a marshalling of all of the statutory assets remaining after the

disaster and a concourse of claimants. In such a situation it matters not to the owner what the "take" of the individual claimant may be from the proceeding for under the Act his payment is limited to the value of the vessel and the pending freight. He can suffer no more in any event.

On the other hand, where the value of the vessel and the pending freight, the fund paid into the proceeding by the offending owner, exceeds the claims made against it, there is no necessity for the maintenance of the concourse. This is not to say that *concursus* is not available where a vessel owner in good faith believes the fund inadequate, but here there is no contention that there might be further claims; the value of the vessels is undisputed and the claims are fixed; it follows indubitably that the fund is sufficient to pay all claims in full. While it is true that the claims as initially filed in the state court exceeded the fund created in the limitation proceeding, still when the admiralty court dissolved the injunction against the state suit these claims, as filed in and limited by stipulation and order of the admiralty court in the limitation proceeding, aggregated less than the fund. On appeal the Court of Appeals placed even more severe restrictions on the state court prosecution, thus insuring beyond doubt that petitioner's right of limitation under the Act was fully protected.

For us to expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all demands upon it. The shipowner's right to limit liability is not so boundless. The Act is not one of immunity from liability but of limitation of it and we read no other privilege for the shipowner into its language over and above that granting him limited

liability. In fact, the Congress not only created the limitation procedure for the primary purpose of apportioning the limitation fund among the claimants where that fund was inadequate to pay the claims in full, but it reserved to such suitors their common-law remedies. 63 Stat. 101, 28 U. S. C. § 1333.[2] In view of this explicit mandate from the Congress the respondent must not be thwarted in her attempt to employ her common-law remedy in the state court where she may obtain trial by jury.

The state proceeding could have no possible effect on the petitioner's claim for limited liability in the admiralty court and the provisions of the Act, therefore, do not control. *Langnes* v. *Green,* 282 U. S. 531, 539–540 (1931). It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus, or railroad company. None of them can force a damage claimant to trial without a jury. They, too, must suffer a multiplicity of suits. Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions. The Act, as we have said, was not adopted to insulate shipowners from liability but merely to limit it to the value of the vessel and the pending freight. It is contended that *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409 (1954), is to the contrary. While there was no opin-

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[2] The forerunner of the current section gave the District Courts jurisdiction "Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it . . . ." 42 Stat. 634, 28 U. S. C. (1946 ed.) § 41 (3). As re-enacted it reads, in pertinent part, that the District Courts have original jurisdiction, exclusive of the courts in the States in "Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 63 Stat. 101, 28 U. S. C. § 1333.

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ion of the Court in that case, it involved an alleged clash between Louisiana's direct action statute and the Act. The majority concluded there was no clash. The amount of the claims there far exceeded the value, if any, of the vessel and the pending freight. The language in one opinion to the effect that *concursus* is "the heart" of the limitation system therefore refers to those cases where the claims exceed the value of the vessel and the pending freight. In that event, as we have pointed out, the *concursus* is vital to the protection of the offending owner's statutory right of limitation. But this is not to say that where *concursus* is not necessary to the protection of this statutory right it is nonetheless required.

We conclude that in the situation here a *concursus* beyond that required by the orders heretofore entered in this case is not necessary and respondent may therefore proceed with her state court suit.

Affirmed.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON join, dissenting.

I agree with the result reached by Judge Hincks in his dissenting opinion below, 232 F. 2d 573, 579, and think that this judgment should be reversed. Since federal limitation jurisdiction was properly invoked, we should not permit it to be aborted by subsequent actions by the claimants with a view to obtaining transfer of the trial of their claims to the state courts. At the time the limitation proceeding was commenced the total claims which had been asserted in the several state court actions far exceeded the value of both the vessels owned by the petitioner, and limitation proceedings were required.

The steps subsequently taken by the claimants to limit their maximum recovery against the petitioner should no more be allowed to defeat or impair the full effectiveness of the limitation proceeding than would a subsequent reduction in the amount involved be permitted to defeat a diversity jurisdiction which had initially been properly invoked. See *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283.

CHESSMAN *v.* TEETS, WARDEN.

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

No. 893. Argued May 13, 1957.—Decided June 10, 1957.

In a State Court, petitioner was convicted of a capital offense. The official court reporter of the trial proceedings died before his notes were transcribed, and they were transcribed by a substitute reporter, who worked in close collaboration with the prosecutor. Though a copy of the transcript was furnished to petitioner and many, but not all, corrections which he requested were made, he was not represented in person or by counsel when the trial record was settled, and it was used over his objection on his appeal, at which his conviction was affirmed. In a habeas corpus proceeding, a Federal District Court found that there was no fraud in the preparation of the record, and it dismissed the writ. *Held:* In the circumstances of this case, the *ex parte* settlement of the record violated petitioner's right to procedural due process under the Fourteenth Amendment. Pp. 157–166.

(a) Petitioner was entitled to be represented either in person or by counsel throughout the proceedings for the settlement of the trial record. P. 162.

(b) Petitioner's refusal to be represented by counsel at the trial did not constitute a waiver of his right to counsel at the settlement proceedings. P. 162.

(c) The hearings before a federal judge in the habeas corpus proceedings, at which petitioner was personally present and represented by counsel, did not cure the lack of procedural due process in the state proceedings. P. 163.

(d) Consistently with procedural due process, the State Supreme Court's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner had no voice in determining, cannot be allowed to stand. Pp. 164–165.

(e) A valid appeal to the Constitution, even by a guilty man, does not come too late because courts were not earlier able to enforce what the Constitution demands. P. 165.

(f) The judgments of the Federal District Court and Court of Appeals are vacated, and the case is remanded to the District Court

for entry of such orders as may be appropriate allowing the State a reasonable time within which to take further proceedings not inconsistent with this Court's opinion, failing which petitioner shall be discharged. P. 166.

239 F. 2d 205, judgment vacated and cause remanded.

George T. Davis argued the cause for petitioner. With him on the brief was *Rosalie S. Asher.*

William M. Bennett, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Edmund G. Brown,* Attorney General, *Arlo E. Smith,* Deputy Attorney General, and *Clarence A. Linn,* Assistant Attorney General.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Our writ of certiorari in this case was limited to the following question:

> "whether, in the circumstances of this case, the state court proceedings to settle the trial transcript, upon which petitioner's automatic appeal from his conviction was necessarily heard by the Supreme Court of the State of California, in which trial court proceedings petitioner allegedly was not represented in person or by counsel designated by the state court in his behalf, resulted in denying petitioner due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States." 353 U. S. 928.

We believe that a mere statement of the facts in this long-drawn-out criminal litigation, material to the issue now before us, will suffice to show why we have reached the conclusion that the judgment of the Court of Appeals, affirming by a divided court [1] discharge of the writ of

[1] 239 F. 2d 205. Chief Judge Denman dissented.

habeas corpus herein, must be vacated, and the case remanded for further proceedings.

In May 1948, petitioner, following a trial by jury in the Superior Court of Los Angeles County, was convicted of a series of felonies under a multi-count indictment, and was sentenced to death upon two counts charging him with kidnaping for the purpose of robbery, with infliction of bodily harm, in violation of § 209 of the California Penal Code. In capital cases California provides that "an appeal is automatically taken by the defendant without any action by him or his counsel," [2] and that in such cases "the entire record of the action shall be prepared." [3] The Supreme Court of the State of California affirmed petitioner's conviction by a divided court. 38 Cal. 2d 166, 238 P. 2d 1001.

At the trial petitioner insisted upon defending himself, and repeatedly refused the trial court's offer of counsel, although he did have at his disposal the services of a deputy public defender, who acted as his "legal adviser" and was present at the counsel table throughout the trial. About a month after the conclusion of the trial, the official court reporter of the trial proceedings suddenly died, having at that time completed the dictation into a recording machine of what later turned out to be 646 out of 1,810 pages of the trial transcript. Following the denial of petitioner's motion in the Superior Court for a new trial,[4] there ensued the preparation and settlement of the trial transcript constituting the appellate record upon

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[2] West's Ann. Cal. Codes, Penal Code, § 1239 (b).

[3] California Rules on Appeal, Rule 33 (c), 36 Cal. 2d 28.

[4] Where the making of a transcript of a *civil* trial becomes impossible by reason of the death or disability of the court reporter, the California statutes empower the trial judge to set aside the judgment and order a new trial. West's Ann. Cal. Codes, Code Civ. Proc., § 953e. The California Penal Code, however, contains no comparable provision.

which the California Supreme Court subsequently heard petitioner's appeal. It is the circumstances under which this transcript was prepared and settled that give rise to the issue now confronting us.

At the instance of the deputy district attorney in charge of the case, and with the approval of the trial judge, one Stanley Fraser, a court reporter and former colleague of the deceased reporter, Perry, was employed in September 1948 to transcribe the uncompleted portion of Perry's shorthand notes, amounting to 1,164 pages as finally transcribed. In November 1948 petitioner unsuccessfully sought to have the California Supreme Court halt the preparation of the transcript on the ground that Perry's notes could not be transcribed with reasonable accuracy.[5] Fraser accordingly went forward with the work, and was occupied with it over the next several months. A "rough" draft of the transcript was submitted to the trial judge in February 1949, but was not made available to petitioner, although he had requested that it be furnished him. After this draft had been gone over by the deputy district attorney, it was filed with the judge in final form on April 11, 1949, and a copy was then sent to the petitioner at San Quentin

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[5] On September 16, 1948, when the appointment of the substitute stenographer was under consideration, the Chairman of the Executive Committee of the Los Angeles Superior Court Reporters' Association wrote the Board of Supervisors respecting the matter, as follows: "We believe the purported charge against the county is not only an exorbitant one per se, but will reflect further adverse publicity upon our group because we have serious doubts that any reporter will be able to furnish a usable transcript of said shorthand notes. Other reporters of our number have examined and studied Mr. Perry's notes and have reached the conclusion that many portions of the same will be found completely indecipherable because, toward the latter part of each court session, Mr. Perry's notes show his illness. We feel that this should be brought to your attention."

Prison. Thereafter petitioner sent to the trial judge a list of some 200 corrections to the transcript, and at the same time moved that

> "a hearing be ordered . . . to enable [petitioner] to determine actually the ability of Mr. Fraser to read Mr. Perry's notes, and to enable the [petitioner] to offer a showing this is not, and challenge it as, a usable transcript, and to enable [petitioner] to point out to the court the many inaccuracies and omissions in this transcript, to prove these inaccuracies and omissions, and for the court to determine these matters . . . ."

In these papers petitioner further stated that he had "not yet had the opportunity to confer with his legal advisor during the trial and consequently has been hesitant to offer error in certain instances until he has verified this error with his legal advisor."

Petitioner's motion was denied and the matter continued to proceed on an *ex parte* basis to final conclusion. At hearings held on June 1, 2, and 3, 1949, in which petitioner was not represented in person or by an attorney, the trial judge, after hearing Fraser's testimony as to the accuracy of his transcription and allowing some 80 of the corrections listed by petitioner, settled the record upon which petitioner's automatic appeal was to be heard. Thereafter petitioner made a motion in the California Supreme Court attacking the adequacy of these settlement proceedings, complaining, among other things, that he had not been permitted to appear at such proceedings. While that motion was pending, on August 18, 1949, a further hearing was held before the trial judge with reference to the settlement of the record, at which two witnesses were examined. Again, petitioner was not represented at this hearing either in person or by counsel. The

sufficiency of the record, as thus settled, was upheld by the California Supreme Court, first upon the motion just mentioned, 35 Cal. 2d 455, 218 P. 2d 769, and subsequently upon petitioner's appeal from his conviction, 38 Cal. 2d 166, 238 P. 2d 1001.

On October 17, 1955, this Court, reversing the Court of Appeals, remanded to the District Court for a hearing petitioner's application for a writ of habeas corpus, charging fraud in the preparation of the state court record, which had been summarily dismissed by the District Court. 350 U. S. 3.[6] This resulted in the judgment which is now before us. The District Court held that no fraud had been shown. The record of proceedings held before District Judge Goodman reveals the following additional facts as to the preparation of the state court record, none of which appear to be disputed by the State, which has been ably and conscientiously represented here: Fraser, the substitute reporter, was an uncle by marriage of the deputy district attorney in charge of this case, a fact of which neither the state trial court nor the appellate court was aware when it approved the transcript. In preparing the transcript, Fraser worked in close collaboration with the prosecutor, and also went over with two police officers, who testified for the State at the trial, his transcription of their testimony. The latter episodes were likewise unknown to the state courts when they approved the transcript. The testimony of one of these officers concerned petitioner's alleged confession, a subject of dispute at the trial, and petitioner's list of alleged inaccuracies, already mentioned, related to some of that testimony. It also appeared at this hearing that Fraser had destroyed the "rough" draft of his transcrip-

[6] On five previous occasions, this Court had denied petitions for certiorari filed by this petitioner. See note 13, *infra*.

tion which petitioner had sought to obtain during the settlement proceedings.[7]

Under the circumstances which have been summarized, we must hold that the *ex parte* settlement of this state court record violated petitioner's constitutional right to procedural due process. We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel. See *Powell* v. *Alabama,* 287 U. S. 45, 68; *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; compare *Dowdell* v. *United States,* 221 U. S. 325, 331; *Schwab* v. *Berggren,* 143 U. S. 442, 449; see also *Cole* v. *Arkansas,* 333 U. S. 196, 201. If California chose to deny petitioner's request to appear in those proceedings *in propria persona,* it then became incumbent on the State to appoint counsel for him. Cf. *Powell* v. *Alabama, supra.* We cannot agree that petitioner's refusal to be represented by counsel at the trial constituted a waiver of his right to counsel at the settlement proceedings.[8] Moreover, it is at least doubtful whether, as a matter of due process, any such waiver would be effective to relieve the trial judge of a duty to appoint counsel for petitioner in connection with the settlement of this record, which was a necessary[9] and integral part

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[7] Petitioner alleges that there were other relevant circumstances that should have been explored in the state settlement proceedings, but could not, he asserts, be proved in the hearings before Judge Goodman because of inability to secure records and the attendance of witnesses from outside the Northern District of California.

[8] The following statement of the petitioner at the trial, quoted in the State's present brief, hardly supports the claim of such a continuing waiver: "I wish to point out that it is my intention . . . at this time [to represent myself] and to continue to do so until such time as it is legally established that I am not qualified to do so, and that I will not accept a court-appointed attorney." *See Johnson* v. *Zerbst,* 304 U. S. 458, 464.

[9] See note 3, *supra.* In granting a certificate of probable cause for appeal to the Court of Appeals in the present proceeding, Chief

of the compulsory appeal provided by California in capital cases.[10] We need not decide that question, however, for the record fails to show that petitioner ever waived his right to counsel in connection with the settlement of the appellate record.

Nor can we regard the hearings before Judge Goodman, at which petitioner was both represented by counsel and personally present, as curing the lack of procedural due process in the state proceedings. Judge Goodman considered that our order of October 17, 1955, restricted the inquiry before him to the issue of whether the settlement of the state court record had been tainted by fraud, and that the accuracy of the record, as such, was not an issue in this proceeding.[11] We accept fully Judge Good-

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Judge Denman noted: "How important the California law regards this transcription [of the trial proceedings] and certification [as to its correctness] by the reporter is apparent from the fact that in *civil* cases the death of the reporter before his transcription and certification, gives the trial court the discretionary power to set aside the judgment and order a new trial. California Code of Civil Procedure, § 953e. By some quirk in California legislation this does not apply to criminal cases. However, it is obvious that if the reporter's transcript is so important as to give the court such power in a civil case, *a fortiori* it must have such importance in a criminal case in which, on the evidence to be transcribed, the accused is sentenced to death. Likewise its importance is emphasized by the California law making the appeal automatic from death sentences. California Penal Code, § 1239 (b)." *In re Chessman,* 219 F. 2d 162, 164.

[10] See note 2, *supra.* Counsel for the petitioner, whose representations in this regard were not challenged by the State, informed us on the oral argument that the California Supreme Court customarily appoints counsel for the defendant when he is not otherwise represented by counsel on an automatic appeal.

[11] Judge Goodman did state, however, that he found petitioner's claims with respect to certain alleged prejudicial comments by the trial judge and the prosecutor to be without foundation. In the context of the limited issue with which the judge was here con-

man's finding that there was no fraud. Even so, the fact remains that the petitioner has never had his day in court upon the controversial issues of fact and law involved in the settlement of the record upon which his conviction was affirmed.

By no means are we to be understood as saying that the state record has been shown to be inaccurate or incomplete. All we hold is that, consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand.[12] Without blinking the fact that the history of this case presents a sorry chapter in the annals of delays in the administration of criminal justice,[13] we cannot allow that circumstance to deter us from with-

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cerned, we should be slow to regard these "findings" as possessing the same conclusiveness as if they had been made in a proceeding where the accuracy of the record, as such, was in issue.

[12] In view of our holding we cannot regard ourselves as concluded by the California Supreme Court's holdings that the record on which it acted was adequate as a matter of state law, and that, in any event, the inaccuracies then claimed by the petitioner would not have changed the result of his appeal. Petitioner is entitled to have his conviction reviewed upon a record which has been settled in accordance with procedural due process. Moreover, in holding as it did the state court was not aware of the facts later developed in hearings before Judge Goodman, see p. 161, *supra,* and we cannot know that those facts, and others that might be disclosed upon an adversary hearing focused squarely on the adequacy of the transcript, would not lead it to a different conclusion.

[13] Certainly this Court's previous denials of certiorari, 340 U. S. 840; 341 U. S. 929; 343 U. S. 915; 346 U. S. 916; 348 U. S. 864, do not foreclose us from now granting appropriate relief. *Brown* v. *Allen,* 344 U. S. 443. And it may be noted that it was not until the present proceedings in the District Court that the facts surrounding the settlement of the state court record were fully developed.

holding relief so clearly called for.[14] On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States.

We have given careful consideration to the nature of the relief to be granted. Petitioner's discharge is not to be ordered without affording California an opportunity to review his conviction upon a record the sufficiency of which has been litigated in proceedings satisfying the requirements of procedural due process. Nor do we think it will do simply to remand the case to the District Court for an inquiry into the accuracy of the record upon which the California Supreme Court has already acted. The task of affording petitioner a further review of his conviction upon a properly settled record is necessarily one for the state courts. A federal court

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[14] In *Mooney* v. *Holohan*, 294 U. S. 103, this Court did not hesitate to deal with a claimed denial of constitutional rights some 18 years after the petitioner had been convicted in a state court. See also *Price* v. *Johnston*, 334 U. S. 266, 291.

is in no such position as the state courts are to determine what inaccuracies or other facts might be decisive under state law, particularly in view of the unusual character of the issues here involved. We conclude, therefore, that our proper course is to vacate the judgments of the Court of Appeals and the District Court and to remand the case to the District Court, with instructions to enter such orders as may be appropriate to allow California a reasonable time within which to take further proceedings not inconsistent with this opinion, failing which the petitioner shall be discharged. Cf. *Dowd* v. *United States*, 340 U. S. 206, 209–210.

It is so ordered.

MR. JUSTICE BURTON dissents because he believes that, upon consideration of all the circumstances of this case, the State of California has accorded to this petitioner due process of law within the meaning of the Constitution of the United States.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

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

I agree with the general principle announced by the Court. But I think it is misapplied here. Its application to the facts results, I fear, in a needless detour in a case already long-drawn-out by many appeals.[1]

I agree that in a case like this it matters not whether the petitioner is guilty or innocent, whether his complaint is timely or tardy. We should respect a man's constitutional right whenever or however it is presented to us. My difficulty here is not with any principle the Court

[1] See the Appendix to this opinion, *post*, p. 173.

announces. My dissent is based on the conviction that, in substance, the requirements of due process have been fully satisfied, that to require more is to exalt a technicality.

To say that the settlement in this case was *ex parte* is to be technically accurate. But it is not to state the whole story. Chessman was not present in court when the record was settled. Nor was he represented there by a lawyer, for he had over and again refused to allow a state-appointed lawyer to represent him. Chessman, however, played an active role in the process of the settlement of the record. The early draft prepared by Fraser, the new reporter, was sent to him for his suggestions. That Chessman went over this draft with a fine-tooth comb is evident from a reading of 200-odd corrections which he prepared. Of these proposals, about 80 were adopted and the rest refused.[2] Some of these proposals were specific, calling the court's attention to the use of a wrong word or phrase. Many were not specific. Some merely said that the reported version of certain testimony was garbled or incomplete or inaccurate. These generalized criticisms were never made specific. When Chessman made a generalized criticism, not once did he indicate such and such a fact had been omitted and prejudice shown, how an episode had been distorted and prejudice shown, where a date or name had been confused and prejudice shown, in what material respect an account was garbled and prejudice shown. Errors might have been made that were minor and inconsequential or major and fatal. From all that Chessman said to the California courts and from all he now says to this Court, it is impossible to conclude that there is any important, significant prejudicial error in the record on which the appeal in this case was taken.

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[2] These include many that relate to the crime of burglary, of which he was acquitted.

Certainly we are pointed to none. Only vague assertions are made. Not once is a finger placed on a crucial issue of the case and a showing made or attempted that on that issue the facts were distorted to Chessman's prejudice. The conclusion is irresistible that Chessman is playing a game with the courts, stalling for time while the facts of the case grow cold.

Much time is given to the fact that Fraser, the substitute reporter, was related to the prosecutor and to the fact that Fraser, in reconstructing the record, talked with several witnesses for the State. Those circumstances conceivably could give rise to prejudice. Yet not once does Chessman say in what way the words of a witness on a critical issue are distorted so as to cause prejudice to Chessman's appeal. We know that there was no connivance between the prosecutor and the substitute reporter, for such was the finding of the District Court. *Chessman* v. *Teets,* 138 F. Supp. 761. And those findings are not subject to challenge, as we limited our grant of certiorari. What we are told—and all that we are told—is that Chessman should have been present in person or by an attorney at the hearing where the record was settled. Error is presumed because he was not present nor represented. But we should presume just the contrary, since Chessman had the opportunity to submit his version and indicate any errors in the reconstructed record and yet came up with no single omission, distortion, falsification, mistake, or error that could reasonably be said to be prejudicial.

A good illustration concerns the main issue on the appeal—the so-called confession obtained from Chessman. The confession was held admissible by the Supreme Court of California. *People* v. *Chessman,* 38 Cal. 2d 166, 178–182, 238 P. 2d 1001, 1008–1011. That was the main point in the petition for certiorari brought here

in the 1951 Term. It presented the problem of the effect of prolonged detention by the police on the voluntary character of the confession, the type of problem presented in *Haley* v. *Ohio,* 332 U. S. 596; *Watts* v. *Indiana,* 338 U. S. 49; *Turner* v. *Pennsylvania,* 338 U. S. 62; and *Harris* v. *South Carolina,* 338 U. S. 68. The Court denied certiorari. *Chessman* v. *California,* 343 U. S. 915.

In that petition Chessman claimed what he claims now—that he should have had a hearing on the settlement of the record. And he asserted that, if the transcript had been wholly accurate, it would be obvious that the confession was involuntary, while on the reconstructed record the question was more debatable.

The reconstructed record shows that Chessman was held incommunicado about 72 hours by the police before arraignment. During this time he was beaten to some extent. During this time he was interrogated off and on by the police. Only when he had made an oral confession was he arraigned. Not once in the earlier petition or in the present one or in any other motion paper did Chessman rebut the accuracy of the facts stated in the reconstructed record. He did not, for example, allege he was held longer than 72 hours. He did not say he was beaten more often or more severely than the reconstructed record shows. He did not assert that he was interrogated for longer periods or subjected to a greater ordeal than the reconstructed record states. Yet certainly he knows whether he was or whether he was not.

He advances no fact, no assertion, no evidence to show that on this critical issue in the case—and in my mind the most important one—the reconstructed record is distorted. I would presume accuracy, not error, in any record from any court. I would insist that this defendant make some showing of inaccuracy in a material way before I would send this record back for further reconstruction.

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Only once during the long history of this case has Chessman pointed specifically to material inaccuracy or omission in the transcript. His charge of fraud, now set to rest by the findings of the District Court, was predicated upon a conspiracy to have expunged from the record certain specific remarks and instructions of the trial court. These omissions had not been mentioned in the long list of inaccuracies which Chessman submitted to the California courts. And, on these contentions, Chessman has now been given a hearing by the District Court, which found:

> "8. The instructions given by the trial judge to the jury on May 21, 1948 were correctly and accurately reported in the transcript as prepared by Fraser. The trial judge did not instruct the jury at that time as alleged and testified to by petitioner. Petitioner's statements in this regard are false and perjurious.
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> "9. The allegation in the petition that the trial judge stated to the jury on May 21, when instructing them, that 'this defendant is one of the worse [*sic*] criminals I have had in my court' is false and perjurious. The trial judge made no such statement. Hence the transcript was correct in not including such statement." 138 F. Supp., at 765–766.

To repeat, this is not a case of a helpless man who was given no opportunity to participate in the settlement of the record. He did participate in a real, vivid sense of the term. A lawyer who entered the case by appointment at this late stage would be utterly helpless, for he would have no idea what went on at the trial. When it came to the settlement of the record, California did all that reasonably could be required by sending the reconstructed record to Chessman for criticism. His

specific criticisms were often accepted.[3] His general criticisms were not.[4] Since it was in his power to make the general criticisms specific, he was given that opportunity which due process of law requires. Yet he declined over and again to make the general criticisms specific, asking only that he be present at the hearing.

The habeas corpus jurisdiction of the federal courts has been greatly under fire in recent years. I for one would hate to see it abolished or greatly curtailed by Congress. It has done high service in the administration of justice. Not uncommonly a case that is here on certiorari from a state court presents only darkly or obliquely an important constitutional issue. Perhaps, as in *Massey* v. *Moore,* 348 U. S. 105, the issue could not be raised at the trial. Perhaps the trial lawyer failed to present it clearly. Perhaps only after the trial were the full facts known. Perhaps the issue was poorly focused in the trial court's charge. On habeas corpus the facts can be fully

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[3] The trial judge resolved doubts in favor of the defendant. Thus he ruled "The amendment . . . is ordered as suggested by the appellant, not because the Court has any recollection of that but to give the appellant the benefit of the doubt in the matter."

[4] A typical ruling by the trial court on a general objection is as follows:

"Going over then to Page 1048, Lines 4 to 10, defendant makes no suggestion as to what ought to go in there. A check with the shorthand notes indicates that the transcription is correct. The objection is overruled."

Occasionally the trial judge ruled as follows on an objection that was cast in general terms:

"Page 866, nothing being pointed out which would be any assistance to the Court in amending the transcript, the amendment is disallowed. However, this again happens to be one of those instances in which the testimony and the manner in which it was given impressed themselves strongly on my mind, and I am quite satisfied that that is a verbatim transcription of that portion of the testimony and is not inaccurate as asserted."

developed; and perhaps only then can the basic constitutional defect be laid bare. Such, for example, was the situation in *Moore* v. *Dempsey,* 261 U. S. 86; *Wade* v. *Mayo,* 334 U. S. 672; and *Leyra* v. *Denno,* 347 U. S. 556, where miscarriages of justice were prevented only through the writ of habeas corpus. And see Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L. J. 50.

But the fragile grounds upon which the present decision rests jeopardize the ancient writ for use by federal courts in state prosecutions. The present decision states in theory the ideal of due process. But the facts of this case cry out against its application here. Chessman has received due process over and again. He has had repeated reviews of every point in his case. The question of the adequacy of the reconstructed record has been here seven times. The question of Chessman's right to participate in the settlement proceedings has been here at least four times.[5] Not once before now did a single Justice vote to grant certiorari on that issue. If the failure to let Chessman, or a lawyer acting for him, participate in the hearing on the settlement of the record went to jurisdiction [6] (as it must for habeas corpus to issue), then we should have granted certiorari when the Supreme Court of California first held in *People* v. *Chessman,* 35 Cal. 2d 455, 218 P. 2d 769, that the reconstructed record was a proper record for appeal. That decision of the California Supreme Court was announced May 19, 1950. We denied certiorari on October 9, 1950. *Chessman* v. *California,* 340 U. S. 840. Nearly seven years later we return to precisely the same issue and not only grant certiorari but order relief by way of habeas corpus.

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[5] See the Appendix to this opinion, *post,* p. 173.

[6] See *Johnson* v. *Zerbst,* 304 U. S. 458.

On Chessman's first appeal, Justice Carter and Justice Edmonds dissented from the decision of the California Supreme Court, stating that in their view the necessity to use a reconstructed record in a capital case required a new trial. 35 Cal. 2d 455, 468–473, 218 P. 2d 769, 776–780. That view to me makes sense as a matter of state law. But the Court today makes no such ruling. To order, after this long delay, a new record seems to me a futility. It must be remembered that Chessman was convicted on May 21, 1948—over nine years ago. It is difficult to see how, after that long lapse of time, the memory of any participant (if he is still alive) would be sharp enough to make any hearing meaningful. We meddle mischievously with the law when we issue the writ today. We do not act to remedy any injustice that has been demonstrated. When the whole history of the case is considered, we seize upon a technicality to undo what has been repeatedly sustained both by the California Supreme Court and by this Court. I would guard the ancient writ jealously, using it only to prevent a gross miscarriage of justice.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

Before his appeal was heard by the California Supreme Court, Chessman moved in that court for orders augmenting and correcting the record, and for a dismissal of his automatic appeal. On May 19, 1950, the California Supreme Court granted the motion for augmentation of the record, insofar as it sought to have added to the transcript the *voir dire* examination of jurors and the prosecutor's opening statement. Further relief was denied. *People* v. *Chessman,* 35 Cal. 2d 455, 218 P. 2d 769. On June 12, 1950, that court denied a petition for a writ of habeas corpus without hearing or opinion. Chessman's

petition for a writ of certiorari to review that decision was filed in this Court on July 31, 1950. No. 98, Misc., 1950 Term. In the petition, Chessman urged that he had been denied due process because he was not present at the hearing in which the trial judge considered objections to the transcript. Certiorari was denied on October 9, 1950. *Chessman* v. *California,* 340 U. S. 840.

Chessman then petitioned the United States District Court for the Northern District of California for a writ of habeas corpus and equitable relief. On December 4, 1950, the District Court discharged its order to show cause and dismissed the petition. On December 27, 1950, the District Court denied Chessman leave to appeal *in forma pauperis,* and, on January 9, 1951, denied a certificate of probable cause. On February 27, 1951, the United States Court of Appeals for the Ninth Circuit denied a petition for a certificate of probable cause and for leave to appeal *in forma pauperis.* On April 2, 1951, Chessman petitioned for a writ of certiorari to review that decision of the Court of Appeals, and for leave to file a petition for habeas corpus. No. 442, Misc., 1950 Term. In this Court, Chessman contended that the state court should be enjoined from deciding his pending appeal until it granted him a full hearing on the question of the adequacy of the record. Certiorari and the motion for leave to file petition for writ of habeas corpus were denied on May 14, 1951. *Chessman* v. *California,* 341 U. S. 929.

The California Supreme Court affirmed Chessman's conviction on December 18, 1951. *People* v. *Chessman,* 38 Cal. 2d 166, 238 P. 2d 1001. Chessman filed a petition for a writ of certiorari on February 20, 1952. No. 371, Misc., 1951 Term. In this Court, he claimed that he had been denied due process because of the manner in which the record was prepared and particularly because he had been denied an opportunity to prove his factual contentions as to the inaccuracy of the transcript. It was also

contended that he had been denied the opportunity to prepare for trial, that the confession introduced against him was coerced, that the prosecution had unfairly presented its case, that his defense had been unreasonably hampered at the trial, and that the statute under which he was sentenced to death was unconstitutional. Certiorari was denied on March 31, 1952. *Chessman* v. *California,* 343 U. S. 915. Rehearing was denied on April 28, 1952. 343 U. S. 937.

On May 19, 1952, Chessman filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California. The District Court denied the petition without hearing on June 9, 1952. The United States Court of Appeals for the Ninth Circuit affirmed that decision on May 28, 1953. *Chessman* v. *People,* 205 F. 2d 128. Petition for a writ of certiorari was filed November 9, 1953. No. 239, Misc., 1953 Term. Here, Chessman contended that he was entitled to a hearing on his contentions in the courts below that he was forced to go to trial unprepared, that coerced confessions had been introduced into evidence against him, that the prosecution and judge were guilty of misconduct. It was alleged that some of these matters could not have been properly determined by the California Supreme Court because of inadequacies in the record, which, it was alleged, had been fraudulently prepared without giving him the opportunity to prove the inaccuracy or fraud. Certiorari was denied on December 14, 1953. *Chessman* v. *California,* 346 U. S. 916. Rehearing was denied on February 1, 1954. 347 U. S. 908.

On July 16, 1954, Chessman filed a petition for a writ of habeas corpus in the Supreme Court of California. That petition was denied July 21, 1954, without written opinion. (Collateral proceedings are: *In re Chessman,* 43 Cal. 2d 296, 273 P. 2d 263; *In re Chessman,* 43 Cal. 2d 391, 274 P. 2d 645; *In re Chessman,* 43 Cal. 2d 408,

274 P. 2d 645, 655.) Chessman's petition for a writ of certiorari was filed August 14, 1954. No. 285, 1954 Term. He contended that the trial transcript had been fraudulently prepared by the prosecutor, reporter and trial judge. On October 25, 1954, certiorari was denied "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." *Chessman* v. *California,* 348 U. S. 864.

Chessman applied to the United States District Court for the Northern Division of California for a writ of habeas corpus on December 30, 1954. The District Court dismissed the petition without a hearing on January 4, 1955. *In re Chessman,* 128 F. Supp. 600. On January 11, 1955, Chief Judge Denman of the Court of Appeals for the Ninth Circuit granted a certificate of probable cause for appeal. *Application of Chessman,* 219 F. 2d 162. The Court of Appeals for the Ninth Circuit, sitting *en banc,* on April 7, 1955, affirmed the District Court decision. *Chessman* v. *Teets,* 221 F. 2d 276. Petition for a writ of certiorari was filed June 30, 1955. No. 196, 1955 Term. It was alleged that prejudicial statements of the trial judge at the trial had been deleted from the transcript as a result of a fraudulent conspiracy between the prosecuting attorney and the court reporter. It was also alleged that Chessman's right to be present at the "vital stage of the proceedings" to settle the record had been "summarily ignored." On October 17, 1955, certiorari was granted, the judgment of the Court of Appeals was reversed, and the case remanded to the District Court for a hearing on Chessman's allegations of fraud. *Chessman* v. *Teets,* 350 U. S. 3.

Hearings were ordered in the District Court, commencing January 9, 1956. Hearings were commenced on January 16, after Chessman was granted two continuances. The hearing lasted 7 days. Finding that there had been no fraud, and that the trial judge's statements

and instructions to the jury had been accurately reported, the District Court discharged the writ on January 31, 1956. *Chessman* v. *Teets,* 138 F. Supp. 761. The Court of Appeals affirmed on October 18, 1956. *Chessman* v. *Teets,* 239 F. 2d 205. Rehearing was denied on November 20, 1956. Chessman's seventh petition for a writ of certiorari was filed on February 1, 1957. No. 566, Misc., 1956 Term.* We granted certiorari, limiting it to the question whether Chessman's failure to be represented in person or by counsel at the settlement proceedings deprived him of due process of law, thus excluding review on the issue of fraud. See 353 U. S. 928.

*Other reported proceedings in connection with Chessman's case are as follows: *People* v. *Superior Court* and *In re Chessman,* 273 P. 2d 936 (Cal. Dist. Ct. of App. 1954); *In re Chessman* and *People* v. *Superior Court,* 44 Cal. 2d 1, 279 P. 2d 24 (1955). And see the opinion of Judge Hamley, below. 239 F. 2d 209–210, n. 2.

WATKINS *v.* UNITED STATES.

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

No. 261. Argued March 7, 1957.—Decided June 17, 1957.

Petitioner was convicted of a violation of 2 U. S. C. § 192, which makes it a misdemeanor for any person summoned as a witness by either House of Congress or any committee thereof to refuse to answer any question "pertinent to the question under inquiry." Summoned to testify before a Subcommittee of the House of Representatives Committee on Un-American Activities, petitioner testified freely about his own activities and associations; but he refused to answer questions as to whether he had known certain other persons to have been members of the Communist Party. He based his refusal on the ground that those questions were outside of the proper scope of the Committee's activities and not relevant to its work. No clear understanding of the "question under inquiry" could be gleaned from the resolution authorizing the full Committee, the legislative history thereof, the Committee's practices thereunder, the action authorizing the Subcommittee, the statement of the Chairman at the opening of the hearings or his statement in response to petitioner's protest. *Held:* Petitioner was not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction was invalid under the Due Process Clause of the Fifth Amendment. Pp. 181–216.

(a) The power of Congress to conduct investigations, inherent in the legislative process, is broad; but it is not unlimited. P. 187.

(b) Congress has no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress. P. 187.

(c) No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of Congress. P. 187.

(d) The Bill of Rights is applicable to congressional investigations, as it is to all forms of governmental action. P. 188.

(e) A congressional investigation is subject to the command that Congress shall make no law abridging freedom of speech or press or assembly. Pp. 196–197.

(f) When First Amendment rights are threatened, the delegation of power to a congressional committee must be clearly revealed in its charter. *United States* v. *Rumely,* 345 U. S. 41. P. 198.

(g) A congressional investigation into individual affairs is invalid if unrelated to any legislative purpose, because it is beyond the powers conferred upon Congress by the Constitution. *Kilbourn* v. *Thompson,* 103 U. S. 168. P. 198.

(h) It cannot simply be assumed that every congressional investigation is justified by a public need that overbalances any private rights affected, since to do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that Congress does not unjustifiably encroach upon an individual's right of privacy nor abridge his liberty of speech, press, religion or assembly. Pp. 198–199.

(i) There is no congressional power to expose for the sake of exposure where the predominant result can be only an invasion of the private rights of individuals. P. 200.

(j) In authorizing an investigation by a committee, it is essential that the Senate or House should spell out the committee's jurisdiction and purpose with sufficient particularity to insure that compulsory process is used only in furtherance of a legislative purpose. P. 201.

(k) The resolution authorizing the Un-American Activities Committee does not satisfy this requirement, especially when read in the light of the practices of the Committee and subsequent actions of the House of Representatives extending the life of the Committee. Pp. 201–205.

(l) Every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our Government; but such deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms. P. 204.

(m) Protected freedoms should not be placed in danger in the absence of a clear determination by the House or Senate that a particular inquiry is justified by specific legislative need. P. 205.

(n) Congressional investigating committees are restricted to the missions delegated to them—to acquire certain data to be used by the House or Senate in coping with a problem that falls within its legislative sphere—and no witness can be compelled to make disclosures on matters outside that area. P. 206.

(o) When the definition of jurisdictional pertinency is as uncertain and wavering as in the case of the Un-American Activities Committee, it becomes extremely difficult for the Committee to limit its inquiries to statutory pertinency. P. 206.

(p) The courts must accord to a defendant indicted under 2 U. S. C. § 192 every right which is guaranteed to defendants in all other criminal cases, including the right to have available information revealing the standard of criminality before the commission of the alleged offense. Pp. 207–208.

(q) Since the statute defines the crime as refusal to answer "any question pertinent to the question under inquiry," part of the standard of criminality is the pertinency of the questions propounded to the witness. P. 208.

(r) Due process requires that a witness before a congressional investigating committee should not be compelled to decide, at peril of criminal prosecution, whether to answer questions propounded to him without first knowing the "question under inquiry" with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. *Sinclair* v. *United States*, 279 U. S. 263. Pp. 208–209.

(s) The authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves, might make the "question under inquiry" sufficiently clear to avoid the "vice of vagueness"; but these sources often leave the matter in grave doubt. P. 209.

(t) In this case, it is not necessary to pass on the question whether the authorizing resolution defines the "question under inquiry" with sufficient clarity, since the Government does not contend that it could serve that purpose. P. 209.

(u) The opening statement of the Chairman at the outset of the hearings here involved is insufficient to serve that purpose, since it merely paraphrased the authorizing resolution and gave a very general sketch of the past efforts of the Committee. Pp. 209–210.

(v) Nor was that purpose served by the action of the full Committee in authorizing the creation of the Subcommittee before which petitioner appeared, since it merely authorized the Chairman to appoint subcommittees "for the purpose of performing any and all acts which the Committee as a whole is authorized to do." Pp. 211–212.

(w) On the record in this case, especially in view of the precise questions petitioner was charged with refusing to answer, it cannot

be said that the "question under inquiry" was Communist infiltration into labor unions. Pp. 212–214.

(x) Unless the subject matter of the inquiry has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. Pp. 214–215.

(y) The Chairman's response, when petitioner objected to the questions on grounds of pertinency, was inadequate to convey sufficient information as to the pertinency of the questions to the "question under inquiry." Pp. 214–215.

98 U. S. App. D. C. 190, 233 F. 2d 681, reversed and remanded.

Joseph L. Rauh, Jr. argued the cause for petitioner. With him on the brief were *Harold A. Cranefield, Norma Zarky, John Silard, Daniel H. Pollitt* and *Sidney S. Sachs.*

Solicitor General Rankin argued the cause for the United States. With him on the brief were *Assistant Attorney General Tompkins, Philip R. Monahan* and *Doris H. Spangenburg.*

Osmond K. Fraenkel filed a brief for the American Civil Liberties Union, as *amicus curiae,* supporting petitioner, and *Telford Taylor* filed a brief for Metcalf, as *amicus curiae*, urging reversal.

Herbert R. O'Conor filed a brief for the American Bar Association, as *amicus curiae,* urging affirmance. With him on the brief were *Julius Applebaum, Tracy E. Griffin, John M. Palmer, Paul W. Updegraff* and *Louis C. Wyman.*

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

This is a review by certiorari of a conviction under 2 U. S. C. § 192 for "contempt of Congress." The misdemeanor is alleged to have been committed during a

hearing before a congressional investigating committee. It is not the case of a truculent or contumacious witness who refuses to answer all questions or who, by boisterous or discourteous conduct, disturbs the decorum of the committee room. Petitioner was prosecuted for refusing to make certain disclosures which he asserted to be beyond the authority of the committee to demand. The controversy thus rests upon fundamental principles of the power of the Congress and the limitations upon that power. We approach the questions presented with conscious awareness of the far-reaching ramifications that can follow from a decision of this nature.

On April 29, 1954, petitioner appeared as a witness in compliance with a subpoena issued by a Subcommittee of the Committee on Un-American Activities of the House of Representatives. The Subcommittee elicited from petitioner a description of his background in labor union activities. He had been an employee of the International Harvester Company between 1935 and 1953. During the last eleven of those years, he had been on leave of absence to serve as an official of the Farm Equipment Workers International Union, later merged into the United Electrical, Radio and Machine Workers. He rose to the position of President of District No. 2 of the Farm Equipment Workers, a district defined geographically to include generally Canton and Rock Falls, Illinois, and Dubuque, Iowa. In 1953, petitioner joined the United Automobile Workers International Union as a labor organizer.

Petitioner's name had been mentioned by two witnesses who testified before the Committee at prior hearings. In September 1952, one Donald O. Spencer admitted having been a Communist from 1943 to 1946. He declared that he had been recruited into the Party with the endorsement and prior approval of petitioner, whom he identified as the then District Vice-President of the Farm Equip-

ment Workers.[1] Spencer also mentioned that petitioner had attended meetings at which only card-carrying Communists were admitted. A month before petitioner testified, one Walter Rumsey stated that he had been recruited into the Party by petitioner.[2] Rumsey added that he had paid Party dues to, and later collected dues from, petitioner, who had assumed the name, Sam Brown. Rumsey told the Committee that he left the Party in 1944.

Petitioner answered these allegations freely and without reservation. His attitude toward the inquiry is clearly revealed from the statement he made when the questioning turned to the subject of his past conduct, associations and predilections:

> "I am not now nor have I ever been a card-carrying member of the Communist Party. Rumsey was wrong when he said I had recruited him into the party, that I had received his dues, that I paid dues to him, and that I had used the alias Sam Brown.
>
> "Spencer was wrong when he termed any meetings which I attended as closed Communist Party meetings.
>
> "I would like to make it clear that for a period of time from approximately 1942 to 1947 I cooperated with the Communist Party and participated in Communist activities to such a degree that some persons may honestly believe that I was a member of the party.
>
> "I have made contributions upon occasions to Communist causes. I have signed petitions for Commu-

[1] R. 153–163; Hearings before the House of Representatives Committee on Un-American Activities on Communist Activities in the Chicago Area—Part 1, 82d Cong., 2d Sess. 3737–3752.

[2] R. 135–149; Hearings before the House of Representatives Committee on Un-American Activities on Investigation of Communist Activities in the Chicago Area—Part 2, 83d Cong., 2d Sess. 4243–4260.

nist causes. I attended caucuses at an FE convention at which Communist Party officials were present.

"Since I freely cooperated with the Communist Party I have no motive for making the distinction between cooperation and membership except the simple fact that it is the truth. I never carried a Communist Party card. I never accepted discipline and indeed on several occasions I opposed their position.

"In a special convention held in the summer of 1947 I led the fight for compliance with the Taft-Hartley Act by the FE–CIO International Union. This fight became so bitter that it ended any possibility of future cooperation." [3]

The character of petitioner's testimony on these matters can perhaps best be summarized by the Government's own appraisal in its brief:

"A more complete and candid statement of his past political associations and activities (treating the Communist Party for present purposes as a mere political party) can hardly be imagined. Petitioner certainly was not attempting to conceal or withhold from the Committee his own past political associations, predilections, and preferences. Furthermore, petitioner told the Committee that he was entirely willing to identify for the Committee, and answer any questions it might have concerning, 'those persons whom I knew to be members of the Communist Party,' provided that, 'to [his] best knowledge and belief,' they still were members of the Party . . . ." [4]

The Subcommittee, too, was apparently satisfied with petitioner's disclosures. After some further discussion elaborating on the statement, counsel for the Committee

[3] R. 75; Hearings, *supra*, note 2, Part 3, at 4268.

[4] Brief for Respondent, pp. 59–60.

turned to another aspect of Rumsey's testimony. Rumsey had identified a group of persons whom he had known as members of the Communist Party, and counsel began to read this list of names to petitioner. Petitioner stated that he did not know several of the persons. Of those whom he did know, he refused to tell whether he knew them to have been members of the Communist Party. He explained to the Subcommittee why he took such a position:

> "I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement.
>
> "I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities. I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates." [5]

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[5] R. 85–86; Hearings, *supra*, note 2, Part 3, at 4275.

The Chairman of the Committee submitted a report of petitioner's refusal to answer questions to the House of Representatives. H. R. Rep. No. 1579, 83d Cong., 2d Sess. The House directed the Speaker to certify the Committee's report to the United States Attorney for initiation of criminal prosecution. H. Res. 534, 83d Cong., 2d Sess.[6] A seven-count indictment was returned.[7] Petitioner waived his right to jury trial and was found guilty on all counts by the court. The sentence, a fine of $100 and one year in prison, was suspended, and petitioner was placed on probation.

An appeal was taken to the Court of Appeals for the District of Columbia. The conviction was reversed by a three-judge panel, one member dissenting. Upon rehearing *en banc,* the full bench affirmed the conviction with the judges of the original majority in dissent. 98 U. S. App. D. C. 190, 233 F. 2d 681. We granted certio-

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[6] There were nine citations of contempt voted at the same time. Petitioner's case was the second to be acted upon. There was no debate other than a statement by Representative Javits on a proposal to consolidate the legislative bodies investigating subversion. 100 Cong. Rec. 6382–6386. The resolution to prosecute petitioner passed by a voice vote.

There was lengthier discussion and a recorded vote on the first case considered by the House. *Id.,* at 6375–6382. In none of the cases was there any debate on the merits of the witnesses' conduct. *Id.,* at 6375–6401.

[7] The counts of the indictment were patterned from the sequence of the questioning by the Committee. Petitioner was asked separately about six persons, and these are the basis of the first six counts. The last count comprises the omnibus question that gave a list of twenty-five names for petitioner to identify. With two exceptions, the questions asked for knowledge of past membership in the Communist Party. The context of the interrogation indicates that the Committee's concern was with such past conduct. Petitioner agreed to and did disclose his knowledge of those he believed to be present members.

rari because of the very important questions of constitutional law presented. 352 U. S. 822.

We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. This was freely conceded by the Solicitor General in his argument of this case.[8] Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.

It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify

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[8] "Now, we don't claim on behalf of the Government that there is any right to expose for the purposes of exposure. And I don't know that Congress has ever claimed any such right. But we do say, in the same breath, that there is a right to inform the public at the same time you inform the Congress."

fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.

The rudiments of the power to punish for "contempt of Congress" come to us from the pages of English history. The origin of privileges and contempts extends back into the period of the emergence of Parliament. The establishment of a legislative body which could challenge the absolute power of the monarch is a long and bitter story. In that struggle, Parliament made broad and varied use of the contempt power. Almost from the beginning, both the House of Commons and the House of Lords claimed absolute and plenary authority over their privileges. This was an independent body of law, described by Coke as *lex parliamenti.*[9] Only Parliament could declare what those privileges were or what new privileges were occasioned, and only Parliament could judge what conduct constituted a breach of privilege.

In particular, this exclusion of *lex parliamenti* from the *lex terrae,* or law of the land, precluded judicial review of the exercise of the contempt power or the assertion of privilege. Parliament declared that no court had jurisdiction to consider such questions. In the latter part of the seventeenth century, an action for false imprisonment was brought by one Jay who had been held in contempt. The defendant, the Serjeant-at-Arms of the House of Commons, demurred that he had taken the plaintiff

[9] Coke, Fourth Institute, 15.

into custody for breach of privilege. The Chief Justice, Pemberton, overruled the demurrer. Summoned to the bar of the House, the Chief Justice explained that he believed that the assertion of privilege went to the merits of the action and did not preclude jurisdiction. For his audacity, the Chief Justice was dispatched to Newgate Prison.[10]

It seems inevitable that the power claimed by Parliament would have been abused. Unquestionably it was. A few examples illustrate the way in which individual rights were infringed. During the seventeenth century, there was a violent upheaval, both religious and political. This was the time of the Reformation and the establishment of the Church of England. It was also the period when the Stuarts proclaimed that the royal prerogative was absolute. Ultimately there were two revolutions, one protracted and bloody, the second without bloodshed. Critical commentary of all kinds was treated as contempt of Parliament in these troubled days. Even clergymen were imprisoned for remarks made in their sermons.[11] Perhaps the outstanding case arose from the private conversation of one Floyd, a Catholic, in which he expressed pleasure over the misfortune of the King's Protestant son-in-law and his wife. Floyd was not a member of Parliament. None of the persons concerned was in any way connected with the House of Commons. Nevertheless, that body imposed an humiliating and cruel sentence upon Floyd for contempt.[12] The House of Lords inter-

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[10] H. Comm. J. (1688–1693) 227; *Jay* v. *Topham,* 12 How. St. Tr. 822.

[11] *Proceedings against Richard Thompson,* 8 How. St. Tr. 2; Wittke, The History of English Parliamentary Privilege, 50.

[12] "Floyd, for uttering a few contemptible expressions, was degraded from his gentility, and to be held an infamous person; his testimony not to be received; to ride from the Fleet to Cheapside on horseback, without a saddle, with his face to the horse's tail, and the tail in

vened, rebuking the Commons for their extension of the privilege. The Commons acceded and transferred the record of the case to the Lords, who imposed substantially the same penalty.[13]

Later in that century, during the reign of Charles II, there was great unrest over the fact that the heir apparent, James, had embraced Catholicism. Anti-Catholic feeling ran high, spilling over a few years later when the infamous rogue, Titus Oates, inflamed the country with rumors of a "Popish Plot" to murder the King. A committee of Parliament was appointed to learn the sources of certain pamphlets that had been appearing. One was entitled: The Grand Question Concerning the Prorogation of this Parliament for a Year and Three Months Stated and Discussed. A Doctor Carey admitted to the committee that he knew the author, but refused to divulge his name. Brought to the bar of the House of Lords, he persisted in this stand. The House imposed a fine of £1,000 and committed the witness to the Tower.[14]

A hundred years later, George III had managed to gain control of Parliament through his ministers. The King could not silence the opposition, however, and one of the most vocal was John Wilkes. This precipitated a

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his hand, and then to stand two hours in the pillory, and to be branded in the forehead with the letter K; to ride four days afterwards in the same manner to Westminster, and then to stand two hours more in the pillory, with words on a paper in his hat showing his offence; to be whipped at the cart's tail from the Fleet to Westminster Hall; to pay a fine of 5000*l.*; and to be a prisoner in Newgate during his life." 1 De Lolme, The Rise and Progress of the English Constitution, 348.

[13] H. L. J. (1620–1628) 110–111, 113, 116, 124, 125, 127, 132, 133–134, 183; Wittke, 76–77. See also Kelke, Constitutional Law and Cases, 155–156.

[14] H. L. J. (1675–1681) 54–55.

struggle that lasted for several years until Wilkes finally prevailed. One writer sums up the case thus:

> "He had won a victory for freedom of the press. He had directed popular attention to the royally-controlled House of Commons, and pointed out its unrepresentative character, and had shown how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned. It was one of life's little ironies that work of such magnitude had been reserved for one of the worst libertines and demagogues of all time." [15]

Even as late as 1835, the House of Commons appointed a select committee to inquire into ". . . the origin, nature, extent and tendency of the Orange Institutions." This was a political-religious organization, vehemently Protestant in religion and strongly in favor of the growth of the British Empire. The committee summoned the Deputy Grand Secretary and demanded that he produce all the records of the organization. The witness refused to turn over a letter-book, which he admitted contained his answers to many communications upon Orange business. But it also contained, he said, records of private communications with respect to Orangeism. Summoned to the bar of the House of Commons, he remained adamant and was committed to Newgate Prison.[16]

Modern times have seen a remarkable restraint in the use by Parliament of its contempt power. Important investigations, like those conducted in America by congressional committees, are made by Royal Commissions

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[15] Wittke, 122–123. With all his knavery, Wilkes was long a hero with certain persecuted groups in England. Here, streets and other public places have been named for him and his writings.

[16] H. Comm. J. (1835) 533, 564–565, 571, 575.

of Inquiry.[17] These commissions are comprised of experts in the problem to be studied. They are removed from the turbulent forces of politics and partisan considerations. Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses or the production of documents.[18] Their success in fulfilling their fact-finding missions without resort to coercive tactics is a tribute to the fairness of the processes to the witnesses and their close adherence to the subject matter committed to them.

The history of contempt of the legislature in this country is notably different from that of England. In the early days of the United States, there lingered the direct knowledge of the evil effects of absolute power. Most of the instances of use of compulsory process by the first Congresses concerned matters affecting the qualification or integrity of their members or came about in inquiries dealing with suspected corruption or mismanagement of government officials.[19] Unlike the English practice, from the very outset the use of contempt power by the legislature was deemed subject to judicial review.[20]

There was very little use of the power of compulsory process in early years to enable the Congress to obtain facts pertinent to the enactment of new statutes or the

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[17] Finer, Congressional Investigations: The British System, 18 U. of Chi. L. Rev. 521, 554–561; Smelser, Legislative Investigations: Safeguards for Witnesses: The Problem in Historical Perspective, 29 Notre Dame Law. 163, 167; Clokie & Robinson, Royal Commissions of Inquiry.

[18] Finer, 559; Smelser, 167; Clokie & Robinson, 186–187.

[19] See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 168–191; Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. of Pa. L. Rev. 691, 719–725.

[20] The first case to reach this Court was *Anderson* v. *Dunn,* 6 Wheat. 204, which upheld the power of the House of Representatives to reprimand a person for attempting to bribe a member of the House.

administration of existing laws. The first occasion for such an investigation arose in 1827 when the House of Representatives was considering a revision of the tariff laws.[21] In the Senate, there was no use of a fact-finding investigation in aid of legislation until 1859.[22] In the Legislative Reorganization Act, the Committee on Un-American Activities was the only standing committee of the House of Representatives that was given the power to compel disclosures.[23]

It is not surprising, from the fact that the Houses of Congress so sparingly employed the power to conduct investigations, that there have been few cases requiring judicial review of the power. The Nation was almost one hundred years old before the first case reached this Court to challenge the use of compulsory process as a legislative device, rather than in inquiries concerning the elections

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[21] On December 31, 1827, the House Committee on Manufacturers was given the task of inquiring into the effect that the proposed upward revision in the tariff schedules would have upon domestic manufacturers. The power of the House to authorize a fact-finding inquiry in aid of legislation was seriously challenged. After full debate the investigation was authorized by a vote of 102 to 88. 4 Cong. Deb. 889.

[22] The subject matter of the select committee was ". . . the late invasion and seizure of the armory and arsenal of the United States at Harper's Ferry, in Virginia, by a band of armed men . . . . And that said committee [shall] report whether any and what legislation may, in their opinion, be necessary, on the part of the United States, for the future preservation of the peace of the country, or for the safety of the public property; and that said committee [shall] have power to send for persons and papers." Cong. Globe, 36th Cong., 1st Sess. 141 (1859).

[23] 60 Stat. 828–829. All standing committees in the Senate were invested with the power of compulsory process. 60 Stat. 830–831. During the 83d Congress, two other standing committees in the House of Representatives, the Appropriations and Government Operations Committees, possessed that power. 99 Cong. Rec. 16–19.

or privileges of Congressmen.[24] In *Kilbourn* v. *Thompson,* 103 U. S. 168, decided in 1881, an investigation had been authorized by the House of Representatives to learn the circumstances surrounding the bankruptcy of Jay Cooke & Company, in which the United States had deposited funds. The committee became particularly interested in a private real estate pool that was a part of the financial structure. The Court found that the subject matter of the inquiry was "in its nature clearly judicial and therefore one in respect to which no valid legislation could be enacted." The House had thereby exceeded the limits of its own authority.

Subsequent to the decision in *Kilbourn,* until recent times, there were very few cases dealing with the investigative power.[25] The matter came to the fore again when the Senate undertook to study the corruption in the handling of oil leases in the 1920's. In *McGrain* v. *Daugherty,* 273 U. S. 135, and *Sinclair* v. *United States,* 279 U. S. 263, the Court applied the precepts of *Kilbourn* to uphold the authority of the Congress to conduct the challenged investigations. The Court recognized the danger to effective and honest conduct of the Government

[24] The first court that was called upon to review the constitutional validity of a legislative inquiry was the New York Court of Common Pleas. The case arose out of the inquiry by the Common Council of New York into the conduct of the Police Department in 1855. Judge Charles Patrick Daly upheld the investigative power as implicit in the functions of a legislature, but ruled that the examination of witnesses must be confined to the subject under investigation. Applying this standard, he ruled that questions directed to the national origin of policemen were improper under the investigators' authorizing resolution. *Briggs* v. *Mackeller,* 2 Abbott's Practice Reports 30 (N. Y. Common Pleas 1855).

[25] *In re Chapman,* 166 U. S. 661 (upheld conviction under R. S. § 102, forerunner of 2 U. S. C. § 192, for refusal to answer questions in inquiry into charges of corruption among certain Senators with respect to pending bill on sugar tariff); cf. *Marshall* v. *Gordon,* 243 U. S. 521.

if the legislature's power to probe corruption in the executive branch were unduly hampered.

Following these important decisions, there was another lull in judicial review of investigations. The absence of challenge, however, was not indicative of the absence of inquiries. To the contrary, there was vigorous use of the investigative process by a Congress bent upon harnessing and directing the vast economic and social forces of the times. Only one case came before this Court, and the authority of the Congress was affirmed.[26]

In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government, but other subjects of congressional interest also contributed to the changed scene. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens. It brought before the courts novel questions of the appropriate limits of congressional inquiry. Prior cases, like *Kilbourn, McGrain* and *Sinclair,* had defined the scope of investigative power in terms of the inherent limitations of the sources of that power. In the more recent cases, the emphasis shifted to problems of accommodating the interest of the Government with the rights and privileges of individuals. The central theme was the application of the Bill of Rights as a restraint upon the assertion of governmental power in this form.

It was during this period that the Fifth Amendment privilege against self-incrimination was frequently in-

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[26] *Jurney* v. *MacCracken,* 294 U. S. 125 (upheld power of Senate to punish as a contempt the action of a witness in allowing the destruction and removal of papers subject to the subpoena of a Senate committee; held that enactment of 2 U. S. C. § 192 did not impair contempt power of Houses of Congress).

voked and recognized as a legal limit upon the authority of a committee to require that a witness answer its questions.[27] Some early doubts as to the applicability of that privilege before a legislative committee never matured.[28] When the matter reached this Court, the Government did not challenge in any way that the Fifth Amendment protection was available to the witness, and such a challenge could not have prevailed. It confined its argument to the character of the answers sought and to the adequacy of the claim of privilege. *Quinn* v. *United States,* 349 U. S. 155; *Emspak* v. *United States,* 349 U. S. 190; *Bart* v. *United States,* 349 U. S. 219.[29]

A far more difficult task evolved from the claim by witnesses that the committees' interrogations were infringements upon the freedoms of the First Amendment.[30]

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[27] The first reported case in which the claim of the privilege against self-incrimination was allowed in a congressional inquiry proceeding was *United States* v. *Yukio Abe,* 95 F. Supp. 991. Prior thereto, several state courts had held that legislative investigations were subject to the witness' privilege not to accuse himself under state constitutions. *Emery's Case,* 107 Mass. 172, decided in 1871 is the earliest. See also *Ex parte Johnson,* 187 S. C. 1, 196 S. E. 164.

[28] *E. g.,* Excerpts from Hearings before the House of Representatives Committee on Un-American Activities—Regarding Investigation of Communist Activities in Connection with the Atom Bomb, 80th Cong., 2d Sess. 5; N. Y. Herald Tribune, Sept. 6, 1948, p. 3, col. 6–7.

[29] Appropriateness of the privilege has been upheld without question in many cases arising out of congressional inquiry. See, *e. g., Starkovich* v. *United States,* 231 F. 2d 411; *Aiuppa* v. *United States,* 201 F. 2d 287; *United States* v. *Costello,* 198 F. 2d 200; *Marcello* v. *United States,* 196 F. 2d 437; *United States* v. *Di Carlo,* 102 F. Supp. 597; *United States* v. *Licavoli,* 102 F. Supp. 607; *United States* v. *Cohen,* 101 F. Supp. 906; *United States* v. *Jaffe,* 98 F. Supp. 191; *United States* v. *Fitzpatrick,* 96 F. Supp. 491; *United States* v. *Raley,* 96 F. Supp. 495; *United States* v. *Yukio Abe,* 95 F. Supp. 991.

[30] The first reported decision, made in 1947, grew out of the inquiry of the Un-American Activities Committee into certain organizations

Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.[31]

Abuses of the investigative process may imperceptibly lead to abridgment of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. This effect is even more harsh when it is past beliefs, expressions or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed. Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to

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suspected of subversive actions. Subpoenas *duces tecum* had been issued calling for the correspondence and other records of these organizations. Refusals to comply were followed by prosecutions under 2 U. S. C. § 192. The District Court denied motions to dismiss the indictments in *United States* v. *Bryan,* 72 F. Supp. 58. The decision with respect to the First Amendment was affirmed in *Barsky* v. *United States,* 167 F. 2d 241.

[31] See *United States* v. *Rumely,* 345 U. S. 41, 43–44; *Lawson* v. *United States,* 176 F. 2d 49, 51–52; *Barsky* v. *United States,* 167 F. 2d 241, 244–250; *United States* v. *Josephson,* 165 F. 2d 82, 90–92.

the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time. That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction.

The Court recognized the restraints of the Bill of Rights upon congressional investigations in *United States* v. *Rumely,* 345 U. S. 41. The magnitude and complexity of the problem of applying the First Amendment to that case led the Court to construe narrowly the resolution describing the committee's authority. It was concluded that, when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter.

Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court. We do not underestimate the difficulties that would attend such an undertaking. It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred. *Kilbourn* v. *Thompson* teaches that such an investigation into individual affairs is invalid if unrelated to any legislative purpose. That is beyond the powers conferred upon the Congress in the Constitution. *United States* v. *Rumely* makes it plain that the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's

right to privacy nor abridge his liberty of speech, press, religion or assembly.

Petitioner has earnestly suggested that the difficult questions of protecting these rights from infringement by legislative inquiries can be surmounted in this case because there was no public purpose served in his interrogation. His conclusion is based upon the thesis that the Subcommittee was engaged in a program of exposure for the sake of exposure. The sole purpose of the inquiry, he contends, was to bring down upon himself and others the violence of public reaction because of their past beliefs, expressions and associations. In support of this argument, petitioner has marshalled an impressive array of evidence that some Congressmen have believed that such was their duty, or part of it.[32]

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[32] In a report to the House, the Committee declared:

"While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate, communism, fascism, and naziism, it does have the right to focus the spotlight of publicity upon their activities . . . ." H. R. Rep. No. 2, 76th Cong., 1st Sess. 13.

A year later, the Committee reported that ". . . investigation to inform the American people . . . is the real purpose of the House Committee." H. R. Rep. No. 1476, 76th Cong., 3d Sess. 1–2.

A pamphlet issued by the Committee in 1951 stated that: "Exposure in a systematic way began with the formation of the House Committee on Un-American Activities, May 26, 1938." The Committee believed itself commanded ". . . to expose people and organizations attempting to destroy this country. That is still its job and to that job it sticks." 100 Things You Should Know About Communism, H. R. Doc. No. 136, 82d Cong., 1st Sess. 19, 67.

In its annual reports, the Committee has devoted a large part of its information to a public listing of names along with a summary of their activities. ". . . [T]he committee feels that the Congress and the American people will have a much clearer and fuller picture of the success and scope of communism in the United States by having set forth the names and, where possible, the positions occupied by individuals who have been identified as Communists, or former Communists, during the past year." H. R. Rep. No. 2516, 82d Cong., 2d Sess. 6–7.

We have no doubt that there is no congressional power to expose for the sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government.[33] That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals. But a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served.[34]

Petitioner's contentions do point to a situation of particular significance from the standpoint of the constitutional limitations upon congressional investigations. The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose. Their function is to act as the eyes and ears of the Congress in obtaining facts upon which the full legislature can act. To carry out this mission, committees and subcommittees, sometimes one Congressman,

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[33] We are not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in *Congressional Government* when he wrote: "The informing function of Congress should be preferred even to its legislative function." *Id.*, at 303. From the earliest times in its history, the Congress has assiduously performed an "informing function" of this nature. See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 168–194.

[34] Compare the treatment of this point in *Barenblatt* v. *United States*, 240 F. 2d 875, 880–881; *Morford* v. *United States*, 176 F. 2d 54, 58; *Eisler* v. *United States*, 170 F. 2d 273, 278–279; *United States* v. *Josephson*, 165 F. 2d 82, 89; and *United States* v. *Kamin*, 136 F. Supp. 791, 800–801.

are endowed with the full power of the Congress to compel testimony. In this case, only two men exercised that authority in demanding information over petitioner's protest.

An essential premise in this situation is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them. It is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter. Broadly drafted and loosely worded, however, such resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress.

The authorizing resolution of the Un-American Activities Committee was adopted in 1938 when a select committee, under the chairmanship of Representative Dies, was created.[35] Several years later, the Committee was made a standing organ of the House with the same mandate.[36] It defines the Committee's authority as follows:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion

[35] H. Res. 282, 75th Cong., 3d Sess., 83 Cong. Rec. 7568, 7586.

[36] H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15.

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> within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." [37]

It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of "un-American"? What is that single, solitary "principle of the form of government as guaranteed by our Constitution"? [38] There is no need to dwell upon the language, however. At one time, perhaps, the resolution might have been read narrowly to confine the Committee to the subject of propaganda.[39] The events that have transpired in the fifteen years before the interrogation of petitioner make such a construction impossible at this date.

The members of the Committee have clearly demonstrated that they did not feel themselves restricted in any way to propaganda in the narrow sense of the word.[40]

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[37] H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 18, 24.

[38] For contrasting views, see *Morford* v. *United States*, 176 F. 2d 54, 57–58, and *Barsky* v. *United States*, 167 F. 2d 241, 247–248.

[39] The language of the resolution was obviously taken from the Dickstein resolution, which established the McCormack Committee in 1934 to study Nazi and other propaganda sent into the United States from foreign countries. H. Res. 198, 73d Cong., 2d Sess., 78 Cong. Rec. 4934, 4949.

[40] In 1947, Judge Charles E. Clark, now Chief Judge of the Court of Appeals for the Second Circuit, wrote about the Committee: "Suffice it to say here that its range of activity has covered all varieties of organizations, including the American Civil Liberties Union, the C. I. O., the National Catholic Welfare Conference, the Farmer-Labor party, the Federal Theatre Project, consumers' organizations, various publications from the magazine 'Time' to the 'Daily Worker,' and varying forms and types of industry, of which the recent

Unquestionably the Committee conceived of its task in the grand view of its name. Un-American activities were its target, no matter how or where manifested. Notwithstanding the broad purview of the Committee's experience, the House of Representatives repeatedly approved its continuation. Five times it extended the life of the special committee.[41] Then it made the group a standing committee of the House.[42] A year later, the Committee's charter was embodied in the Legislative Reorganization Act.[43] On five occasions, at the beginning of sessions of Congress, it has made the authorizing resolution part of the rules of the House.[44] On innumerable occasions, it has passed appropriation bills to allow the Committee to continue its efforts.

Combining the language of the resolution with the construction it has been given, it is evident that the preliminary control of the Committee exercised by the House

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investigation of the movie industry is fresh in the public mind. While it has avoided specific definition of what it is seeking, it has repeatedly inquired as to membership in the Communist party and in other organizations which it regards as communist controlled or affected." *United States* v. *Josephson*, 165 F. 2d 82, 95 (dissent). See also the dissenting opinion of Judge Henry W. Edgerton, now Chief Judge of the Court of Appeals for the District of Columbia Circuit, in *Barsky* v. *United States*, 83 U. S. App. D. C. 127, at 143, 167 F. 2d 241, at 257.

[41] H. Res. 26, 76th Cong., 1st Sess., 84 Cong. Rec. 1098, 1127–1128; H. Res. 321, 76th Cong., 3d Sess., 86 Cong. Rec. 572, 604–605; H. Res. 90, 77th Cong., 1st Sess., 87 Cong. Rec. 886, 899; H. Res. 420, 77th Cong., 2d Sess., 88 Cong. Rec. 2282, 2297; H. Res. 65, 78th Cong., 1st Sess., 89 Cong. Rec. 795, 809–810.

[42] 91 Cong. Rec. 10, 15.

[43] 60 Stat. 812, 828.

[44] H. Res. 5, 80th Cong., 1st Sess., 93 Cong. Rec. 38; H. Res. 5, 81st Cong., 1st Sess., 95 Cong. Rec. 10; H. Res. 7, 82d Cong., 1st Sess., 97 Cong. Rec. 17, 19; H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 15; H. Res. 5, 84th Cong., 1st Sess., 101 Cong. Rec. 11.

of Representatives is slight or non-existent. No one could reasonably deduce from the charter the kind of investigation that the Committee was directed to make. As a result, we are asked to engage in a process of retroactive rationalization. Looking backward from the events that transpired, we are asked to uphold the Committee's actions unless it appears that they were clearly not authorized by the charter. As a corollary to this inverse approach, the Government urges that we must view the matter hospitably to the power of the Congress—that if there is any legislative purpose which might have been furthered by the kind of disclosure sought, the witness must be punished for withholding it. No doubt every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our Government. But such deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms.

The Government contends that the public interest at the core of the investigations of the Un-American Activities Committee is the need by the Congress to be informed of efforts to overthrow the Government by force and violence so that adequate legislative safeguards can be erected. From this core, however, the Committee can radiate outward infinitely to any topic thought to be related in some way to armed insurrection. The outer reaches of this domain are known only by the content of "un-American activities." Remoteness of subject can be aggravated by a probe for a depth of detail even farther removed from any basis of legislative action. A third dimension is added when the investigators turn their attention to the past to collect minutiae on remote topics, on the hypothesis that the past may reflect upon the present.

The consequences that flow from this situation are manifold. In the first place, a reviewing court is unable

to make the kind of judgment made by the Court in *United States* v. *Rumely, supra.* The Committee is allowed, in essence, to define its own authority, to choose the direction and focus of its activities. In deciding what to do with the power that has been conferred upon them, members of the Committee may act pursuant to motives that seem to them to be the highest. Their decisions, nevertheless, can lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it. Yet it is impossible in this circumstance, with constitutional freedoms in jeopardy, to declare that the Committee has ranged beyond the area committed to it by its parent assembly because the boundaries are so nebulous.

More important and more fundamental than that, however, it insulates the House that has authorized the investigation from the witnesses who are subjected to the sanctions of compulsory process. There is a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power. This is an especially vital consideration in assuring respect for constitutional liberties. Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need.

It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected. An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of

citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives itself has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures.

Absence of the qualitative consideration of petitioner's questioning by the House of Representatives aggravates a serious problem, revealed in this case, in the relationship of congressional investigating committees and the witnesses who appear before them. Plainly these committees are restricted to the missions delegated to them, *i. e.*, to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority. It is not wholly different from nor unrelated to the element of pertinency embodied in the criminal statute under which petitioner was prosecuted. When the definition of jurisdictional pertinency is as uncertain and wavering as in the case of the Un-American Activities Committee, it becomes extremely difficult for the Committee to limit its inquiries to statutory pertinency.

Since World War II, the Congress has practically abandoned its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House. The sanction there imposed is imprisonment by the House until the recalcitrant witness agrees to testify or disclose the matters sought, provided that the incarceration does

not extend beyond adjournment. The Congress has instead invoked the aid of the federal judicial system in protecting itself against contumacious conduct. It has become customary to refer these matters to the United States Attorneys for prosecution under criminal law.

The appropriate statute is found in 2 U. S. C. § 192. It provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." [45]

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[45] This statute was passed in 1857 as a direct result of an incident which caused the Congress to feel that it needed more severe sanctions to compel disclosures than were available in the historical procedure of summoning the recalcitrant witness before the bar of either House of Congress and ordering him held in custody until he agreed to testify. Such imprisonment is valid only so long as the House remains in session. See *Anderson* v. *Dunn*, 6 Wheat. 204, 231; Eberling, Congressional Investigations, 180–184.

The immediate cause for adoption of the statute was an accusation by one J. W. Simonton, a newspaperman, that certain unnamed Congressmen were soliciting bribes on a matter pending before the legislature. Simonton was cited before the House of Representatives and refused to divulge the names of those implicated. In the course of that episode, the forerunner of 2 U. S. C. § 192 was passed in order ". . . to inflict a greater punishment than the committee believe the House possesses the power to inflict." Cong. Globe, 34th

In fulfillment of their obligation under this statute, the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases. Among these is the right to have available, through a sufficiently precise statute, information revealing the standard of criminality before the commission of the alleged offense.[46] Applied to persons prosecuted under § 192, this raises a special problem in that the statute defines the crime as refusal to answer "any question pertinent to the question under inquiry." Part of the standard of criminality, therefore, is the pertinency of the questions propounded to the witness.[47]

The problem attains proportion when viewed from the standpoint of the witness who appears before a congressional committee. He must decide at the time the questions are propounded whether or not to answer. As the Court said in *Sinclair* v. *United States*, 279 U. S. 263, the witness acts at his peril. He is ". . . bound rightly to construe the statute." *Id.*, at 299. An erroneous determination on his part, even if made in the utmost good faith, does not exculpate him if the court should later rule that the questions were pertinent to the question under inquiry.

It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to

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Cong., 3d Sess. 405. See also *id.*, at 403–413, 426–433, 434–445. Thereafter, having been in custody more than two weeks, Simonton testified to the satisfaction of the committee and was discharged. 3 Hinds' Precedents § 1669.

[46] *United States* v. *Harriss*, 347 U. S. 612; *United States* v. *Cardiff*, 344 U. S. 174; *Winters* v. *New York*, 333 U. S. 507; *Musser* v. *Utah*, 333 U. S. 95; *Lanzetta* v. *New Jersey*, 306 U. S. 451.

[47] *United States* v. *Orman*, 207 F. 2d 148; *Bowers* v. *United States*, 202 F. 2d 447; *United States* v. *Kamin*, 135 F. Supp. 382, 136 F. Supp. 791.

which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. The "vice of vagueness" [48] must be avoided here as in all other crimes. There are several sources that can outline the "question under inquiry" in such a way that the rules against vagueness are satisfied. The authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves, might sometimes make the topic clear. This case demonstrates, however, that these sources often leave the matter in grave doubt.

The first possibility is that the authorizing resolution itself will so clearly declare the "question under inquiry" that a witness can understand the pertinency of questions asked him. The Government does not contend that the authorizing resolution of the Un-American Activities Committee could serve such a purpose. Its confusing breadth is amply illustrated by the innumerable and diverse questions into which the Committee has inquired under this charter since 1938. If the "question under inquiry" were stated with such sweeping and uncertain scope, we doubt that it would withstand an attack on the ground of vagueness.

That issue is not before us, however, in light of the Government's position that the immediate subject under inquiry before the Subcommittee interviewing petitioner was only one aspect of the Committee's authority to investigate un-American activities. Distilling that single topic from the broad field is an extremely difficult task upon the record before us. There was an opening statement by the Committee Chairman at the outset of the

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[48] *United States* v. *Josephson*, 165 F. 2d 82, 88.

hearing, but this gives us no guidance. In this statement, the Chairman did no more than paraphrase the authorizing resolution and give a very general sketch of the past efforts of the Committee.[49]

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[49] "The committee will be in order. I should like to make an opening statement regarding our work here in the city of Chicago. The Congress of the United States, realizing that there are individuals and elements in this country whose aim it is to subvert our constitutional form of government, has established the House Committee on Un-American Activities. In establishing this committee, the Congress has directed that we must investigate and hold hearings, either by the full committee or by a subcommittee, to ascertain the extent and success of subversive activities directed against these United States.

"On the basis of these investigations and hearings, the Committee on Un-American Activities reports its findings to the Congress and makes recommendations from these investigations and hearings for new legislation. As a result of this committee's investigations and hearings, the Internal Security Act of 1950 was enacted.

"Over the past fifteen years this committee has been in existence, both as a special and permanent committee, it has made forty-seven recommendations to the Congress to insure proper security against subversion. I am proud to be able to state that of these forty-seven recommendations, all but eight have been acted upon in one way or another. Among these recommendations which the Congress has not acted upon are those which provide that witnesses appearing before congressional committees be granted immunity from prosecution on the information they furnish.

"The committee has also recommended that evidence secured from confidential devices be admissible in cases involving the national security. The executive branch of Government has now also asked the Congress for such legislation. A study is now being made of various bills dealing with this matter.

"The Congress has also referred to the House Committee on Un-American Activities a bill which would amend the National Security Act of 1950. This bill, if enacted into law, would provide that the Subversive Activities Control Board should, after suitable hearings and procedures, be empowered to find if certain labor organizations are in fact Communist-controlled action groups. Following this action, such labor groups would not have available the use of the

No aid is given as to the "question under inquiry" in the action of the full Committee that authorized the creation of the Subcommittee before which petitioner appeared. The Committee adopted a formal resolution giving the Chairman the power to appoint subcommittees ". . . for the purpose of performing any and all acts which the Committee as a whole is authorized to do." [50] In effect, this was a device to enable the investigations to proceed with a quorum of one or two members and

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National Labor Relations Board as they now have under the provisions of the Labor-Management Relations Act of 1947.

"During the first session of this 83rd Congress, the House Un-American Activities Committee has held hearings in Los Angeles and San Francisco, California; Albany and New York City, New York; Philadelphia, Pennsylvania, and Columbus, Ohio. We are here in Chicago, Illinois, realizing that this is the center of the great mid-western area of the United States.

"It cannot be said that subversive infiltration has had a greater nor a lesser success in infiltrating this important area. The hearings today are the culmination of an investigation that has been conducted by the committee's competent staff and is a part of the committee's intention for holding hearings in various parts of the country.

"The committee has found that by conducting its investigations and holding hearings in various parts of the country, it has been able to secure a fuller and more comprehensive picture of subversive efforts throughout our nation. Every witness who has been subpoenaed to appear before the committee here in Chicago, as in all hearings conducted by this committee, are [*sic*] known to possess information which will assist the committee in performing its directed function to the Congress of the United States." (R. 43–44; Hearing, *supra*, note 2, Part 1, at 4165–4166.)

[50] The Committee convened in executive session on January 22, 1953, and adopted the following resolution:

"Be It Resolved, that the Chairman shall have authority from time to time to appoint subcommittees composed of one or more members of the Committee on Un-American Activities for the purpose of performing any and all acts which the Committee as a whole is authorized to do." (R. 91.)

sheds no light on the relevancy of the questions asked of petitioner.[51]

The Government believes that the topic of inquiry before the Subcommittee concerned Communist infiltration in labor. In his introductory remarks, the Chairman made reference to a bill, then pending before the Committee,[52] which would have penalized labor unions controlled or dominated by persons who were, or had been, members of a "Communist-action" organization, as de-

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[51] The original resolution authorizing subcommittees was amended on March 3, 1954, to require any subcommittee to consist of at least three members, two of whom could constitute a quorum. (R. 92.)

Petitioner appeared before a subcommittee composed at the outset of four members. After a recess in the course of his testimony, only two committeemen were present. It was during this latter phase of his testimony that petitioner refused to answer the questions involved in this case.

[52] The bill pending at the time of the Chairman's remarks, March 15, 1954, and when petitioner testified a month later was H. R. 7487, 100 Cong. Rec. 763. No action was ever taken on this proposal. Introduced by Representative Velde, it would have withdrawn the rights, privileges and benefits under the National Labor Relations Act of any labor organization which was substantially directed, dominated or controlled by persons who were or ever had been members of a "Communist-action organization," as that phrase is used in the Internal Security Act.

On July 6, 1954, after extensive hearings, the Senate Judiciary Committee reported favorably on S. 3706, a bill drafted by that committee to amend the Internal Security Act. Two days later, Representative Velde introduced H. R. 9838, which was identical to S. 3706. These bills eventually became law. 68 Stat. 775. The Act created the concept of a "Communist infiltrated organization," and part of its provisions declared that a labor union that came within that definition should be barred from the rights, privileges and benefits of the National Labor Relations Act. The same sanctions were applied to a labor group that was a "Communist-action" or "Communist-front organization" under the original Internal Security Act.

fined in the Internal Security Act of 1950. The Subcommittee, it is contended, might have been endeavoring to determine the extent of such a problem.

This view is corroborated somewhat by the witnesses who preceded and followed petitioner before the Subcommittee. Looking at the entire hearings, however, there is strong reason to doubt that the subject revolved about labor matters. The published transcript is entitled: Investigation of Communist Activities in the Chicago Area, and six of the nine witnesses had no connection with labor at all.[53]

The most serious doubts as to the Subcommittee's "question under inquiry," however, stem from the precise questions that petitioner has been charged with refusing to answer. Under the terms of the statute, after all, it is these which must be proved pertinent. Petitioner is charged with refusing to tell the Subcommittee whether or not he knew that certain named persons had been members of the Communist Party in the past. The Subcommittee's counsel read the list from the testimony of a previous witness who had identified them as Communists. Although this former witness was identified with labor, he had not stated that the persons he named were involved in union affairs. Of the thirty names propounded to petitioner, seven were completely unconnected with organized labor. One operated a beauty parlor. Another was a watchmaker. Several were identified as "just citizens" or "only Communists." When

[53] The first four witnesses testified principally about the Communist Party activities of an employee of the National Cancer Institute of the United States Public Health Service. A Chicago attorney related to the Subcommittee his experiences with Communist youth organizations during his college days. The sixth witness told of her work as a district organizer for the Communist Party in Montana, Wyoming, Idaho and the Dakotas during the 1930's.

almost a quarter of the persons on the list are not labor people, the inference becomes strong that the subject before the Subcommittee was not defined in terms of Communism in labor.

The final source of evidence as to the "question under inquiry" is the Chairman's response when petitioner objected to the questions on the grounds of lack of pertinency. The Chairman then announced that the Subcommittee was investigating "subversion and subversive propaganda." [54] This is a subject at least as broad and indefinite as the authorizing resolution of the Committee, if not more so.

Having exhausted the several possible indicia of the "question under inquiry," we remain unenlightened as to the subject to which the questions asked petitioner were pertinent. Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer. Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance. Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject

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[54] "This committee is set up by the House of Representatives to investigate subversion and subversive propaganda and to report to the House of Representatives for the purpose of remedial legislation.

"The House of Representatives has by a very clear majority, a very large majority, directed us to engage in that type of work, and so we do, as a committee of the House of Representatives, have the authority, the jurisdiction, to ask you concerning your activities in the Communist Party, concerning your knowledge of any other persons who are members of the Communist Party or who have been members of the Communist Party, and so, Mr. Watkins, you are directed to answer the question propounded to you by counsel." (R. 86; Hearings, *supra*, note 2, Part 3, at 4275–4276.)

under inquiry at that time and the manner in which the propounded questions are pertinent thereto.[55] To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.

The statement of the Committee Chairman in this case, in response to petitioner's protest, was woefully inadequate to convey sufficient information as to the pertinency of the questions to the subject under inquiry. Petitioner was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment.

We are mindful of the complexities of modern government and the ample scope that must be left to the Congress as the sole constitutional depository of legislative power. Equally mindful are we of the indispensable function, in the exercise of that power, of congressional investigations. The conclusions we have reached in this case will not prevent the Congress, through its committees, from obtaining any information it needs for the proper fulfillment of its role in our scheme of government. The legislature is free to determine the kinds of data that should be collected. It is only those investigations that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses. A measure of added care on the part of the House and the Senate in authorizing the use of compulsory process and by their committees in exercising that power would suffice.

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[55] Cf. *United States* v. *Kamin*, 136 F. Supp. 791, 800.

That is a small price to pay if it serves to uphold the principles of limited, constitutional government without constricting the power of the Congress to inform itself.

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with instructions to dismiss the indictment.

It is so ordered.

MR. JUSTICE BURTON and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

I deem it important to state what I understand to be the Court's holding. Agreeing with its holding, I join its opinion.

The power of the Congress to punish for contempt of its authority is, as the Court points out, rooted in history. It has been acknowledged by this Court since 1821. *Anderson* v. *Dunn,* 6 Wheat. 204. Until 1857, Congress was content to punish for contempt through its own process. By the Act of January 24, 1857, 11 Stat. 155, as amended by the Act of January 24, 1862, 12 Stat. 333, Congress provided that, "in addition to the pains and penalties now existing" (referring of course to the power of Congress itself to punish for contempt), "contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States." *In re Chapman,* 166 U. S. 661, 672. This legislation is now 2 U. S. C. § 192. By thus making the federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function.

To turn to the immediate problem before us, the scope of inquiry that a committee is authorized to pursue must be defined with sufficiently unambiguous clarity to safeguard a witness from the hazards of vagueness in the enforcement of the criminal process against which the Due Process Clause protects. The questions must be put with relevance and definiteness sufficient to enable the witness to know whether his refusal to answer may lead to conviction for criminal contempt and to enable both the trial and the appellate courts readily to determine whether the particular circumstances justify a finding of guilt.

While implied authority for the questioning by the Committee, sweeping as was its inquiry, may be squeezed out of the repeated acquiescence by Congress in the Committee's inquiries, the basis for determining petitioner's guilt is not thereby laid. Prosecution for contempt of Congress presupposes an adequate opportunity for the defendant to have awareness of the pertinency of the information that he has denied to Congress. And the basis of such awareness must be contemporaneous with the witness' refusal to answer and not at the trial for it. Accordingly, the actual scope of the inquiry that the Committee was authorized to conduct and the relevance of the questions to that inquiry must be shown to have been luminous at the time when asked and not left, at best, in cloudiness. The circumstances of this case were wanting in these essentials.

MR. JUSTICE CLARK, dissenting.

As I see it the chief fault in the majority opinion is its mischievous curbing of the informing function of the Congress. While I am not versed in its procedures, my experience in the Executive Branch of the Government leads me to believe that the requirements laid down in the opinion for the operation of the committee system of

inquiry are both unnecessary and unworkable. It is my purpose to first discuss this phase of the opinion and then record my views on the merits of Watkins' case.

I.

It may be that at times the House Committee on Un-American Activities has, as the Court says, "conceived of its task in the grand view of its name." And, perhaps, as the Court indicates, the rules of conduct placed upon the Committee by the House admit of individual abuse and unfairness. But that is none of our affair. So long as the object of a legislative inquiry is legitimate and the questions propounded are pertinent thereto, it is not for the courts to interfere with the committee system of inquiry. To hold otherwise would be an infringement on the power given the Congress to inform itself, and thus a trespass upon the fundamental American principle of separation of powers. The majority has substituted the judiciary as the grand inquisitor and supervisor of congressional investigations. It has never been so.

II.

Legislative committees to inquire into facts or conditions for assurance of the public welfare or to determine the need for legislative action have grown in importance with the complexity of government. The investigation that gave rise to this prosecution is of the latter type. Since many matters requiring statutory action lie in the domain of the specialist or are unknown without testimony from informed witnesses, the need for information has brought about legislative inquiries that have used the compulsion of the subpoena to lay bare needed facts and a statute, 2 U. S. C. § 192 here involved, to punish recalcitrant witnesses. The propriety of investigations has long been recognized and rarely curbed by the courts, though

constitutional limitations on the investigatory powers are admitted.[1] The use of legislative committees to secure information follows the example of the people from whom our legislative system is derived. The British method has variations from that of the United States but fundamentally serves the same purpose—the enlightenment of Parliament for the better performance of its duties. There are standing committees to carry on the routine work, royal commissions to grapple with important social or economic problems, and special tribunals of inquiry for some alleged offense in government.[2] Our Congress has since its beginning used the committee system to inform itself. It has been estimated that over 600 investigations have been conducted since the First Congress. They are "a necessary and appropriate attribute of the power to legislate . . . ." *McGrain* v. *Daugherty,* 273 U. S. 135, 175 (1927).

The Court indicates that in this case the source of the trouble lies in the "tremendous latitude" given the Un-American Activities Committee in the Legislative Reorganization Act.[3] It finds that the Committee "is

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[1] *United States* v. *Rumely,* 345 U. S. 41 (1953); *Sinclair* v. *United States,* 279 U. S. 263 (1929); *Reed* v. *County Commissioners,* 277 U. S. 376 (1928); *McGrain* v. *Daugherty,* 273 U. S. 135 (1927); Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926).

[2] Symposium on Congressional Investigations, 18 U. of Chi. L. Rev. 421, Finer, The British System, 521, 532, 554, 561 (1951).

[3] The Committee originated in 1938 under H. Res. 282, 75th Cong., 3d Sess., 83 Cong. Rec. 7568, and was patterned after a resolution of 1934 authorizing the investigation of Nazi propaganda. H. Res. 198, 73d Cong., 2d Sess., 78 Cong. Rec. 4934. The resolution read much the same as the present authority of the Committee which is quoted below. By a succession of House Resolutions (H. Res. 26, 76th Cong., 1st Sess., 84 Cong. Rec. 1098; H. Res. 321, 76th Cong., 3d Sess., 86 Cong. Rec. 572; H. Res. 90, 77th Cong., 1st Sess., 87 Cong. Rec. 886; H. Res. 420, 77th Cong., 2d Sess., 88 Cong. Rec. 2282; H. Res. 65, 78th Cong., 1st Sess., 89 Cong. Rec. 795) the

allowed, in essence, to define its own authority, [and] to choose the direction and focus of its activities." This, of course, is largely true of all committees within their respective spheres. And, while it is necessary that the "charter," as the opinion calls the enabling resolution, "spell out [its] jurisdiction and purpose," that must necessarily be in more or less general terms. An examination of the enabling resolutions of other committees reveals the extent to which this is true.

Permanent or standing committees of both Houses have been given power in exceedingly broad terms. For example, the Committees on the Armed Services have jurisdiction over "Common defense generally"; [4] the Committees on Interstate and Foreign Commerce have

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Committee continued in existence until in 1945, by amendment of the House Rules, it was made a standing committee. 91 Cong. Rec. 10, 15. The Legislative Reorganization Act of 1946 retained it as one of the standing committees and provided:

"All proposed legislation, messages, petitions, memorials, and other matters relating to the subjects listed under the standing committees named below shall be referred to such committees, respectively: . . ."

"(q) . . . (2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." 60 Stat. 823, 828.

The Committee is authorized to sit and act at any time, anywhere in the United States and to require the attendance of witnesses and the production of books and papers. A resolution of the Eighty-third Congress adopted the Rules of the previous Congresses as amended by the Legislative Reorganization Act of 1946. H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 15, 16, 18, 24.

[4] 60 Stat. 815, 824.

jurisdiction over "Interstate and foreign commerce generally"; [5] and the Committees on Appropriation have jurisdiction over "Appropriation of the revenue for the support of the Government." [6] Perhaps even more important for purposes of comparison are the broad authorizations given to select or special committees established by the Congress from time to time. Such committees have been "authorized and directed" to make full and complete studies "of whether *organized crime* utilizes the facilities of interstate commerce or otherwise operates in interstate commerce"; [7] "of . . . *all lobbying activities* intended to influence, encourage, promote, or retard legislation"; [8] "to determine the extent to which current

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[5] 60 Stat. 817, 826.

[6] 60 Stat. 815, 824.

[7] S. Res. 202, 81st Cong., 2d Sess., in pertinent part provides:

"authorized and directed to make a full and complete study and investigation of whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law of the United States or of the State in which the transactions occur, and, if so, the manner and extent to which, and the identity of the persons, firms, or corporations by which such utilization is being made, what facilities are being used, and whether or not organized crime utilizes such interstate facilities or otherwise operates in interstate commerce for the development of corrupting influences in violation of law of the United States or of the laws of any State: *Provided, however,* That nothing contained herein shall authorize (1) the recommendation of any change in the laws of the several States relative to gambling, or (2) any possible interference with the rights of the several States to prohibit, legalize, or in any way regulate gambling within their borders."

[8] H. Res. 298, 81st Cong., 1st Sess., in pertinent part provides:

"authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation."

literature . . . containing *immoral,* [or] *obscene* . . . matter, or placing *improper* emphasis on crime . . . are being made available to the people of the United States . . ."; [9] and "of the extent to which criminal or other *improper* practices . . . are, or have been, engaged in in *the field of labor-management relations* . . . to the *detriment* of the *interests* of the public . . . ." [10] (Emphasis added in each example.) Surely these authorizations permit the committees even more "tremendous latitude" than the "charter" of the Un-American Activities Committee. Yet no one has suggested that the powers granted were too broad. To restrain and limit the breadth of investigative power of this Committee necessitates the similar handling of all other committees. The resulting restraint imposed on the committee system appears to cripple the system beyond workability.

The Court finds fault with the use made of compulsory process, power for the use of which is granted the Com-

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[9] H. Res. 596, 82d Cong., 2d Sess., in pertinent part provides:

"authorized and directed to conduct a full and complete investigation and study (1) to determine the extent to which current literature—books, magazines, and comic books—containing immoral, obscene, or otherwise offense matter, or placing improper emphasis on crime, violence, and corruption, are being made available to the people of the United States through the United States mails and otherwise; and (2) to determine the adequacy of existing law to prevent the publication and distribution of books containing immoral, offensive, and other undesirable matter."

[10] S. Res. 74, 85th Cong., 1st Sess., in pertinent part provides:

"authorized and directed to conduct an investigation and study of the extent to which criminal or other improper practices or activities are, or have been, engaged in in the field of labor-management relations or in groups or organizations of employees or employers to the detriment of the interests of the public, employers or employees, and to determine whether any changes are required in the laws of the United States in order to protect such interests against the occurrence of such practices or activities."

mittee in the Reorganization Act. While the Court finds that the Congress is free "to determine the kinds of data" it wishes its committees to collect, this has led, the Court says, to an encroachment on individual rights through the abuse of process. To my mind this indicates a lack of understanding of the problems facing such committees. I am sure that the committees would welcome voluntary disclosure. It would simplify and relieve their burden considerably if the parties involved in investigations would come forward with a frank willingness to cooperate. But everyday experience shows this just does not happen. One needs only to read the newspapers to know that the Congress could gather little "data" unless its committees had, unfettered, the power of subpoena. In fact, Watkins himself could not be found for appearance at the first hearing and it was only by subpoena that he attended the second. The Court generalizes on this crucial problem saying "added care on the part of the House and the Senate in authorizing the use of compulsory process and by their committees in exercising that power would suffice." It does not say how this "added care" could be applied in practice; however, there are many implications since the opinion warns that "procedures which prevent the separation of power from responsibility" would be necessary along with "constitutional requisites of fairness for witnesses." The "power" and "responsibility" for the investigations are, of course, in the House where the proceeding is initiated. But the investigating job itself can only be done through the use of committees. They must have the "power" to force compliance with their requirements. If the rule requires that this power be retained in the full House then investigations will be so cumbrous that their conduct will be a practical impossibility. As to "fairness for witnesses" there is nothing in the record showing any abuse of Watkins. If anything, the Committee was abused by his recalcitrance.

While ambiguity prevents exactness (and there is "vice in vagueness" the majority reminds), the sweep of the opinion seems to be that "preliminary control" of the Committee must be exercised. The Court says a witness' protected freedoms cannot "be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need." Frankly I do not see how any such procedure as "preliminary control" can be effected in either House of the Congress. What will be controlled preliminarily? The plans of the investigation, the necessity of calling certain witnesses, the questions to be asked, the details of subpoenas *duces tecum,* etc.? As it is now, Congress is hard pressed to find sufficient time to fully debate and adopt all needed legislation. The Court asserts that "the Congress has practically abandoned its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House." This was to be expected. It may be that back in the twenties and thirties Congress could spare the time to conduct contempt hearings, but that appears impossible now. The Court places a greater burden in the conduct of contempt cases before the courts than it does before "the bar of the House." It cites with approval cases of contempt tried before a House of the Congress where no more safeguards were present than we find here. In contempt prosecutions before a court, however, the majority places an investigative hearing on a par with a criminal trial, requiring that "knowledge of the subject to which the interrogation is deemed pertinent . . . must be available [to the witness] with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense." I know of no such claim ever being made before. Such a requirement has never been thought applicable to investigations and is wholly out of place when related to the informing func-

tion of the Congress. See Frankfurter, Hands Off The Investigations, 38 New Republic, May 21, 1924, p. 329, 65 Cong. Rec. 9080–9082. The Congress does not have the facts at the time of the investigation for it is the facts that are being sought. In a criminal trial the investigation has been completed and all of the facts are at hand. The informing function of the Congress is in effect "a study by the government of circumstances which seem to call for study in the public interest." See Black, Inside a Senate Investigation, 172 Harper's Magazine, Feb. 1936, pp. 275, 278. In the conduct of such a proceeding it is impossible to be as explicit and exact as in a criminal prosecution. If the Court is saying that its new rule does not apply to contempt cases tried before the bar of the House affected, it may well lead to trial of all contempt cases before the bar of the whole House in order to avoid the restrictions of the rule. But this will not promote the result desired by the majority. Summary treatment, at best, could be provided before the whole House because of the time factor, and such treatment would necessarily deprive the witness of many of the safeguards in the present procedures. On review here the majority might then find fault with that procedure.

III.

Coming to the merits of Watkins' case, the Court reverses the judgment because: (1) The subject matter of the inquiry was not "made to appear with undisputable clarity" either through its "charter" or by the Chairman at the time of the hearing and, therefore, Watkins was deprived of a clear understanding of "the manner in which the propounded questions [were] pertinent thereto"; and (2) the present committee system of inquiry of the House, as practiced by the Un-American Activities Committee, does not provide adequate safeguards for the protection

of the constitutional right of free speech. I subscribe to neither conclusion.

Watkins had been an active leader in the labor movement for many years and had been identified by two previous witnesses at the Committee's hearing in Chicago as a member of the Communist Party. There can be no question that he was fully informed of the subject matter of the inquiry. His testimony reveals a complete knowledge and understanding of the hearings at Chicago. There the Chairman had announced that the Committee had been directed "to ascertain the extent and success of subversive activities directed against these United States [and] On the basis of these investigations and hearings . . . [report] its findings to the Congress and [make] recommendations . . . for new legislation." He pointed to the various laws that had been enacted as a result of Committee recommendations. He stated that "The Congress has also referred to the House Committee on Un-American Activities a bill which would amend the National Security Act of 1950" which, if made law, would restrict the availability of the Labor Act to unions not "in fact Communist-controlled action groups." The Chairman went on to say that "It cannot be said that subversive infiltration has had a greater nor a lesser success in infiltrating this important area. The hearings today are the culmination of an investigation . . . . Every witness who has been subpoenaed to appear before the committee here in Chicago . . . [is] known to possess information which will assist the Committee in performing its directed function to the Congress of the United States."

A subpoena had issued for Watkins to appear at the Chicago hearings but he was not served. After Watkins was served the hearing in question was held in Washington, D. C. Reference at this hearing was made to the one conducted in Chicago. Watkins came before the

Committee with a carefully prepared statement. He denied certain testimony of the previous witnesses and declared that he had never been a "card-carrying member" of the Party. He admitted that for the period 1942–1947 he "cooperated with the Communist Party . . . participated in Communist activities . . . made contributions . . . attended caucuses at [his union's] convention at which Communist Party officials were present . . . [and] freely cooperated with the Communist Party . . . ." This indicated that for a five-year period he, a union official, was cooperating closely with the Communist Party even permitting its officials to attend union caucuses. For the last two years of this liaison the Party had publicly thrown off its cloak of a political party. It was a reconstituted, militant group known to be dedicated to the overthrow of our Government by force and violence. In this setting the Committee attempted to have Watkins identify 30 persons, most of whom were connected with labor unions in some way. While one "operated a beauty parlor" and another was "a watchmaker," they may well have been "drops" or other functionaries in the program of cooperation between the union and the Party. It is a *non sequitur* for the Court to say that since "almost a quarter of the persons on the list are not labor people, the inference becomes strong that the subject before the Subcommittee was not defined in terms of Communism in labor." I submit that the opposite is true.

IV.

I think the Committee here was acting entirely within its scope and that the purpose of its inquiry was set out with "undisputable clarity." In the first place, the authorizing language of the Reorganization Act [11] must be read as a whole, not dissected. It authorized investi-

[11] See note 3, *supra*.

gation into subversive activity, its extent, character, objects, and diffusion. While the language might have been more explicit than using such words as "un-American," or phrases like "principle of the form of government," still these are fairly well understood terms. We must construe them to give them meaning if we can. Our cases indicate that rather than finding fault with the use of words or phrases, we are bound to presume that the action of the legislative body in granting authority to the Committee was with a legitimate object "if [the action] is *capable* of being so construed." (Emphasis added.) *People ex rel. McDonald* v. *Keeler,* 99 N. Y. 463, 487, 2 N. E. 615, 627–628 (1885), as quoted and approved in *McGrain* v. *Daugherty, supra,* at 178. Before we can deny the authority "it must be obvious that" the Committee has "exceeded the bounds of legislative power." *Tenney* v. *Brandhove,* 341 U. S. 367, 378 (1951). The fact that the Committee has often been attacked has caused close scrutiny of its acts by the House as a whole and the House has repeatedly given the Committee its approval. "Power" and "responsibility" have not been separated. But the record in this case does not stop here. It shows that at the hearings involving Watkins, the Chairman made statements explaining the functions of the Committee.[12] And, furthermore, Watkins' action at the hear-

[12] See *supra,* at p. 226. See also the statement by Congressman Velde, Chairman of the Committee on Un-American Activities, April 29, 1954, at Washington, D. C., where Mr. Velde stated, *inter alia:* "This committee is set up by the House of Representatives to investigate subversion and subversive propaganda and to report to the House of Representatives for the purpose of remedial legislation.

"The House of Representatives has by a very clear majority, a very large majority, directed us to engage in that type of work, and so we do, as a committee of the House of Representatives, have the authority, the jurisdiction, to ask you concerning your activities in the Communist Party, concerning your knowledge of any other persons

ing clearly reveals that he was well acquainted with the purpose of the hearing. It was to investigate Communist infiltration into his union. This certainly falls within the grant of authority from the Reorganization Act and the House has had ample opportunity to limit the investigative scope of the Committee if it feels that the Committee has exceeded its legitimate bounds.

The Court makes much of petitioner's claim of "exposure for exposure's sake" and strikes at the purposes of the Committee through this catch phrase. But we are bound to accept as the purpose of the Committee that stated in the Reorganization Act together with the statements of the Chairman at the hearings involved here. Nothing was said of exposure. The statements of a single Congressman cannot transform the real purpose of the Committee into something not authorized by the parent resolution. See *United States* v. *Rumely,* 345 U. S. 41 (1953); *Sinclair* v. *United States,* 279 U. S. 263, 290, 295 (1929). The Court indicates that the questions propounded were asked for exposure's sake and had no pertinency to the inquiry. It appears to me that they were entirely pertinent to the announced purpose of the Committee's inquiry. Undoubtedly Congress has the power to inquire into the subjects of communism and the Communist Party. *American Communications Assn.* v. *Douds,* 339 U. S. 382 (1950). As a corollary of the congressional power to inquire into such subject matter, the Congress, through its committees, can legitimately seek to identify individual members of the Party. *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 167 F. 2d 241 (1948), cert. denied, 334 U. S. 843. See also *Lawson* v. *United States,* 85 U. S. App. D. C. 167, 170–171, 176 F. 2d 49, 52–53

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who are members of the Communist Party or who have been members of the Communist Party, and so, Mr. Watkins, you are directed to answer the question propounded to you by counsel."

(1949), cert. denied, 339 U. S. 934; *United States* v. *Josephson,* 165 F. 2d 82, 90–92 (1947), cert. denied, 333 U. S. 838.

The pertinency of the questions is highlighted by the need for the Congress to know the extent of infiltration of communism in labor unions. This technique of infiltration was that used in bringing the downfall of countries formerly free but now still remaining behind the Iron Curtain. The *Douds* case illustrates that the Party is not an ordinary political party and has not been at least since 1945. Association with its officials is not an ordinary association. Nor does it matter that the questions related to the past. Influences of past associations often linger on as was clearly shown in the instance of the witness Matusow and others. The techniques used in the infiltration which admittedly existed here might well be used again in the future. If the parties about whom Watkins was interrogated were Communists and collaborated with him, as a prior witness indicated, an entirely new area of investigation might have been opened up. Watkins' silence prevented the Committee from learning this information which could have been vital to its future investigation. The Committee was likewise entitled to elicit testimony showing the truth or falsity of the prior testimony of the witnesses who had involved Watkins and the union with collaboration with the Party. If the testimony was untrue a false picture of the relationship between the union and the Party leaders would have resulted. For these reasons there were ample indications of the pertinency of the questions.

V.

The Court condemns the long-established and long-recognized committee system of inquiry of the House because it raises serious questions concerning the protection it affords to constitutional rights. It concludes that com-

pelling a witness to reveal his "beliefs, expressions or associations" impinges upon First Amendment rights. The system of inquiry, it says, must "insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly." In effect the Court honors Watkins' claim of a "right to silence" which brings all inquiries, as we know, to a "dead end." I do not see how any First Amendment rights were endangered here. There is nothing in the First Amendment that provides the guarantees Watkins claims. That Amendment was designed to prevent attempts by law to curtail freedom of speech. *Whitney* v. *California,* 274 U. S. 357, 375 (1927). It forbids Congress from making any law "abridging the freedom of speech, or of the press." It guarantees Watkins' right to join any organization and make any speech that does not have an intent to incite to crime. *Dennis* v. *United States,* 341 U. S. 494 (1951). But Watkins was asked whether he knew named individuals and whether they were Communists. He refused to answer on the ground that his rights were being abridged. What he was actually seeking to do was to protect his former associates, not himself, from embarrassment. He had already admitted his own involvement. He sought to vindicate the rights, if any, of his associates. It is settled that one cannot invoke the constitutional rights of another. *Tileston* v. *Ullman,* 318 U. S. 44, 46 (1943).

As already indicated, even if Watkins' associates were on the stand they could not decline to disclose their Communist connections on First Amendment grounds. While there may be no restraint by the Government of one's beliefs, the right of free belief has never been extended to include the withholding of knowledge of past events or transactions. There is no general privilege of silence. The First Amendment does not make speech or silence permissible to a person in such measure as he

chooses. Watkins has here exercised his own choice as to when he talks, what questions he answers, and when he remains silent. A witness is not given such a choice by the Amendment. Remote and indirect disadvantages such as "public stigma, scorn and obloquy" may be related to the First Amendment, but they are not enough to block investigation. The Congress has recognized this since 1862 when it first adopted the contempt section, R. S. § 103, as amended, 2 U. S. C. § 193, declaring that no witness before a congressional committee may refuse to testify "upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." See also *McGrain* v. *Daugherty, supra,* at 179–180; *United States* v. *Josephson,* 165 F. 2d 82, 89 (1947), cert. denied, 333 U. S. 838. See also Report on Congressional Investigations, Assn. of the Bar of the City of New York, 3–4 (1948).

We do not have in this case unauthorized, arbitrary, or unreasonable inquiries and disclosures with respect to a witness' personal and private affairs so ably and properly denounced in the *Sinclair* case, *supra,* at 291–292. This inquiry is far different from the cases relied upon by the Court. There is no analogy to the case of Richard Thompson [13] involving the sermons of clergymen. It is not Floyd's [14] case involving criticism of the royal family. There is no resemblance to John Wilkes' struggle for a seat in Parliament. It is not *Briggs* [15] where the prosecutor sought to develop the national origin of policemen. It is not *Kilbourn* [16] involving a private real estate pool.

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[13] *Proceedings against Richard Thompson,* 8 How. St. Tr. 2 (1680).

[14] See 1 De Lolme, The Rise and Progress of the English Constitution (1838), at 347–348.

[15] *Briggs* v. *Mackellar,* 2 Abb. Pr. 30, 65 (N. Y. Common Pleas 1855).

[16] *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881).

Nor is it *Quinn*,[17] *Emspak*,[18] or *Bart*,[19] involving the Fifth Amendment. It is not *Rumely*[20] involving the interpretation of a lobbying statute. Nor is this "a new kind of congressional inquiry unknown in prior periods of American history . . . [*i. e.*] a broad scale intrusion into the lives and affairs of private citizens." As I see it only the setting is different. It involves new faces and new issues brought about by new situations which the Congress feels it is necessary to control in the public interest. The difficulties of getting information are identical if not greater. Like authority to that always used by the Congress is employed here and in the same manner so far as congressional procedures are concerned. We should afford to Congress the presumption that it takes every precaution possible to avoid unnecessary damage to reputations. Some committees have codes of procedure, and others use the executive hearing technique to this end. The record in this case shows no conduct on the part of the Un-American Activities Committee that justifies condemnation. That there may have been such occasions is not for us to consider here. Nor should we permit its past transgressions, if any, to lead to the rigid restraint of all congressional committees. To carry on its heavy responsibility the compulsion of truth that does not incriminate is not only necessary to the Congress but is permitted within the limits of the Constitution.

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[17] *Quinn* v. *United States*, 349 U. S. 155 (1955).

[18] *Emspak* v. *United States*, 349 U. S. 190 (1955).

[19] *Bart* v. *United States*, 349 U. S. 219 (1955).

[20] *United States* v. *Rumely*, 345 U. S. 41 (1953).

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SWEEZY *v.* NEW HAMPSHIRE, BY WYMAN, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 175. Argued March 5, 1957.—
Decided June 17, 1957.

1. This case was brought here on appeal under 28 U. S. C. § 1257 (2); but the appellant has failed to meet his burden of showing that jurisdiction by appeal was properly invoked. *Held:* The appeal is dismissed. Treating the papers as a petition for certiorari under 28 U. S. C. § 2103, certiorari is granted. Pp. 235–236.

2. In an investigation conducted by a State Attorney General, acting on behalf of the State Legislature under a broad resolution directing him to determine whether there were "subversive persons" in the State and to recommend further legislation on that subject, appellant answered most questions asked him, including whether he was a Communist; but he refused to answer questions related to (1) the contents of a lecture he had delivered at the State University, and (2) his knowledge of the Progressive Party of the State and its members. He did not plead his privilege against self-incrimination, but based his refusal to answer such questions on the grounds that they were not pertinent to the inquiry and violated his rights under the First Amendment. Persisting in his refusal when haled into a State Court and directed to answer, he was adjudged guilty of contempt. This judgment was affirmed by the State Supreme Court, which construed the term "subversive persons" broadly enough to include persons engaged in conduct only remotely related to actual subversion and done completely apart from any conscious intent to be a part of such activity. It also held that the need of the Legislature to be informed on the subject of self-preservation of government outweighed the deprivation of constitutional rights that occurred in the process. *Held:* On the record in this case, appellant's rights under the Due Process Clause of the Fourteenth Amendment were violated, and the judgment is reversed. Pp. 235–267.

100 N. H. 103, 121 A. 2d 783, reversed.

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

Opinion of THE CHIEF JUSTICE, joined by MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN, p. 235.

Opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE HARLAN, concurring in the result, *post*, p. 255.

For dissenting opinion of MR. JUSTICE CLARK, joined by MR. JUSTICE BURTON, see *post*, p. 267.

Thomas I. Emerson argued the cause for appellant. With him on the brief was *William L. Phinney.*

Louis C. Wyman, Attorney General of New Hampshire, argued the cause for appellee. With him on the brief were *Joseph F. Gall,* Special Assistant to the Attorney General, and *Elmer T. Bourque,* Assistant Attorney General.

MR. CHIEF JUSTICE WARREN announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join.

This case, like *Watkins* v. *United States, ante,* p. 178, brings before us a question concerning the constitutional limits of legislative inquiry. The investigation here was conducted under the aegis of a state legislature, rather than a House of Congress. This places the controversy in a slightly different setting from that in *Watkins.* The ultimate question here is whether the investigation deprived Sweezy of due process of law under the Fourteenth Amendment. For the reasons to be set out in this opinion, we conclude that the record in this case does not sustain the power of the State to compel the disclosures that the witness refused to make.

This case was brought here as an appeal under 28 U. S. C. § 1257 (2). Jurisdiction was alleged to rest upon contentions, rejected by the state courts, that a statute

of New Hampshire is repugnant to the Constitution of the United States. We postponed a decision on the question of jurisdiction until consideration of the merits. 352 U. S. 812. The parties neither briefed nor argued the jurisdictional question. The appellant has thus failed to meet his burden of showing that jurisdiction by appeal was properly invoked. The appeal is therefore dismissed. Treating the appeal papers as a petition for writ of certiorari, under 28 U. S. C. § 2103, the petition is granted. Cf. *Union National Bank* v. *Lamb,* 337 U. S. 38, 39–40.

The investigation in which petitioner was summoned to testify had its origins in a statute passed by the New Hampshire legislature in 1951.[1] It was a comprehensive scheme of regulation of subversive activities. There was a section defining criminal conduct in the nature of sedition. "Subversive organizations" were declared unlawful and ordered dissolved. "Subversive persons" were made ineligible for employment by the state government. Included in the disability were those employed as teachers or in other capacities by any public educational institution. A loyalty program was instituted to eliminate "subversive persons" among government personnel. All present employees, as well as candidates for elective office in the future, were required to make sworn statements that they were not "subversive persons."

In 1953, the legislature adopted a "Joint Resolution Relating to the Investigation of Subversive Activities." [2] It was resolved:

> "That the attorney general is hereby authorized and directed to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive

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[1] N. H. Laws 1951, c. 193; now N. H. Rev. Stat. Ann., 1955, c. 588, §§ 1–16.

[2] N. H. Laws 1953, c. 307.

persons as defined in said act are presently located within this state. The attorney general is authorized to act upon his own motion and upon such information as in his judgment may be reasonable or reliable. . . .

. . . . . .

"The attorney general is directed to proceed with criminal prosecutions under the subversive activities act whenever evidence presented to him in the course of the investigation indicates violations thereof, and he shall report to the 1955 session on the first day of its regular session the results of this investigation, together with his recommendations, if any, for necessary legislation." [3]

Under state law, this was construed to constitute the Attorney General as a one-man legislative committee.[4]

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[3] The authority of the Attorney General was continued for another two-year period by N. H. Laws 1955, cc. 197, 340.

[4] "Having determined that an investigation should be conducted concerning a proper subject of action by it, the Legislature's choice of the Attorney General as its investigating committee, instead of a committee of its own members or a special board or commission, was not in and of itself determinative of the nature of the investigation. His position as the chief law enforcement officer of the State did not transform the inquiry which was otherwise legislative into executive action." *Nelson* v. *Wyman*, 99 N. H. 33, 38, 105 A. 2d 756, 762–763.

The Attorney General of New Hampshire is appointed to office by the Governor and the State Council, a group of five persons who share some of the executive responsibilities in the State Government. The principal duties of the Attorney General are set forth in N. H. Rev. Stat. Ann., 1955, c. 7, §§ 6–11. He represents the State in all cases before the State Supreme Court. He prosecutes all criminal cases in which the accused is charged with an offense punishable by twenty-five years in prison or more. All other criminal cases are under his general supervision. He gives opinions on questions of law to the legislature, or to state boards, departments, commissions, officers, etc., on questions relating to their official duties.

He was given the authority to delegate any part of the investigation to any member of his staff. The legislature conferred upon the Attorney General the further authority to subpoena witnesses or documents. He did not have power to hold witnesses in contempt, however. In the event that coercive or punitive sanctions were needed, the Attorney General could invoke the aid of a State Superior Court which could find recalcitrant witnesses in contempt of court.[5]

Petitioner was summoned to appear before the Attorney General on two separate occasions. On January 5, 1954, petitioner testified at length upon his past conduct and associations. He denied that he had ever been a member of the Communist Party or that he had ever been part of any program to overthrow the government by force or violence. The interrogation ranged over many matters, from petitioner's World War II military service with the Office of Strategic Services to his sponsorship, in 1949, of the Scientific and Cultural Conference for World Peace, at which he spoke.

During the course of the inquiry, petitioner declined to answer several questions. His reasons for doing so were given in a statement he read to the Committee at

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[5] "Whenever any official or board is given the power to summon witnesses and take testimony, but has not the power to punish for contempt, and any witness refuses to obey such summons, either as to his appearance or as to the production of things specified in the summons, or refuses to testify or to answer any question, a petition for an order to compel him to testify or his compliance with the summons may be filed in the superior court, or with some justice thereof." N. H. Rev. Stat. Ann., 1955, c. 491, § 19. "Upon such petition the court or justice shall have authority to proceed in the matter as though the original proceeding had been in the court, and may make orders and impose penalties accordingly." *Id.*, § 20. See *State* v. *Uphaus*, 100 N. H. 1, 116 A. 2d 887.

the outset of the hearing.[6] He declared he would not answer those questions which were not pertinent to the

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[6] "Those called to testify before this and other similar investigations can be classified in three categories.

"First there are Communists and those who have reason to believe that even if they are not Communists they have been accused of being and are in danger of harassment and prosecution.

"Second, there are those who approve of the purposes and methods of these investigations.

"Third, there are those who are not Communists and do not believe they are in danger of being prosecuted, but who yet deeply disapprove of the purposes and methods of these investigations.

"The first group will naturally, and I think wholly justifiably, plead the constitutional privilege of not being witnesses against themselves.

"The second group will equally naturally be cooperative witnesses.

"The third group is faced with an extremely difficult dilemma. I know because I belong to this third group, and I have been struggling with its problems for many weeks now. I would like to explain what the nature of that dilemma is. I think it is important that both those conducting these inquiries and the public should understand.

"It is often said: If a person is not a Communist and has nothing to fear, why should he not answer whatever questions are put to him and be done with it? The answer, of course, is that some of us believe these investigations are evil and dangerous, and we do not want to give our approval to them, either tacitly or otherwise. On the contrary, we want to oppose them to the best of our ability and persuade others to do likewise, with the hope of eventually abolishing them altogether.

"Our reasons for opposing these investigations are not captious or trivial. They have deep roots in principle and conscience. Let me explain with reference to the present New Hampshire investigation. The official purpose of the inquiry is to uncover and lay the basis for the prosecution of persons who in one way or another promote the forcible overthrow of constitutional forms of government. Leaving aside the question of the constitutionality of the investigation, which is now before the courts, I think it must be plain to any reasonable person who is at all well informed about conditions in New Hampshire today that strict adherence to this purpose would leave little room for investigation. It is obvious

subject under inquiry as well as those which transgress the limitations of the First Amendment. In keeping with

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enough that there are few radicals or dissenters of any kind in New Hampshire; and if there are any who advocate use of force and violence, they must be isolated crackpots who are no danger to anyone, least of all to the constitutional form of government of state and nation. The Attorney General should be able to check these facts quickly and issue a report satisfying the mandate laid upon him by the legislature.

"But this is not what he has done. We do not know the whole story, but enough has come out to show that the Attorney General has issued a considerable number of subpoenas and has held hearings in various parts of the state. And so far as the available information allows us to judge, most of those subpoenaed have fallen into one or both of two groups: first professors at Dartmouth and the University of New Hampshire who have gained a reputation for liberal or otherwise unorthodox views, and, second, people who have been active in the Progressive Party. It should be specially noted that whatever may be thought of the Progressive Party in any other respect, it was certainly not devoted to violent overthrow of constitutional forms of government but on the contrary to effecting reforms through the very democratic procedures which are the essence of constitutional forms of government.

"The pattern I have described is no accident. Whatever their official purpose, these investigations always end up by inquiring into the politics, ideas, and beliefs of people who hold what are, for the time being, unpopular views. The federal House Committee on Un-American Activities, for example, is supposed to investigate various kinds of propaganda and has no other mandate whatever. Over the years, however, it has spent almost no time investigating propaganda and has devoted almost all of its energies to 'exposing' people and their ideas, their affiliations, their associations. Similarly, this New Hampshire investigation is supposed to be concerned with violent overthrow of government, but it is actually turning out to be concerned with what few manifestations of political dissent have made themselves felt in the state in recent years.

"If all this is so, and if the very first principle of the American constitutional form of government is political freedom—which I take to include freedoms of speech, press, assembly, and association—then I do not see how it can be denied that these investigations are a

this stand, he refused to disclose his knowledge of the Progressive Party in New Hampshire or of persons with

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grave danger to all that Americans have always claimed to cherish. No rights are genuine if a person, for exercising them, can be hauled up before some tribunal and forced under penalties of perjury and contempt to account for his ideas and conduct.

"Let us now return to the problem of the witness who would have nothing to fear from being what is nowadays styled a 'friendly' witness, but who feels deeply that to follow such a course would be a betrayal of his principles and repugnant to his conscience. What other courses are open to him?

"He can claim the privilege not to be a witness against himself and thus avoid a hateful inquisition. I respect the decision of those who elect to take this course. My own reason for rejecting it is that, with public opinion in its present state, the exercise of the privilege is almost certain to be widely misinterpreted. One of the noblest and most precious guarantees of freedom, won in the course of bitter struggles and terrible suffering, has been distorted in our own day to mean a confession of guilt, the more sinister because undefined and indeed undefinable. It is unfortunate, but true, that the public at large has accepted this distortion and will scarcely listen to those who have invoked the privilege.

"Alternatively, the witness can seek to uphold his principles and maintain his integrity, not by claiming the protection of the Fifth Amendment (or the Fifteenth Article of the New Hampshire Bill of Rights), but by contesting the legitimacy of offensive questions on other constitutional and legal grounds.

"Just how far the First Amendment limits the right of legislative inquiry has not been settled. The Supreme Court of the United States is at this very moment considering a case (the *Emspak* case) which may do much to settle the question. But even before the Court has handed down its decision in the *Emspak* case, it is quite certain that the First Amendment does place *some* limitations on the power of investigation, and it is always open to a witness to challenge a question on the ground that it transgresses these limitations and, if necessary, to take the issue to the courts for decision.

"Moreover, a witness may not be required to answer questions unless they are 'pertinent to the matter under inquiry' (the words are those of the United States Supreme Court).

"What is the 'matter under inquiry' in the present investigation? According to the Act of the New Hampshire legislature directing

whom he was acquainted in that organization.[7] No action was taken by the Attorney General to compel answers to these questions.

The Attorney General again summoned petitioner to testify on June 3, 1954. There was more interrogation about the witness' prior contacts with Communists. The Attorney General lays great stress upon an article which petitioner had co-authored. It deplored the use of violence by the United States and other capitalist countries in attempting to preserve a social order which the writers thought must inevitably fall. This resistance, the article

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the investigation, its purpose is twofold: (1) 'to make full and complete investigation with respect to violations of the subversive activities act of 1951,' and (2) 'to determine whether subversive persons as defined in said act are presently located within this state.'

"I have studied the subversive activities act of 1951 with care, and I am glad to volunteer the information that I have absolutely no knowledge of any violations of any of its provisions; further, that I have no knowledge of subversive persons presently located within the state.

"That these statements may carry full conviction, I am prepared to answer certain questions about myself, though in doing so I do not mean to concede the right to ask them. I am also prepared to discuss my views relating to the use of force and violence to overthrow constitutional forms of government.

"But I shall respectfully decline to answer questions concerning ideas, beliefs, and associations which could not possibly be pertinent to the matter here under inquiry and/or which seem to me to invade the freedoms guaranteed by the First Amendment to the United States Constitution (which, of course, applies equally to the several states)."

[7] The Progressive Party offered a slate of candidates for national office in the 1948 presidential election. Henry A. Wallace, former Vice President of the United States, was the party's selection for the presidency. Glen Taylor, former United States Senator, was the vice-presidential nominee of the party. Nationwide, the party received a popular vote of 1,156,103. Of this total, 1,970 votes for Progressive Party candidates were cast in New Hampshire. Statistics of the Presidential and Congressional Election of November 2, 1948, pp. 24, 48–49.

continued, will be met by violence from the oncoming socialism, violence which is to be less condemned morally than that of capitalism since its purpose is to create a "truly human society." Petitioner affirmed that he styled himself a "classical Marxist" and a "socialist" and that the article expressed his continuing opinion.

Again, at the second hearing, the Attorney General asked, and petitioner refused to answer, questions concerning the Progressive Party, and its predecessor, the Progressive Citizens of America. Those were:

> "Was she, Nancy Sweezy, your wife, active in the formation of the Progressive Citizens of America?"
>
> "Was Nancy Sweezy then working with individuals who were then members of the Communist Party?"
>
> "Was Charles Beebe active in forming the Progressive Citizens of America?"
>
> "Was Charles Beebe active in the Progressive Party in New Hampshire?"
>
> "Did he work with your present wife—Did Charles Beebe work with your present wife in 1947?"
>
> "Did it [a meeting at the home of Abraham Walenko in Weare during 1948] have anything to do with the Progressive Party?"

The Attorney General also turned to a subject which had not yet occurred at the time of the first hearing. On March 22, 1954, petitioner had delivered a lecture to a class of 100 students in the humanities course at the University of New Hampshire. This talk was given at the invitation of the faculty teaching that course. Petitioner had addressed the class upon such invitations in the two preceding years as well. He declined to answer the following questions:

> "What was the subject of your lecture?"
>
> "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?"

"Did you advocate Marxism at that time?"

"Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?"

"Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?"

Distinct from the categories of questions about the Progressive Party and the lectures was one question about petitioner's opinions. He was asked: "Do you believe in Communism?" He had already testified that he had never been a member of the Communist Party, but he refused to answer this or any other question concerning opinion or belief.

Petitioner adhered in this second proceeding to the same reasons for not answering he had given in his statement at the first hearing. He maintained that the questions were not pertinent to the matter under inquiry and that they infringed upon an area protected under the First Amendment.

Following the hearings, the Attorney General petitioned the Superior Court of Merrimack County, New Hampshire, setting forth the circumstances of petitioner's appearance before the Committee and his refusal to answer certain questions.[8] The petition prayed that the court propound the questions to the witness. After hearing argument, the court ruled that the questions set out above were pertinent.[9] Petitioner was called as a witness by the court and persisted in his refusal to answer for constitutional reasons. The court adjudged him in contempt

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[8] See note 5, *supra*.

[9] The court made a general ruling that questions concerning the opinions or beliefs of the witness were not pertinent. Nevertheless, it did propound to the witness the one question about his belief in Communism.

and ordered him committed to the county jail until purged of the contempt.

The New Hampshire Supreme Court affirmed. 100 N. H. 103, 121 A. 2d 783. Its opinion discusses only two classes of questions addressed to the witness: those dealing with the lectures and those about the Progressive Party and the Progressive Citizens of America. No mention is made of the single question concerning petitioner's belief in Communism. In view of what we hold to be the controlling issue of the case, however, it is unnecessary to resolve affirmatively that that particular question was or was not included in the decision by the State Supreme Court.

There is no doubt that legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals. It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community. Responsibility for the proper conduct of investigations rests, of course, upon the legislature itself. If that assembly chooses to authorize inquiries on its behalf by a legislatively created committee, that basic responsibility carries forward to include the duty of adequate supervision of the actions of the committee. This safeguard can be nullified when a committee is invested with a broad and ill-defined jurisdiction. The authorizing resolution thus becomes especially significant in that it reveals the amount of discretion that has been conferred upon the committee.

In this case, the investigation is governed by provisions in the New Hampshire Subversive Activities Act of

1951.[10] The Attorney General was instructed by the legislature to look into violations of that Act. In addition, he was given the far more sweeping mandate to find out if there were subversive persons, as defined in that Act, present in New Hampshire. That statute, therefore, measures the breadth and scope of the investigation before us.

"Subversive persons" are defined in many gradations of conduct. Our interest is in the minimal requirements of that definition since they will outline its reach. According to the statute, a person is a "subversive person" if he, by any means, aids in the commission of any act intended to assist in the alteration of the constitutional form of government by force or violence.[11] The possible remoteness from armed insurrection of conduct that could satisfy these criteria is obvious from the language. The statute goes well beyond those who are engaged in efforts designed to alter the form of government by force or violence. The statute declares, in effect, that the assistant of an assistant is caught up in the definition. This chain of conduct attains increased significance in light of the lack of a necessary element of guilty knowledge in either stage of assistants. The State Supreme Court has held that the definition encompasses persons engaged in the specified conduct ". . . whether or not done 'knowingly and willfully . . . .'" *Nelson* v. *Wyman,* 99 N. H. 33,

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[10] See note 1, *supra.*

[11] " 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization." N. H. Rev. Stat. Ann., 1955, c. 588, § 1.

39, 105 A. 2d 756, 763. The potential sweep of this definition extends to conduct which is only remotely related to actual subversion and which is done completely free of any conscious intent to be a part of such activity.

The statute's definition of "subversive organizations" is also broad. An association is said to be any group of persons, whether temporarily or permanently associated together, for joint action or advancement of views on any subject.[12] An organization is deemed subversive if it has a purpose to abet, advise or teach activities intended to assist in the alteration of the constitutional form of government by force or violence.

The situation before us is in many respects analogous to that in *Wieman* v. *Updegraff*, 344 U. S. 183. The Court held there that a loyalty oath prescribed by the State of Oklahoma for all its officers and employees violated the requirements of the Due Process Clause because it entailed sanctions for membership in subversive organizations without scienter. A State cannot, in attempting to bar disloyal individuals from its employ, exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they belonged. The Court said:

> "There can be no dispute about the consequences visited upon a person excluded from public employ-

[12] "For the purpose of this chapter 'organization' means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

" 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or of any political subdivision of either of them, by force, or violence." *Ibid.*

ment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.' Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." 344 U. S., at 190–191.

The sanction emanating from legislative investigations is of a different kind than loss of employment. But the stain of the stamp of disloyalty is just as deep. The inhibiting effect in the flow of democratic expression and controversy upon those directly affected and those touched more subtly is equally grave. Yet here, as in *Wieman*, the program for the rooting out of subversion is drawn without regard to the presence or absence of guilty knowledge in those affected.

The nature of the investigation which the Attorney General was authorized to conduct is revealed by this case. He delved minutely into the past conduct of petitioner, thereby making his private life a matter of public record. The questioning indicates that the investigators had thoroughly prepared for the interview and were not acquiring new information as much as corroborating data already in their possession. On the great majority of questions, the witness was cooperative, even though he made clear his opinion that the interrogation was unjustified and unconstitutional. Two subjects arose upon which petitioner refused to answer: his lectures at the University of New Hampshire, and his knowledge of the Progressive Party and its adherents.

The state courts upheld the attempt to investigate the academic subject on the ground that it might indicate whether petitioner was a "subversive person." What he taught the class at a state university was found relevant to the character of the teacher. The State Supreme Court carefully excluded the possibility that the inquiry was sustainable because of the state interest in the state university. There was no warrant in the authorizing resolution for that. 100 N. H., at 110, 121 A. 2d, at 789–790. The sole basis for the inquiry was to scrutinize the teacher as a person, and the inquiry must stand or fall on that basis.

The interrogation on the subject of the Progressive Party was deemed to come within the Attorney General's mandate because that party might have been shown to be a "subversive organization." The State Supreme Court held that the ". . . questions called for answers concerning the membership or participation of named persons in the Progressive Party which, if given, would aid the Attorney General in determining whether that party and its predecessor are or were subversive organizations." 100 N. H., at 112, 121 A. 2d, at 791.

The New Hampshire court concluded that the ". . . right to lecture and the right to associate with others for a common purpose, be it political or otherwise, are individual liberties guaranteed to every citizen by the State and Federal Constitutions but are not absolute rights. . . . The inquiries authorized by the Legislature in connection with this investigation concerning the contents of the lecture and the membership, purposes and activities of the Progressive Party undoubtedly interfered with the defendant's free exercise of those liberties." 100 N. H., at 113, 121 A. 2d, at 791–792.

The State Supreme Court thus conceded without extended discussion that petitioner's right to lecture and his right to associate with others were constitutionally

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protected freedoms which had been abridged through this investigation. These conclusions could not be seriously debated. Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political

ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Notwithstanding the undeniable importance of freedom in the areas, the Supreme Court of New Hampshire did not consider that the abridgment of petitioner's rights under the Constitution vitiated the investigation. In the view of that court, "the answer lies in a determination of whether the object of the legislative investigation under consideration is such as to justify the restriction thereby imposed upon the defendant's liberties." 100 N. H., at 113–114, 121 A. 2d, at 791–792. It found such justification in the legislature's judgment, expressed by its authorizing resolution, that there exists a potential menace from those who would overthrow the government by force and violence. That court concluded that the need for the legislature to be informed on so elemental a subject as the self-preservation of government outweighed the deprivation of constitutional rights that occurred in the process.

We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields. But we do not need to reach such fundamental questions of state power to decide this case. The State Supreme Court itself recognized that there was a weakness in its conclusion that the menace of forcible overthrow of the government justified sacrificing constitutional rights. There was a missing link in the chain of reasoning. The syllogism was not complete. There was nothing to connect the questioning of petitioner with this fundamental interest of the State. Petitioner had been

interrogated by a one-man legislative committee, not by the legislature itself. The relationship of the committee to the full assembly is vital, therefore, as revealing the relationship of the questioning to the state interest.

In light of this, the state court emphasized a factor in the authorizing resolution which confined the inquiries which the Attorney General might undertake to the object of the investigation. That limitation was thought to stem from the authorizing resolution's condition precedent to the institution of any inquiry. The New Hampshire legislature specified that the Attorney General should act only when he had information which ". . . in his judgment may be reasonable or reliable." The state court construed this to mean that the Attorney General must have something like probable cause for conducting a particular investigation. It is not likely that this device would prove an adequate safeguard against unwarranted inquiries. The legislature has specified that the determination of the necessity for inquiry shall be left in the judgment of the investigator. In this case, the record does not reveal what reasonable or reliable information led the Attorney General to question petitioner. The state court relied upon the Attorney General's description of prior information that had come into his possession.[13]

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[13] The State Supreme Court illustrated the "reasonable or reliable" information underlying the inquiries on the Progressive Party by quoting from a remark made by the Attorney General at the hearing in answer to petitioner's objection to a line of questions. The Attorney General had declared that he had ". . . considerable sworn testimony . . . to the effect that the Progressive Party in New Hampshire has been heavily infiltrated by members of the Communist Party and that the policies and purposes of the Progressive Party have been directly influenced by members of the Communist Party." 100 N. H., at 111, 121 A. 2d, at 790–791. None of this testimony is a part of the record in this case. Its existence and weight were not independently reviewed by the state courts.

The court did not point to anything that supported the question-

The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it cannot be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated.

Instead of making known the nature of the data it desired, the legislature has insulated itself from those witnesses whose rights may be vitally affected by the investigation. Incorporating by reference provisions from its subversive activities act, it has told the Attorney General, in effect to screen the citizenry of New Hampshire to bring to light anyone who fits into the expansive definitions.

Within the very broad area thus committed to the discretion of the Attorney General there may be many facts

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ing on the subject of the lecture. It stated that the Attorney General could inquire about lectures only if he ". . . possesses reasonable or reliable information indicating that the violent overthrow of existing government may have been advocated or taught, either 'knowingly and wilfully' or not." 100 N. H., at 110, 121 A. 2d, at 789–790. What, if anything, indicated that petitioner knowingly or innocently advocated or taught violent overthrow of existing government does not appear. At one point in the hearing, the Attorney General said to petitioner: "I have in the file here a statement from a person who attended your class, and I will read it in part because I don't want you to think I am just fishing. 'His talk this time was on the inevitability of the Socialist program. It was a glossed-over interpretation of the materialist dialectic.' " R. 107. The court did not cite this statement.

which the legislature might find useful. There would also be a great deal of data which that assembly would not want or need. In the classes of information that the legislature might deem it desirable to have, there will be some which it could not validly acquire because of the effect upon the constitutional rights of individual citizens. Separating the wheat from the chaff, from the standpoint of the legislature's object, is the legislature's responsibility because it alone can make that judgment. In this case, the New Hampshire legislature has delegated that task to the Attorney General.

As a result, neither we nor the state courts have any assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed when it initiated this inquiry. The judiciary are thus placed in an untenable position. Lacking even the elementary fact that the legislature wants certain questions answered and recognizing that petitioner's constitutional rights are in jeopardy, we are asked to approve or disapprove his incarceration for contempt.

In our view, the answer is clear. No one would deny that the infringement of constitutional rights of individuals would violate the guarantee of due process where no state interest underlies the state action. Thus, if the Attorney General's interrogation of petitioner were in fact wholly unrelated to the object of the legislature in authorizing the inquiry, the Due Process Clause would preclude the endangering of constitutional liberties. We believe that an equivalent situation is presented in this case. The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights,

was not in accordance with the due process requirements of the Fourteenth Amendment.

The conclusion that we have reached in this case is not grounded upon the doctrine of separation of powers. In the Federal Government, it is clear that the Constitution has conferred the powers of government upon three major branches: the Executive, the Legislative and the Judicial. No contention has been made by petitioner that the New Hampshire legislature, by this investigation, arrogated to itself executive or judicial powers. We accept the finding of the State Supreme Court that the employment of the Attorney General as the investigating committee does not alter the legislative nature of the proceedings. Moreover, this Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments. *Dreyer* v. *Illinois,* 187 U. S. 71; but cf. *Tenney* v. *Brandhove,* 341 U. S. 367, 378. Our conclusion does rest upon a separation of the power of a state legislature to conduct investigations from the responsibility to direct the use of that power insofar as that separation causes a deprivation of the constitutional rights of individuals and a denial of due process of law.

The judgment of the Supreme Court of New Hampshire is

Reversed.

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

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

For me this is a very different case from *Watkins* v. *United States, ante,* p. 178. This case comes to us solely through the limited power to review the action of the

States conferred upon the Court by the Fourteenth Amendment. Petitioner claims that respect for liberties guaranteed by the Due Process Clause of that Amendment precludes the State of New Hampshire from compelling him to answer certain questions put to him by the investigating arm of its legislature. Ours is the narrowly circumscribed but exceedingly difficult task of making the final judicial accommodation between the competing weighty claims that underlie all such questions of due process.

In assessing the claim of the State of New Hampshire to the information denied it by petitioner, we cannot concern ourselves with the fact that New Hampshire chose to make its Attorney General in effect a standing committee of its legislature for the purpose of investigating the extent of "subversive" activities within its bounds. The case must be judged as though the whole body of the legislature had demanded the information of petitioner. It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight States. As the earlier Mr. Justice Harlan said for a unanimous Court in *Dreyer* v. *Illinois,* 187 U. S. 71, 84:

> "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty."

Whether the state legislature should operate largely by committees, as does the Congress, or whether committees should be the exception, as is true of the House of Commons, whether the legislature should have two chambers or only one, as in Nebraska, whether the State's chief executive should have the pardoning power, whether the State's judicial branch must provide trial by jury, are all matters beyond the reviewing powers of this Court. Similarly, whether the Attorney General of New Hampshire acted within the scope of the authority given him by the state legislature is a matter for the decision of the courts of that State, as it is for the federal courts to determine whether an agency to which Congress has delegated power has acted within the confines of its mandate. See *United States* v. *Rumely,* 345 U. S. 41. Sanction of the delegation rests with the New Hampshire Supreme Court, and its validation in *Nelson* v. *Wyman,* 99 N. H. 33, 105 A. 2d 756, is binding here.

Pursuant to an investigation of subversive activities authorized by a joint resolution of both houses of the New Hampshire Legislature, the State Attorney General subpoenaed petitioner before him on January 8, 1954, for extensive questioning. Among the matters about which petitioner was questioned were: details of his career and personal life, whether he was then or ever had been a member of the Communist Party, whether he had ever attended its meetings, whether he had ever attended meetings that he knew were also attended by Party members, whether he knew any Communists in or out of the State, whether he knew named persons with alleged connections with organizations either on the United States Attorney General's list or cited by the Un-American Activities Committee of the United States House of Representatives or had ever attended meetings with them, whether he had ever taught or supported the

overthrow of the State by force or violence or had ever known or assisted any persons or groups that had done so, whether he had ever been connected with organizations on the Attorney General's list, whether he had supported or written in behalf of a variety of allegedly subversive, named causes, conferences, periodicals, petitions, and attempts to raise funds for the legal defense of certain persons, whether he knew about the Progressive Party, what positions he had held in it, whether he had been a candidate for Presidential Elector for that Party, whether certain persons were in that Party, whether Communists had influenced or been members of the Progressive Party, whether he had sponsored activities in behalf of the candidacy of Henry A. Wallace, whether he advocated replacing the capitalist system with another economic system, whether his conception of socialism involved force and violence, whether by his writings and actions he had ever attempted to advance the Soviet Union's "propaganda line," whether he had ever attended meetings of the Liberal Club at the University of New Hampshire, whether the magazine of which he was co-editor was "a Communist-line publication," and whether he knew named persons.

Petitioner answered most of these questions, making it very plain that he had never been a Communist, never taught violent overthrow of the Government, never knowingly associated with Communists in the State, but was a socialist believer in peaceful change who had at one time belonged to certain organizations on the list of the United States Attorney General (which did not include the Progressive Party) or cited by the House Un-American Activities Committee. He declined to answer as irrelevant or violative of free speech guarantees certain questions about the Progressive Party and whether he knew particular persons. He stated repeatedly, however, that

he had no knowledge of Communists or of Communist influence in the Progressive Party, and he testified that he had been a candidate for that Party, signing the required loyalty oath, and that he did not know whether an alleged Communist leader was active in the Progressive Party.

Despite the exhaustive scope of this inquiry, the Attorney General again subpoenaed petitioner to testify on June 3, 1954, and the interrogation was similarly sweeping. Petitioner again answered virtually all questions, including those concerning the relationship of named persons to the Communist Party or other causes deemed subversive under state laws, alleged Communist influence on all organizations with which he had been connected including the Progressive Party, and his own participation in organizations other than the Progressive Party and its antecedent, the Progressive Citizens of America. He refused, however, to answer certain questions regarding (1) a lecture given by him at the University of New Hampshire, (2) activities of himself and others in the Progressive political organizations, and (3) "opinions and beliefs," invoking the constitutional guarantees of free speech.

The Attorney General then petitioned the Superior Court to order petitioner to answer questions in these categories. The court ruled that petitioner had to answer those questions pertaining to the lectures and to the Progressive Party and its predecessor but not those otherwise pertaining to "opinions and beliefs." Upon petitioner's refusal to answer the questions sanctioned by the court, he was found in contempt of court and ordered committed to the county jail until purged of contempt.

The Supreme Court of New Hampshire affirmed the order of the Superior Court. It held that the questions at issue were relevant and that no constitutional provision permitted petitioner to frustrate the State's demands. 100 N. H. 103, 121 A. 2d 783.

The questions that petitioner refused to answer regarding the university lecture, the third given by him in three years at the invitation of the faculty for humanities, were:

> "What was the subject of your lecture?"
>
> "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?"
>
> "Did you advocate Marxism at that time?"
>
> "Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?"
>
> "Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?"
>
> "I have in the file here a statement from a person who attended your class, and I will read it in part because I don't want you to think I am just fishing. 'His talk this time was on the inevitability of the Socialist program. It was a glossed-over interpretation of the materialist dialectic.' Now, again I ask you the original question."

In response to the first question of this series, petitioner had said at the hearing:

> "I would like to say one thing in this connection, Mr. Wyman. I stated under oath at my last appearance that, and I now repeat it, that I do not advocate or in any way further the aim of overthrowing constitutional government by force and violence. I did not so advocate in the lecture I gave at the University of New Hampshire. In fact I have never at any time so advocated in a lecture anywhere. Aside from that I have nothing I want to say about the lecture in question."

The New Hampshire Supreme Court, although recognizing that such inquiries "undoubtedly interfered with

the defendant's free exercise" of his constitutionally guaranteed right to lecture, justified the interference on the ground that it would occur "in the limited area in which the legislative committee may reasonably believe that the overthrow of existing government by force and violence is being or has been taught, advocated or planned, an area in which the interest of the State justifies this intrusion upon civil liberties." 100 N. H., at 113, 114, 121 A. 2d, at 792. According to the court, the facts that made reasonable the Committee's belief that petitioner had taught violent overthrow in his lecture were that he was a Socialist with a record of affiliation with groups cited by the Attorney General of the United States or the House Un-American Activities Committee and that he was co-editor of an article stating that, although the authors hated violence, it was less to be deplored when used by the Soviet Union than by capitalist countries.

When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. Particularly is this so where the witness has sworn that neither in the lecture nor at any other time did he ever advocate overthrowing the Government by force and violence.

Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic per-

plexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. One need only refer to the address of T. H. Huxley at the opening of Johns Hopkins University, the Annual Reports of President A. Lawrence Lowell of Harvard, the Reports of the University Grants Committee in Great Britain, as illustrative items in a vast body of literature. Suffice it to quote the latest expression on this subject. It is also perhaps the most poignant because its plea on behalf of continuing the free spirit of the open universities of South Africa has gone unheeded.

> "In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—'to follow the argument where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repug-

> nant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.
>
> . . . . . .
>
> "Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.
>
> . . . . . .
>
> ". . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." The Open Universities in South Africa 10–12. (A statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities.[1])

I do not suggest that what New Hampshire has here sanctioned bears any resemblance to the policy against which this South African remonstrance was directed. I do say that in these matters of the spirit inroads on legitimacy must be resisted at their incipiency. This kind of evil grows by what it is allowed to feed on. The

[1] The Hon. A. v. d. S. Centlivres only recently retired as Chief Justice of South Africa, and the Hon. Richard Feetham is also an eminent, retired South African judge.

admonition of this Court in another context is applicable here. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635.

Petitioner stated, in response to questions at the hearing, that he did not know of any Communist interest in, connection with, influence over, activity in, or manipulation of the Progressive Party. He refused to answer, despite court order, the following questions on the ground that, by inquiring into the activities of a lawful political organization, they infringed upon the inviolability of the right to privacy in his political thoughts, actions and associations:

> "Was she, Nancy Sweezy, your wife, active in the formation of the Progressive Citizens of America?"
>
> "Was Nancy Sweezy then working with individuals who were then members of the Communist Party?" [2]
>
> "Was Charles Beebe active in forming the Progressive Citizens of America?"
>
> "Did he work with your present wife—Did Charles Beebe work with your present wife in 1947?"
>
> "Did it [a meeting at the home of one Abraham Walenko] have anything to do with the Progressive Party?"

[2] Inclusion of this question among the unanswered questions appears to have been an oversight in view of the fact that petitioner attempted to answer it at the hearing by stating that he had never to his knowledge known members of the Communist Party in New Hampshire. In any event, petitioner's brief states that he is willing to repeat the answer to this question if the Attorney General so desires. This is consistent with his demonstrated willingness to answer all inquiries regarding the Communist Party, including its relation to the Progressive Party.

The Supreme Court of New Hampshire justified this intrusion upon his freedom on the same basis that it upheld questioning about the university lecture, namely, that the restriction was limited to situations where the Committee had reason to believe that violent overthrow of the Government was being advocated or planned. It ruled:

> ". . . That he [the Attorney General] did possess information which was sufficient to reasonably warrant inquiry concerning the Progressive Party is evident from his statement made during the hearings held before him that 'considerable sworn testimony has been given in this investigation to the effect that the Progressive Party in New Hampshire has been heavily infiltrated by members of the Communist Party and that the policies and purposes of the Progressive Party have been directly influenced by members of the Communist Party.' " 100 N. H., at 111, 121 A. 2d, at 790.

For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling. Inquiry pursued in safeguarding a State's security against threatened force and violence cannot be shut off by mere disclaimer, though of course a relevant claim may be made to the privilege against self-incrimination. (The New Hampshire Constitution guarantees this privilege.) But the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these.

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In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority. It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties either in a state or national election. Until recently, no difference would have been entertained in regard to inquiries about a voter's affiliations with one of the various so-called third parties that have had their day, or longer, in our political history. This is so, even though adequate protection of secrecy by way of the Australian ballot did not come into use till 1888. The implications of the United States Constitution for national elections and "the concept of ordered liberty" implicit in the Due Process Clause of the Fourteenth Amendment as against the States, *Palko* v. *Connecticut,* 302 U. S. 319, 325, were not frozen as of 1789 or 1868, respectively. While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning. See *Hurtado* v. *California,* 110 U. S. 516, 528–529; *McCulloch* v. *Maryland,* 4 Wheat. 316. Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party. A foundation in fact and reason would have to be established far weightier than the intimations that appear in the record to warrant such a view of the Progressive Party.[3] This precludes the questioning that petitioner resisted in regard to that Party.

To be sure, this is a conclusion based on a judicial judgment in balancing two contending principles—the right

[3] The Progressive Party was on the ballot in forty-four States, including New Hampshire, in 1948, and in twenty-six States in 1952.

of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection. And striking the balance implies the exercise of judgment. This is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause, and it is a task ultimately committed to this Court. It must not be an exercise of whim or will. It must be an overriding judgment founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed. Such a judgment must be arrived at in a spirit of humility when it counters the judgment of the State's highest court. But, in the end, judgment cannot be escaped—the judgment of this Court. See concurring opinions in *Haley* v. *Ohio,* 332 U. S. 596, 601; *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 466, 470–471; *Malinski* v. *New York,* 324 U. S. 401, 412, 414–417.

And so I am compelled to conclude that the judgment of the New Hampshire court must be reversed.

MR. JUSTICE CLARK, with whom MR. JUSTICE BURTON joins, dissenting.

The Court today has denied the State of New Hampshire the right to investigate the extent of "subversive activities" within its boundaries in the manner chosen by its legislature. Unfortunately there is no opinion for the Court, for those who reverse are divided and they do so on entirely different grounds. Four of my Brothers join in what I shall call the principal opinion. They hold that the appointment of the Attorney General to act as a committee for the legislature results in a separation of its power to investigate from its "responsibility to direct the use of that power" and thereby "causes a deprivation

of the constitutional rights of individuals and a denial of due process . . . ." This theory was not raised by the parties and is, indeed, a novel one.

My Brothers FRANKFURTER and HARLAN do not agree with this opinion because they conclude, as do I, that the internal affairs of the New Hampshire State Government are of no concern to us. See *Dreyer* v. *Illinois,* 187 U. S. 71, 84 (1902). They do join in the reversal, however, on the ground that Sweezy's rights under the First Amendment have been violated. I agree with neither opinion.

The principal opinion finds that "The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked." The New Hampshire Act clearly indicates that it was the legislature that determined the general subject matter of the investigation, subversive activities; the legislature's committee, the Attorney General, properly decided what witnesses should be called and what questions should be asked. My Brothers surely would not have the legislature as a whole make these decisions. But they conclude, nevertheless, that it cannot be said that the legislature "asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated." It follows, says this opinion, that there is no "assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed . . . ." But New Hampshire's Supreme Court has construed the state statute. It has declared the purpose to be to investigate "subversive" activities within the State; it has approved the use of the "one-man" technique; it has said the questions were all relevant to the legislative purpose. In effect the state court says the Attorney General was "directed" to inquire as he did.

Furthermore, the legislature renewed the Act in the same language twice in the year following Sweezy's interrogation. N. H. Laws 1955, c. 197. In ratifying the Attorney General's action it used these words: "The investigation . . . provided for by chapter 307 of the Laws of 1953, as continued by a resolution approved January 13, 1955, is hereby continued in full force and effect, in form, *manner* and authority as therein provided . . . ." (Emphasis added.) We are bound by the state court findings. We have no right to strike down the state action unless we find not only that there has been a deprivation of Sweezy's constitutional rights, but that the interest in protecting those rights is greater than the State's interest in uncovering subversive activities within its confines. The majority has made no such findings.

The short of it is that the Court blocks New Hampshire's effort to enforce its law. I had thought that in *Pennsylvania* v. *Nelson,* 350 U. S. 497 (1956), we had left open for legitimate state control any subversive activity leveled against the interest of the State. I for one intended to suspend state action only in the field of subversion against the Nation and thus avoid a race to the courthouse door between federal and state prosecutors. Cases concerning subversive activities against the National Government have such interstate ramifications that individual state action might effectively destroy a prosecution on the national level. I thought we had left open a wide field for state action, but implicit in the opinions today is a contrary conclusion. They destroy the fact-finding power of the State in this field and I dissent from this wide sweep of their coverage.

The principal opinion discusses, by way of dictum, due process under the Fourteenth Amendment. Since the basis of the opinion is not placed on this ground, I would not think it necessary to raise it here. However, my Brothers say that the definition of "subversive person"

lacks "a necessary element of guilty knowledge . . . ." *Wieman* v. *Updegraff,* 344 U. S. 183 (1952), is heavily depended upon as authority for the view expressed. I do not so regard it. I authored that opinion. It was a loyalty oath case in which Oklahoma had declared *ipso facto* disqualified any employee of the State who failed to take a prescribed oath that, *inter alia,* he belonged to no subversive organizations. We struck down the Act for lack of a requirement of *scienter.* We said there that "constitutional protection . . . extend[s] to the public servant whose *exclusion pursuant to a statute* is patently arbitrary or discriminatory." *Id.,* at 192. But Sweezy is not charged as a "subversive person" and the Committee has made no finding that he is. In fact, had he been found to be such a person, there is no sanction under the Act. New Hampshire is invoking no statute like Oklahoma's. Its Act excludes no one from anything. *Updegraff* stands for no such broad abstraction as the principal opinion suggests.

Since the conclusion of a majority of those reversing is not predicated on the First Amendment questions presented, I see no necessity for discussing them. But since the principal opinion devotes itself largely to these issues I believe it fair to ask why they have been given such an elaborate treatment when the case is decided on an entirely different ground. It is of no avail to quarrel with a straw man. My view on First Amendment problems in this type of case is expressed in my dissent in *Watkins,* decided today, *ante,* p. 217. Since a majority of the Court has not passed on these problems here, and since I am not convinced that the State's interest in investigating subversive activities for the protection of its citizens is outweighed by any necessity for the protection of Sweezy I would affirm the judgment of the New Hampshire Supreme Court.

UNITED STATES *v.* KORPAN.

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

No. 596. Argued April 25, 1957.—Decided June 17, 1957.

1. A coin-operated gambling machine of the "pin-ball" type, the operation of which involves the element of chance, as a result of which the player may become entitled to money, is a "so-called 'slot' machine" within the meaning of 26 U. S. C. (Supp. IV) § 4462 (a) (2), and is, therefore, subject to the tax of $250 per annum imposed by 26 U. S. C. (Supp. IV) § 4461. Pp. 271–277.

2. Section 4462 (a) (2), as here construed, is not unconstitutionally vague. P. 273, n. 2.

237 F. 2d 676, reversed.

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack.*

Robert A. Sprecher argued the cause for respondent. With him on the brief were *Simon Herr* and *Frank A. Karaba.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The respondent, Walter Korpan, was indicted in a Federal District Court in Illinois for willfully failing to pay the $250 per device tax imposed by 26 U. S. C. (Supp. IV) § 4461 on any person who maintains for use any gaming device. For purposes of this tax, 26 U. S. C. (Supp. IV) § 4462 (a) defines gaming devices as:

> "so-called 'slot' machines which operate by means of insertion of a coin . . . and which, by application

> of the element of chance, may deliver, or entitle the person playing . . . the machine to receive cash, premiums, merchandise, or tokens." [1]

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[1] In full the pertinent statutory provisions read as follows:

"§ 4461. Imposition of Tax.

"There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:

"(1) $10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);

"(2) $250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and

"(3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device.

"§ 4462. Definition of Coin-Operated Amusement or Gaming Device.

"(a) In general.

"As used in sections 4461 to 4463, inclusive, the term 'coin-operated amusement or gaming device' means—

"(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

"(2) so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

"(b) Exclusion.

"The term 'coin-operated amusement or gaming device' does not include bona fide vending machines in which are not incorporated gaming or amusement features.

"(c) 1-cent vending machine.

"For purposes of sections 4461 to 4463, inclusive, a vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens, shall be classified under paragraph (1) and not under paragraph (2) of subsection (a)."

The evidence at the trial showed that Korpan maintained on his premises a number of coin-operated gambling machines. These machines were played by inserting a coin into the machine through a slot. The player was then able to shoot several balls onto a playing surface which was interspersed with pockets or holes. If he succeeded in getting balls into certain holes he received a varying number of free games. He had the option of either playing the free games or of cashing them in at a designated rate. By inserting extra coins the player could sometimes secure additional balls or increased "odds" (in other words, increase the number of free games he could win). The machines were equipped with electrical devices which over a period of time controlled the number of free games won.

The district judge found respondent guilty as charged and fined him $750. The Court of Appeals for the Seventh Circuit reversed, holding that respondent's machines did not come within the definition laid down by § 4462 (a)(2). 237 F. 2d 676. On the Government's petition we granted certiorari because the case raised important questions in the administration of the revenue laws. 352 U. S. 980. The issue before us is whether the machines maintained by petitioner were included within the definition given by § 4462 (a)(2).[2] For the reasons stated hereafter we believe that they were within that definition and that the judgment of the Court of Appeals setting aside Korpan's conviction on the ground that they were not must be reversed.

It is clear that respondent's machines were operated by the insertion of a coin and that persons playing them could receive cash for any free games won. The machines also involved an element of chance suffi-

[2] Respondent contends that § 4462 (a)(2) as interpreted by the District Court is unconstitutionally vague. This contention is without merit.

cient to meet the requirements of § 4462 (a)(2), although skill may have had some part in playing them successfully. In short, they were "slot-machine" gambling devices.

Respondent argues, however, that when Congress used the phrase "so-called 'slot' machines" in § 4462 (a)(2) it intended to restrict the scope of that section to those "slot machines" gambling devices colloquially known as "one-armed bandits." He describes the latter as machines in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit, and which automatically dispense coins to a player when certain combinations of these insignia are aligned. The Government, on the other hand, takes the position that Congress intended to cover all "slot machines" which come within the specific requirements of § 4462 (a)(2). It argues that the qualifying phrase "so-called" was added because (1) the draftsmen were apprehensive that the term "slot-machine" might be a slang expression not accepted as proper English or (2) they wanted to cover every gambling device operated by the insertion of coins through a slot even though the device might go under a label other than "slot machine."

On its face the language of § 4462 (a)(2) and related sections does not manifest an intent to limit the application of the otherwise broad terms of § 4462 (a)(2) to any particular kind of "slot-machine" gambling device. The phrase "so-called 'slot' machine" is, if anything, more consistent with the position advanced by the Government than that taken by Korpan. And the remainder of § 4462 (a)(2), as well as § 4462 (c), has language which affirmatively suggests that § 4462 (a)(2) was designed to include all sorts of coin-operated gambling devices regard-

less of their particular structure or the method by which they paid off players.

This interpretation is supported by the relevant legislative history. Apart from the amount of tax imposed, § 4462 (a)(2) is substantially the same as its original predecessor, § 3267 of the Internal Revenue Code of 1939, as amended, 55 Stat. 722. Senator Clark, the sponsor of the amendment which became § 3267, declared during the Senate debates on his amendment that his objective was to impose a heavy tax on "any machine which returns any sort of a premium, and that was the intention of the amendment, and it was the intention of the committee in adopting it." [3] The Senate report which accompanied Clark's amendment stated:

> "The House bill places a special tax of $25 per year upon each coin-operated amusement or gaming device maintained for use on any premises.
>
> "*Your committee divides these devices into two categories.* Upon so-called pinball or other *amusement* devices operated by the insertion of a coin or token, the tax is reduced to $10 per year. Upon so-called slot machines, however, the tax is placed at $200 per year." [4] (Emphasis added.)

Respondent contends that this report as well as similar language in other parts of the legislative history is indicative of an intent on the part of Congress to draw a distinction between "one-armed bandits" and other coin-operated gambling or amusement machines.[5] We interpret this history, however, as demonstrating a con-

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[3] 87 Cong. Rec. 7301.

[4] S. Rep. No. 673, 77th Cong., 1st Sess. 21.

[5] For the legislative history of what became § 3267 see: H. R. Rep. No. 1040, 77th Cong., 1st Sess. 60; H. R. Rep. No. 1203, 77th Cong., 1st Sess. 18; S. Rep. No. 673, 77th Cong., 1st Sess. 21; 87 Cong. Rec. 6476, 7297–7307.

gressional purpose to place a heavy tax on all "slot-machine" gambling devices, regardless of their particular structure, and a substantially smaller tax on machines played purely for amusement which offered the player no expectation of receiving "cash, premiums, merchandise, or tokens."

The administrative interpretation of § 4462 (a)(2) and its predecessors adds additional strength to this view. In 1942 the Treasury Department published interpretative regulations which included so-called "pin-ball" gambling machines under § 4462 (a)(2).[6] This administrative ruling was publicized in the trade paper of the coin-operated machine industry. In both 1942 and 1954 the representatives of that industry complained to Congress about the Treasury's interpretation, which is still in effect, and asked that § 4462 (a)(2) be amended so that it expressly excluded "pin-ball" gambling machines.[7] In each instance Congress left the existing provisions of § 4462 (a)(2) standing, although, at the request of others in the industry, it did provide an exception for certain penny-operated gambling machines.[8]

If the respondent's position were adopted § 4462 (a)(2) would be restricted to a peculiar type of gambling device—the so-called "one-armed bandit"—even though ingenuity, a desire to avoid taxes, and technological

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[6] 59 Treas. Reg. § 323.22, as amended by T. D. 5203, 7 Fed. Reg. 10835, Dec. 22, 1942.

[7] See Hearings before the House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess. 2055–2061, 2682–2688; Hearings before the Senate Committee on Finance on H. R. 7378, 77th Cong., 2d Sess. 1132–1141; Hearings before House Committee on Ways and Means on General Revision of the Internal Revenue Code, 83d Cong., 1st Sess. 2505–2522; Hearings before Senate Committee on Finance on H. R. 8300, 83d Cong., 2d Sess. 1874–1879.

[8] 56 Stat. 978–979.

progress provide a multitude of new devices which permit substantially the same kind of gambling but only with a different kind of coin-operated machine. We are convinced that Congress had no such purpose and meant only to distinguish between "slot-machines" operated as gambling devices and "slot-machines" which were used exclusively for amusement.

Reversed.

MR. JUSTICE DOUGLAS dissents from the conclusion that here pin ball machines are games of chance within the meaning of the statute.

THEARD *v.* UNITED STATES.

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

No. 68. Argued December 13, 1956.—Decided June 17, 1957.

In a proceeding instituted in 1950, a lawyer was disbarred by a State Supreme Court in 1954 for forging a promissory note in 1935, when he concededly was suffering from a degree of insanity which resulted in his confinement in an insane asylum for several years thereafter. After release from the asylum, he had practiced law for six years without any charge of misconduct being brought against him. Solely because of his disbarment by the State Court, petitioner subsequently was disbarred by a Federal District Court under a Rule providing for such action "Whenever . . . any member of its bar has been disbarred . . . from practice . . . in any other court." *Held:* The District Court erred in considering itself conclusively bound by the state-court disbarment, and the case is remanded to the District Court for disposition on the merits under its Rules, in accordance with the standards defined in *Selling* v. *Radford*, 243 U. S. 46, and in this Court's opinion in this case. Pp. 279–283.

(a) While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. P. 281.

(b) Ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred; and an order of disbarment by a state court is not conclusively binding on federal courts. P. 282.

(c) The "principles of right and justice" do not require a federal court to enforce automatic disbarment of a lawyer 18 years after he had uttered a forgery when concededly he was suffering from some form of insanity. P. 282.

228 F. 2d 617, reversed and remanded.

Delvaille H. Theard argued the cause and filed a brief *pro se.*

Edward H. Hickey argued the cause for the United States. With him on the brief were *Solicitor General*

Rankin, Assistant Attorney General Doub and *Paul A. Sweeney.*

James G. Schillin filed a brief for the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association supporting the United States.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Because of petitioner's disbarment by the Supreme Court of Louisiana, the United States District Court for the Eastern District of Louisiana struck him from its roll of attorneys, and the Court of Appeals for the Fifth Circuit affirmed the order. 228 F. 2d 617. The case raises an important question regarding disbarment by a federal court on the basis of disbarment by a state court and so we granted certiorari. 351 U. S. 961.

A proceeding for disbarment of a lawyer is always painful. The circumstances of this case make it puzzling as well as painful. The facts are few and clear. It is undisputed that petitioner, in 1935, forged a promissory note and collected its proceeds. Criminal prosecution and action for disbarment were duly initiated but both were aborted because the petitioner was "suffering under an exceedingly abnormal mental condition, some degree of insanity" at the time of this behavior, to such a degree that he was committed to an insane asylum and was under a decree of interdiction until 1948. Years after, criminal prosecution was unsuccessfully revived, *State* v. *Theard,* 212 La. 1022, 34 So. 2d 248. The disbarment proceedings, which led to the order in the federal court now under review, got under way in 1950 and the Supreme Court of Louisiana, acting on the findings of a committee of the Louisiana State Bar Association, overruled exceptions to the petition for disbarment. In so doing, the court met the plea of insanity against the claim

of misconduct with the statement that it did not "view the mental deficiency of a lawyer at the time of his misconduct to be a valid defense to his disbarment." *Louisiana State Bar Association* v. *Theard,* 222 La. 328, 334, 62 So. 2d 501, 503. The next year, "after issue had been joined," the Supreme Court of Louisiana appointed a Commissioner to take evidence and to report to that court his findings of fact and conclusions of law. The Commissioner did so and reported to the Supreme Court this fact that we deem vital to the issue before us: "It must then, from the record, be held that the respondent was suffering under an exceedingly abnormal mental condition, some degree of insanity." 225 La. 98, 104, 105, 72 So. 2d 310, 312. The Commissioner deemed himself, however, bound by "the law of the case" as announced by the Supreme Court in 222 La. 328, 334, 62 So. 2d 501, 503, *supra,* according to which it was immaterial to disbarment that the petitioner "was probably suffering from amnesia and other mental deficiencies at the time of his misdeeds." *Ibid.* The Supreme Court of Louisiana in its second decision approved the Commissioner's view about "the law of the case," and added that, were the doctrine otherwise, it would not change its previous ruling. 225 La. 98, 108, 72 So. 2d 310, 313.

The state proceedings thus establish that petitioner was disbarred in 1954 for an action in 1935, although at the time of the fateful conduct he was concededly in a condition of mental irresponsibility so pronounced that for years he was in an insane asylum under judicial restraint. The proceedings also establish that as an active practitioner for six years preceding disbarment, after recovering his capacity, including the argument of thirty-six cases before the Louisiana Supreme Court and the Court of Appeals for the Parish of Orleans, no charge of misconduct or impropriety was brought against him.

It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in *Konigsberg* v. *California,* 353 U. S. 252, and *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. " 'Membership in the bar is a privilege burdened with conditions' (*Matter of Rouss,* [221 N. Y. 81, 84, 116 N. E. 782, 783]). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465, 470–471, 162 N. E. 487, 489. The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in "good standing" so to do.

The rules of the various federal courts, more particularly the District Court which disbarred this petitioner, have provisions substantially like the present Rule 8 of this Court dealing with disbarment. "Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of con-

duct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred." Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. If the accusation rests on disbarment by a state court, such determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts. The recognition that must be accorded such a state judgment and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling* v. *Radford,* 243 U. S. 46. The short of it is that disbarment by federal courts does not automatically flow from disbarment by state courts. Of the conditions that qualify such a state court judgment, the one here relevant is that some "grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do." *Id.,* at 51.

We do not think that "the principles of right and justice" require a federal court to enforce disbarment of a man eighteen years after he had uttered a forgery when concededly he "was suffering under an exceedingly abnormal mental condition, some degree of insanity." Neither considerations relating to "the law of the case," cf. *Messenger* v. *Anderson,* 225 U. S. 436, 444, nor the temptation to get bogged down in the quagmire of controversy about the M'Naghten rule, require automatic acceptance by a federal court of the state disbarment in the circumstances of this case. The District Court apparently felt itself

so bound. This we deem error. The case must therefore be remanded to that court for disposition of the motion for disbarment under that court's Rule 1 (f) of its General Rules, in accordance with the standards defined in *Selling* v. *Radford, supra,* and this opinion.

It is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE BLACK concur in the result.

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

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695, A. F. L., ET AL. *v.* VOGT, INC.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 79. Argued February 26, 1957.—Decided June 17, 1957.

Respondent owns and operates a gravel pit in Wisconsin, where it employs 15 to 20 men. Petitioner unions sought unsuccessfully to induce some of respondent's employees to join the unions and began picketing the entrance to respondent's gravel pit with signs reading, "The men on this job are not 100% affiliated with the A. F. L." As a result, drivers of several trucking companies refused to deliver and haul goods to and from respondent's plant, causing substantial damage to respondent. On respondent's application, a State Court enjoined the picketing. The injunction was sustained by the State Supreme Court on findings by it that (1) the picketing had been engaged in for the purpose of coercing respondent to force its employees to become members of petitioner unions, and (2) such picketing was for "an unlawful purpose," since Wis. Stat. § 111.06 (2) (b) made it an unfair labor practice for an employee individually or in concert with others to "coerce, intimidate or induce an employer to interfere with any of his employes in the enjoyment of their legal rights . . . or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative." *Held:* The judgment is affirmed. Pp. 285–295.

(a) Prior decisions of this Court have established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, may constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy. Pp. 287–293.

(b) Consistently with the Fourteenth Amendment, a State may enjoin peaceful picketing the purpose of which is to coerce an employer to put pressure on his employees to join a union in violation of the declared policy of the State. *Pappas* v. *Stacey*, 151 Me. 36, 116 A. 2d 497, appeal dismissed, 350 U. S. 870. Pp. 293–295.

270 Wis. 321a, 74 N. W. 2d 749, affirmed.

David Previant argued the cause and filed a brief for petitioners.

Leon B. Lamfrom argued the cause for respondent. With him on the brief was *Jacob L. Bernheim.*

J. Albert Woll and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is one more in the long series of cases in which this Court has been required to consider the limits imposed by the Fourteenth Amendment on the power of a State to enjoin picketing. The case was heard below on the pleadings and affidavits, the parties stipulating that the record contained "all of the facts and evidence that would be adduced upon a trial on the merits . . . ." Respondent owns and operates a gravel pit in Oconomowoc, Wisconsin, where it employs 15 to 20 men. Petitioner unions sought unsuccessfully to induce some of respondent's employees to join the unions and commenced to picket the entrance to respondent's place of business with signs reading, "The men on this job are not 100% affiliated with the A. F. L." "In consequence," drivers of several trucking companies refused to deliver and haul goods to and from respondent's plant, causing substantial damage to respondent. Respondent thereupon sought an injunction to restrain the picketing.

The trial court did not make the finding, requested by respondent, "That the picketing of plaintiff's premises has been engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel, or induce its employees to become members of defendant labor organizations, and for the purpose of injuring the plaintiff in its

business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization." It nevertheless held that by virtue of Wis. Stat. § 103.535, prohibiting picketing in the absence of a "labor dispute," the petitioners must be enjoined from maintaining any pickets near respondent's place of business, from displaying at any place near respondent's place of business signs indicating that there was a labor dispute between respondent and its employees or between respondent and any of the petitioners, and from inducing others to decline to transport goods to and from respondent's business establishment.

On appeal, the Wisconsin Supreme Court at first reversed, relying largely on *A. F. of L.* v. *Swing*, 312 U. S. 321, to hold § 103.535 unconstitutional, on the ground that picketing could not constitutionally be enjoined merely because of the absence of a "labor dispute." 270 Wis. 315, 71 N. W. 2d 359.

Upon reargument, however, the court withdrew its original opinion. Although the trial court had refused to make the finding requested by respondent, the Supreme Court, noting that the facts as to which the request was made were undisputed, drew the inference from the undisputed facts and itself made the finding. It canvassed the whole circumstances surrounding the picketing and held that "One would be credulous, indeed, to believe under the circumstances that the union had no thought of coercing the employer to interfere with its employees in their right to join or refuse to join the defendant union." Such picketing, the court held, was for "an unlawful purpose," since Wis. Stat. § 111.06 (2)(b) made it an unfair labor practice for an employee individually or in concert with others to "coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights . . . or to engage in any practice with regard to his employes which would

constitute an unfair labor practice if undertaken by him on his own initiative." Relying on *Building Service Employees* v. *Gazzam,* 339 U. S. 532, and *Pappas* v. *Stacey,* 151 Me. 36, 116 A. 2d 497, the Wisconsin Supreme Court therefore affirmed the granting of the injunction on this different ground. 270 Wis. 321a, 74 N. W. 2d 749.

We are asked to reverse the judgment of the Wisconsin Supreme Court, which to a large extent rested its decision on that of the Supreme Judicial Court of Maine in *Pappas* v. *Stacey, supra.* When an appeal from that decision was filed here, this Court granted appellee's motion to dismiss for lack of a substantial federal question. 350 U. S. 870. Since the present case presents a similar question, we might well have denied certiorari on the strength of our decision in that case. In view of the recurrence of the question, we thought it advisable to grant certiorari, 352 U. S. 817, and to restate the principles governing this type of case.

It is inherent in the concept embodied in the Due Process Clause that its scope be determined by a "gradual process of judicial inclusion and exclusion," *Davidson* v. *New Orleans,* 96 U. S. 97, 104. Inevitably, therefore, the doctrine of a particular case "is not allowed to end with its enunciation and . . . an expression in an opinion yields later to the impact of facts unforeseen." *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 619 (Brandeis, J., dissenting). It is not too surprising that the response of States—legislative and judicial—to use of the injunction in labor controversies should have given rise to a series of adjudications in this Court relating to the limitations on state action contained in the provisions of the Due Process Clause of the Fourteenth Amendment. It is also not too surprising that examination of these adjudications should disclose an evolving, not a static, course of decision.

The series begins with *Truax* v. *Corrigan,* 257 U. S. 312, in which a closely divided Court found it to be viola-

tive of the Equal Protection Clause—not of the Due Process Clause—for a State to deny use of the injunction in the special class of cases arising out of labor conflicts. The considerations that underlay that case soon had to yield, through legislation and later through litigation, to the persuasiveness of undermining facts. Thus, to remedy the abusive use of the injunction in the federal courts (see Frankfurter and Greene, The Labor Injunction), the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101, withdrew, subject to qualifications, jurisdiction from the federal courts to issue injunctions in labor disputes to prohibit certain acts. Its example was widely followed by state enactments.

Apart from remedying the abuses of the injunction in this general type of litigation, legislatures and courts began to find in one of the aims of picketing an aspect of communication. This view came to the fore in *Senn* v. *Tile Layers Union,* 301 U. S. 468, where the Court held that the Fourteenth Amendment did not prohibit Wisconsin from authorizing peaceful stranger picketing by a union that was attempting to unionize a shop and to induce an employer to refrain from working in his business as a laborer.

Although the Court had been closely divided in the *Senn* case, three years later, in passing on a restrictive instead of a permissive state statute, the Court made sweeping pronouncements about the right to picket in holding unconstitutional a statute that had been applied to ban all picketing, with "no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute." *Thornhill* v. *Alabama,* 310 U. S. 88, 99. As the statute dealt at large with all picketing, so the Court broadly

assimilated peaceful picketing in general to freedom of speech, and as such protected against abridgment by the Fourteenth Amendment.

These principles were applied by the Court in *A. F. of L.* v. *Swing,* 312 U. S. 321, to hold unconstitutional an injunction against peaceful picketing, based on a State's common-law policy against picketing when there was no immediate dispute between employer and employee. On the same day, however, the Court upheld a generalized injunction against picketing where there had been violence because "it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 294.

Soon, however, the Court came to realize that the broad pronouncements, but not the specific holding, of *Thornhill* had to yield "to the impact of facts unforeseen," or at least not sufficiently appreciated. Cf. *People* v. *Schweinler Press,* 214 N. Y. 395, 108 N. E. 639, 28 Harv. L. Rev. 790. Cases reached the Court in which a State had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though "peaceful," involved more than just communication of ideas and could not be immune from all state regulation. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 776 (concurring opinion); see *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722, 725–728.

These latter two cases required the Court to review a choice made by two States between the competing interests of unions, employers, their employees, and the

public at large. In the *Ritter's Cafe* case, Texas had enjoined as a violation of its antitrust law picketing of a restaurant by unions to bring pressure on its owner with respect to the use of nonunion labor by a contractor of the restaurant owner in the construction of a building having nothing to do with the restaurant. The Court held that Texas could, consistent with the Fourteenth Amendment, insulate from the dispute a neutral establishment that industrially had no connection with it. This type of picketing certainly involved little, if any, "communication."

In *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, in a very narrowly restricted decision, the Court held that because of the impossibility of otherwise publicizing a legitimate grievance and because of the slight effect on "strangers" to the dispute, a State could not constitutionally prohibit a union from picketing bakeries in its efforts to have independent peddlers, buying from bakers and selling to small stores, conform to certain union requests. Although the Court in *Ritter's Cafe* and *Wohl* did not question the holding of *Thornhill,* the strong reliance on the particular facts in each case demonstrated a growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than "publicity" and competing interests of state policy. (See also *Cafeteria Union* v. *Angelos,* 320 U. S. 293, where the Court reviewed a New York injunction against picketing by a union of a restaurant that was run by the owners without employees. The New York court appeared to have justified an injunction on the alternate grounds that there was no "labor dispute" under the New York statute or that use of untruthful placards justified the injunction. We held, in a brief opinion, that the abuses alleged

did not justify an injunction against all picketing and that *A. F. of L.* v. *Swing* governed the alternate ground for decision.)

The implied reassessments of the broad language of the *Thornhill* case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation. The decisive reconsideration came in *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490. A union, seeking to organize peddlers, picketed a wholesale dealer to induce it to refrain from selling to nonunion peddlers. The state courts, finding that such an agreement would constitute a conspiracy in restraint of trade in violation of the state antitrust laws, enjoined the picketing. This Court affirmed unanimously.

> "It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgment of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. . . . But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities . . . constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony." *Id.*, at 497–498.

The Court therefore concluded that it was "clear that appellants were doing more than exercising a right of free speech or press. . . . They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade." *Id.*, at 503.

The following Term, the Court decided a group of cases applying and elaborating on the theory of *Giboney*. In *Hughes* v. *Superior Court,* 339 U. S. 460, the Court held that the Fourteenth Amendment did not bar use of the injunction to prohibit picketing of a place of business solely to secure compliance with a demand that its employees be hired in percentage to the racial origin of its customers. "We cannot construe the Due Process Clause as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy." *Id.*, at 466. The Court also found it immaterial that the state policy had been expressed by the judiciary rather than by the legislature.

On the same day, the Court decided *Teamsters Union* v. *Hanke,* 339 U. S. 470, holding that a State was not restrained by the Fourteenth Amendment from enjoining picketing of a business, conducted by the owner himself without employees, in order to secure compliance with a demand to become a union shop. Although there was no one opinion for the Court, its decision was another instance of the affirmance of an injunction against picketing because directed against a valid public policy of the State.

A third case, *Building Service Employees* v. *Gazzam,* 339 U. S. 532, was decided the same day. Following an unsuccessful attempt at unionization of a small hotel and refusal by the owner to sign a contract with the union as bargaining agent, the union began to picket the hotel with signs stating that the owner was unfair to organized

labor. The State, finding that the object of the picketing was in violation of its statutory policy against employer coercion of employees' choice of bargaining representative, enjoined picketing for such purpose. This Court affirmed, rejecting the argument that "the *Swing* case, *supra,* is controlling. . . . In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any lawful purpose is not prohibited by the decree under review." *Id.,* at 539.

A similar problem was involved in *Plumbers Union* v. *Graham,* 345 U. S. 192, where a state court had enjoined, as a violation of its "Right to Work" law, picketing that advertised that nonunion men were being employed on a building job. This Court found that there was evidence in the record supporting a conclusion that a substantial purpose of the picketing was to put pressure on the general contractor to eliminate nonunion men from the job and, on the reasoning of the cases that we have just discussed, held that the injunction was not in conflict with the Fourteenth Amendment.

This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.

In the light of this background, the Maine Supreme Judicial Court in 1955 decided, on an agreed statement of facts, the case of *Pappas* v. *Stacey,* 151 Me. 36, 116 A. 2d 497. From the statement, it appeared that three union employees went on strike and picketed a restaurant peacefully "for the sole purpose of seeking to organize other

employees of the Plaintiff, ultimately to have the Plaintiff enter into collective bargaining and negotiations with the Union . . . ." Maine had a statute providing that workers should have full liberty of self-organization, free from restraint by employers or other persons. The Maine Supreme Judicial Court drew the inference from the agreed statement of facts that "there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during noncompliance by the employees with the request of the union." 151 Me., at 42, 116 A. 2d, at 500. It therefore enjoined the picketing, and an appeal was taken to this Court.

The whole series of cases discussed above allowing, as they did, wide discretion to a State in the formulation of domestic policy, and not involving a curtailment of free speech in its obvious and accepted scope, led this Court, without the need of further argument, to grant appellee's motion to dismiss the appeal in that it no longer presented a substantial federal question. 350 U. S. 870.

The *Stacey* case is this case. As in *Stacey,* the present case was tried without oral testimony. As in *Stacey,* the highest state court drew the inference from the facts that the picketing was to coerce the employer to put pressure on his employees to join the union, in violation of the declared policy of the State. (For a declaration of similar congressional policy, see § 8 of the National Labor Relations Act, 61 Stat. 140, 29 U. S. C. § 158.) The cases discussed above all hold that, consistent with the Fourteenth Amendment, a State may enjoin such conduct.

Of course, the mere fact that there is "picketing" does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no

more than state legislatures, can enact blanket prohibitions against picketing. *Thornhill* v. *Alabama* and *A. F. of L.* v. *Swing, supra.* The series of cases following *Thornhill* and *Swing* demonstrate that the policy of Wisconsin enforced by the prohibition of this picketing is a valid one. In this case, the circumstances set forth in the opinion of the Wisconsin Supreme Court afford a rational basis for the inference it drew concerning the purpose of the picketing. No question was raised here concerning the breadth of the injunction, but of course its terms must be read in the light of the opinion of the Wisconsin Supreme Court, which justified it on the ground that the picketing was for the purpose of coercing the employer to coerce his employees. "If astuteness may discover argumentative excess in the scope of the [injunction] beyond what we constitutionally justify by this opinion, it will be open to petitioners to raise the matter, which they have not raised here, when the [case] on remand [reaches] the [Wisconsin] court." *Teamsters Union* v. *Hanke,* 339 U. S., at 480–481.

Therefore, having deemed it appropriate to elaborate on the issues in the case, we affirm.

Affirmed.

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

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

The Court has now come full circle. In *Thornhill* v. *Alabama,* 310 U. S. 88, 102, we struck down a state ban on picketing on the ground that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Less than one year later, we held that the First Amendment protected organi-

zational picketing on a factual record which cannot be distinguished from the one now before us. *A. F. of L.* v. *Swing,* 312 U. S. 321. Of course, we have always recognized that picketing has aspects which make it more than speech. *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 776–777 (concurring opinion). That difference underlies our decision in *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490. There, picketing was an essential part of "a single and integrated course of conduct, which was in violation of Missouri's valid law." *Id.,* at 498. And see *Labor Board* v. *Virginia Power Co.,* 314 U. S. 469, 477–478. We emphasized that "there was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making [the state] policy a dead letter . . . ." 336 U. S., at 503. Speech there was enjoined because it was an inseparable part of conduct which the State constitutionally could and did regulate.

But where, as here, there is no rioting, no mass picketing, no violence, no disorder, no fisticuffs, no coercion—indeed nothing but speech—the principles announced in *Thornhill* and *Swing* should give the advocacy of one side of a dispute First Amendment protection.

The retreat began when, in *Teamsters Union* v. *Hanke,* 339 U. S. 470, four members of the Court announced that all picketing could be prohibited if a state court decided that that picketing violated the State's public policy. The retreat became a rout in *Plumbers Union* v. *Graham,* 345 U. S. 192. It was only the "purpose" of the picketing which was relevant. The state court's characterization of the picketers' "purpose" had been made well-nigh conclusive. Considerations of the proximity of picketing to conduct which the State could control or prevent were abandoned, and no longer was it necessary for the state court's decree to be narrowly drawn to prescribe a specific evil. *Id.,* at 201–205 (dissenting opinion).

Today, the Court signs the formal surrender. State courts and state legislatures cannot fashion blanket prohibitions on all picketing. But, for practical purposes, the situation now is as it was when *Senn* v. *Tile Layers Union,* 301 U. S. 468, was decided. State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing. I would adhere to the principle announced in *Thornhill.* I would adhere to the result reached in *Swing.* I would return to the test enunciated in *Giboney*—that this form of expression can be regulated or prohibited only to the extent that it forms an essential part of a course of conduct which the State can regulate or prohibit. I would reverse the judgment below.

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YATES ET AL. *v.* UNITED STATES.

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

No. 6. Argued October 8–9, 1956.—Decided June 17, 1957.

The 14 petitioners, leaders of the Communist Party in California, were indicted in 1951 in a Federal District Court under § 3 of the Smith Act and 18 U. S. C. § 371 for conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit. The indictment charged that the conspiracy originated in 1940 and continued down to the date of the indictment and that, in carrying it out, petitioners and their co-conspirators would (a) become members and officers of the Communist Party, with knowledge of its unlawful purposes, and assume leadership in carrying out its policies and activities, (b) cause to be organized units of the Party in California and elsewhere, (c) write and publish articles on such advocacy and teaching, (d) conduct schools for the indoctrination of Party members in such advocacy and teaching, and (e) recruit new Party members, particularly from among persons employed in the key industries of the Nation. It also alleged 23 overt acts in furtherance of the conspiracy. Petitioners were convicted after a jury trial, and their convictions were sustained by the Court of Appeals. *Held:* The convictions are reversed and the cause is remanded to the District Court with directions to enter judgments of acquittal as to five of the petitioners and to grant a new trial as to the others. Pp. 300–338.

1. Since the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the "organizing" charge, and required the withdrawal of that part of the indictment from the jury's consideration. Pp. 303–312.

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*Together with No. 7, *Schneiderman* v. *United States*, and No. 8, *Richmond et al.* v. *United States*, also on certiorari to the same Court.

(a) Applying the rule that criminal statutes are to be construed strictly, the word "organize," as used in the Smith Act, is construed as referring only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though the latter may loosely be termed "organizational." Pp. 303–311.

(b) The trial court's mistaken construction of the word "organize" was not harmless error; the circumstances are such as to call for application of the rule which requires a verdict to be set aside where it is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected. Pp. 311–312.

2. The Smith Act does not prohibit advocacy and teaching of forcible overthrow of the Government as an abstract principle, divorced from any effort to instigate action to that end; the trial court's charge to the jury furnished wholly inadequate guidance on this central point in the case; and the conviction cannot be allowed to stand. *Dennis* v. *United States*, 341 U. S. 494, distinguished. Pp. 312–327.

3. The evidence against five of the petitioners is so clearly insufficient that their acquittal should be ordered, but that as to the others is such as not to justify closing the way to their retrial. Pp. 327–334.

4. Determinations favorable to petitioner Schneiderman made by this Court in *Schneiderman* v. *United States*, 320 U. S. 118, a denaturalization proceeding in which he was the prevailing party, are not conclusive in this proceeding under the doctrine of collateral estoppel, and he is not entitled to a judgment of acquittal on that ground. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683. Pp. 335–338.

225 F. 2d 146, reversed and remanded.

Ben Margolis argued the cause for petitioners in No. 6. With him on the brief were *Norman Leonard, Alexander H. Schullman, A. L. Wirin* and *Leo Branton, Jr.*

Robert W. Kenny argued the cause for petitioner in No. 7. With him on the brief was *Benjamin Dreyfus.*

Augustin Donovan argued the cause and filed a brief for petitioners in No. 8.

Philip R. Monahan argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Tompkins* and *Harold D. Koffsky.*

Briefs of *amici curiae* urging reversal were filed by *David I. Shapiro, Osmond K. Fraenkel* and *Fred Okrand,* for the American Civil Liberties Union in No. 6, and *Thomas D. McBride,* for Kuzma et al., and *Telford Taylor,* for Hall, in Nos. 6, 7 and 8.

MR. JUSTICE HARLAN delivered the opinion of the Court.

We brought these cases here to consider certain questions arising under the Smith Act which have not heretofore been passed upon by this Court, and otherwise to review the convictions of these petitioners for conspiracy to violate that Act. Among other things, the convictions are claimed to rest upon an application of the Smith Act which is hostile to the principles upon which its constitutionality was upheld in *Dennis* v. *United States,* 341 U. S. 494.

These 14 petitioners stand convicted, after a jury trial in the United States District Court for the Southern District of California, upon a single count indictment charging them with conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit. Act of June 28, 1940, § 2 (a)(1) and (3), 54

Stat. 670, 671, 18 U. S. C. §§ 371, 2385.[1] The conspiracy is alleged to have originated in 1940 and continued down to the date of the indictment in 1951. The indictment charged that in carrying out the conspiracy the defend-

[1] The Smith Act, as enacted in 1940, provided in pertinent part as follows:

"SEC. 2. (a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . . ;

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

. . . . . .

"SEC. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

. . . . . .

"SEC. 5. (a) Any person who violates any of the provisions of this title shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than ten years, or both."

Effective September 1, 1948, the Smith Act was repealed, and substantially re-enacted as 18 U. S. C. § 2385, as part of the 1948 recodification. 62 Stat. 808. Section 2385 provided in pertinent part as follows:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence . . . ; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advo-

ants and their co-conspirators would (a) become members and officers of the Communist Party, with knowledge of its unlawful purposes, and assume leadership in carrying out its policies and activities; (b) cause to be organized units of the Party in California and elsewhere; (c) write and publish, in the "Daily Worker" and other Party organs, articles on the proscribed advocacy and teaching; (d) conduct schools for the indoctrination of Party members in such advocacy and teaching, and (e) recruit new Party members, particularly from among persons employed in the key industries of the nation. Twenty-three overt acts in furtherance of the conspiracy were alleged.

Upon conviction each of the petitioners was sentenced to five years' imprisonment and a fine of $10,000. The

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cating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . . ; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ."

For convenience the original Smith Act and § 2385 will both be referred to in this opinion as "the Smith Act."

It will be noted that the recodification did not carry into § 2385 the conspiracy section of the Smith Act (§ 3). The latter provision, however, was in substance restored to § 2385 on July 24, 1956, to apply to offenses committed on or after that date. 70 Stat. 623.

The conspiracy charged in this case was laid under § 3 of the Smith Act for the period 1940 to September 1, 1948, and for the period thereafter, down to the filing of the indictment in 1951, under the general conspiracy statute, 18 U. S. C. § 371, providing in pertinent part as follows:

"If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Court of Appeals affirmed. 225 F. 2d 146. We granted certiorari for the reasons already indicated. 350 U. S. 860.

In the view we take of this case, it is necessary for us to consider only the following of petitioners' contentions: (1) that the term "organize" as used in the Smith Act was erroneously construed by the two lower courts; (2) that the trial court's instructions to the jury erroneously excluded from the case the issue of "incitement to action"; (3) that the evidence was so insufficient as to require this Court to direct the acquittal of these petitioners; and (4) that petitioner Schneiderman's conviction was precluded by this Court's judgment in *Schneiderman* v. *United States*, 320 U. S. 118, under the doctrine of collateral estoppel.[2] For reasons given hereafter, we conclude that these convictions must be reversed and the case remanded to the District Court with instructions to enter judgments of acquittal as to certain of the petitioners, and to grant a new trial as to the rest.

I. *The Term "Organize."*

One object of the conspiracy charged was to violate the third paragraph of 18 U. S. C. § 2385, which provides:

> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any [government in the United States] by force or violence . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ." [3]

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[2] We find it unnecessary to consider the petitioners' contention with respect to the District Court's alleged failure to apply the "clear and present danger" rule, as well as the contention that their motions for a new trial and a continuance were erroneously denied.

[3] See note 1, *supra*, at p. 302.

Petitioners claim that "organize" means to "establish," "found," or "bring into existence," and that in this sense the Communist Party[4] was organized by 1945 at the latest.[5] On this basis petitioners contend that this part of the indictment, returned in 1951, was barred by the three-year statute of limitations.[6] The Government, on the other hand, says that "organize" connotes a continuing process which goes on throughout the life of an organization, and that, in the words of the trial court's instructions to the jury, the term includes such things as "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization." The two courts below accepted the Government's position. We think, however, that petitioners' position must prevail, upon principles stated by Chief Justice Marshall more than a century ago in *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96, as follows:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

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[4] Except where otherwise indicated, throughout this opinion "Communist Party" refers to the present Communist Party of the United States.

[5] It is not disputed that the Communist Party, as referred to in the indictment, came into being no later than July 1945, when the Communist Political Association was disbanded and reconstituted as the Communist Party of the United States. The original Party was founded in this country in 1919.

[6] 62 Stat. 828, 18 U. S. C. § 3282.

"It is said, that notwithstanding this rule, the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

The statute does not define what is meant by "organize." Dictionary definitions are of little help, for, as those offered us sufficiently show, the term is susceptible

of both meanings attributed to it by the parties here.[7] The fact that the Communist Party comprises various components and activities, in relation to which some of the petitioners bore the title of "Organizer," does not advance us towards a solution of the problem. The charge here is that petitioners conspired to organize the Communist Party, and, unless "organize" embraces the continuing concept contended for by the Government, the establishing of new units within the Party and similar activities, following the Party's initial formation in 1945, have no independent significance or vitality so far as the "organizing" charge is involved. Nor are we here concerned with the quality of petitioners' activities as such, that is, whether particular activities may properly be categorized as "organizational." Rather, the issue is whether the term "organize" as used in this statute is limited by temporal concepts. Stated most simply, the problem is to choose between two possible answers to the question: when was the Communist Party "organized"? Petitioners contend that the only natural answer to the question is the formation date—in this case, 1945. The Government would have us answer the question by saying that the Party today is still not completely "organ-

[7] Both petitioners and the Government cite the following definitions of "organize" from Webster's New International Dictionary (2d ed.): "1. To furnish with organs; to give an organic structure to. . . . 2. To arrange or constitute in interdependent parts, each having a special function, act, office, or relation with respect to the whole; to systematize; to get into working order; as, to *organize* an army; to *organize* recruits." The Government also gives us the following from Funk & Wagnall's New Standard Dictionary (1947): "1. To bring into systematic connection and cooperation as parts of a whole, or to bring the various parts of into effective correlation and cooperation; as, to *organize* the peasants into an army." And petitioners cite Black's Law Dictionary, as follows: "To establish or furnish with organs; to systematize; to put into working order; to arrange in order for the normal exercise of its appropriate functions."

ized"; that "organizing" is a continuing process that does not end until the entity is dissolved.

The legislative history of the Smith Act is no more revealing as to what Congress meant by "organize" than is the statute itself. The Government urges that "organize" should be given a broad meaning since acceptance of the term in its narrow sense would require attributing to Congress the intent that this provision of the statute should not apply to the Communist Party as it then existed. The argument is that since the Communist Party as it then existed had been born in 1919 and the Smith Act was not passed until 1940, the use of "organize" in its narrow sense would have meant that these provisions of the statute would never have reached the act of organizing the Communist Party, except for the fortuitous rebirth of the Party in 1945—an occurrence which, of course, could not have been foreseen in 1940. This, says the Government, could hardly have been the congressional purpose since the Smith Act as a whole was particularly aimed at the Communist Party, and its "organizing" provisions were especially directed at the leaders of the movement.

We find this argument unpersuasive. While the legislative history of the Smith Act does show that concern about communism was a strong factor leading to this legislation, it also reveals that the statute, which was patterned on state anti-sedition laws directed not against Communists but against anarchists and syndicalists, was aimed equally at all groups falling within its scope.[8]

[8] Representative John W. McCormack, one of the leading proponents of the Smith Act, stated before the Subcommittee of the Committee on the Judiciary, House of Representatives: "And by the way, this bill is not alone aimed at Communists; this bill is aimed at anyone who advocates the overthrow of Government by violence and force." Hearing before Subcommittee No. 2 of the House Committee on the Judiciary on H. R. 4313 and H. R. 6427, 74th Cong., 1st Sess., May 22, 1935, Serial 5, p. 3.

More important, there is no evidence whatever to support the thesis that the *organizing* provision of the statute was written with particular reference to the Communist Party. Indeed, the congressional hearings indicate that it was the "advocating and teaching" provision of the Act, rather than the "organizing" provision, which was especially thought to reach Communist activities.[9]

Nor do there appear to be any other reasons for ascribing to "organize" the Government's broad interpretation. While it is understandable that Congress should have wished to supplement the general provisions of the Smith Act by a special provision directed at the activities of those responsible for creating a new organization of the proscribed type, such as was the situation involved in the *Dennis* case, we find nothing which suggests that the "organizing" provision was intended to reach beyond this, that is, to embrace the activities of those concerned with carrying on the affairs of an already existing organization. Such activities were already amply covered by other provisions of the Act, such as the "membership" clause,[10] and the basic prohibition of "advocacy" in conjunction with the conspiracy provision, and there is thus no need to stretch the "organizing" provision to fill any gaps in the statute. Moreover, it is difficult to find any considerations, comparable to those relating to persons responsible for creating a new organization, which would have led the Congress to single out for special treatment those persons occupying so-called organizational positions in an existing organization, especially when this same section of the statute proscribes membership in such an organization without drawing any distinction between those holding executive office and others.

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[9] *Id., passim.*

[10] The "organizing" section, *supra,* n. 1, also makes it an offense "to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

On the other hand, we also find unpersuasive petitioners' argument as to the intent of Congress. In support of the narrower meaning of "organize," they argue that the Smith Act was patterned after the California Criminal Syndicalism Act; [11] that the California courts have consistently taken "organize" in that Act in its narrow sense; [12] and that under such cases as *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 304, 309, and *Joines* v. *Patterson*, 274 U. S. 544, 549, it should be presumed that Congress in adopting the wording of the California Act intended "organize" to have the same meaning as that given it by the California courts. As the hearings on the Smith Act show, however, its particular prototype was the New York Criminal Anarchy Act,[13] not the California statute, and the "organizing" provisions of the New York Act have never been construed by any court. Moreover, to the extent that the language of the California statute, which itself was patterned on the earlier New York legislation, might be significant, we think that little weight can be given to these California decisions. The "general rule that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording . . . is a presumption of legislative intention . . . which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of other indicia of intention." *Carolene Products Co.* v. *United States*, 323

[11] Cal. Stat. 1919, c. 188, West's Ann. Cal. Codes, Penal Code, § 11401.

[12] See *People* v. *Thurman*, 62 Cal. App. 147, 216 P. 394; *People* v. *Thornton*, 63 Cal. App. 724, 219 P. 1020; *People* v. *Ware*, 67 Cal. App. 81, 226 P. 956.

[13] N. Y. Laws 1902, c. 371, McKinney's N. Y. Laws, Penal Law, § 161.

U. S. 18, 26. Here, the three California cases relied on by petitioners were all decisions of lower courts, and, in the absence of anything in the legislative history indicating that they were called to its attention, we should not assume that Congress was aware of them.

We are thus left to determine for ourselves the meaning of this provision of the Smith Act, without any revealing guides as to the intent of Congress. In these circumstances we should follow the familiar rule that criminal statutes are to be strictly construed and give to "organize" its narrow meaning, that is, that the word refers only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though such acts may loosely be termed "organizational." See *United States* v. *Wiltberger, supra; United States* v. *Lacher,* 134 U. S. 624, 628; *United States* v. *Gradwell,* 243 U. S. 476, 485; *Fasulo* v. *United States,* 272 U. S. 620, 628. Such indeed is the normal usage of the word "organize," [14] and until the decisions below in this case the federal trial courts in which the question had arisen uniformly gave it that meaning. See *United States* v. *Flynn,* unreported (D. C. S. D. N. Y.), No. C. 137–37, aff'd, 216 F. 2d 354, 358; *United States* v. *Mesarosh,* 116 F. Supp. 345, aff'd, 223 F. 2d 449, 465 (dissenting opinion of Hastie, J.); see also *United States* v. *Dennis,* unreported (D. C. S. D. N. Y.), No. C. 128–87, aff'd, 183 F. 2d 201, 341 U. S. 494.[15]

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[14] In other contexts state courts have given the term that meaning. See *State ex rel. Childs* v. *School District,* 54 Minn. 213, 55 N. W. 1122; *Whitmire* v. *Cass,* 213 S. C. 230, 236, 49 S. E. 2d 1, 3; *Warren* v. *Barber Asphalt Pav. Co.,* 115 Mo. 572, 576–577, 22 S. W. 490–491; *Commonwealth* v. *Wm. Mann Co.,* 150 Pa. 64, 70, 24 A. 601, 602.

[15] Following the decision of the Court of Appeals for the Ninth Circuit in this case, "organize" has been given its wider meaning by two District Courts in that circuit, *United States* v. *Fujimoto,*

We too think this statute should be read "according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." *United States* v. *Temple,* 105 U. S. 97, 99.

The Government contends that even if the trial court was mistaken in its construction of the statute, the error was harmless because the conspiracy charged embraced both "advocacy" of violent overthrow and "organizing" the Communist Party, and the jury was instructed that in order to convict it must find a conspiracy extending to both objectives. Hence, the argument is, the jury must in any event be taken to have found petitioners guilty of conspiring to advocate, and the convictions are supportable on that basis alone. We cannot accept this proposition for a number of reasons. The portions of the trial court's instructions relied on by the Government are not sufficiently clear or specific to warrant our drawing the inference that the jury understood it must find an agreement extending to *both* "advocacy" and "organizing" in order to convict.[16] Further, in order to convict, the jury was required, as the court charged, to find an overt act which was "knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment," and we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance

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reported on another point, 107 F. Supp. 865, and *United States* v. *Huff,* as yet unreported, now pending on appeal to the Court of Appeals. The Court of Appeals for the Sixth Circuit, following the Ninth Circuit, has likewise given the term its broader meaning. *Wellman* v. *United States,* 227 F. 2d 757.

[16] The trial court did no more on this score than to charge, in the language of the indictment, that the conspiracy had two objects, namely, to advocate and teach forcible overthrow and to organize the Communist Party as a vehicle for that purpose, and then instruct the jury that it must find that "the conspiracy charged in the indictment" had been proved beyond a reasonable doubt.

of the "advocacy" rather than the "organizing" objective of the alleged conspiracy. The character of most of the overt acts alleged associates them as readily with "organizing" as with "advocacy." [17] In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *Stromberg* v. *California,* 283 U. S. 359, 367–368; *Williams* v. *North Carolina,* 317 U. S. 287, 291–292; *Cramer* v. *United States,* 325 U. S. 1, 36, n. 45.

We conclude, therefore, that since the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the "organizing" charge, and required the withdrawal of that part of the indictment from the jury's consideration. *Samuel* v. *United States,* 169 F. 2d 787, 798. See also *Haupt* v. *United States,* 330 U. S. 631, 641, n. 1; *Stromberg* v. *California, supra,* at 368.

II. *Instructions to the Jury.*

Petitioners contend that the instructions to the jury were fatally defective in that the trial court refused to charge that, in order to convict, the jury must find that the advocacy which the defendants conspired to promote was of a kind calculated to "incite" persons to action for the forcible overthrow of the Government. It is argued that advocacy of forcible overthrow as mere *abstract doctrine* is within the free speech protection of the First

[17] Of the 23 overt acts charged, 20 alleged attendance of various defendants at meetings or conventions, and 3 alleged the issuance and circulation of "directives" by certain of the defendants. Only two of the acts alleged were proved. Both were Party meetings unmarked by any advocacy of the type that the petitioners were allegedly conspiring to promote.

Amendment; that the Smith Act, consistently with that constitutional provision, must be taken as proscribing only the sort of advocacy which incites to illegal *action;* and that the trial court's charge, by permitting conviction for mere advocacy, unrelated to its tendency to produce forcible action, resulted in an unconstitutional application of the Smith Act. The Government, which at the trial also requested the court to charge in terms of "incitement," now takes the position, however, that the true constitutional dividing line is not between inciting and abstract advocacy of forcible overthrow, but rather between advocacy as such, irrespective of its inciting qualities, and the mere discussion or exposition of violent overthrow as an abstract theory.

We print in the margin the pertinent parts of the trial court's instructions.[18] After telling the jury that it could

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[18] The trial court charged:

"As used in the Smith Act and the indictment:

"(1) the word 'advocate' means to urge or 'to plead in favor of; . . . to support, vindicate, or recommend publicly . . .';

"(2) the word 'teach' means 'to instruct . . . show how . . . to guide the studies of . . .';

. . . . . .

"The holding of a belief or opinion does not constitute advocacy or teaching. Hence the Smith Act does not prohibit persons who may believe that the violent overthrow and destruction of the Government of the United States is probable or inevitable from expressing that belief. Whether such belief be reasonable or unreasonable is immaterial. Prediction or prophecy is not advocacy.

"Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants.

"The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety

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not convict the defendants for holding or expressing mere opinions, beliefs, or predictions relating to violent overthrow, the trial court defined the content of the proscribed advocacy or teaching in the following terms, which are crucial here:

> "Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants.
>
> "The kind of advocacy and teaching which is charged and upon which your verdict must be

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but a duty to overthrow and destroy the Government of the United States by force and violence.

. . . . . .

"The word 'wilfully,' as used in the indictment, means a statement or declaration made or other act done with the specific intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

"The defendants, in common with all other persons living under our Constitution, have a general right protected by the First Amendment to hold, express, teach and advocate opinions, even though their opinions are rejected by the overwhelming majority of the American people; and have the further right to organize or combine peaceably with other persons for the purpose of spreading and promoting their opinions more effectively.

"Whether you agree with these opinions or whether they seem to you reasonable, unreasonable, absurd, distasteful or hateful has no bearing whatever on the right of other persons to maintain them and to seek to persuade others of their validity.

"No inference that any of the defendants knowingly and wilfully conspired as charged in the indictment, or intended to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, may be drawn from the advocacy or teaching of

> reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence."

There can be no doubt from the record that in so instructing the jury the court regarded as immaterial, and intended to withdraw from the jury's consideration, any issue as to the character of the advocacy in terms of its capacity to stir listeners to forcible action. Both the petitioners and the Government submitted proposed instructions which would have required the jury to find

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socialism or other economic or political or social doctrines, by reason of any unpopularity of such doctrines or by reason of any opinion you may hold with respect to whether such doctrines, or the opinions or beliefs of any of the defendants, are unreasonable, distasteful, absurd or hateful.

"The defendants, in common with other persons living under our Constitution, have the right protected by the First Amendment to criticize our system of Government and the Government itself, even though the speaking or writing of such criticism may undermine confidence in the Government or cause or increase discontent. They have the right also to criticize the foreign policy of the United States and the role being played by this country in international affairs; and to praise the foreign policy of other governments and the role being played by those governments in international affairs.

"The right of the defendants to enjoy such freedom of expression is unaffected by whether or not the opinions spoken or published may seem to you to be crudely intemperate, or to contain falsehoods, or to be designed to embarrass the Government. No inference of conspiracy to advocate and teach the necessity and duty of overthrow and destruction of the Government of the United States by force and violence, or of intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, may be drawn from such expressions alone."

that the proscribed advocacy was not of a mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language reasonably and ordinarily calculated to incite persons to such action.[19] The trial court rejected these proposed instructions on the ground that any necessity for giving them which may have existed at

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[19] Petitioners' proposed instructions were:

"Where the Smith Act, the statute which these defendants are charged with conspiring to violate, speaks of advocating and teaching the duty and necessity of overthrowing the Government by force and violence, this refers only to statements which, in the language of incitement to action, urge immediate action to overthrow the then existing government under the then existing circumstances. A statement on the other hand, that, if our form of government should change in the future, violent overthrow of the government would then become necessary and right, is not within the Smith Act's prohibition and would not constitute any basis for a finding against the defendants here.

. . . . . .

"For purposes of this trial, a person can be said to teach or advocate the overthrow and destruction of the Government of the United States by force and violence only when his expressions are designed to induce action, rather than discussion or belief, and only when they are expressed in language which, under the circumstances in which it is used, is reasonably and ordinarily calculated to incite persons to such action, rather than merely to discussion or belief.

. . . . . .

"The burden is on the prosecution to show beyond a reasonable doubt that a common understanding existed among the alleged co-conspirators as to the specific content of expressions amounting to advocacy of the overthrow and destruction of the Government by force and violence. The Government must further show that this understanding included an understanding that such advocacy would be in language amounting to incitement to action and that it would take place under circumstances such as to lead to a probability that it would inspire persons to take action toward violent overthrow.

"The Government's burden is not met by proof that the defendant shared certain beliefs and made joint efforts to persuade other persons to adopt them, no matter what you may find the content of such

the time the *Dennis* case was tried [20] was removed by this Court's subsequent decision in that case. The court made it clear in colloquy with counsel that in its view the illegal advocacy was made out simply by showing that what was said dealt with forcible overthrow and that it was uttered with a specific intent to accomplish that purpose,[21] insisting that all such advocacy was punish-

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beliefs to have been, or whether you may agree or disagree with such beliefs."

The Government's proposed instruction was:

"In further construction and interpretation of the statute I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

[20] The Government's proposed instruction was that given by the trial court in the *Dennis* case, 341 U. S. 494. See p. 326, *infra*.

[21] Having stated that all advocacy and teaching of forcible overthrow of Government was punishable "whether it is language of incitement or not," so long as it was done with the requisite intent, the court added, "It seems to me this question of 'incitement to' is involved around the question of sufficiency of evidence to indicate intent. The language used is language of philosophy and theory and academic treatment, rather than language . . . [of] 'incitement to action.' If the jury should convict on that sort of language, [the] argument would be the evidence was insufficient to sustain the conviction . . . ."

able "whether it is language of incitement or not." The Court of Appeals affirmed on a different theory, as we shall see later on.

We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not.

The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court, beginning with *Fox* v. *Washington,* 236 U. S. 273, and *Schenck* v. *United States,* 249 U. S. 47.[22] This distinction was heavily underscored in *Gitlow* v. *New York,* 268 U. S. 652, in which the statute involved[23] was nearly identical with the one now before us, and where the Court, despite the narrow view there taken of the First Amendment,[24] said:

> "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. . . . It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. . . . This [Manifesto] . . . is [in] the language of direct incitement. . . . That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and

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[22] For discussion of the principal cases in this Court on the subject, see the several opinions in *Dennis* v. *United States, supra.*

[23] The New York Criminal Anarchy Act, note 13, *supra.*

[24] See *Dennis* v. *United States, supra,* at 541.

> unlawful means, but action to that end, is clear. . . . That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear." *Id.*, at 664–669.

We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words "advocate" and "teach" in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation. See *Willis* v. *Eastern Trust & Banking Co., supra; Joines* v. *Patterson, supra; James* v. *Appel,* 192 U. S. 129, 135. The *Gitlow* case and the New York Criminal Anarchy Act there involved, which furnished the prototype for the Smith Act, were both known and adverted to by Congress in the course of the legislative proceedings.[25] Cf. *Carolene Products Co.* v. *United States, supra.* The legislative history of the Smith Act and related bills shows beyond all question that Congress was aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action, and that it did not intend to disregard it.[26] The statute was aimed

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[25] Hearings on H. R. 4313 and H. R. 6427, May 22, 1935, at pp. 5, 6, cited in note 8, *supra.*

[26] At the hearing cited in note 8, *supra,* Representative McCormack repeatedly emphasized that the proscribed advocacy was *inciting* advocacy. For example, he stated: ". . . the word 'advocacy' means 'in a manner to incite,' as construed by the Supreme Court in the *Gitlow case* . . . ." (P. 5.) ". . . Government has a right to make it a crime for a person to use language specifically inciting to the commission of illegal acts. . . . [I]t is advocacy in the manner to incite, knowingly to advocate in a manner to incite to the overthrow of the Government . . . ." (P. 15.) See also pp. 4, 8, 11.

at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action.

The Government's reliance on this Court's decision in *Dennis* is misplaced. The jury instructions which were refused here were given there,[27] and were referred to by this Court as requiring "the jury to find the facts *essential* to establish the substantive crime." 341 U. S., at 512 (emphasis added). It is true that at one point in the late Chief Justice's opinion it is stated that the Smith Act "is directed at advocacy, not discussion," *id.*, at 502, but it is clear that the reference was to advocacy of action, not ideas, for in the very next sentence the opinion emphasizes that the jury was properly instructed that there could be no conviction for "advocacy in the realm of ideas." The two concurring opinions in that case likewise emphasize the distinction with which we are concerned. *Id.*, at 518, 534, 536, 545, 546, 547, 571, 572.

In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since "inciting" speech is usually thought of as something calculated to induce immediate action, and since *Dennis* held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action, is punishable, provided only that it is uttered with a specific intent to accomplish overthrow. In other words, the District Court apparently thought that *Dennis* obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action.[28]

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[27] See p. 326, *infra*.

[28] See *United States* v. *Schneiderman*, 106 F. Supp. 906, 923.

This misconceives the situation confronting the Court in *Dennis* and what was held there. Although the jury's verdict, interpreted in light of the trial court's instructions,[29] did not justify the conclusion that the defendants' advocacy was directed at, or created any danger of, immediate overthrow, it did establish that the advocacy was aimed at building up a seditious group and maintaining it in readiness for action at a propitious time. In such circumstances, said Chief Justice Vinson, the Government need not hold its hand "until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required." 341 U. S., at 509. The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule or principle of action," and employing "language of incitement," *id.*, at 511–512, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. This is quite a different thing from the view of the District Court here that mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow, is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded

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[29] The writ of certiorari in *Dennis* did not bring up the sufficiency of the evidence. 340 U. S. 863.

as the kind of indoctrination preparatory to action which was condemned in *Dennis*. As one of the concurring opinions in *Dennis* put it: "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." *Id.*, at 545. There is nothing in *Dennis* which makes that historic distinction obsolete.

The Court of Appeals took a different view from that of the District Court. While seemingly recognizing that the proscribed advocacy must be associated in some way with action, and that the instructions given the jury here fell short in that respect, it considered that the instructions which the trial court refused were unnecessary in this instance because establishment of the conspiracy, here charged under the general conspiracy statute, required proof of an overt act, whereas in *Dennis*, where the conspiracy was charged under the Smith Act, no overt act was required.[30] In other words, the Court of Appeals thought that the requirement of proving an overt act was an adequate substitute for the linking of the advocacy to action which would otherwise have been necessary.[31] This, of course, is a mistaken notion, for the

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[30] See note 1, *supra*.

[31] The Court of Appeals stated, 225 F. 2d, at 151:

"Finally, [referring to *Dennis*] the opinion of the Court of Appeals and a concurring opinion in the Supreme Court gave approval of instructions of the trial judge in Dennis requiring the jury to find 'language of incitement' was used by the conspirators there. Another phrase given approval is that the doctrine of destruction had become a 'rule of action.' In conjunction with an indictment based upon such a statute proscribing organization for the purpose of teaching and advocating overthrow, but which required neither proof of overt acts nor a specifically planned objective, such precautionary instructions were well enough. But these expressions of the judges in instructions in connection with the original statute established no unalterable requirement that such phrases themselves be used

overt act will not necessarily evidence the character of the advocacy engaged in, nor, indeed, is an agreement to advocate forcible overthrow itself an unlawful conspiracy if it does not call for advocacy of action. The statement in *Dennis* that "it is the existence of the conspiracy which creates the danger," 341 U. S., at 511, does not support the Court of Appeals. Bearing in mind that *Dennis,* like all other Smith Act conspiracy cases thus far, including this one, involved advocacy which had already taken place, and not advocacy still to occur, it is clear that in context the phrase just quoted referred to more than the basic agreement to advocate. "The mere fact that [during the indictment period] petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was *ready to make the attempt.* The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that

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ipsissimis verbis where the changes in the basic law and an entirely different indictment predicated upon the conspiracy statute have rendered admonitions to a jury in such language supererogatory." And further at p. 162:

"The gist of the substantive crime of conspiracy is that an unlawful combination and agreement becomes a positive crime only when some of the proved conspirators enter the field of action pursuant to the criminal design. Therefore, if the conspiracy did not become a rule of action pursuant to the proscribed intent, there would have been no violation of the conspiracy statute. The use of such phrases [as incitement] in instructions might have been well enough where a violation of the Smith Act alone was charged in its original form. It would be folly to command imperatively that these specific phrases be each used in instructions after a trial on an indictment such as the present one."

It may also be noted that for the period 1940 to September 1, 1948 (see note 1, *supra*), the conspiracy charge here was laid under the old Smith Act.

the time had come *for action,* coupled with . . . world conditions, . . . disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. . . . If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added." 341 U. S., at 510–511 (emphasis supplied). The reference of the term "conspiracy," in context, was to an agreement to *accomplish* overthrow at some future time, implicit in the jury's findings under the instructions given, rather than to an agreement to speak. *Dennis* was thus not concerned with a conspiracy to engage at some future time in seditious advocacy, but rather with a conspiracy to advocate presently the taking of forcible action in the future. It was action, not advocacy, that was to be postponed until "circumstances" would "permit." We intimate no views as to whether a conspiracy to engage in advocacy in the future, where speech would thus be separated from action by one further remove, is punishable under the Smith Act.

We think, thus, that both of the lower courts here misconceived *Dennis.*

In light of the foregoing we are unable to regard the District Court's charge upon this aspect of the case as adequate. The jury was never told that the Smith Act does not denounce advocacy in the sense of preaching abstractly the forcible overthrow of the Government. We think that the trial court's statement that the proscribed advocacy must include the "urging," "necessity," and "duty" of forcible overthrow, and not merely its "desirability" and "propriety," may not be regarded as a sufficient substitute for charging that the Smith Act reaches only advocacy of action for the overthrow of government by force and violence. The essential distinction

is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something. At best the expressions used by the trial court were equivocal, since in the absence of any instructions differentiating advocacy of abstract doctrine from advocacy of action, they were as consistent with the former as they were with the latter. Nor do we regard their ambiguity as lessened by what the trial court had to say as to the right of the defendants to announce their beliefs as to the inevitability of violent revolution, or to advocate other unpopular opinions. Especially when it is unmistakable that the court did not consider the urging of action for forcible overthrow as being a necessary element of the proscribed advocacy, but rather considered the crucial question to be whether the advocacy was uttered with a specific intent to accomplish such overthrow,[32] we would not be warranted in assuming that the jury drew from these instructions more than the court itself intended them to convey.

Nor can we accept the Government's argument that the District Court was justified in not charging more than it did because the refused instructions proposed by both sides specified that the advocacy must be of a character reasonably calculated to "incite" to forcible overthrow, a term which, it is now argued, might have conveyed to the jury an implication that the advocacy must be of immediate action. Granting that some qualification of the proposed instructions would have been permissible to dispel such an implication, and that it was not necessary even that the trial court should have employed the particular term "incite," it was nevertheless incumbent on the court to make clear in some fashion that the advocacy must be of action and not merely abstract doctrine. The instructions given not only do not employ the word

[32] See pp. 317–318, *supra*.

"incite," but also avoid the use of such terms and phrases as "action," "call for action," "as a rule or principle of action," and so on, all of which were offered in one form or another by both the petitioners and the Government.[33]

What we find lacking in the instructions here is illustrated by contrasting them with the instructions given to the *Dennis* jury, upon which this Court's sustaining of the convictions in that case was bottomed. There the trial court charged:

> "In further construction and interpretation of the statute [the Smith Act] I charge you that it is *not the abstract doctrine* of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy *of action* for the accomplishment of that purpose, *by language reasonably and ordinarily calculated to incite persons to such action.* Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired . . . to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy *be of a rule or principle of action* and *by language reasonably and ordinarily calculated to incite persons to such action,* all with the intent to cause the overthrow . . . as speedily as circumstances would permit." (Emphasis added.) 9 F. R. D. 367, 391; and see 341 U. S., at 511–512.

We recognize that distinctions between advocacy or teaching of abstract doctrines, with evil intent, and that which is directed to stirring people to action, are often subtle and difficult to grasp, for in a broad sense, as Mr. Justice Holmes said in his dissenting opinion in *Gitlow,*

[33] See note 19, *supra.*

supra, 268 U. S., at 673: "Every idea is an incitement." But the very subtlety of these distinctions required the most clear and explicit instructions with reference to them, for they concerned an issue which went to the very heart of the charges against these petitioners. The need for precise and understandable instructions on this issue is further emphasized by the equivocal character of the evidence in this record, with which we deal in Part III of this opinion. Instances of speech that could be considered to amount to "advocacy of action" are so few and far between as to be almost completely overshadowed by the hundreds of instances in the record in which overthrow, if mentioned at all, occurs in the course of doctrinal disputation so remote from action as to be almost wholly lacking in probative value. Vague references to "revolutionary" or "militant" action of an unspecified character, which are found in the evidence, might in addition be given too great weight by the jury in the absence of more precise instructions. Particularly in light of this record, we must regard the trial court's charge in this respect as furnishing wholly inadequate guidance to the jury on this central point in the case. We cannot allow a conviction to stand on such "an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States,* 326 U. S. 607, 613.

III. *The Evidence.*

The determinations already made require a reversal of these convictions. Nevertheless, in the exercise of our power under 28 U. S. C. § 2106 to "direct the entry of such appropriate judgment . . . as may be just under the circumstances," we have conceived it to be our duty to scrutinize this lengthy record [34] with care, in order to determine whether the way should be left open for a new trial of all or some of these petitioners. Such a judgment, we

[34] The record consists of some 14,000 typewritten pages.

think, should, on the one hand, foreclose further proceedings against those of the petitioners as to whom the evidence in this record would be palpably insufficient upon a new trial, and should, on the other hand, leave the Government free to retry the other petitioners under proper legal standards, especially since it is by no means clear that certain aspects of the evidence against them could not have been clarified to the advantage of the Government had it not been under a misapprehension as to the burden cast upon it by the Smith Act. In judging the record by these criteria we do not apply to these cases the rigorous standards of review which, for example, the Court of Appeals would be required to apply in reviewing the evidence if any of these petitioners are convicted upon a retrial. Compare *Dennis* v. *United States, supra,* at 516. Rather, we have scrutinized the record to see whether there are individuals as to whom acquittal is unequivocally demanded. We do this because it is in general too hypothetical and abstract an inquiry to try to judge whether the evidence would have been inadequate had the cases been submitted under a proper charge, and had the Government realized that all its evidence must be channeled into the "advocacy" rather than the "organizing" charge. We think we may do this by drawing on our power under 28 U. S. C. § 2106, because under that statute we would no doubt be justified in refusing to order acquittal even where the evidence might be deemed palpably insufficient, particularly since petitioners have asked in the alternative for a new trial as well as for acquittal. See *Bryan* v. *United States,* 338 U. S. 552.

On this basis we have concluded that the evidence against petitioners Connelly, Kusnitz, Richmond, Spector, and Steinberg is so clearly insufficient that their acquittal should be ordered, but that as to petitioners Carlson, Dobbs, Fox, Healey (Mrs. Connelly), Lambert, Lima, Schneiderman, Stack, and Yates, we would not be justi-

fied in closing the way to their retrial. We proceed to the reasons for these conclusions.

At the outset, in view of the conclusions reached in Part I of this opinion, we must put aside as against all petitioners the evidence relating to the "organizing" aspect of the alleged conspiracy, except insofar as it bears upon the "advocacy" charge. That, indeed, dilutes in a substantial way a large part of the evidence, for the record unmistakably indicates that the Government relied heavily on its "organizing" charge. Two further general observations should also be made about the evidence as to the "advocacy" charge. The first is that both the Government and the trial court evidently proceeded on the theory that advocacy of abstract doctrine was enough to offend the Smith Act, whereas, as we have held, it is only advocacy of forcible action that is proscribed. The second observation is that both the record and the Government's brief in this Court make it clear that the Government's thesis was that the Communist Party, or at least the Communist Party of California, constituted the conspiratorial group, and that membership in the conspiracy could therefore be proved by showing that the individual petitioners were actively identified with the Party's affairs and thus inferentially parties to its tenets. This might have been well enough towards making out the Government's case if advocacy of the abstract doctrine of forcible overthrow satisfied the Smith Act, for we would at least have little difficulty in saying on this record that a jury could justifiably conclude that such was one of the tenets of the Communist Party; and there was no dispute as to petitioners' active identification with Party affairs. But when it comes to Party advocacy or teaching in the sense of a call to forcible action at some future time we cannot but regard this record as strikingly deficient. At best this voluminous record shows but a half dozen or so scattered incidents which, even under the loosest

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standards, could be deemed to show such advocacy. Most of these were not connected with any of the petitioners, or occurred many years before the period covered by the indictment. We are unable to regard this sporadic showing as sufficient to justify viewing the Communist Party as the nexus between these petitioners and the conspiracy charged. We need scarcely say that however much one may abhor even the abstract preaching of forcible overthrow of government, or believe that forcible overthrow is the ultimate purpose to which the Communist Party is dedicated, it is upon the evidence in the record that the petitioners must be judged in this case.

We must, then, look elsewhere than to the evidence concerning the Communist Party as such for the existence of the conspiracy to advocate charged in the indictment. As to the petitioners Connelly, Kusnitz, Richmond, Spector, and Steinberg we find no adequate evidence in the record which would permit a jury to find that they were members of such a conspiracy. For all purposes relevant here, the sole evidence as to them was that they had long been members, officers or functionaries of the Communist Party of California; and that standing alone, as Congress has enacted in § 4 (f) of the Internal Security Act of 1950,[35] makes out no case against them. So far as this record shows, none of them has engaged in or been associated with any but what appear to have been wholly lawful activities,[36] or has ever made a single remark or

[35] 64 Stat. 987, 50 U. S. C. § 783 (f): "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

[36] While there was evidence that might tend to link petitioner Richmond to "the conspiracy," *i. e.*, evidence of association by him with other petitioners, and with an individual who might be found by the jury to have engaged during the same period in the proscribed advocacy, see pp. 332–333, *infra*, we think that without more such evidence would not justify refusal to direct an acquittal.

been present when someone else made a remark, which would tend to prove the charges against them. Connelly and Richmond were, to be sure, the Los Angeles and Executive Editors, respectively, of the Daily People's World, the West Coast Party organ, but we can find nothing in the material introduced into evidence from that newspaper which advances the Government's case.

Moreover, apart from the inadequacy of the evidence to show, at best, more than the abstract advocacy and teaching of forcible overthrow by the Party, it is difficult to perceive how the requisite specific intent to accomplish such overthrow could be deemed proved by a showing of mere membership or the holding of office in the Communist Party. We therefore think that as to these petitioners the evidence was entirely too meagre to justify putting them to a new trial, and that their acquittal should be ordered.

As to the nine remaining petitioners, we consider that a different conclusion should be reached. There was testimony from the witness Foard, and other evidence, tying Fox, Healey, Lambert, Lima, Schneiderman, Stack, and Yates to Party classes conducted in the San Francisco area during the year 1946, where there occurred what might be considered to be the systematic teaching and advocacy of illegal action which is condemned by the statute. It might be found that one of the purposes of such classes was to develop in the members of the group a readiness to engage at the crucial time, perhaps during war or during attack upon the United States from without, in such activities as sabotage and street fighting, in order to divert and diffuse the resistance of the authorities and if possible to seize local vantage points. There was also testimony as to activities in the Los Angeles area, during the period covered by the indictment, which might be considered to amount to "advocacy of action," and with which petitioners Carlson and Dobbs were linked. From the

testimony of the witness Scarletto, it might be found that individuals considered to be particularly trustworthy were taken into an "underground" apparatus and there instructed in tasks which would be useful when the time for violent action arrived. Scarletto was surreptitiously indoctrinated in methods, as he said, of moving "masses of people in time of crisis." It might be found, under all the circumstances, that the purpose of this teaching was to prepare the members of the underground apparatus to engage in, to facilitate, and to cooperate with violent action directed against government when the time was ripe. In short, while the record contains evidence of little more than a general program of educational activity by the Communist Party which included advocacy of violence as a theoretical matter, we are not prepared to say, at this stage of the case, that it would be impossible for a jury, resolving all conflicts in favor of the Government and giving the evidence as to these San Francisco and Los Angeles episodes its utmost sweep, to find that advocacy of action was also engaged in when the group involved was thought particularly trustworthy, dedicated, and suited for violent tasks.

Nor can we say that the evidence linking these nine petitioners to that sort of advocacy, with the requisite specific intent, is so tenuous as not to justify their retrial under proper legal standards. Fox, Healey, Lambert, Lima, Schneiderman, Stack, and Yates, as members of the State and San Francisco County Boards, were shown to have been closely associated with Ida Rothstein, the principal teacher of the San Francisco classes, who also during this same period arranged in a devious and conspiratorial manner for the holding of Board meetings at the home of the witness Honig, which were attended by these petitioners. It was also shown that from time to time instructions emanated from the Boards or their members to instructors of groups at lower levels. And while none

of the written instructions produced at the trial were invidious in themselves, it might be inferred that additional instructions were given which were not reduced to writing. Similarly, there was evidence of close association between petitioners Carlson and Dobbs and associates or superiors of the witness Scarletto, which might be taken as indicating that these two petitioners had knowledge of the apparatus in which Scarletto was active. And finally, all of these nine petitioners were shown either to have made statements themselves, or apparently approved statements made in their presence, which a jury might take as some evidence of their participation with the requisite intent in a conspiracy to advocate illegal action.

As to these nine petitioners, then, we shall not order an acquittal.

Before leaving the evidence, we consider it advisable, in order to avoid possible misapprehension upon a new trial, to deal briefly with petitioners' contention that the evidence was insufficient to prove the overt act required for conviction of conspiracy under 18 U. S. C. § 371. Only 2 of the 11 overt acts alleged in the indictment to have occurred within the period of the statute of limitations were proved. Each was a public meeting held under Party auspices at which speeches were made by one or more of the petitioners extolling leaders of the Soviet Union and criticizing various aspects of the foreign policy of the United States. At one of the meetings an appeal for funds was made. Petitioners contend that these meetings do not satisfy the requirement of the statute that there be shown an act done by one of the conspirators "to effect the object of the conspiracy." The Government concedes that nothing unlawful was shown to have been said or done at these meetings, but contends that these occurrences nonetheless sufficed as overt acts under the jury's findings.

We think the Government's position is correct. It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. *Pierce* v. *United States,* 252 U. S. 239, 244; *United States* v. *Rabinowich,* 238 U. S. 78, 86. Nor, indeed, need such an act, taken by itself, even be criminal in character. *Braverman* v. *United States,* 317 U. S. 49. The function of the overt act in a conspiracy prosecution is simply to manifest "that the conspiracy is at work," *Carlson* v. *United States,* 187 F. 2d 366, 370, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence. The substantive offense here charged as the object of the conspiracy is speech rather than the specific action that typically constitutes the gravamen of a substantive criminal offense. Were we to hold that some concrete action leading to the overthrow of the Government was required, as petitioners appear to suggest, we would have changed the nature of the offense altogether. No such drastic change in the law can be drawn from Congress' perfunctory action in 1948 bringing Smith Act cases within 18 U. S. C. § 371.

While upon a new trial the overt act must be found, in view of what we have held, to have been in furtherance of a conspiracy to "advocate," rather than to "organize," we are not prepared to say that one of the episodes relied on here could not be found to be in furtherance of such an objective, if, under proper instructions, a jury should find that the Communist Party was a vehicle through which the alleged conspiracy was promoted. While in view of our acquittal of Steinberg, the first of these episodes, in which he is alleged to have been involved, may no longer be relied on as an overt act, this would not affect the second episode, in which petitioner Schneiderman was alleged and proved to have participated.

For the foregoing reasons we think that the way must be left open for a new trial to the extent indicated.

IV. *Collateral Estoppel.*

There remains to be dealt with petitioner Schneiderman's claim based on the doctrine of collateral estoppel by judgment. Petitioner urges that in *Schneiderman* v. *United States,* 320 U. S. 118, a denaturalization proceeding in which he was the prevailing party, this Court made determinations favorable to him which are conclusive in this proceeding under the doctrine of collateral estoppel. Specifically, petitioner contends that the *Schneiderman* decision determined, for purposes of this proceeding, (1) that the teaching of Marxism-Leninism by the Communist Party was not necessarily the advocacy of violent overthrow of government; (2) that at least one tenable conclusion to be drawn from the evidence was that the Communist Party desired to achieve its goal of socialism through peaceful means; (3) that it could not be presumed, merely because of his membership or officership in the Communist Party, that Schneiderman adopted an illegal interpretation of Marxist doctrine; and finally, (4) that absent proof of overt acts indicating that Schneiderman personally adopted a reprehensible interpretation, the Government had failed to establish its burden by the clear and unequivocal evidence necessary in a denaturalization case. In the courts below, petitioner urged unsuccessfully that these determinations were conclusive in this proceeding under the doctrine of collateral estoppel, and entitled him either to an acquittal or to special instructions to the jury. He makes the same contentions here.

We are in agreement with petitioner that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in character. *United States* v. *Oppenheimer,* 242 U. S. 85. We agree further that the nonexistence of a fact may be established by a judgment no less than its

existence; that, in other words, a party may be precluded under the doctrine of collateral estoppel from attempting a second time to prove a fact that he sought unsuccessfully to prove in a prior action. *Sealfon* v. *United States,* 332 U. S. 575. Nor need we quarrel with petitioner's premise that the standard of proof applicable in denaturalization cases is at least no greater than that applicable in criminal proceedings. Compare *Helvering* v. *Mitchell,* 303 U. S. 391; *Murphy* v. *United States,* 272 U. S. 630. We assume, without deciding, that substantially the same standards of proof are applicable in the two types of cases. Cf. *Klapprott* v. *United States,* 335 U. S. 601, 612. Nevertheless, for reasons that will appear, we think that the doctrine of collateral estoppel does not help petitioner here.

We differ with petitioner, first of all, in his estimate of what the *Schneiderman* case determined for purposes of the doctrine of collateral estoppel. That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision. *Commissioner* v. *Sunnen,* 333 U. S. 591, 601–602; *Tait* v. *Western Maryland R. Co.,* 289 U. S. 620; *The Evergreens* v. *Nunan,* 141 F. 2d 927, 928. As we read the *Schneiderman* opinion, the only determination essential to the decision was that Schneiderman had not, prior to 1927, adopted an interpretation of the Communist Party's teachings featuring "agitation and exhortation calling for present violent action." 320 U. S., at 157–159. If it be accepted that the holding extended in the alternative to the character of advocacy engaged in by the Communist Party, then the essential finding was that the Party had not, in 1927, engaged in "agitation and exhortation calling for present violent action." *Ibid.* The Court in *Schneiderman* certainly did not purport to determine what the doctrinal content of "Marxism-Leninism" might be at all times and in all places. Nor did it establish that the books and pamphlets introduced against

Schneiderman in that proceeding could not support in any way an inference of criminality, no matter how or by whom they might thereafter be used. At most, we think, it made the determinations we have stated, limited to the time and place that were then in issue.

It is therefore apparent that the determinations made by this Court in *Schneiderman* could not operate as a complete bar to this proceeding. Wholly aside from the fact that the Court was there concerned with the state of affairs existing in 1927, whereas we are concerned here with the period 1948–1951, the issues in the present case are quite different. We are not concerned here with whether petitioner has engaged in "agitation and exhortation calling for present violent action," whether in 1927 or later. Even if it were conclusively established against the Government that neither petitioner nor the Communist Party had ever engaged in such advocacy, that circumstance would constitute no bar to a conviction under 18 U. S. C. § 371 of conspiring to advocate forcible overthrow of government in violation of the Smith Act. It is not necessary for conviction here that advocacy of "present violent action" be proved. Petitioner's demand for judgment of acquittal must therefore be rejected. The decision in *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 708–709, is precisely in point and is controlling.

What we have said we think also disposes of petitioner's contention that the trial court should have instructed the jury that certain evidentiary or subordinate issues must be taken as conclusively determined in his favor. The argument is that the determinations made in the *Schneiderman* case are not wholly irrelevant to this case, even if they do not conclude it, and hence that petitioner should be entitled to an instruction giving those determinations such partial conclusive effect as they might warrant. We think, however, that the doctrine

of collateral estoppel does not establish any such concept of "conclusive evidence" as that contended for by petitioner. The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or "mediate" facts are concerned, the doctrine of collateral estoppel is inoperative. *The Evergreens* v. *Nunan,* 141 F. 2d 927; Restatement, Judgments § 68, comment *p.* Whether there are any circumstances in which the giving of limiting instructions such as those requested here might be necessary or proper, we need not now determine. Cf. *Bordonaro Bros. Theatres, Inc.* v. *Paramount Pictures, Inc.,* 203 F. 2d 676, 678. It is sufficient for us to hold that in this case the matters of fact and mixed fact and law necessarily determined by the prior judgment, limited as they were to the year 1927, were so remote from the issues as to justify their exclusion from evidence in the discretion of the trial judge.

Since there must be a new trial, we have not found it necessary to deal with the contentions of the petitioners as to the fairness of the trial already held. The judgment of the Court of Appeals is reversed, and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BURTON, concurring in the result.

I agree with the result reached by the Court, and with the opinion of the Court except as to its interpretation of the term "organize" as used in the Smith Act. As to that, I agree with the interpretation given it by the Court of Appeals. 225 F. 2d 146.

MR. JUSTICE BRENNAN and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this case.

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

I.

I would reverse every one of these convictions and direct that all the defendants be acquitted. In my judgment the statutory provisions on which these prosecutions are based abridge freedom of speech, press and assembly in violation of the First Amendment to the United States Constitution. See my dissent and that of MR. JUSTICE DOUGLAS in *Dennis* v. *United States,* 341 U. S. 494, 579, 581. Also see my opinion in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 445.

The kind of trials conducted here are wholly dissimilar to normal criminal trials. Ordinarily these "Smith Act" trials are prolonged affairs lasting for months. In part this is attributable to the routine introduction in evidence of massive collections of books, tracts, pamphlets, newspapers, and manifestoes discussing Communism, Socialism, Capitalism, Feudalism and governmental institutions in general, which, it is not too much to say, are turgid, diffuse, abstruse, and just plain dull. Of course, no juror can or is expected to plow his way through this jungle of verbiage. The testimony of witnesses is comparatively insignificant. Guilt or innocence may turn on what Marx or Engels or someone else wrote or advocated as much as a hundred or more years ago. Elaborate, refined distinctions are drawn between "Communism," "Marxism," "Leninism," "Trotskyism," and "Stalinism." When the propriety of obnoxious or unorthodox views about government is in reality made the crucial issue, as it must be in cases of this kind, prejudice makes conviction inevitable except in the rarest circumstances.

II.

Since the Court proceeds on the assumption that the statutory provisions involved are valid, however, I feel free to express my views about the issues it considers.

First.—I agree with Part I of the Court's opinion that deals with the statutory term, "organize," and holds that the organizing charge in the indictment was barred by the three-year statute of limitations.

Second.—I also agree with the Court insofar as it holds that the trial judge erred in instructing that persons could be punished under the Smith Act for teaching and advocating forceful overthrow as an abstract principle. But on the other hand, I cannot agree that the instruction which the Court indicates it might approve is constitutionally permissible. The Court says that persons can be punished for advocating action to overthrow the Government by force and violence, where those to whom the advocacy is addressed are urged "to *do* something, now or in the future, rather than merely to *believe* in something." Under the Court's approach, defendants could still be convicted simply for agreeing to talk as distinguished from agreeing to act. I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal. See Meiklejohn, Free Speech and Its Relation to Self-Government. Cf. Chafee, Book Review, 62 Harv. L. Rev. 891. As the Virginia Assembly said in 1785, in its "Statute for Religious Liberty," written by Thomas Jefferson, "it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order. . . ." * Cf. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 501–502; *Labor*

*12 Hening's Stat. (Virginia 1823), c. 34, p. 85.

Board v. *Virginia Electric & P. Co.*, 314 U. S. 469, 476–480; *Virginia Electric & P. Co.* v. *Labor Board*, 319 U. S. 533, 539.

Third.—I also agree with the Court that petitioners, Connelly, Kusnitz, Richmond, Spector, and Steinberg, should be ordered acquitted since there is no evidence that they have ever engaged in anything but "wholly lawful activities." But in contrast to the Court, I think the same action should also be taken as to the remaining nine defendants. The Court's opinion summarizes the strongest evidence offered against these defendants. This summary reveals a pitiful inadequacy of proof to show beyond a reasonable doubt that the defendants were guilty of conspiring to incite persons to act to overthrow the Government. The Court says:

> "In short, while the record contains evidence of little more than a general program of educational activity by the Communist Party which included advocacy of violence as a theoretical matter, we are not prepared to say, at this stage of the case, that it would be impossible for a jury, resolving all conflicts in favor of the Government and giving the evidence as to these San Francisco and Los Angeles episodes its utmost sweep, to find that advocacy of action was also engaged in when the group involved was thought particularly trustworthy, dedicated, and suited for violent tasks."

It seems unjust to compel these nine defendants, who have just been through one four-month trial, to go through the ordeal of another trial on the basis of such flimsy evidence. As the Court's summary demonstrates, the evidence introduced during the trial against these defendants was insufficient to support their conviction. Under such circumstances, it was the duty of the trial judge to direct a verdict of acquittal. If the jury had

been discharged so that the Government could gather additional evidence in an attempt to convict, such a discharge would have been a sound basis for a plea of former jeopardy in a second trial. See *Wade* v. *Hunter,* 336 U. S. 684, and cases cited there. I cannot agree that "justice" requires this Court to send these cases back to put these defendants in jeopardy again in violation of the spirit if not the letter of the Fifth Amendment's provision against double jeopardy.

Fourth.—The section under which this conspiracy indictment was brought, 18 U. S. C. § 371, requires proof of an overt act done "to effect the object of the conspiracy." Originally, 11 such overt acts were charged here. These 11 have now dwindled to 2, and as the Court says:

> "Each was a public meeting held under Party auspices at which speeches were made by one or more of the petitioners extolling leaders of the Soviet Union and criticizing various aspects of the foreign policy of the United States. At one of the meetings an appeal for funds was made. Petitioners contend that these meetings do not satisfy the requirement of the statute that there be shown an act done by one of the conspirators 'to effect the object of the conspiracy.' The Government concedes that nothing unlawful was shown to have been said or done at these meetings, but contends that these occurrences nonetheless sufficed as overt acts under the jury's findings."

The Court holds that attendance at these lawful and orderly meetings constitutes an "overt act" sufficient to meet the statutory requirements. I disagree.

The requirement of proof of an overt act in conspiracy cases is no mere formality, particularly in prosecutions like these which in many respects are akin to trials for treason. Article III, § 3, of the Constitution provides

that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." One of the objects of this provision was to keep people from being convicted of disloyalty to government during periods of excitement when passions and prejudices ran high, merely because they expressed "unacceptable" views. See *Cramer* v. *United States,* 325 U. S. 1, 48. The same reasons that make proof of overt acts so important in treason cases apply here. The only overt act which is now charged against these defendants is that they went to a constitutionally protected public assembly where they took part in lawful discussion of public questions, and where neither they nor anyone else advocated or suggested overthrow of the United States Government. Many years ago this Court said that "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States* v. *Cruikshank,* 92 U. S. 542, 552. And see *De Jonge* v. *Oregon,* 299 U. S. 353, 364–365. In my judgment defendants' attendance at these public meetings cannot be viewed as an overt act to effectuate the object of the conspiracy charged.

III.

In essence, petitioners were tried upon the charge that they believe in and want to foist upon this country a different and to us a despicable form of authoritarian government in which voices criticizing the existing order are summarily silenced. I fear that the present type of prosecutions are more in line with the philosophy of authoritarian government than with that expressed by our First Amendment.

Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes.

But governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution stands for. The choice expressed in the First Amendment in favor of free expression was made against a turbulent background by men such as Jefferson, Madison, and Mason—men who believed that loyalty to the provisions of this Amendment was the best way to assure a long life for this new nation and its Government. Unless there is complete freedom for expression of all ideas, whether we like them or not, concerning the way government should be run and who shall run it, I doubt if any views in the long run can be secured against the censor. The First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.

MR. JUSTICE CLARK, dissenting.

The petitioners, principal organizers and leaders of the Communist Party in California, have been convicted for a conspiracy covering the period 1940 to 1951. They were engaged in this conspiracy with the defendants in *Dennis* v. *United States,* 341 U. S. 494 (1951). The *Dennis* defendants, named as co-conspirators but not indicted with the defendants here, were convicted in New York under the former conspiracy provisions of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) § 11. They have served or are now serving prison terms as a result of their convictions.

The conspiracy charged here is the same as in *Dennis,* except that here it is geared to California conditions, and brought, for the period 1948 to 1951, under the general conspiracy statute, 18 U. S. C. § 371, rather than the old conspiracy section of the Smith Act. The indictment

charges petitioners with a conspiracy to violate two sections of the Smith Act, as recodified in 18 U. S. C. § 2385, by knowingly and wilfully (1) teaching and advocating the violent overthrow of the Government of the United States, and (2) organizing in California through the creation of groups, cells, schools, assemblies of persons, and the like, the Communist Party, a society which teaches or advocates violent overthrow of the Government.

The conspiracy includes the same group of defendants as in the *Dennis* case though petitioners here occupied a lower echelon in the party hierarchy. They, nevertheless, served in the same army and were engaged in the same mission. The convictions here were based upon evidence closely paralleling that adduced in *Dennis* and in *United States* v. *Flynn,* 216 F. 2d 354 (C. A. 2d Cir. 1954), both of which resulted in convictions. This Court laid down in *Dennis* the principles governing such prosecutions and they were closely adhered to here, although the nature of the two cases did not permit identical handling.

I would affirm the convictions. However, the Court has freed five of the convicted petitioners and ordered new trials for the remaining nine. As to the five, it says that the evidence is "clearly insufficient." I agree with the Court of Appeals, the District Court, and the jury that the evidence showed guilt beyond a reasonable doubt.[1] It paralleled that in *Dennis* and *Flynn* and was

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[1] Petitioners Richmond, Connelly, Kusnitz, Steinberg, and Spector are set free.

Richmond at the time of his indictment had for many years been the editor-in-chief of the Daily People's World, the official organ of the Party on the West Coast. He had joined the Party in 1931 and received his indoctrination in Communist technique at the offices of the Daily Worker, the official Party paper on the East Coast. In 1937 he was chosen by the Party's Central Committee to be

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equally as strong. In any event, this Court should not acquit anyone here. In its long history I find no case in which an acquittal has been ordered by this Court solely on the *facts*. It is somewhat late to start in now usurping the function of the jury, especially where new trials are to be held covering the same charges. It may be—although after today's opinion it is somewhat doubtful—that under the new theories announced by the Court

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managing editor of the Daily People's World and was transferred to California. From 1946 through 1948 he regularly attended secret meetings of the state and county boards of the Party, admission to which was by identification from a special list of Party members prepared by the Party chairman or its security chief. Party strategy was mapped out at "very secret meetings" attended by Richmond and the core of the Party machinery, including at least seven of the petitioners here. Richmond served on a special committee to help develop "preconvention discussion" with petitioner Yates; he represented the state committee at the 1950 convention; he addressed many Party meetings preaching the "vanguard role" of the Party and the importance of the People's World in the Communist movement; and his articles in the paper urged the "Leninist and Marxist approach."

Connelly, a Party member since at least 1938, was the Los Angeles editor of the People's World. During the mobilization effort early in World War II he devoted his efforts to "building up sentiment against . . . the war effort" among steel, aircraft, and shipyard workers. He attended the same secret meetings attended by Richmond.

There can be no question that the proof sustained the charges against Richmond and Connelly in the conspiracy. Their newspaper was the conduit through which the Party announced its aims, policies, and decisions, sought its funds, and recruited its members. It is the height of naiveté to claim that the People's World does not publish appeals to its readers to follow Party doctrine in seeking the overthrow of the Government by force, but it is stark reality to conclude that such a publication provides an incomparable means of promoting the Party's aim of forcible seizure when the time is ripe.

Petitioner Spector has been active in the California Party since the early 1930's. He taught "Marxism-Leninism" in Party schools

for Smith Act prosecutions sufficient evidence might be available on remand. To say the least, the Government should have an opportunity to present its evidence under these changed conditions.

I cannot agree that half of the indictment against the remaining nine petitioners should be quashed as barred by the statute of limitations. I agree with my Brother BURTON that the Court has incorrectly interpreted the

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and was "division organizer" in Los Angeles County. He attended "underground meetings" with petitioners Lambert, Dobbs, Healy, Carlson, and Schneiderman. The witness Rosser testified that these meetings were "so hid that you couldn't get to them unless you were invited and taken there." In 1946 he "conducted classes" for Party members in Hollywood, and in 1947 as a member of a committee of three Party officials examined the witness Russell, a student in one of his classes, on charges of being a Party "police spy."

Petitioner Kusnitz, following an organizational indoctrination period in New York City, became a Party leader in California in 1946, served as "section organizer," and later as "organizational secretary" in Los Angeles. Her position was directly below that of the local chairman in Party hierarchy. She attended many secret meetings and was present at a Party meeting with petitioner Yates when Yates advocated the necessity of "Soviet support" and "Marxist-Leninist training" as a means of bringing about the Soviet "type of government . . . all over the world." She contributed articles to Communist publications and was very active in the "regrouping of . . . clubs into smaller units"; conducting a "six session leadership training seminar"; carrying on campaigns for subscriptions to the People's World; and leading the "Party Building drive" for the recruitment of members.

Petitioner Henry Steinberg, active in the Young Communist League, and associated with the Party since 1936, was the "educational director." He took part in the creation of the program for the Party's training schools in Los Angeles County. His "education department" sponsored several meetings, one honoring the 25th anniversary of the death of Lenin. He worked with petitioner Schneiderman, the Party Chairman in California, attended meetings regularly, was active in circulation drives for the People's World, and was the principal speaker at many meetings.

term "organize" as used in the Smith Act. The Court concludes that the plain words of the Act,[2] "Whoever organizes or *helps* or *attempts* to organize any society, group, or assembly of persons" (emphasis added) embodies only those "acts entering into the creation of a new organization." As applied to the Communist Party, the Court holds that it refers only to the reconstitution of the Party in 1945 and a part of the prosecution here is, therefore, barred by the three-year statute of limitations. This construction frustrates the purpose of the Congress for the Act was passed in 1940 primarily to curb the growing strength and activity of the Party.[3] Under such an interpretation all prosecution would have been barred at the very time of the adoption of the Act for the Party was formed in 1919. If the Congress had been concerned with the initial establishment of the Party it would not have used the words "helps or attempts," nor the phrase "group,

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[2] 18 U. S. C. § 2385.

[3] Congressman McCormack's remarks on the floor of the House of Representatives on July 29, 1939, during the debate on the Smith Act reflect the underlying purpose behind that Act. He stated, *inter alia:*

"We all know that the Communist movement has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both. That testimony was indisputably produced before the special committee of which I was chairman, and came from the lips not of those who gave hearsay testimony, but of the actual official records of the Communist Party of the United States, presented to our committee by the executive secretary of the Communist Party and the leader of the Communist Party in the United States, Earl Browder. . . . Therefore, a Communist is one who intends knowingly or willfully to participate in any actions, legal or illegal, or a combination of both, that will bring about the ultimate overthrow of our Government. *He is the one we are aiming at . . .*" (Emphasis added.) 84 Cong. Rec. 10454. See also Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H. R. 5138, 76th Cong., 1st Sess. 84.

or assembly of persons." It was concerned with the new Communist fronts, cells, schools, and other groups, as well as assemblies of persons, which were being created nearly every day under the aegis of the Party to carry on its purposes. This is what the indictment here charges and the proof shows beyond doubt was in fact done. The decision today prevents for all time any prosecution of Party members under this subparagraph of the Act.

While the holding of the Court requires a reversal of the case and a retrial, the Court very properly considers the instructions given by the trial judge. I do not agree with the conclusion of the Court regarding the instructions, but I am highly pleased to see that it disposes of this problem so that on the new trial instructions will be given that will at least meet the views of the Court. I have studied the section of the opinion concerning the instructions and frankly its "artillery of words" leaves me confused as to why the majority concludes that the charge as given was insufficient. I thought that *Dennis* merely held that a charge was sufficient where it requires a finding that "the Party advocates the theory that there is a duty and necessity to overthrow the Government by force and violence. . . . not as a prophetic insight or as a bit of . . . speculation, but as a program for winning adherents and as a policy to be translated into action" as soon as the circumstances permit. 341 U. S., at 546–547 (concurring opinion). I notice however that to the majority

> "The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence 'as a rule or principle of action,' and employing 'language of incitement,' *id.*, at 511–512, is not constitutionally protected when the group is of sufficient

> size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur."

I have read this statement over and over but do not seem to grasp its meaning for I see no resemblance between it and what the respected Chief Justice wrote in *Dennis,* nor do I find any such theory in the concurring opinions. As I see it, the trial judge charged in essence all that was required under the *Dennis* opinions, whether one takes the view of the Chief Justice or of those concurring in the judgment. Apparently what disturbs the Court now is that the trial judge here did not give the *Dennis* charge although both the prosecution and the defense asked that it be given. Since he refused to grant these requests I suppose the majority feels that there must be some difference between the two charges, else the one that was given in *Dennis* would have been followed here. While there may be some distinctions between the charges, as I view them they are without material difference. I find, as the majority intimates, that the distinctions are too "subtle and difficult to grasp."

However, in view of the fact that the case must be retried, regardless of the disposition made here on the charges, I see no reason to engage in what becomes nothing more than an exercise in semantics with the majority about this phase of the case. Certainly if I had been sitting at the trial I would have given the *Dennis* charge, not because I consider it any more correct, but simply because it had the stamp of approval of this Court. Perhaps this approach is too practical. But I am sure the trial judge realizes now that practicality often pays.

I should perhaps add that I am in agreement with the Court in its holding that petitioner Schneiderman can find no aid from the doctrine of collateral estoppel.

UNITED STATES *v.* CALAMARO.

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

No. 304. Argued March 4, 1957.—
Decided June 17, 1957.

A so-called "pick-up man" in a type of lottery called the "numbers game," who has no proprietary interest in the enterprise and acts merely as a messenger transmitting records of wagers from the "writer" (an agent who accepts wagers from the bettors) to the "banker" (the principal for whom the wagers are accepted), is not "engaged in receiving wagers for or on behalf of any person" within the meaning of Subchapter B of Chapter 27 A of the Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.) § 3290, and, therefore, is not subject to the annual $50 special occupational tax imposed by that Subchapter. Pp. 351–360.

236 F. 2d 182, affirmed.

Leonard B. Sand argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper.*

Raymond J. Bradley argued the cause for respondent. With him on the brief was *Edwin P. Rome.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question before us is whether the respondent, a so-called "pick-up man" in a type of lottery called the "numbers game," is subject to the annual $50 special occupational tax enacted by Subchapter B of Chapter 27A (Wagering Taxes) of the Internal Revenue Code of 1939, 65 Stat. 530, 26 U. S. C. § 3285 *et seq.*

As will be seen from the statute, whose material parts are printed in the margin,[1] this Chapter of the 1939 Code enacts two kinds of wagering taxes: (1) An excise tax, imposed by § 3285 (d) on persons "engaged in the business of accepting wagers," and (2) a special occupational tax, imposed by § 3290 not only on persons who are sub-

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[1] "SUBCHAPTER A—TAX ON WAGERS

"SEC. 3285. TAX.

"(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.

"(b) DEFINITIONS.—For the purposes of this chapter—

"(1) The term 'wager' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

"(2) The term 'lottery' includes the numbers game . . . .

. . . . . .

"(d) PERSONS LIABLE FOR TAX.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

. . . . . .

"SUBCHAPTER B—OCCUPATIONAL TAX

"SEC. 3290. TAX.

"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.

"SEC. 3291. REGISTRATION.

"(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

"(1) his name and place of residence;

"(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on,

ject to the excise tax, being "engaged in the business," but also on those who are "engaged in receiving wagers" on behalf of one subject to the excise tax. By definition the "numbers game" is among the wagering transactions included in the statute.

At the outset we must understand some professional gambling terminology which has been given us by the parties. A numbers game involves three principal functional types of individuals: (1) the "banker," who deals in the numbers and against whom the player bets; (2) the "writer," who, for the banker, does the actual selling of the numbers to the public, and who records on triplicate slips the numbers sold to each player and the amount of his wager; and (3) the "pick-up man," who collects wagering slips [2] from the writer and delivers them to the banker. If there are winnings to be distributed, the banker delivers the required amount to the writer, who in turn pays off the successful players.

The respondent here was a pick-up man for a Philadelphia banker, receiving for his services a salary of $40 a week, but having no proprietary interest in this num-

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and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

"(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

. . . . . .

"SEC. 3294. PENALTIES.

"(a) FAILURE TO PAY TAX.—Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000." 65 Stat. 530, 26 U. S. C. §§ 3285–3294.

[2] The pick-up man collects the "yellow" copy. The "tissue" copy is given to the player when he places his bet, and the "white" copy is retained by the writer.

bers enterprise. He was convicted, after a jury trial in the United States District Court for the Eastern District of Pennsylvania, of failing to pay the § 3290 occupational tax, and was fined $1,000.[3] The Court of Appeals reversed by a divided court, 236 F. 2d 182, and upon the Government's petition we granted certiorari, 352 U. S. 864, to resolve the conflict between the decision below and that of the Court of Appeals for the Fifth Circuit in *Sagonias* v. *United States,* 223 F. 2d 146, as to the scope of § 3290. For reasons given hereafter we consider that the Court of Appeals in this case took the correct view of this statute.

The nub of the Court of Appeals' holding was put in the following language, with which we agree:

> "In normal usage of familiar language, 'receiving wagers' is what someone on the 'banking' side of gambling does in dealing with a bettor. Placing and receiving a wager are opposite sides of a single coin. You can't have one without the other. [The court here referred to the definition of "wager" contained in § 3285 (b)(1)(C); note 1, *supra.*] Before the pick-up man enters the picture, in such a case as we have here, the wager has been received physically by the writer and, in legal contemplation, by the writer's principal as well. The government recognizes—and in an appropriate case no doubt would insist—that what the writer does in relation to the bettor amounts to 'receiving a wager.' Thus, the government has to argue that the wager is received a second time when the writer hands the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and

[3] 137 F. Supp. 816.

> not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits." 236 F. 2d, at 184–185.

We do not think that either the language or purpose of this statute, as revealed by its legislative history, supports the position of the Government. When the phrase "receiving wagers" is read in conjunction with § 3285 (b)(1), which defines "wager" in terms of the "placing" of a bet in connection with any of the kinds of wagering transactions embraced in the statute,[4] it seems evident that the Court of Appeals was quite correct in regarding the "placing" and "receiving" of a wager as being "opposite sides of a single coin." [5] In other words, we think that as used in § 3290 the term "receiving" a wager is synonymous with "accepting" a wager; [6] that it is the making of a gambling contract, not the transportation of a piece of paper, to which the statute refers; and hence that, in such a case as this, it is the writer and not the pick-up man who is "engaged in receiving wagers" within the meaning of § 3290.

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[4] See note 1, *supra*.

[5] That the "placing" and "receiving" of a wager should be regarded as simply complementing one another is recognized by Treasury Regulations 132, § 325.24 (a) of which states:

". . . Any wager or contribution received by an agent or employee on behalf of such person [one in the business of accepting wagers or operating a wagering pool or lottery] shall be considered to have been accepted by and placed with such person." 26 CFR, 1957 Cum. Pocket Supp., § 325.24 (a).

[6] Indeed, the information filed against the respondent, which charged him with failing to pay the § 3290 occupational tax, alleged that he "did accept," not that he "did receive," wagers. 137 F. Supp., at 817, n. 1.

We consider the legislative history of the statute, such as it is, to be fully consistent with this interpretation of § 3290. In the Senate and House Reports on the bill, it is stated:

> ". . . A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account. The principals in such transactions are commonly referred to as 'bookmakers,' although it is not intended that any technical definition of 'bookmaker,' such as the maintenance of a handbook or other device for the recording of wagers, be required. *It is intended that a wager be considered as 'placed' with a principal when it has been placed with another person acting for him. Persons who receive bets for principals are sometimes known as 'bookmakers' agents' or as 'runners.'* . . .
>
> . . . . . .
>
> "As in the case of bookmaking transactions, *a wager will be considered as 'placed' in a pool or in a lottery whether placed directly with the person who conducts the pool or lottery or with another person acting for such a person.*" H. R. Rep. No. 586, 82d Cong., 1st Sess. 56; S. Rep. No. 781, 82d Cong., 1st Sess. 114 (emphasis added).

Again, in the case of a numbers game, this indicates that Congress regarded the "placing" of a wager as being complemented by its "receipt" by the banker or by one acting for him in that transaction, that is, the writer and not the pick-up man.

Nor, contrary to what the Government contends, can we see anything in the registration provisions of § 3291 which points to the pick-up man as being considered a "receiver" of wagers. Those provisions simply provide that one liable for any tax imposed by the statute must

register his name and address with the collector of the district, and require in addition, (a) as to those subject to the § 3285 excise tax, the registration of the name and address "of each person who is engaged in receiving wagers for him or on his behalf," and (b) as to those subject to the § 3290 occupational tax, the registration of the name and address of each person for whom they are "engaged in receiving wagers." [7] It is doubtless true that these provisions, as well as the occupational tax itself,[8] were designed at least in part to facilitate collection of the excise tax. It is likewise plausible to suppose, as the Government suggests, that the more participants in a gambling enterprise are swept within these provisions, the more likely it is that information making possible the collection of excise taxes will be secured. The fact remains, however, that Congress did not choose to subject all employees of gambling enterprises to the tax and reporting requirements, but was content to impose them on persons actually "engaged in receiving wagers." Neither we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon.[9]

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[7] See note 1, *supra.*

[8] H. R. Rep. No. 586, 82d Cong., 1st Sess. 60; S. Rep. No. 781, 82d Cong., 1st Sess. 118 (1951).

[9] We do not consider as illuminating, on the issue before us, the statement in the House and Senate Reports cited in note 8, *supra,* to the effect that "Enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved." This general statement, not necessarily referring to the numbers game or to mere delivery systems, as distinguished from arrangements for the "lay-off" of bets by gambling principals, is not helpful in interpreting § 3290 in relation to the numbers game and "pick-up men." Cf. *Federal Communications Commission* v. *Columbia Broadcasting System of Calif., Inc.,* 311 U. S. 132, 136. We think the same is true of the statements of Representative Reed, 97

We can give no weight to the Government's suggestion that holding the pick-up man to be not subject to this tax will defeat the policy of the statute because its enactment was "in part motivated by a congressional desire to suppress wagering." [10] The statute was passed, and its constitutionality was upheld, as a revenue measure, *United States* v. *Kahriger,* 345 U. S. 22, and, apart from all else, in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt. See *id.,* at 31.

Finally, the Government points to the fact that the Treasury Regulations relating to the statute purport to include the pick-up man among those subject to the § 3290 tax,[11] and argues (a) that this constitutes an administrative interpretation to which we should give weight in construing the statute, particularly because (b) section 3290 was carried over *in haec verba* into § 4411 of the Internal Revenue Code of 1954. We find neither argument persuasive. In light of the above discussion,

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Cong. Rec. 6896, and of Senator Kefauver, 97 Cong. Rec. 12231–12232, relied on by the Government. The significance of Senator Kefauver's statement is further limited by the fact that he was an opponent of the bill. See *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, 288.

[10] See 97 Cong. Rec. 6892, 12236, referred to in *United States* v. *Kahriger,* 345 U. S. 22, 27, n. 3.

[11] Treas. Reg. 132, § 325.41, Example 2 (26 CFR, 1957 Cum. Pocket Supp.), which was issued on November 1, 1951 (16 Fed. Reg. 11211, 11222), provides as follows:

"B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.

"B, his ten agents, and the employee who collects the wagers received on his behalf are each liable for the special tax."

we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there.[12] As such the regulation can furnish no sustenance to the statute. *Koshland* v. *Helvering,* 298 U. S. 441, 446–447. Nor is the Government helped by its argument as to the 1954 Code. The regulation had been in effect for only three years,[13] and there is nothing to indicate that it was ever called to the attention of Congress. The re-enactment of § 3290 in the 1954 Code was not accompanied by any congressional discussion which throws light on its intended scope. In such circumstances we consider the 1954 re-enactment to be without significance. *Commissioner* v. *Glenshaw Glass Co.,* 348 U. S. 426, 431.

In conclusion, we cannot accept the alternative reasoning of the dissenting judge below who, relying on that part of the opinion in *Daley* v. *United States,* 231 F. 2d 123, 128, relating to the trial court's charge to the jury in a prosecution for failing to pay the § 3285 excise tax,[14]

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[12] Apart from this, the force of this Treasury Regulation as an aid to the interpretation of the statute is impaired by its own internal inconsistency. Thus, while Example 2 of that regulation purports to make the pick-up man liable for the § 3290 occupational tax, Example 1 of the same regulation provides that "a secretary and bookkeeper" of one "engaged in the business of accepting horse race bets" are not liable for the occupational tax "unless they also receive wagers" for the person so engaged in business, although those who "receive wagers by telephone" are so liable. Thus in this instance a distinction seems to be drawn between the "acceptance" of the wager, and its "receipt" for recording purposes. But if this be proper, it is not apparent why the same distinction is not also valid between a writer, who "accepts" or "receives" a bet from a numbers player, and a pick-up man, who simply "receives" a copy of the slips on which the writer has recorded the bet, and passes it along to the banker.

[13] See note 11, *supra.*

[14] See the dissenting judge's opinion below, 236 F. 2d 182, 185–186. The sufficiency of the instructions to the jury in *Daley* apparently

regarded the respondent's conviction here as sustainable also on the theory that he was a person "engaged in the business of accepting wagers" within the meaning of § 3285 (d). The Government disclaims this ground for upholding the respondent's conviction, as indeed it must, in light of the unambiguous legislative history showing that the excise tax applies only to one who is "engaged in the business of accepting wagers" as a "principal . . . on his own account." [15] In this instance, that means the banker, as the Government concedes.

We hold, therefore, that the occupational tax imposed by § 3290 does not apply to this respondent as a pick-up man, and that the judgment below must accordingly be

Affirmed.

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

MR. JUSTICE BURTON, dissenting.

For the reasons stated in *Sagonias* v. *United States,* 223 F. 2d 146, I believe that the respondent pickup man was "engaged in receiving wagers for and on behalf" of the banker, within the meaning of §§ 3290 and 3291 (a)(3), and therefore was required to pay the occupational tax and to register not only his name and place of residence, but that of the banker.

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was not challenged on appeal. In any event, the *Daley* case was not concerned with a pick-up man, nor was the legislative history quoted at p. 356, *supra,* brought to the court's attention. The court in the *Sagonias* case, *supra,* which accepted the Government's contention as to the meaning of "receiving wagers," rejected the construction of the statute embodied in the instructions to the jury quoted in *Daley*.

[15] See p. 356, *supra*.

The language of § 3290 does not limit the occupational tax to persons "accepting wagers" in a contractual sense. Instead, it imposes the tax on "each person . . . who is engaged in receiving wagers for or on behalf of any person so liable [for the excise tax]." Those words readily include a pickup man for he is engaged in receiving for the banker the slips which provide the banker with the sole evidence of the wagers made.

The legislative history contains specific references that indicate that the section was to apply to bookmakers' agents or runners.[1] It shows that the occupational tax was enacted not only as a revenue measure on its own account, but as a measure to help enforce the much larger excise tax placed by § 3285 upon the principal operator of the gambling enterprise.[2] To this end, § 3291 (a)(1) and (3) requires each person who is subject to the occupational tax to register not only his own name and place of residence, but also that of the person for whom he is receiving wagers. Registration of the pickup man aids the Government in tracking these gambling operations to their headquarters and is essential to the enforcement of the excise tax. Since the "receiving wagers" phrase in the registration provisions includes the pickup man, it must have the same meaning in the identical provisions imposing the occupational tax.

Furthermore, the administrative interpretation of § 3290 is significant. Since the enactment of the section

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[1] H. R. Rep. No. 586, 82d Cong., 1st Sess. 56; S. Rep. No. 781, 82d Cong., 1st Sess. 114; 97 Cong. Rec. 6896 (Representative Reed); *id.*, at 12231–12232 (Senator Kefauver). In this connection, it should be noted that the opinion of the court below states that "The 'numbers banker', even as bankers and brokers in reputable commerce, employs salaried *runners* and messengers. These couriers are called 'pick-up men.'" (Emphasis supplied.) 236 F. 2d 182, 184.

[2] H. R. Rep. No. 586, 82d Cong., 1st Sess. 60; S. Rep. No. 781, 82d Cong., 1st Sess. 118.

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in 1951, there has been in effect the following explanation of its scope in Treasury Regulations 132:

> "*Example* (*2*). B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.
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> "B, his ten agents, *and the employee who collects the wagers received on his behalf* are each liable for the special tax." (Emphasis supplied.) 26 CFR, 1957 Cum. Pocket Supp., § 325.41.

This regulation should not be disregarded unless shown to be plainly inconsistent with the statute. *Commissioner* v. *Wheeler,* 324 U. S. 542, 547; *Brewster* v. *Gage,* 280 U. S. 327, 336. Moreover, Congress re-enacted § 3290 in 1954 as 26 U. S. C. (Supp. II) § 4411. It thus impliedly accepted this established interpretation of the scope of the section. *Corn Products Refining Co.* v. *Commissioner,* 350 U. S. 46, 53; *Helvering* v. *Winmill,* 305 U. S. 79, 83.

Syllabus.

SERVICE *v.* DULLES ET AL.

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

No. 407. Argued April 2–3, 1957.—Decided June 17, 1957.

This suit was brought by petitioner, a Foreign Service Officer, to test the validity of his discharge by the Secretary of State under these circumstances: The State Department's Loyalty Security Board had repeatedly cleared petitioner of charges of being disloyal and a security risk; and its findings had been approved by the Deputy Under Secretary, whose approval of findings *favorable* to an employee were final under the applicable Regulations. No finding *unfavorable* to petitioner ever had been made by the Department's Loyalty Security Board or the Deputy Under Secretary, and no recommendation *unfavorable* to petitioner ever had been made by the Deputy Under Secretary to the Secretary. Nevertheless, the Loyalty Review Board of the Civil Service Commission, on its own motion, conducted its own hearing, found that there was reasonable doubt as to petitioner's loyalty, and advised the Secretary that petitioner "should be forthwith removed from the rolls of the Department of State." Acting solely on the basis of the finding of that Board, and without making any independent determination of his own on the record in the case, the Secretary discharged petitioner on the same day. He based this action on Executive Orders No. 9835 and No. 10241 and § 103 of Public Law 188, 82d Congress, commonly known as the McCarran Rider, which authorized the Secretary, "in his absolute discretion," to "terminate the employment of any officer . . . of the Foreign Service . . . whenever he shall deem such termination necessary or advisable in the interests of the United States." *Held:* Petitioner's discharge was invalid, because it violated Regulations of the Department of State which were binding on the Secretary; and the judgment is reversed. Pp. 365–389.

1. The Regulations of the State Department governing this subject were applicable to discharges under the McCarran Rider, as well as to those effected under the Loyalty-Security Program. Pp. 373–381.

(a) The terms of the Regulations, the fact that the Department itself proceeded in this very case under those Regulations down to the point of petitioner's discharge, representations made by the State Department to Congress relating to its practices under the McCarran Rider, and the announced wish of the President to the effect that authority under the McCarran Rider should be exercised subject to procedural safeguards designed to protect "the personal liberties of employees," all combine to support this conclusion. Pp. 373–379.

(b) The Secretary was not powerless to bind himself by these Regulations as to discharges under the McCarran Rider. Pp. 379–380.

(c) A different result is not required by the fact that the Regulations refer explicitly to discharges based on loyalty and security grounds and make no reference to discharges deemed "necessary or advisable in the interests of the United States," which is the sole standard of the McCarran Rider. Pp. 380–381.

2. The manner in which petitioner was discharged was inconsistent with, and violative of, Regulations of the State Department—regardless of whether the 1949 Regulations or the 1951 Regulations be considered applicable. Pp. 382–388.

(a) Under the 1949 Regulations, the Secretary had no right to dismiss petitioner for loyalty or security reasons unless and until the Deputy Under Secretary, acting upon findings of the Department's Loyalty Security Board, had recommended dismissal. Pp. 383–387.

(b) Under § 393.1 of the 1951 Regulations, a decision in such a case could be reached only "after consideration of the complete file, arguments, briefs, and testimony presented," and the record shows that the Secretary made no attempt to comply with this requirement in this case. Pp. 387–388.

3. Since the Secretary did not comply with the applicable Regulations of his Department, which were binding on him, petitioner's dismissal cannot stand. *Accardi* v. *Shaughnessy*, 347 U. S. 260. Pp. 388–389.

98 U. S. App. D. C. 268, 235 F. 2d 215, reversed and remanded.

C. Edward Rhetts argued the cause for petitioner. With him on the brief were *Warner W. Gardner* and *Alfred L. Scanlan.*

Donald B. MacGuineas argued the cause for respondents. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Paul A. Sweeney.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

On December 14, 1951, petitioner, John S. Service, was discharged by the then Secretary of State, Dean Acheson, from his employment as a Foreign Service Officer in the Foreign Service of the United States. This case brings before us the validity of that discharge.

At the time of his discharge in 1951, Service had been a Foreign Service Officer for some sixteen years, during ten of which, 1935–1945, he had served in various capacities in China. In April 1945, shortly after his return to this country, Service became involved in the so-called Amerasia investigation through having furnished to one Jaffe, the editor of the Amerasia magazine, copies of certain of his Foreign Service reports. Two months later, Service, Jaffe and others were arrested and charged with violating the Espionage Act,[1] but the grand jury, in August 1945, refused to indict Service. He was thereupon restored to active duty in the Foreign Service, from which he had been on leave of absence since his arrest, and returned to duty in the Far East.

From then on Service's loyalty and standing as a security risk were under recurrent investigation and review by a number of governmental agencies under the provisions of Executive Order No. 9835,[2] establishing the President's Loyalty Program, and otherwise. He was accorded successive "clearances" by the State Department

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[1] Act of June 15, 1917, c. 30, 40 Stat. 217, as amended.

[2] 12 Fed. Reg. 1935.

in each of the years 1945, 1946 and 1947,[3] and a fourth clearance in 1949 by that Department's Loyalty Security Board, which, however, was directed by the Loyalty Review Board of the Civil Service Commission, when the case was examined by it on "post-audit," [4] to prefer charges against Service and conduct a hearing thereon. This was done, and on October 6, 1950, after extensive hearings, the Department Board concluded that "reasonable grounds do not exist for belief that . . . Service is disloyal to the Government of the United States . . . ," and that ". . . he does not constitute a security risk to the Department of State." These findings were approved by the Deputy Under Secretary of State, acting pursuant to authority delegated to him by the Secretary.[5] Again, however, the Loyalty Review Board, on post-audit, remanded the case to the Department Board for further consideration.[6] Such consideration was had, this time under the more stringent loyalty standard established by Executive Order No. 10241,[7] amending the earlier Executive Order No. 9835, and again the Department Board, on July 31, 1951, decided favorably to Service. This determination was likewise approved by the Deputy Under Secretary. However, on a further post-audit, the Loyalty Review Board decided to conduct a new hearing itself, which resulted this time in the Board's finding that there was a reasonable doubt as to Service's loyalty, and

[3] Hearings before the Subcommittee of the House Committee on Appropriations on the Department of State Appropriation Bill for 1950, 81st Cong., 1st Sess. 298.

[4] See *Peters* v. *Hobby*, 349 U. S. 331, 339–348, for a discussion of the then-existing "post-audit" procedure.

[5] See pp. 382–386 and note 16, *infra*.

[6] This action was based on "supplementary information . . . received from the Federal Bureau of Investigation," the nature of which does not appear in the record.

[7] 16 Fed. Reg. 3690.

in its advising the Secretary of State, on December 13, 1951, that in the Board's opinion Service "should be forthwith removed from the rolls of the Department of State" and that "the Secretary should approve and adopt the proceedings" had before the Board.[8] On the same

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[8] The essence of the Loyalty Review Board's action, and its relation to the prior departmental proceedings with respect to Service, are summarized in the State Department's press release of December 13, 1951, as follows:

"The Department of State announced today that the Loyalty Review Board of the Civil Service Commission has advised the Department that this Board has found a reasonable doubt as to the loyalty of John Stewart Service, Foreign Service Officer.

"Today's decision of the Loyalty Review Board is based on the evidence which was considered by the Department's Board and found to be insufficient on which to base a finding of 'reasonable doubt' as to Mr. Service's loyalty or security. Copies of the Opinions of both Boards are attached.

"The Department of State's Loyalty Security Board, on July 31, 1951, had reaffirmed its earlier findings that Service was neither disloyal nor a security risk, and the case had been referred to the Loyalty Review Board for post-audit on September 4, 1951. The Loyalty Review Board assumed jurisdiction of Mr. Service's case on October 9, 1951.

"The Chairman of the Loyalty Review Board in today's letter to the Secretary (full text attached) noted:

" 'The Loyalty Review Board found no evidence of membership in the Communist Party or in any organization on the Attorney General's list on the part of John Stewart Service. The Loyalty Review Board did find that there is a reasonable doubt as to the loyalty of the employee, John Stewart Service, to the Government of the United States, based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of paragraph 2 of Part V, "Standards," of Executive Order No. 9835, as amended.'

"The Opinion of the Loyalty Review Board stressed the points made above by the Chairman—that is, it stated that the Board was not required to find and did not find Mr. Service guilty of disloyalty, but it did find that his intentional and unauthorized

day the Department notified Service of his discharge, effective at the close of business on the following day.

The authority and basis upon which the Secretary acted in discharging petitioner are set forth in an affidavit later filed by Mr. Acheson in the present litigation, in which he states:

> "2. On December 13, 1951, I received a letter from the Chairman of the Loyalty Review Board of the Civil Service Commission submitting to me that Board's opinion, dated December 12, 1951, in the case of John S. Service, a Foreign Service officer of the Department of State and the plaintiff in this action.
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> "3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as

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disclosure of confidential documents raised reasonable doubt as to his loyalty. The State Department Board while censoring [*sic*] Mr. Service for indiscretions, believed that the experience Mr. Service had been through as a result of his indiscretions in 1945 had served to make him far more than normally security conscious. It found also that no reasonable doubt existed as to his loyalty to the Government of the United States. On this point the State Department Board was reversed.

"The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241—which established the President's Loyalty Program—and the Regulations promulgated thereon. These Regulations are binding on the Department of State.

"The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated."

amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.

"4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

"5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment."

Section 103 of Public Law 188, 82d Congress,[9] upon which the Secretary thus relied, was the so-called McCarran Rider, first enacted as a rider to the Appropriation Act for 1947, which provided:

> "Notwithstanding the provisions of . . . any other law, the Secretary of State may, in his absolute discretion, . . . terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States . . . ." [10]

Similar provisions were re-enacted in each subsequent appropriation act until 1953.[11]

After an attempt to secure further administrative review of his discharge proved unsuccessful, petitioner brought this action, in which he sought a declaratory judgment that his discharge was invalid; an order directing the respondents to expunge from their records all written statements reflecting that his employment had been terminated because there was a reasonable doubt as to his loyalty; and an order directing the Secretary to reinstate him to his employment and former grade in the Foreign Service, with full restoration of property rights and payment of accumulated salary.

While cross-motions for summary judgment were pending before the District Court, this Court rendered its decision in *Peters* v. *Hobby,* 349 U. S. 331, holding that under Executive Order No. 9835, the Loyalty Review Board had no authority to review, on post-audit, determinations *favorable* to employees made by department or agency

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[9] 65 Stat. 581.

[10] 60 Stat. 458.

[11] See 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768, 65 Stat. 581, 66 Stat. 555. All of these provisions are referred to in this opinion as "the McCarran Rider."

authorities, or to adjudicate individual cases on its own motion. On the authority of that decision, the District Court declared the finding and opinion of the Loyalty Review Board respecting Service to be a nullity, and directed the Civil Service Commission to expunge from its records the Board's finding that there was reasonable doubt as to his loyalty. But since petitioner's removal rested not only upon Executive Order No. 9835, as amended, but also upon the McCarran Rider, the District Court sustained petitioner's discharge as a valid exercise of the "absolute discretion" conferred upon the Secretary by the latter provision, and granted summary judgment in favor of respondents in all other respects.[12] The Court of Appeals affirmed, 98 U. S. App. D. C. 268, 235 F. 2d

[12] The District Court's opinion is unreported. Actually, the Secretary could be considered to have power to discharge petitioner as he did only by virtue of the McCarran Rider. Petitioner was an officer in the Foreign Service of the United States, and as such was entitled to the protection of the Foreign Service Act of 1946, as amended. 22 U. S. C. § 801 *et seq.* That statute authorizes the Secretary of State to separate officers from the Foreign Service "for unsatisfactory performance of duty," *id.*, § 1007, or for "misconduct or malfeasance," *id.*, § 1008. However, under both sections, an officer may not be separated without a hearing before the Board of the Foreign Service established by § 211 of the Act, 22 U. S. C. § 826, and his unsatisfactory performance of duty or misconduct must be established at that hearing. No such hearing was ever afforded petitioner. Executive Order No. 9835 did not vest any additional authority in the heads of administrative agencies to discharge employees. It merely established new standards and procedures for effecting discharges under whatever independent legal authority existed for those discharges. Cf. *Cole* v. *Young*, 351 U. S. 536, 543–544. The only statutory provision which could be deemed to authorize the Secretary to dismiss petitioner without observance of the provisions of the Foreign Service Act was therefore the McCarran Rider. The latter provision thus was an indispensable supplement to the Department's authority if it was to proceed against petitioner under the Loyalty-Security Regulations as it did. See p. 376, *infra*.

215, and this Court granted certiorari, 352 U. S. 905, because of the importance of the questions involved to federal administrators and employees alike.

Petitioner here attacks the validity of the termination of his employment on two separate grounds: *First,* he contends that the Secretary's exercise of discretion was invalid since the findings and opinion of the Loyalty Review Board, upon which alone the Secretary acted, were void, because they were rendered without jurisdiction [13] and were based upon procedures assertedly contrary to due process of law. Even conceding that the Secretary's powers under the McCarran Rider were such that he was not required to state the grounds for his decision, petitioner urges, his decision cannot stand because he did in fact rely upon grounds that are invalid. See *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80; *Perkins* v. *Elg,* 307 U. S. 325. *Second,* petitioner contends that the Secretary's action is subject to attack under the principles established by this Court's decision in *Accardi* v. *Shaughnessy,* 347 U. S. 260, namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature. Regulations relating to "loyalty and security of employees" which had been promulgated by the Secretary, petitioner asserts, were intended to govern discharges effected under the McCarran Rider as well as those effected under Executive Order No. 9835, as amended, and because those regulations were violated by the Secretary in this case, so petitioner claims, his dismissal by the Secretary cannot stand. Since, for reasons discussed hereafter, we have concluded that petitioner's second contention must be sustained, we do not reach the first.

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[13] See *Peters* v. *Hobby, supra,* 349 U. S., at 342–343.

The questions to which we address ourselves therefore are as follows: (1) Were the departmental Regulations here involved applicable to discharges effected under the McCarran Rider? and (2) Were those Regulations violated in this instance? We do not understand the respondents to dispute that the principle of *Accardi* v. *Shaughnessy, supra,* is controlling, if we find that the Regulations were indeed applicable and were violated. We might also add that we are not here concerned in any wise with the merits of the Secretary's action in terminating the petitioner's employment.

I.

We think it is not open to serious question that the departmental Regulations upon which petitioner relies were applicable to McCarran Rider discharges as well as to those effected pursuant to the Loyalty-Security program. The terms of the Regulations, the fact that the Department itself proceeded in this very case under those Regulations down to the point of petitioner's discharge, representations made by the State Department to Congress relating to its practices under the McCarran Rider, and the announced wish of the President to the effect that McCarran Rider authority should be exercised subject to procedural safeguards designed to protect "the personal liberties of employees," all combine to lead to that conclusion. We also think it clear that these Regulations were valid, so far as their validity is put in issue by the respondents in this case.

A. *The Regulations.*

When the Department's proceedings against the petitioner, which resulted in the "clearances" of October 6, 1950, and July 31, 1951, were begun, the Regulations in effect were those of March 11, 1949, entitled "Regulations and Procedures relating to Loyalty and Security of

Employees, U. S. Department of State." [14] Section 391 stated the "Authority and General Policy" of the Regulations in three subsections. Subsection 391.1 stated that it was "highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk." Subsection 391.2 stated that so far as the Regulations related to the handling of loyalty cases, they were promulgated in accordance with Executive Order No. 9835, which had recognized the "necessity for removing disloyal employees from the Federal service and for refusing employment therein to disloyal persons," and the "obligation to protect employees and applicants from unfounded accusations of disloyalty." Subsection 391.3 referred to the language of the McCarran Rider, noting that the Secretary of State had been granted by Congress the right, in his absolute discretion, "to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States." "In the exercise of this right," the subsection concluded, "the Department will, so far as possible,[15] afford its employees the same protection as those provided under the Loyalty Program." And, as we shall see hereafter, the Regulations made no provision for action by the

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[14] U. S. Department of State, Manual of Regulations and Procedures (1949), § 390 *et seq.*

[15] This qualification is without significance here in view of the fact that the petitioner's case before the Department was handled, down to the time of his discharge by the Secretary, under these Regulations. See p. 376, *infra.* Moreover, this phrase was deleted in the 1951 revision of the Regulations, as we note hereafter, p. 376, *infra,* and the respondents have insisted here that the 1951 revision is controlling, see p. 382, *infra.*

Secretary himself, under the McCarran Rider or otherwise, except following *unfavorable* action in the employee's case by the Department Loyalty Security Board, after full hearing before that Board on the charges against him, and approval of the Board's action by the Deputy Under Secretary.[16]

In May and September 1951, prior to the time of petitioner's discharge, the Regulations were revised, and the amended § 391 provided even more explicitly than the original that the procedures and standards established were intended to govern exercise of the authority granted by the McCarran Rider. After stating in the first subsection [17] that the Regulations were adopted to implement the Department's policy that "no person be employed in the Department [18] who is disloyal or who constitutes a security risk," the section continues in the next two subsections [19] to state in effect that the Regulations relating to the handling of *loyalty* cases were promulgated in accordance with Executive Order No. 9835, and that those relating to *security* cases were promulgated under

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[16] We follow the parties in this case in using interchangeably the terms "Deputy Under Secretary" and "Assistant Secretary—Administration." When the Department's 1949 Regulations were promulgated, the official charged with duties under them was the "Assistant Secretary—Administration." At some time thereafter, however, that official's functions were apparently transferred to a Deputy Under Secretary. Cf. Act of May 26, 1949, §§ 3, 4, 63 Stat. 111. To avoid confusion, we have used exclusively the latter title in the text of this opinion, regardless of its technical correctness in the particular instance.

[17] "391.1 *Policy*." For the Department's 1951 Regulations see U. S. Department of State, Manual of Regulations and Procedures (1951), Vol. I, § 390 *et seq.*

[18] "Department" is defined as including "the Foreign Service of the United States." § 391.3.

[19] "391.2 *Loyalty Authority*," and "391.3 *Security Authority*."

the authority of the Act of August 26, 1950[20] and the McCarran Rider.[21] The phrase "so far as possible," in reference to McCarran Rider authority, was deleted. The Regulations thus drew upon all the sources of authority available to the Secretary with reference to such cases, and purported to set forth definitively the procedures and standards to be followed in their handling.

B. *The Administrative Proceedings in this Case.*

The administrative proceedings held in petitioner's case were unquestionably conducted on the premise that the Regulations were applicable in this instance. The charges were based on the Regulations, and a copy of the Regulations was sent to Service along with the letter of charges. The hearing was scheduled under § 395 of the 1949 Regulations. In its opinion exonerating Service, the Department Board noted, following the Regulations, that "the issues here are (1) loyalty, and (2) security risk." The Board's favorable recommendations came twice before the Deputy Under Secretary for review under §§ 395.6 and 396.7 of these Regulations, and were approved by him. Later, before the Civil Service Commission's Loyalty Review Board, an additional charge was added to the Department's original charges by stipulation of the parties, and the stipulation expressly referred to §§ 392.2 and 393.1a of the Regulations. Indeed, at no time during any of the administrative pro-

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[20] This statute is referred to in the subsection as "Public Law 733, 81st Congress," being the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. §§ 22–1, 22–3, which gave to the State Department, among other departments and agencies of the Government, suspension and dismissal powers over their civilian employees when deemed necessary "in the interest of the national security of the United States." Cf. *Cole* v. *Young*, 351 U. S. 536.

[21] Referred to in the subsection as "General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress."

ceedings in this case was there any suggestion that the Regulations were not applicable to the entire proceedings and binding upon all parties to the case.

C. *The Department's Representations to Congress.*

In the spring of 1950, the Department of State submitted to an investigating subcommittee of the Senate Foreign Relations Committee a comprehensive report on the procedures and standards used by the Department in dealing with employee loyalty and security problems. After describing the procedures utilized by the Department in the early post-war period, the report continued as follows:

> ". . . The policy of the Department prior to the passage of the McCarran rider was that if there was reasonable doubt as to an employee's loyalty, his employment was required to be terminated. The McCarran rider freed the hands of the Department in making this policy effective. Basically any reasonable doubt of an employee's loyalty if based on substantial evidence was to be resolved in favor of the Government. After enactment of the McCarran rider the Department did not contemplate that the legislation required or that the people of this country would countenance the use of 'Gestapo' methods or harassment or persecution of loyal employees who were American citizens on flimsy evidence or hearsay and innuendo. The Department proceeded to develop appropriate procedures designed to implement fully and properly the authority granted the Department under the McCarran rider.
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> "The McCarran rider . . . was the first of a series of provisions included in each subsequent appropriation act which authorized the Secretary of State in his absolute discretion to 'terminate the employment

of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.' Accordingly, effective during the 1947 fiscal year, and each fiscal year thereafter, the Department considered the McCarran rider as an additional standard for dealing with security problems in the Department. . . . *In* [its] *considered view the McCarran rider was subject to procedural limitations.* The McCarran rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims.

. . . . . .

"The President's loyalty order of March 21, 1947, prescribed a comprehensive set of standards governing the executive branch as a whole. It was deemed applicable to the Department of State, as well as to other agencies. *The unique powers conferred on the Department as a result of continuous reenactment of the McCarran rider led the Department to promulgate regulations which would encompass its duties and powers both under the Executive order and under the McCarran rider.*" [22]

D. *The President's Letter.*

That the policy of the Secretary to subject his plenary powers under the McCarran Rider to procedural limitations was deliberately adopted, and rested on decisions taken at the highest level, is evidenced by a letter dated September 6, 1950, from President Truman to the Secretary of State, which was made a part of the record below. In that letter, the President advised the Secretary that he had just approved H. R. 7786, the General Appropriation Act, 1951, 64 Stat. 595, 768, § 1213 of

[22] S. Rep. No. 2108, 81st Cong., 2d Sess. 15–16 (emphasis supplied).

which re-enacted the McCarran Rider for the current fiscal year. The President continued:

> "I am sure you will agree that in exercising the discretion conferred upon you by Section 1213, every effort should be made to protect the national security without unduly jeopardizing the personal liberties of the employees within your jurisdiction. Procedures designed to accomplish these two objectives are set forth in Public Law 733, 81st Congress, which authorizes the summary suspension of civilian officers and employees of various departments and agencies of the Government, including the Department of State.
>
> "In order that officers and employees of the Department of State may be afforded the same protection as that afforded by Public Law 733, it is my desire that you follow the procedures set forth in that law in carrying out the provisions of section 1213 of the General Appropriations Act."

In view of the terms of the Regulations, the course of procedure followed by the Department, and the background materials we have noted, we think that there is no room for doubt that the departmental Regulations for the handling of loyalty and security cases were both intended and considered by the Department to apply in this instance. We cannot accept either of the respondents' present arguments to the contrary. The first argument, as put by the District Court, whose language was adopted by the Court of Appeals,[23] is:

> ". . . It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188. This power of summary dismissal would not have been granted the

[23] 98 U. S. App. D. C., at 271, 235 F. 2d, at 218.

> Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835."

We gather from this that the lower courts thought that the Secretary was powerless to bind himself by these Regulations as to McCarran Rider discharges based on loyalty or security grounds. We do not think this is so. Although Congress was advised in unmistakable terms that the Secretary had seen fit to limit by regulations the discretion conferred upon him, see pp. 377–378, *supra,* it continued to re-enact the McCarran Rider without change for several succeeding years.[24] Cf. *Labor Board* v. *Gullett Gin Co.,* 340 U. S. 361, 366; *Fleming* v. *Mohawk Co.,* 331 U. S. 111, 116. Nor do we see any inconsistency between this statute and the effect of the Regulations upon the Secretary under *Accardi* v. *Shaughnessy,* 347 U. S. 260, already discussed, pp. 372–373, *supra. Accardi,* indeed, involved statutory authority as broad as that involved here.[25]

The respondents' second argument is that the Regulations refer explicitly to discharges based on loyalty and security grounds, but make no reference to discharges

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[24] See note 11, *supra.*

[25] *I. e.,* § 19 (c) of the Immigration Act of 1917, as amended: "In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act." 62 Stat. 1206, 8 U. S. C. (1946 ed., Supp. V) § 155 (c).

deemed "necessary or advisable in the interests of the United States"—the sole McCarran Rider standard—and hence were not applicable to such discharges. But, as has already been demonstrated, both the Regulations and their historical context show that the Regulations were applicable to McCarran Rider discharges, at least to the extent that they were based on loyalty or security grounds, and we do not see how it could seriously be considered, as the respondents now seem to urge, that Service was not discharged on such grounds. The Secretary's affidavit,[26] and also the Department's formal notice to Service of his discharge,[27] both of which, among other things, refer to Executive Order No. 9835 as well as to the McCarran Rider as authority for the Secretary's action, unmistakably show that the discharge was based on such grounds.

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[26] See pp. 368–369, *supra*.

[27] This notice read:

"My dear Mr. Service:

"The Secretary of State was advised today by the Chairman of the Loyalty Review Board of the U. S. Civil Service Commission that the Loyalty Review Board has found that there is a reasonable doubt as to your loyalty to the Government of the United States. This finding was based on the intentional and unauthorized disclosure of documents and information of a confidential and non-public character within the meaning of subparagraph d of Paragraph 2 of Part V of Executive Order 9835, as amended. The Loyalty Review Board further advised that it found no evidence of membership on your part in the Communist Party or in any organizations on the Attorney General's list.

"Pursuant to the foregoing, the Secretary of State, under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82nd Congress, has directed me to terminate your employment in the Foreign Service of the United States as of the close of business December 14, 1951.

"In view thereof, you are advised that your employment in the Foreign Service of the United States is hereby terminated effective [at the] close of business December 14, 1951."

We now turn to the question whether the manner of petitioner's discharge was consistent with the Department's Regulations.

II.

Preliminarily, it must be noted that the parties are in dispute as to which of the two sets of Regulations—those of 1949 or those of 1951—is applicable to petitioner's case, assuming, as we have held, that one or the other must govern. The departmental proceedings against petitioner were begun and were conducted under the 1949 Regulations. However, prior to petitioner's discharge in December 1951, the revised Regulations of May and September 1951 had become effective, and it is under those Regulations, the respondents say, that Service's discharge must be judged.[28] On the other hand, the petitioner contends that the 1949 Regulations remained applicable to his case, since he was not advised of the existence of the 1951 Regulations until after his discharge had been accomplished and the present court proceedings had been commenced.[29] However, it is unnecessary for us to make a choice between the two sets of Regulations, for we find the manner in which petitioner was discharged to have been inconsistent with both.

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[28] The respondents argue that the proper rule to be applied is that of *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, holding that a change in the applicable law after a case has been decided by a *nisi prius* court, but before decision on appeal, requires the appellate court to apply the changed law. And see *Ziffrin, Inc.* v. *United States*, 318 U. S. 73.

[29] Petitioner argues that the decisions cited in note 28, *supra*, are not in point here because, *inter alia*, the changed regulations were invalid as to him under the Federal Register Act, 49 Stat. 502, 44 U. S. C. § 307, and the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. § 1002, because not published in the Federal Register.

A. *The 1949 Regulations.*

In terms of the 1949 Regulations, the vice we find in petitioner's discharge is that the Secretary had no right to dismiss the petitioner for loyalty or security reasons unless and until the Deputy Under Secretary, acting upon the findings of the Department's Loyalty Security Board, had recommended such dismissal. In other words, the Deputy Under Secretary in this instance having approved the findings of the Loyalty Security Board favorable to petitioner, the Secretary, consistently with these Regulations, could not, without more, dismiss the petitioner.

The basis for this conclusion will appear from a consideration of the procedural scheme established by the 1949 Regulations relating to loyalty and security cases. In outline that scheme involved the following procedural steps:

> (1) The filing of charges, upon notice to the employee involved, accompanied by adequate factual details as to their basis, and a statement as to the employee's work and pay status pending further action.[30]
>
> (2) A hearing on such charges, if requested by the employee, before the Department's Loyalty Security Board, whose determination, together with the record of the hearings, were then to be forwarded to the Deputy Under Secretary for review.[31]
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> (3) Upon such review the Deputy Under Secretary was empowered (i) to return the case to the Board for further investigation or action; (ii) to decide in favor of the employee, and to so notify him

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[30] §§ 394.13, 394.15, 395.1.

[31] §§ 395.1, 395.53.

in writing; or (iii) to decide against the employee, and to notify him of his right to appeal to the Secretary within 10 days thereafter.[32]

(4) In the event of such an appeal, the Secretary was empowered (i) to decide favorably to the employee, and to so notify him in writing; or (ii) to decide against the employee, and to notify him of such decision, and further, in a loyalty case, of his right to appeal to the Loyalty Review Board within 20 days thereafter.[33]

(5) If, upon such an appeal, the Loyalty Review Board decided adversely to the employee and made an "advisory" recommendation to the Secretary that the employee should be removed from employment under the applicable loyalty standards, the Department was to take prompt administrative action to that end. On the other hand if the Board decided favorably to the employee the Secretary was empowered (i) to restore the employee to duty and "close the case"; (ii) to permit the employee to resign; or (iii) to terminate his employment under the authority conferred by the McCarran Rider "or other appropriate authority." [34]

From this survey, three things appear as to the handling of loyalty and security cases under the 1949 Regulations which are of significance in this case. *First,* following the decision of the Deputy Under Secretary upon a determination of the Department Loyalty Security Board, there was to be an appeal to the Secretary *only* if the Deputy's action had been adverse to the employee. In other words, under these Regulations the action of the

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[32] §§ 395.6, 396.11.

[33] §§ 396.2, 396.3.

[34] §§ 396.4, 396.5.

Deputy Under Secretary, if *favorable* to the employee, was to be final, the Secretary reserving to himself power to act further only if his Deputy's action was *unfavorable* to the employee.[35] *Second,* there was likewise an appeal to the Loyalty Review Board from the Secretary's decision *only* if his action was *adverse* to the employee. Again, in other words, a decision of the Secretary favorable to the employee was to be final, and immune from further action by the Loyalty Review Board on post-audit, a rule since confirmed by our decision in *Peters* v. *Hobby, supra. Third,* the Secretary reserved the right to deal with such a case under his McCarran Rider authority, outside the Regulations, only in instances where, upon an employee's appeal to the Loyalty Review Board from an unfavorable decision by the Secretary, the decision of that body was favorable to the employee.

Granted, as the respondents argue, that these Regulations gave the petitioner (a) no right of appeal to the Secretary from the Deputy Under Secretary's *favorable*

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[35] That this was understood to be the effect of the Regulations is indicated by Department of State Press Release No. 247, March 13, 1950, which is reprinted in S. Rep. No. 2108, 81st Cong., 2d Sess. 254. Deputy Under Secretary of State John E. Peurifoy is there quoted as stating, in reply to charges made on the floor of the Senate:

". . . I am in full charge of loyalty matters and . . . am fully prepared to deal with these charges.

"Gen. George C. Marshall, as Secretary of State, vested in me full responsibility and authority for carrying out the loyalty and security program of the Department of State, and I have continued to exercise the same responsibility and authority under Secretary Dean Acheson.

"My decisions on matters of loyalty and security within the Department are *final,* subject, however, under the law, *in certain instances* to appeal to the Secretary and the President's Loyalty Review Board. Since the loyalty and security program was launched in the Department, however, there has not been a single instance in which a decision made by me has been reversed or overruled in any way by Secretary Acheson." (Emphasis supplied.)

decision, and (b) no right of appeal at all from the action of the Loyalty Review Board, it does not follow, as the respondents then argue, that the Secretary was free to dismiss the petitioner. For, as has already been observed, the Regulations left the Secretary *functus officio* with respect to such cases once the Deputy Under Secretary had made a determination favorable to the employee. So here when the Deputy Under Secretary approved the Loyalty Security Board's action of July 31, 1951, clearing the petitioner, under these Regulations the case against Service was closed.[36] Hence Service's subsequent discharge by the Secretary must be deemed to have been in contravention of these 1949 Regulations.[37] The situation under the 1949 Regulations was thus closely analogous to that which obtained in *Accardi* v. *Shaughnessy, supra.* There, the Attorney General bound himself not to exercise his discretion until he had received an impartial recommendation from a subordinate board. Here, the

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[36] Section 396.7 of the Regulations provided:

"If the Assistant Secretary—Administration or the Secretary of State shall, during his consideration of any case, decide affirmatively that an officer or employee is not disloyal and does not constitute a security risk and that his case should be closed, such officer or employee shall be restored to duty, if suspended, and the record shall show such decision."

In holding as we do we by no means imply that under these Regulations the action of the Deputy Under Secretary had the effect of "closing" petitioner's case irrevocably and beyond hope of recall. No doubt proper steps could have been taken to reopen it in the Department. But, consistent with his Regulations, we think that the Secretary could in no event have discharged the petitioner, as he did here, without the required action first having been taken by the Department's Loyalty Security Board and the Deputy Under Secretary.

[37] In view of this conclusion, it becomes unnecessary to consider the other respects in which petitioner claims that his discharge contravened the 1949 Regulations.

Secretary bound himself not to act at all in cases such as this, except upon appeal by employees from determinations unfavorable to them. We see no relevant ground for distinction.

B. *The 1951 Regulations.*

A similar conclusion must be reached if the 1951 Regulations are deemed applicable to petitioner's case. Section 393.1 of those Regulations provides:

> "The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. *The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.*" (Emphasis added.)

The "authority referred to in section 391.3," as we have already noted, included the McCarran Rider.[38] In light of the former Secretary's affidavit [39] there is no room for dispute that no attempt was made to comply with this section of the Regulations,[40] as indeed the respondents' brief virtually concedes.

The respondents argue that this provision was not violated in petitioner's case because "the only decision to which Section 393.1 relates is that the removal of the

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[38] See pp. 375–376, *supra.*

[39] See pp. 368–369, *supra.*

[40] We do not, of course, imply that the Regulations precluded the Secretary from discharging any individual without *personally* reading the "complete file" and considering "all the evidence." No doubt the Secretary could delegate that duty. But nothing of the kind appears to have been done here.

officer or employee involved is 'necessary or advisable in the interest of national security,' " the standard laid down in the Act of August 26, 1950,[41] and that "[n]othing in this section purports to prescribe the procedure to be followed in determining that removal is 'necessary or advisable in the interests of the United States,' " the standard contained in the McCarran Rider. But since § 391.3, which is incorporated by reference into § 393.1, specifically subjected the exercise of the Secretary's McCarran Rider authority, in such cases as this, to the operation of the 1951 Regulations, it seems clear that the necessary effect of § 393.1 was to subject the exercise of that authority to the substantive standards prescribed by that section, namely, those established by the Act of August 26, 1950,[42] and also to the procedural requirements that such cases must be decided "on all the evidence" and "after consideration of the complete file, arguments, briefs, and testimony presented." The essential meaning of the section, in other words, was that the Secretary's decision was required to be on the merits. While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

It being clear that § 393.1 was not complied with by the Secretary in this instance, it follows that under the *Accardi* doctrine petitioner's dismissal cannot stand,

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[41] See note 20, *supra*.

[42] Sections 393.2 and 393.3 further refined the standard by defining five classes of persons constituting security risks, and listing five factors which were to be taken into account, together with possible mitigating circumstances.

regardless of whether the 1951, rather than the 1949, Regulations are deemed applicable in his case.[43]

For the foregoing reasons the judgment of the Court of Appeals must be reversed, and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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

[43] Because of this conclusion it is unnecessary to deal with the other respects in which petitioner claims his discharge violated the 1951 Regulations.

WEST POINT WHOLESALE GROCERY CO. *v.* CITY OF OPELIKA, ALABAMA.

APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

No. 478. Argued April 24, 1957.—Decided June 17, 1957.

A municipal ordinance of an Alabama City imposes a flat-sum annual privilege tax on all firms engaged in the wholesale grocery business which deliver groceries at wholesale in the City from points outside the City but does not impose the same tax on local wholesale merchants. *Held:* As applied to a Georgia corporation which solicits orders in the Alabama City, transmits them to Georgia, where they are accepted, and delivers groceries to customers in the Alabama City, the tax is invalid under the Commerce Clause. *Nippert* v. *City of Richmond,* 327 U. S. 416; *Memphis Steam Laundry* v. *Stone,* 342 U. S. 389. Pp. 390–392.

38 Ala. App. 444, 87 So. 2d 661, reversed and remanded.

M. R. Schlesinger argued the cause for appellant. With him on the brief were *N. D. Denson* and *Tom B. Slade.*

R. E. L. Cope argued the cause for appellee. On the brief was *Lawrence K. Andrews.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This is a suit to recover taxes paid by the appellant to the City of Opelika, Alabama, on the ground that the taxes in question imposed a discriminatory burden on interstate commerce. The state court sustained a demurrer to the complaint, 38 Ala. App. 444, 87 So. 2d 661, rejecting the appellant's federal contention, and we noted probable jurisdiction. 352 U. S. 924.

Section 130 (a) of Ordinance No. 101–53 of the City of Opelika, as amended by Ordinance No. 103–53, provides that an annual privilege tax of $250 must be paid by any firm engaged in the wholesale grocery business which

delivers, at wholesale, groceries in the City from points without the City.[1] Appellant is a Georgia corporation engaged in the wholesale grocery business in West Point, Georgia. It solicits business in the City of Opelika through salesmen; orders are transmitted to appellant's place of business in Georgia, where they are accepted and the groceries thereupon loaded on trucks and delivered to the City. Appellant has no place of business, office, or inventory in Opelika, its only contact with that City being the solicitation of orders and the delivery of goods.[2]

We held in *Nippert* v. *City of Richmond,* 327 U. S. 416, and in *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U. S. 389, that a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having a substantial exclusory effect on interstate commerce. In our opinion the tax here in question falls squarely within the ban of those cases. This is particularly so in that Opelika places no comparable flat-sum tax on local merchants. Wholesale grocers whose deliveries originate in Opelika, instead of paying $250 annually, are taxed a sum graduated according to their gross receipts. Such an Opelika wholesaler would have to gross the sum of $280,000 in sales in one year before

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[1] The ordinance provides for the following "schedule of rates for license or privilege taxes for the conduct of any trade, vocation, profession or other business conducted within the City of Opelika":

"Each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama which are transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual only.....$250.00."

[2] The facts, which are admitted for purposes of the demurrer, are taken from the complaint.

his tax would reach the flat $250 amount imposed on all foreign grocers before they may set foot in the City.[3] The Commerce Clause forbids any such discrimination against the free flow of trade over state boundaries.

Since the present tax cannot constitutionally be applied to the appellant, the judgment must be reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BLACK dissents.

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[3] Section 82 of the Ordinance provides for the following rates of tax on local wholesale merchants:

"Where a gross annual business is:

$100,000.00 and less	$35.00
Over $100,000.00 and less than $200,000.00	$50.00
$200,000.00 and less than $500,000.00	$75.00
$500,000.00 and less than $1,000,000.00	$100.00
$1,000,000.00 and less than $2,000,000.00	$200.00
$2,000,000.00 and over	$250.00

"And in addition thereto, one-sixteenth (1/16) of one percent (1%) on the first $500,000.00 gross receipts, plus one-twentieth (1/20) of one percent (1%) on the next $500,000.00 gross receipts plus one-fortieth (1/40) of one percent (1%) on all gross receipts over one million dollars ($1,000,000.00)."

Thus a local wholesale grocer grossing $280,000 in one year would pay a sum of $75, plus 1/16 of one percent of his sales, that is, $175—a total of $250.

BLACKBURN *v.* ALABAMA.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 426. Argued May 2, 1957.—Decided June 17, 1957.

On the record in this case, it is uncertain whether petitioner's claim to protection under the Due Process Clause of the Fourteenth Amendment was passed on by the State Court of Appeals, and the judgment of that Court is vacated and the cause remanded to that Court, so that it may pass on that claim.

38 Ala. App. 143, 88 So. 2d 199, judgment vacated and cause remanded.

Truman Hobbs argued the cause and filed a brief for petitioner.

Paul T. Gish, Jr., Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief were *John Patterson,* Attorney General, and *Bernard F. Sykes,* Assistant Attorney General.

PER CURIAM.

The record in this case leaves us uncertain whether petitioner's claim to the protection of the Due Process Clause of the Fourteenth Amendment to the United States Constitution was passed upon by the Court of Appeals of Alabama. 38 Ala. App. 143, 88 So. 2d 199. Accordingly, we vacate the judgment of the Court of Appeals and remand the cause to that court in order that it may pass upon this claim. *Minnesota* v. *National Tea Co.,* 309 U. S. 551.

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

Petitioner has made as strong a showing as possible that he signed the confession when he was insane. Throughout the whole proceeding he has claimed that the confession was involuntary. The judgment should therefore be reversed. See *Chambers* v. *Florida,* 309 U. S. 227; *Leyra* v. *Denno,* 347 U. S. 556.

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CARROLL ET AL. *v.* UNITED STATES.

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

No. 571. Argued April 4, 1957.—Decided June 24, 1957.

Petitioners were arrested on warrants and subsequently were indicted in the United States District Court for the District of Columbia for violations of local lottery laws and for conspiracy to violate them. After indictment, each filed a pre-trial motion under Rule 41 (e) of the Federal Rules of Criminal Procedure for suppression of evidence seized from his person at the time of his arrest. The District Court granted the motions, on the ground that probable cause had been lacking for issuance of the arrest warrants. Urging that, without the evidence that had been seized and suppressed, it would have to dismiss the indictment for want of sufficient evidence to proceed with the prosecution, the Government appealed to the United States Court of Appeals for the District of Columbia Circuit, which reversed the District Court. *Held:* The appeal should have been dismissed; the Government had no right to appeal from such an order in such circumstances, either under the general statutes relating to the appellate jurisdiction of all federal courts of appeals or under the special statutes relating to the appellate jurisdiction of the United States Court of Appeals for the District of Columbia Circuit. Pp. 396–415.

1. The suppression order here involved is not sufficiently separable and collateral to the criminal case to be "final" and hence appealable under the general authority of 28 U. S. C. § 1291, giving the federal courts of appeals jurisdiction of appeals from "all final decisions" of the district courts. Pp. 399–408.

(a) Appellate jurisdiction in a specific federal court over a given type of case is dependent on authority expressly conferred by statute. Pp. 399–400.

(b) In federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional and not favored. Pp. 400–403.

(c) The suppression order here involved, having been entered after indictment and in the district of trial, has an interlocutory character and, therefore, cannot be appealed by the Government as a "final decision." Pp. 403–405.

(d) The suppression order here involved does not have sufficient characteristics of independence and completeness to make it appealable as an order separable from, or collateral to, the criminal case. Pp. 403–408.

2. The suppression order here involved is not a "final" order within the criminal case and thus appealable under the statutory provisions applicable in the District of Columbia in criminal cases. Pp. 408–415.

(a) Even today, criminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. § 3731, although as to cases covered by that nationwide jurisdictional statute, its explicit directions will prevail over the terms of § 935 of the District of Columbia Code of 1901, now found in § 23–105 of the District of Columbia Code (1951 ed.). Pp. 408–411.

(b) Under § 226 of the District of Columbia Code of 1901, the practice had developed of allowing appeals from interlocutory orders in criminal cases; but § 226 was replaced in 1949 by the nationwide appellate jurisdiction provisions of 28 U. S. C. §§ 1291 and 1292, which do not authorize interlocutory appeals in criminal cases. Pp. 411–413.

(c) The standard of "final decisions" as prerequisite to appeal is not something less or different under 18 U. S. C. § 1291 as the successor to § 226 of the District of Columbia Code of 1901 than it is under § 1291 as the successor to the nationally applicable appeal provisions of the Judicial Code. P. 413.

(d) The statutory provisions applicable to the District of Columbia, subject to the further limitations stated therein, afford the Government an appeal only from an order against it which terminates a prosecution or makes a decision whose distinct or plenary character meets the standards of the precedents applicable to finality problems in all federal courts. Pp. 413–415.

98 U. S. App. D. C. 244, 234 F. 2d 679, reversed and remanded.

Curtis P. Mitchell argued the cause for petitioners. With him on the brief were *Henry Lincoln Johnson, Jr.* and *William B. Bryant.*

Harold H. Greene argued the cause for the United States. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Olney.*

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

Petitioners were arrested in February 1954 on John Doe warrants and subsequently were indicted in the United States District Court for the District of Columbia, with two others, for violations of the local lottery laws and for conspiracy to carry on a lottery.[1] After indictment each filed a pre-trial motion under Rule 41 (e) of the Federal Rules of Criminal Procedure,[2] asking for the suppression of evidence seized from his person at the time of his arrest. The District Court granted petitioners' motions to suppress, on the ground that probable cause had been lacking for the issuance of the arrest warrants directed against them.[3] 126 F. Supp. 620. The Government

[1] Petitioners were charged with carrying on a lottery known as the "numbers game," a violation of D. C. Code, 1951, § 22–1501; with knowing possession of lottery slips, a violation of § 22–1502; and with conspiracy to carry on a lottery, a violation of 18 U. S. C. § 371. Since the substantive offense of carrying on a lottery was a felony under § 22–1501, the conspiracy charge was also a felony, by the terms of 18 U. S. C. § 371.

[2] Fed. Rules Crim. Proc., 41:

"(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that . . . (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, ... If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. . . ."

[3] Petitioners' individual motions were each captioned "Motion to Suppress 'Arrest Warrant'" and asked only for suppression of the evidence taken from the person at the arrest. The District Court also granted in part a motion, made on behalf of all the defendants, relating to the seizure of evidence under search warrants at two homes. The Government makes some point of characterizing this as a motion for the *return* of property. It was captioned "Motion to Suppress Evidence and Return Property," but the body of the

appealed the order for suppression to the United States Court of Appeals for the District of Columbia Circuit. The indictment against petitioners had not been dismissed, but the Government informed the Court of Appeals that, without the "numbers" paraphernalia seized and suppressed, it would lack sufficient evidence to proceed on any of the counts involving petitioners and therefore would have to dismiss the indictment. Petitioners challenged the jurisdiction of the Court of Appeals to hear an appeal by the Government from an order of the District Court granting a motion to suppress that was made while an indictment was pending in the same District Court. The Court of Appeals sustained its jurisdiction on the authority of its prior decision in *United States* v. *Cefaratti*,[4] and reversed the district judge on the merits, holding that there had been probable cause to justify the issuance of warrants for the arrest of petitioners. 98 U. S. App. D. C. 244, 234 F. 2d 679. We granted certiorari, limited to the question of appealability of the suppression order, because of the importance of that question to the administration of the federal criminal laws. 352 U. S. 906.

The Government contends, most broadly, that the suppression order of any District Court is "final" and sufficiently separable and collateral to the criminal case to be appealable under the general authority of 28 U. S. C. § 1291, notwithstanding that such an order is not listed

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motion asked only that the evidence seized at those places be suppressed. We find it unnecessary to decide whether this was a motion "for return of property," or whether that would make a difference in the question of appealability on these facts, for the Court of Appeals, when it reached the merits of the issue of probable cause, dealt only with the warrants for the arrest of petitioners. Hence we limit our consideration of the case to that aspect of the District Court's order for suppression.

[4] 91 U. S. App. D. C. 297, 202 F. 2d 13, as explained in *United States* v. *Stephenson*, 96 U. S. App. D. C. 44, 45, 223 F. 2d 336, 337.

among the few types of orders in criminal cases from which the Government may appeal pursuant to 18 U. S. C. § 3731.[5] More narrowly, failing acceptance of the posi-

[5] 28 U. S. C. § 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court."

18 U. S. C. § 3731:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance. . . ."

The references in the above statutes to "courts of appeals" and "district courts" encompass the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia. 28 U. S. C. §§ 43, 132, 451; 62 Stat. 991, as amended, 63 Stat. 107. See also 56 Stat. 271.

tion just stated, the Government maintains that an order of suppression is, within the criminal case, a "final" order and thus appealable under the statutory provisions for appeals by the Government in criminal cases that are applicable exclusively in the District of Columbia.[6] It will be convenient to discuss the issues in the same order.

I.

It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act, 1 Stat. 73, they have always been interpreted in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction. It suffices to cite as authority for these principles some of the cases in which they have been applied to the general problem now before us, the availability of appellate review sought by the Government in criminal cases. *E. g., United States* v. *More,* 3 Cranch 159; *United States* v. *Sanges,* 144 U. S. 310; *In re Heath,* 144

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[6] D. C. Code, 1951, § 23–105:

"In all criminal prosecutions the United States . . . shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside."

D. C. Code, 1951, § 17–102:

"Nothing contained in any Act of Congress shall be construed to empower the United States Court of Appeals for the District of Columbia to allow an appeal from any interlocutory order entered in any criminal action or proceeding or to entertain any such appeal heretofore or hereafter allowed or taken."

U. S. 92; *Cross* v. *United States,* 145 U. S. 571; *United States* v. *Burroughs,* 289 U. S. 159.[7]

There is a further principle, also supported by the history of federal appellate jurisdiction, that importantly pertains to the present problem. That is the concept that in the federal jurisprudence, at least,[8] appeals by the Government in criminal cases are something unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by the statute. Indeed, it was 100 years before the *defendant* in a criminal case, even a capital case, was afforded appellate review as of right.[9] And

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[7] See also *Cobbledick* v. *United States,* 309 U. S. 323; *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 176, 178–182.

[8] As to the development in state law of statutes in derogation of the common-law principle against appeal by the prosecution, see *United States* v. *Sanges,* 144 U. S. 310, 312–318; S. Rep. No. 5650, 59th Cong., 2d Sess.; H. R. Rep. No. 45, 77th Cong., 1st Sess. 2–3. See also *Palko* v. *Connecticut,* 302 U. S. 319.

[9] The Act of February 6, 1889, 25 Stat. 656, authorized direct review in the Supreme Court by writ of error "in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States . . . ." Two years later the Circuit Courts of Appeals Act extended the jurisdiction for direct review to all "cases of conviction of a capital or otherwise infamous crime." 26 Stat. 827. The burden upon this Court of hearing the large number of criminal cases led, in 1897, to transfer of the jurisdiction over convictions in noncapital cases to the Circuit Courts of Appeals. 29 Stat. 492. Section 238 of the Judicial Code completed the retrenchment in 1911 by eliminating direct review of capital cases. 36 Stat. 1157. See Frankfurter and Landis, The Business of the Supreme Court (1928), 109–113.

Prior to the Acts of 1889 and 1891, there was no jurisdictional provision for appeal or writ of error in criminal cases. *United States* v. *More,* 3 Cranch 159; see *United States* v. *Sanges,* 144 U. S. 310, 319. A question of law arising in a case tried by a Circuit Court of two judges, if they disagreed on the question, could be brought

after review on behalf of convicted defendants was made certain by the Acts of 1889 and 1891, the Court continued to withhold an equivalent remedy from the Government, despite the existence of colorable statutory authority for permitting the Government to appeal in those important cases where a prosecution was dismissed upon the trial court's opinion of the proper construction or the constitutional validity of a federal statute.[10] When the Congress responded to the problem of such cases, in the Criminal Appeals Act of 1907, now 18 U. S. C. § 3731,

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here upon a certificate of division of opinion, at the request of either party, and (except during one two-year period) without awaiting the final outcome of the case in the Circuit Court. 2 Stat. 159; 17 Stat. 196; R. S. § 651. See *United States* v. *Sanges, supra,* at 320–321. The availability of this procedure for review, haphazard at best because dependent on disagreement between the two sitting judges, came to be very much diluted by the increasing frequency with which the Circuit Courts were conducted by a single judge. See Frankfurter and Landis, 79, 109.

[10] The Act of 1891 included as a category of cases subject to direct review by this Court, "any case in which the constitutionality of any law of the United States . . . is drawn in question." 26 Stat. 828. But in *United States* v. *Sanges, supra,* the Court related the history of repeated rejections of Government criminal appeals, noted that the Act expressly conferred appellate jurisdiction in "cases of conviction," and held that the Act did not sufficiently demonstrate congressional intent to have criminal cases reviewed at the behest of the Government, either in this Court or in the Circuit Courts of Appeals. The Court said: "It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States." 144 U. S., at 323.

Similarly, after review of noncapital convictions was again committed to the Circuit Courts of Appeals in 1897, it was held that upon a reversal of a conviction by that court, the Government could not bring the case here through the certiorari jurisdiction that had also been created by the Act of 1891. *United States* v. *Dickinson,* 213 U. S. 92. Section 240 of the Judicial Code later conferred this jurisdiction explicitly. 36 Stat. 1157.

it did so with careful expression of the limited types of orders in criminal cases as to which the Government might thenceforth have review.[11] It was as late as 1942 before the Criminal Appeals Act was amended to permit appeals by the Government from decisions, granting dismissal or arrest of judgment, other than those grounded

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[11] The 1907 enactment, 34 Stat. 1246, authorized direct review in this Court by writ of error in the same three classes of cases, roughly speaking, as are listed in the first four paragraphs of the present 18 U. S. C. § 3731, quoted in note 5, *supra*. The original Act also included the provisions protective of the defendant in the last two paragraphs quoted there, relating to expedition of the Government appeal and bail on his own recognizance, and the original Act had additional cautionary provisions, commanding precedence for these cases and barring the writ of error "in any case where there has been a verdict in favor of the defendant."

The legislative history emphasizes the awareness of the Congress that Government appeals in criminal cases were a sharp innovation and congressional concern that such jurisdiction should go no farther at that time than the immediate problem of affording review for trial court opinions as to the construction or validity of federal statutes. In brief, the development of the Criminal Appeals Act was this: The House bill proposed adoption of the language of the District of Columbia Code of 1901, which had given the Government "the same right of appeal that is given to the defendant . . . ." (Quoted, note 6, *supra,* and discussed later in this opinion.) The Senate Committee on the Judiciary substituted a more specifically drawn measure, dividing the jurisdiction between this Court and the Circuit Court of Appeals along the line the 1891 Act had drawn for civil cases. After lengthy floor debate, in which various objections to the measure were put forth, it was amended on the floor by narrowing the classes of cases in which the Government could seek review, by limiting the jurisdiction to direct review here, and by adding the protective provisions noted above. The House accepted the Senate product. See H. R. Rep. No. 2119, 59th Cong., 1st Sess.; S. Rep. No. 3922, 59th Cong., 1st Sess.; S. Rep. No. 5650, 59th Cong., 2d Sess.; H. R. Conf. Rep. No. 8113, 59th Cong., 2d Sess.; 40 Cong. Rec. 8695, 9032–9033; 41 Cong. Rec. 2190–2197, 2745–2763, 2818–2825, 3044–3047. See also Frankfurter and Landis, 114–119.

by the trial court upon the construction or invalidity of a statute.[12]

It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U. S. C. § 1291 without regard to the limitations of 18 U. S. C. § 3731, just as in civil litigation orders of equivalent distinctness are appealable on the same authority without regard to the limitations of 28 U. S. C. § 1292.[13] The instances in criminal cases are very few. The only decision of this Court applying to a criminal case the reasoning of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, held that an order relating to the amount of bail to be exacted falls into this category. *Stack* v. *Boyle*, 342 U. S. 1. Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment*,[14] or in a *different district* from that in which the trial will occur,[15] or *after dismissal* of the

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[12] 56 Stat. 271. See H. R. Rep. No. 45, 77th Cong., 1st Sess. In these new categories of cases the appeal was directed to the Court of Appeals. The present version of the added language is quoted, as the fifth through seventh paragraphs of 18 U. S. C. § 3731, in note 5, *supra*.

[13] *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545–547; *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684, 688–689; and cases cited.

[14] *E. g.*, *Perlman* v. *United States*, 247 U. S. 7; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344.

[15] Cf. *Dier* v. *Banton*, 262 U. S. 147. Rule 41 (e) explicitly authorizes making the motion in a different district:
"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained . . . . The motion to suppress evidence may also be made in the district where the trial is to be had. . . ."

case,[16] or perhaps where the emphasis is on the *return of property* rather than its suppression as evidence.[17] In such cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision. *Burdeau* v. *McDowell,* 256 U. S. 465.

But a motion made by a defendant after indictment and in the district of trial has none of the aspects of independence just noted, as the Court held in *Cogen* v. *United States,* 278 U. S. 221. As the opinion by Mr. Justice Brandeis explains, the denial of a pre-trial motion in this posture is interlocutory in form and real effect, and thus not appealable at the instance of the defendant. We think the granting of such a motion also has an interlocutory character, and therefore cannot be the subject of an appeal by the Government. In the present case the

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[16] *E. g., Dickhart* v. *United States,* 57 App. D. C. 5, 16 F. 2d 345. That was a motion, after acquittal in a case under the National Prohibition Act, 41 Stat. 305, to regain possession of liquor that had been seized. See also note 17, *infra.*

[17] *E. g., Steele* v. *United States No. 1,* 267 U. S. 498; *United States* v. *Kirschenblatt,* 16 F. 2d 202; cf. also *Steele* v. *United States No. 2,* 267 U. S. 505; *Dowling* v. *Collins,* 10 F. 2d 62. We do not suggest that a motion made under Rule 41 (e) gains or loses appealability simply upon whether it asks return or suppression or both. The cases just cited arose under the National Prohibition Act, which provided an independent proceeding to secure the return of property seized under a search warrant that had been issued wrongfully. 41 Stat. 315, adopting 40 Stat. 228. That factor underlay the discussion of this category of orders as appealable in *Cogen* v. *United States,* 278 U. S. 221, 225–227. The "essential character and the circumstances under which it is made" determine whether a motion is an independent proceeding or merely a step in the criminal case. *Id.,* at 225; cf. *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 793, 801–803.

We think that a contemporary illustration of this category is *United States* v. *Ponder,* 238 F. 2d 825, where the suppression order related to a plenary proceeding that had been brought in order to impound election records for investigation by the Department of Justice and the grand jury.

Government argues, as it offered to stipulate below, that the effect of suppressing the evidence seized from petitioners at their arrests will be to force dismissal of the indictment for lack of evidence on which to go forward. But that is not a necessary result of a suppression order relating to particular items of evidence, nor have we been shown whether it will be the result in practice in the generality of cases. Appeal rights cannot depend on the facts of a particular case. The Congress necessarily has had to draw the jurisdictional statutes in terms of categories. To fit an order granting suppression before trial in a criminal case into the category of "final decisions" requires a straining that is not permissible in the light of the principles and the history concerning criminal appeals, especially Government appeals, that are outlined above and more fully set forth in the cases cited.[18] Other Courts of Appeals that have considered the problem have concluded that this order is not "final" or appealable at the behest of the Government.[19]

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[18] See especially *United States* v. *Sanges,* 144 U. S. 310; *Cross* v. *United States,* 145 U. S. 571; cf. *Kepner* v. *United States,* 195 U. S. 100, 124–134.

[19] *United States* v. *Rosenwasser,* 145 F. 2d 1015 (C. A. 9th Cir.); cf. *United States* v. *Janitz,* 161 F. 2d 19 (C. A. 3d Cir.) (order made at trial); *United States* v. *Williams,* 227 F. 2d 149 (C. A. 4th Cir.) (motion made before indictment); see *United States* v. *One 1946 Plymouth Sedan,* 167 F. 2d 3, 8–9 (C. A. 7th Cir.). The court below has held a pre-trial order suppressing wiretap evidence to be interlocutory, distinguishing its ruling in the *Cefaratti* case on the basis that the prohibition of Rule 41 (e) against reviving the issue of admissibility at the trial does not apply to wiretap evidence. *United States* v. *Stephenson,* 96 U. S. App. D. C. 44, 223 F. 2d 336. We express no opinion as to this distinction, in view of our disposition of the present case.

An appeal by the United States was treated on the merits without discussion of appealability, where the move for return of papers was made after indictment, in *United States* v. *Kirschenblatt,* 16 F. 2d 202 (C. A. 2d Cir.). That proceeding had elements of independent

The Government exhorts us not to exalt form over substance, in contending that the present order has virtually the same attributes as the suppression orders found reviewable in earlier cases. We do not agree that the order entered in a pending criminal case has the same characteristics of independence and completeness as a suppression order entered under other circumstances. Moreover, in a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction. While it is always necessary to categorize a situation realistically, to place a given order according to its real effect, it remains true that the categories themselves were defined by the Congress in terms of form. Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable. In particular is this true of the Government in a criminal case, for there is no authority today for interlocutory appeals,[20] and even if the Government had a general right to review upon an adverse conclusion of a case after trial, much of what it might complain of would have been swallowed up in the sanctity of the jury's verdict.[21]

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character because of its statutory context under the National Prohibition Act. Likewise, *United States* v. *Ponder*, 238 F. 2d 825 (C. A. 4th Cir.), which has some broad language favoring appealability for the Government, on its facts was seen by the court as a proceeding independent of the pending criminal case. See note 17, *supra*.

[20] For an earlier technique, see note 9, *supra*.

[21] See *United States* v. *Ball*, 163 U. S. 662, 671; *Kepner* v. *United States*, 195 U. S. 100, 124–134.

Under the District of Columbia Code of 1901, to be discussed later in this opinion, the Government was granted "the same right of appeal that is given to the defendant, . . . *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall

If there is serious need for appeals by the Government from suppression orders, or unfairness to the interests of effective criminal law enforcement in the distinctions we have referred to, it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases.[22] We must decide the case on the statutes that

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not be set aside." 31 Stat. 1341. It was soon held that the effect of the proviso was to preclude entirely the taking of an appeal by the Government after a verdict for the defendant. *United States* v. *Evans*, 30 App. D. C. 58, approved, 213 U. S. 297; see *United States* v. *Martin*, 81 A. 2d 651, 652–653 (Mun. Ct. App.).

[22] In the Narcotic Control Act of 1956, the Congress enacted the following provision in a new chapter being added to Title 18 of the U. S. Code (Supp. IV, 1957):

"§ 1404. Motion to suppress—appeal by the United States

"In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation of—

[designated narcotics offenses]

"This section shall not apply with respect to any such motion unless the United States attorney shall certify, to the judge granting such motion, that the appeal is not taken for purposes of delay. Any appeal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted." 70 Stat. 573.

The legislative history shows that the Department of Justice expressed a preference for the passage of other bills, which had been introduced to amend 18 U. S. C. § 3731 so as to authorize Government appeals from suppression orders in all federal prosecutions, and without the qualification requiring certification by the United States Attorney. See S. Rep. No. 1997, 84th Cong., 2d Sess. 19. The need for the enactment of the more limited measure was stated by the respective committees, which were aware of some of the prior court decisions, including those of the District of Columbia Circuit in *Cefaratti* and the instant case. See *id.*, at 11, 15, 26; S. Rep. No. 2033, 84th Cong., 2d Sess. 16–19, 28; H. R. Rep. No. 2388, 84th

exist today, in the light of what has been the development of the jurisdiction. It is only through legislative resolution, furthermore, that peripheral questions regarding the conduct of government appeals in this situation can be regulated. Some of the problems directed at legislative judgment involve such particulars as confinement or bail of the defendant, acceleration of the Government's appeal, and discretionary limitation of the right to take the appeal.[23]

II.

The Court of Appeals sustained its jurisdiction on the basis of statutory provisions peculiar to the District of Columbia. Here again, the jurisdictional statutes are a product of historical development, and must be interpreted in that light. During the century from 1801 to 1901 the Congress several times organized and reorganized the courts of the District of Columbia, independently of the federal courts in the States. It is not necessary here to relate the chronology of shuffled jurisdictions and

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Cong., 2d Sess. 5; Hearing before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary on S. 3760, 84th Cong., 2d Sess. 7–11, 38–43.

The more general bills referred to by the Department of Justice were S. 3423 and H. R. 9364, of the 84th Congress. In the current session of the 85th Congress, a bill to the same effect, H. R. 263, has been introduced.

[23] Thus, the Criminal Appeals Act has provided for bail on the defendant's own recognizance, and the bills listed in note 22, *supra*, would extend that provision to defendants pending Government appeals from suppression orders, while the appeal section enacted in the Narcotic Control Act of 1956 does not refer to bail. Both Acts and the bills have the same acceleration provision, albeit the 30-day period was much more of a speed-up when the Criminal Appeals Act was drawn in 1907 than it is today. Cf. Fed. Rules Crim. Proc., 37 (a) (2); 28 U. S. C. § 2107. Only the Narcotic Control Act requires an express certification that the government appeal is not taken for purposes of delay.

nomenclature.[24] It is sufficient to note that from 1838 on, review of a final judgment of conviction in the criminal trial court was available in the appellate tribunal of the District.[25] However, the appellate judgment was not further reviewable in this Court in any manner during this period. *In re Heath,* 144 U. S. 92; *Cross* v. *United States,* 145 U. S. 571. When the Acts of 1889 and 1891 opened up appellate review of criminal convictions in the federal courts throughout the country, at first directly to this Court, it was held that those statutes did not apply to cases originating in the District of Columbia. *Ibid.*

In 1901 the Congress codified the laws of the District of Columbia, including those relating to the judicial system. District of Columbia Code, 31 Stat. 1189. Criminal jurisdiction was vested in the trial court of general jurisdiction, then known as the Supreme Court of the District of Columbia.[26] A single section of the statute, § 226, conferred appellate jurisdiction on the Court of Appeals over decisions of the Supreme Court in general terms, apparently including criminal decisions. A party aggrieved could take an appeal from a final order or judgment, and was entitled to allowance of an appeal from an interlocutory order affecting possession of property. In addition, the Court of Appeals could allow an

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[24] See *Ex parte Bradley,* 7 Wall. 364, 366–368; Frankfurter and Landis, 120–124.

[25] 5 Stat. 307; Dist. Col. R. S. § 845.

[26] 31 Stat. 1202. There was also a Police Court, given concurrent jurisdiction over misdemeanors, which now is known as the criminal branch of the Municipal Court. 31 Stat. 1196; D. C. Code, 1951, § 11–755. In order to simplify the discussion, we shall not refer in this opinion to the appellate jurisdiction that has existed, in changing forms, from the decisions of this inferior court. See D. C. Code, 1951, §§ 11–772, 11–773; *United States* v. *Martin,* 81 A. 2d 651 (Mun. Ct. App.); *United States* v. *Bcsiliko,* 35 A. 2d 185 (Mun. Ct. App.).

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appeal, in its discretion, from any other interlocutory order when it was shown "that it will be in the interest of justice to allow such appeal." [27]

Section 935 of the Code of 1901 established this new provision:

> "In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside." 31 Stat. 1341.

The legislative history of the Code does not indicate why the Government was now given a right of appeal, but we may surmise that the draftsmen of the Code desired to adopt a procedural technique that was then in force in a large number of States.[28] The "same right of appeal that is given to the defendant" would be defined by reference to § 226, of course, in cases coming up from the Supreme Court. After the Congress conferred on the United

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[27] 31 Stat. 1225. The relevant text of § 226 was:
"Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia . . . may appeal therefrom to the said court of appeals; . . . . Appeals shall also be allowed to said court of appeals from all interlocutory orders of the supreme court of the District of Columbia . . . whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in the discretion of the said court of appeals, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal."

[28] A list of state provisions was submitted to the Congress in 1907 in connection with the Criminal Appeals Act. See S. Rep. No. 5650, 59th Cong., 2d Sess. Also see *United States* v. *Sanges,* 144 U. S. 310, 312–318.

States a more limited right of appeal from the District Courts in the Criminal Appeals Act of 1907, running directly to this Court, it was held that the 1907 Act was not applicable to cases decided in the Supreme Court of the District of Columbia. There § 935 provided "the complete appellate system." *United States* v. *Burroughs,* 289 U. S. 159, 164. When the Criminal Appeals Act was broadened in 1942, it was then first made applicable to the District of Columbia.[29] But the text of § 935 was not repealed at that time, nor was it repealed in connection with the 1948 revisions of the Judicial Code and the Criminal Code.[30] It may be concluded, then, that even today criminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of § 935, now found in the District of Columbia Code, 1951 Edition, as § 23–105. *United States* v. *Hoffman,* 82 U. S. App. D. C. 153, 161 F. 2d 881, decided on merits, 335 U. S. 77.

Meanwhile, under the general provisions of § 226 of the 1901 Code, the practice had developed of allowing appeals from interlocutory orders in criminal cases. A particular instance disturbed the Congress in 1926, and it immediately passed a statute to eliminate the practice. It is apparent from the legislative history that it was interlocutory appeals for the *defendant* that were considered anomalous in a federal court and undesirable from the viewpoint of prompt dispatch of criminal prosecutions,[31] but the new provision in terms applied equally to the possibility of an interlocutory appeal being allowed

[29] 56 Stat. 271.

[30] 62 Stat. 862, 992; 63 Stat. 110.

[31] See S. Rep. No. 926, 69th Cong., 1st Sess.; H. R. Rep. No. 1363, 69th Cong., 1st Sess.; 67 Cong. Rec. 9968.

to the Government through the combined provisions of § 226 and § 935. The 1926 enactment, as it now reads in the District of Columbia Code, 1951 Edition, § 17–102, states:

> "Nothing contained in any Act of Congress shall be construed to empower the United States Court of Appeals for the District of Columbia to allow an appeal from any interlocutory order entered in any criminal action or proceeding or to entertain any such appeal heretofore or hereafter allowed or taken." 44 Stat. 831, as amended, 48 Stat. 926.

The allowance of appeal technique no longer exists as to cases coming from the District Court (the former Supreme Court), but if this section does not continue to have life by force of the words "or hereafter . . . taken," it does not matter, for § 226 itself was replaced in 1949 [32] by the nationwide appellate jurisdiction provisions of Title 28 of the U. S. Code, § 1291 and § 1292, which do not authorize interlocutory appeals in criminal cases.

Thus the statutory context in which the court below made its ruling is seen to be this: Subject to stated limitations, the Government has the "same right of appeal" as the defendant in criminal cases in the District Court for the District of Columbia, but no party can appeal an interlocutory order in such cases. In *United States* v. *Cefaratti,* 91 U. S. App. D. C. 297, 202 F. 2d 13, the Court of Appeals reconciled these rules by holding:

> "Since defendants may appeal from 'final decisions,' to say that 'the United States . . . shall have the same right of appeal that is given to the defendant . . .' means that . . . the United States may appeal from final decisions. It does not mean that the United States cannot appeal from a final deci-

[32] 63 Stat. 110.

> sion unless it so happens that an opposite decision would also have been final." 91 U. S. App. D. C., at 302, 202 F. 2d, at 17.

Applying this reasoning to orders for the suppression of evidence, the Court of Appeals concluded that such an order had the requisite finality and independence of the criminal case to be appealable under 28 U. S. C. § 1291. In the present case, the court below reaffirmed its *Cefaratti* analysis. Insofar as these decisions, resting on opinions of this Court,[33] imply a reviewability for suppression orders that would be general to cases from all Federal District Courts, we have already indicated our disagreement earlier in this opinion.

But the Government contends that appealability under the District of Columbia statutes, though it requires a "final decision," does not call for the independent or separable character of the orders in the cases relied on by the Court of Appeals, because here it is not essential to characterize an order as plenary or disassociated from the criminal case, inasmuch as the Government has a comprehensive right of appeal within a criminal case in the District of Columbia. We do not agree that the standard of "final decisions" as prerequisite to appeal is something less or different under 28 U. S. C. § 1291 as the successor to § 226 of the District of Columbia Code of 1901 than it is under § 1291 as the successor to the nationally applicable appeal provisions of the Judicial Code. Cf. *Stack* v. *Boyle,* 342 U. S. 1, 6, 12. By this we do not mean to say that § 935 of the 1901 Code is no broader than 18 U. S. C. § 3731, but merely that the underlying concepts of finality are the same in each case.

As the outline of the statutory development demonstrates, both this Court and the Congress have been strict

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[33] *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541; *Swift & Co.* v. *Compania Caribe,* 339 U. S. 684; *Stack* v. *Boyle,* 342 U. S. 1.

in confining rights of appeal in criminal cases in the District of Columbia to those plainly authorized by statute. We do not believe that the combined provisions of the 1901 and 1926 enactments permit the Government to appeal in any situation where the decision against it may have some characteristics of finality, yet does not either terminate the prosecution or pertain to an independent peripheral matter such as would be appealable in other federal courts on the authority of *Stack* v. *Boyle, supra.* The 1901 Code gave the Government "the same right of appeal that is given to the defendant," while the 1926 amendment to the Code restricted the defendant's right of appeal to those decisions of the Supreme Court (now District Court) that have a "final" effect, as that term is understood in defining appellate jurisdiction. We conclude that full force cannot be given to the limitations imposed on criminal appeals in the District of Columbia unless the Government is restricted as is the defendant. This is not to say "that the United States cannot appeal from a final decision unless it so happens that an opposite decision would also have been final," as the Court of Appeals suggested in *Cefaratti.* Quite to the contrary, our holding is that the statutory provisions applicable to the District of Columbia, subject to the further limitations stated therein, afford the Government an appeal only from an order against it which terminates a prosecution or makes a decision whose distinct or plenary character meets the standards of the precedents applicable to finality problems in all federal courts.[34]

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[34] Cases cited note 33, *supra;* see also *ante,* pp. 399–408.

Since the Court of Appeals relied on precedents of general applicability to finality problems in construing the District of Columbia statutory provisions, we do not consider that this case falls within the policy that ordinarily causes us to adhere to that court's view on local law matters. Cf. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285; see *Griffin* v. *United States,* 336 U. S. 704, 712–718.

In thus defining the Government's appeal rights under § 935 of the 1901 Code, we are mindful of the considerations that motivated the Congress to specify in 1926 that interlocutory appeals in criminal cases were not possible:

> "Promptness in the dispatch of the criminal business of the courts is by all recognized as in the highest degree desirable. Greater expedition is demanded by a wholesome public opinion." S. Rep. No. 926, 69th Cong., 1st Sess.

And cf. H. R. Rep. No. 1363, 69th Cong., 1st Sess. Delays in the prosecution of criminal cases are numerous and lengthy enough without sanctioning appeals that are not plainly authorized by statute. We cannot do so here without a much clearer mandate than exists in the present terms and the historical development of the relevant provisions. Cf. *United States* v. *Burroughs,* 289 U. S. 159; *United States* v. *Sanges,* 144 U. S. 310.

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for proceedings consistent with this opinion.

Reversed.

VANDERBILT *v.* VANDERBILT ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK AND SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK.

No. 302. Argued April 22–23, 1957.—Decided June 24, 1957.

A husband and wife separated while living in California, and the wife moved to New York, where she has since resided. Subsequently, the husband sued for divorce in Nevada. The wife was not served with process and did not appear in the Nevada court; but it entered a final decree of divorce, providing that both husband and wife were "freed and released from the bonds of matrimony and all duties and obligations thereof." Subsequently, the wife sued in New York for separation from the husband and alimony. The New York court did not have personal jurisdiction over the husband; but it sequestered his property in the State and entered an order directing the husband to make support payments to the wife. *Held:* Since the Nevada court had no personal jurisdiction over the wife, it had no power to extinguish any right she had under New York law to financial support from her husband, its decree was void insofar as it purported to do so, and the New York judgment did not violate the Full Faith and Credit Clause. Pp. 416–419.

1 N. Y. 2d 342, 135 N. E. 2d 553, affirmed.

Sol A. Rosenblatt argued the cause for petitioner. With him on the brief was *Charles Roden.*

Monroe J. Winsten argued the cause for respondents. With him on the brief was *Charles L. Raskin* for Vanderbilt, respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Cornelius Vanderbilt, Jr., petitioner, and Patricia Vanderbilt, respondent, were married in 1948. They separated in 1952 while living in California. The wife moved to New York where she has resided since February 1953. In March of that year the husband filed suit for

divorce in Nevada. This proceeding culminated, in June 1953, with a decree of final divorce which provided that both husband and wife were "freed and released from the bonds of matrimony and all the duties and obligations thereof . . . ." [1] The wife was not served with process in Nevada and did not appear before the divorce court.

In April 1954, Mrs. Vanderbilt instituted an action in a New York court praying for separation from petitioner and for alimony. The New York court did not have personal jurisdiction over him, but in order to satisfy his obligations, if any, to Mrs. Vanderbilt, it sequestered his property within the State.[2] He appeared specially and, among other defenses to the action, contended that the Full Faith and Credit Clause of the United States Constitution [3] compelled the New York court to treat the Nevada divorce as having ended the marriage and as having destroyed any duty of support which he owed the respondent. While the New York court found the Nevada decree valid and held that it had effectively dissolved the marriage, it nevertheless entered an order, under § 1170–b

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[1] It seems clear that in Nevada the effect of this decree was to put an end to the husband's duty to support the wife—provided, of course, that the Nevada courts had power to do this. *Sweeney* v. *Sweeney*, 42 Nev. 431, 438–439, 179 P. 638, 639–640; *Herrick* v. *Herrick*, 55 Nev. 59, 68, 25 P. 2d 378, 380. See *Estin* v. *Estin*, 334 U. S. 541, 547.

[2] See *Pennington* v. *Fourth Natl. Bank of Cincinnati*, 243 U. S. 269; *Harris* v. *Balk*, 198 U. S. 215.

[3] Art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress has provided that judgments shall have the same force and effect in every court throughout the United States that they have in the State where they were rendered. 28 U. S. C. § 1738.

of the New York Civil Practice Act,[4] directing petitioner to make designated support payments to respondent. 207 Misc. 294, 138 N. Y. S. 2d 222. The New York Court of Appeals upheld the support order. 1 N. Y. 2d 342, 135 N. E. 2d 553. Petitioner then applied to this Court for certiorari contending that § 1170–b, as applied, is unconstitutional because it contravenes the Full Faith and Credit Clause.[5] We granted certiorari, 352 U. S. 820.

In *Estin* v. *Estin,* 334 U. S. 541, this Court decided that a Nevada divorce court, which had no personal jurisdiction over the wife, had no power to terminate a husband's obligation to provide her support as required in a pre-existing New York separation decree. The factor which distinguishes the present case from *Estin* is that here the wife's right to support had not been reduced to judgment prior to the husband's *ex parte* divorce. In our opinion this difference is not material on the question before us. Since the wife was not subject to its jurisdiction, the Nevada divorce court had no power to extinguish any right which she had under the law of New York to financial support from her husband. It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.[6] Here, the Nevada divorce court

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[4] "In an action for divorce, separation or annulment, . . . where the court refuses to grant such relief by reason of a finding by the court that a divorce . . . declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife." Gilbert-Bliss' N. Y. Civ. Prac., Vol. 6A, 1956 Cum. Supp., § 1170–b.

[5] The petition for certiorari also raised a number of other contentions. We have considered them and find that they do not justify reversing the decision below.

[6] *Pennoyer* v. *Neff,* 95 U. S. 714, 726–727. If a defendant has property in a State it can adjudicate his obligations, but only to

was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction. Therefore, the Nevada decree, to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition.[7]

Petitioner claims that this case is governed by *Thompson* v. *Thompson,* 226 U. S. 551. For the reasons given in a concurring opinion in *Armstrong* v. *Armstrong,* 350 U. S. 568, 575, at 580–581, the *Thompson* case, insofar as it held that an *ex parte* divorce destroyed alimony rights, can no longer be considered controlling.

Affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting.

The question in this case is whether Nevada, which was empowered to grant petitioner a divorce without personal jurisdiction over respondent that must be respected, by command of the Constitution, by every other State, *Williams* v. *North Carolina,* 317 U. S. 287,

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the extent of his interest in that property. *Pennington* v. *Fourth Natl. Bank of Cincinnati,* 243 U. S. 269; *Harris* v. *Balk,* 198 U. S. 215.

[7] A concurring opinion in *Armstrong* v. *Armstrong,* 350 U. S. 568, 575, and the authorities collected there, set forth in greater detail the reasons underlying this holding. Cf. *Meredith* v. *Meredith,* 96 U. S. App. D. C. 355, 226 F. 2d 257, 69 Harv. L. Rev. 1497.

"A state lacks judicial jurisdiction to absolve a spouse from any duty of support which, under the law of a second state, he may owe the other spouse in the absence of personal jurisdiction over the latter." Restatement, Conflict of Laws, § 116 (2) (Tent. Draft No. 1, 1953), and see Comment f to § 116.

was at the same time empowered by virtue of its domiciliary connection with petitioner to make, incidental to its dissolution of the marriage, an adjudication denying alimony to which sister States must also give full faith and credit. Whatever the answer to the question may be, *Estin* v. *Estin,* 334 U. S. 541, does not supply it. What the Court now states to be "not material" was crucial to the decision in that case, namely, the prior New York support order, which the Court held Nevada was required to respect by virtue of the Full Faith and Credit Clause, Art. IV, § 1, of the Constitution. That this fact was crucial to the Court's decision in that case is made clear by the Court's reference to the prior New York judgment in its two statements of the question presented and more than a half dozen times throughout the course of its opinion. The Court rightly regarded the fact as crucial because of the requirement of Art. IV, § 1, that Nevada give full faith and credit to the prior New York "judicial Proceedings."

The Court now chooses to regard the existence of a prior New York support order as "not material," holding for the first time that "the Nevada divorce court had no power to extinguish any right which [respondent] had under the law of New York to financial support from her husband. It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant [citing for this proposition, *Pennoyer* v. *Neff,* 95 U. S. 714, 726–727]." We have thus reached another stage—one cannot say it is the last—in the Court's tortuous course of constitutional adjudication relating to dissolution of the marriage status. Whereas previously only the State of "matrimonial domicile" could grant an *ex parte* divorce and alimony, now any domiciliary State can grant an *ex parte* divorce, but no State, even if domiciliary, can grant alimony *ex parte* when it grants a divorce *ex parte.*

It will make for clarity to give a brief review of the singular history of matrimonial law in this Court since the decision in *Atherton* v. *Atherton,* 181 U. S. 155. In that case, the Court held that a sister State had to give full faith and credit to a divorce granted, on the basis of constructive service, by the matrimonial domicile to a deserted husband. In *Haddock* v. *Haddock,* 201 U. S. 562, the Court refused to extend *Atherton,* holding that a State need not give full faith and credit to a divorce granted *ex parte* to a deserted husband by a domiciliary State other than the matrimonial domicile. These precedents were applied to the incidental claim to alimony in *Thompson* v. *Thompson,* 226 U. S. 551, where the Court held that full faith and credit was to be given to the refusal of the matrimonial domicile to grant alimony when it granted a divorce on the basis of substituted service. Under the pre-*Williams* law, then, the same jurisdictional rules applied to the dissolution of the marriage tie and to an incidental adjudication denying alimony. Not only the adjudication of divorce but also the adjudication denying alimony by the matrimonial domicile was required to be given full faith and credit despite the lack of personal jurisdiction over the other spouse.

In *Williams* v. *North Carolina, I,* 317 U. S. 287, the scope of Art. IV, § 1, was found to require full faith and credit to be given to a divorce granted *ex parte* by any State where one spouse was domiciled. The limitation of *ex parte* divorces to the matrimonial domicile imposed by *Haddock* v. *Haddock* was rejected as being based on "fiction." *Williams* v. *North Carolina, II,* 325 U. S. 226, made it clear that full faith and credit was required to be given only if the granting State was actually a domiciliary State, that the finding on this issue could not be foreclosed by the decreeing State, and that it could be readjudicated later by another State. But this restriction of *Williams II* was considerably weakened

when the Court held that a sister State, no matter how great its interest because of its own social policy, was precluded from relitigating the existence of the jurisdictional facts underlying a divorce when both parties had merely made an appearance in the original divorce proceeding. *Sherrer* v. *Sherrer,* 334 U. S. 343, and *Coe* v. *Coe,* 334 U. S. 378. This was so even if the collateral attack were made by a third party who had not appeared in the original proceeding and who had independent interests. *Johnson* v. *Muelberger,* 340 U. S. 581.

The decisions from *Williams I* through *Johnson* resulted in a broad extension of the scope of the Full Faith and Credit Clause. *Haddock* v. *Haddock* was rejected, not because it gave too little respect to the rights of the absent spouse, but rather because it gave too much respect to those rights, and not enough to the rights of the other spouse and his or her domiciliary State. The interests of the absent spouses were subordinated to the interests of the other spouses and their domicile of divorce in *Williams I,* and the interests of a State that was allegedly both pre-divorce and post-divorce domicile were subordinated to the interest of the temporary "domicile" of divorce in *Sherrer* and *Coe.*

One might have expected that since *Thompson* v. *Thompson, supra,* was based on *Haddock* v. *Haddock,* it would have suffered the same fate. But no. The law is not so logical. The Court shrinks from applying *Williams I* to *Thompson.* In fact, we are now told that the vice of *Thompson* v. *Thompson* is just the opposite of that of *Haddock* v. *Haddock: Thompson* paid too little respect to the rights of the absent spouse and too much to the rights of the other spouse and his domicile. And so, as compensation, the interests of the absent spouse, which the Court subordinated so far as the breaking up of the marital relation was concerned in *Williams I,* are now to be enlarged, so far as alimony is concerned. The require-

ment of *Pennoyer* v. *Neff,* 95 U. S. 714, that there must be personal jurisdiction in an action to recover a judgment for personal services rendered, was before the Court in *Haddock,* in *Thompson,* and in *Williams I.* Although it was found in all three cases not to be applicable to the unique interests and factors pertaining to the severance of the marriage status and the incidental determination denying alimony, it is now treated as a controlling precedent.

A normal action for divorce comprehends dissolution of the marital relation and, incident thereto, a property arrangement between the parties. I stand on the *Williams* decisions; and so I start from the proposition that full faith and credit must be given to an *ex parte* divorce granted by a State that is the domicile of one of the parties. The only legal question for our concern in this case is whether the other aspect of, and indeed an incident to, a proceeding for divorce, the property arrangement, is similar enough to the dissolution of the marital relation, with respect to both the interests of the parties and the nature of what is adjudicated, that constitutionally it may be treated alike.

Haddock v. *Haddock* and *Thompson* v. *Thompson* proceeded on the basis that they should be treated alike. The Court, however, solves all with the statement, "It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." This is an artful disguise for labeling the action with the question-begging phrase, "in personam." A dogmatic, unanalyzed disregard of the difficulties of a problem does not make the problem disappear. Strictly speaking, all rights eventually are "personal." For example, a successful suit in admiralty against a ship results of course not in loss to the ship but to its owner. The crucial question is: what is the fair way to proceed against these

interests? May a State deal with the dissolution of a marriage comprehensively, or must it chop up the normal incidents of the cause of action for divorce?

No explanation is vouchsafed why the dissolution of the marital relation is not so "personal" as to require personal jurisdiction over an absent spouse, while the denial of alimony incident thereto is. Calling alimony a "personal claim or obligation" solves nothing. I note this concern for "property rights," but I fail to see why the marital relation would not be worthy of equal protection, also as a "personal claim or obligation." It may not be translatable into dollars and cents, but that does not make it less valuable to the parties. It cannot be assumed, by judicial notice as it were, that absent spouses value their alimony rights more highly than their marital rights. Factually, therefore, both situations involve the adjudication of valuable rights of an absent spouse,[1] and I see no reason to split the cause of action and hold that a domiciliary State can *ex parte* terminate the marital relation, but cannot *ex parte* deny alimony. "Divisible divorce" is just name-calling.[2] I would therefore hold that

[1] Custody over children presents an entirely different problem. See *May* v. *Anderson*, 345 U. S. 528. The interests of independent human beings, the children, are involved. Also, insofar as the spouses' interests are concerned, the divorce may terminate their relations with each other as husband and wife, but it cannot terminate their relation to their children. They are still parents.

[2] "The deceptive appeal of the phrase 'divisible divorce' should not be permitted to obscure the basic concepts involved. A finding of divisibility may be appropriate where, as in *Estin*, the particular right at issue is a distinct property right, embodied in a previously granted judgment, which is no longer dependent, for its recognition or enforcement, upon the marital relationship, or where, as in *Armstrong*, the court rendering the divorce has itself severed the issue of support and left it subject to separate adjudication in the future. The situation is, however, decidedly different where, as in the case before us, the claim asserted depends for its very existence on the continuance of the marital status and that status and its incidents

Nevada had jurisdiction to make the determination it made with respect to alimony and that New York must give full faith and credit to the whole Nevada judgment, not just to part of it.

It should also be noted that the Court's decision, besides turning the constitutional law of marital relations topsy-turvy, has created numerous problems whose solution is far from obvious. The absent spouse need no longer appear in the divorcing State in order to be present when an adjudication is made. She (or he) may sue wherever she can serve the other spouse or attach his property. What will happen in States that grant alimony only as incident to a divorce? Most States do not have statutes like the New York statute involved in the present case. Would this Court require any State in which one spouse catches another to entertain a cause of action for alimony? This is a far cry from what was involved in *Hughes* v. *Fetter,* 341 U. S. 609. Also, it is not even settled what the relation of a State to an ex-wife and an ex-husband must be for the State, as a matter of due process, to be able to grant support on the basis that the parties were once man and wife.

Another view, agreeing that Nevada can adjudicate alimony *ex parte* incident to its granting a divorce *ex parte,* at least for purposes of its own law, would then hold that New York is not compelled to give full faith and credit to the valid Nevada judgment. "New York's law and policy is," so the argument runs, "that the right of a married woman domiciled in New York to support

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have both been terminated by a jurisdictionally valid judgment of divorce." Judge Fuld, dissenting in this case in the New York Court of Appeals, 1 N. Y. 2d 342, 356–357, 135 N. E. 2d 553, 561. I would add that the concept of "divisible divorce" is a misnomer. The divorce is not divisible. It is the cause of action for terminating the marital relation and making a property arrangement that is divided.

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survives an *ex parte* divorce, whether obtained in New York or elsewhere. . . . The interest of New York in her domiciliaries seems . . . to be of sufficient weight to justify allowing her to apply her own policy on the question of what effect *ex parte* divorces will be given as against the surviving support rights of her own domiciliaries."

To begin with, it cannot be pretended that New York is not discriminating against alimony adjudications in all out-of-state *ex parte* divorces, for a divorce granted to a husband in New York against a wife who is not served personally in New York is not *ex parte* if the wife is a New York domiciliary. Her domicile provides a basis of jurisdiction that would be sufficient in an ordinary non-matrimonial action. See *Williams* v. *North Carolina, I,* 317 U. S. 287, 298–299; *Milliken* v. *Meyer,* 311 U. S. 457, 463.

To go to the heart of the matter, the Full Faith and Credit Clause is itself a constitutional adjustment of the conflicting interests of States, and we are not free, by weighing contending claims in particular cases, to make readjustments of the conflicting interests as if the Full Faith and Credit Clause did not exist. The clause requires that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State." See also 28 U. S. C. § 1738. It is true that the commands of the Full Faith and Credit Clause are not inexorable in the sense that exceptional circumstances may relieve a State from giving full faith and credit to the judgment of a sister State because "obnoxious" to an overriding policy of its own. But such instances "have been few and far between, apart from *Haddock* v. *Haddock.*" See *Williams* v. *North Carolina, I,* 317 U. S. 287, 294–295.

Of course New York has substantial connection with a domiciliary who has been divorced *ex parte* in Nevada, but that provides no justification for allowing it to refuse

to give full faith and credit to that part of the Nevada judgment denying alimony. A State desiring to deny full faith and credit to the judgment of another State almost always has such a connection. Whatever the unusual circumstances that may justify making an exception to the requirements of the Full Faith and Credit Clause, this case does not present them because, for the reasons I have already stated, no stronger state policy can be urged in this case than was overridden in *Williams I*. Blanket discrimination against *ex parte* alimony decrees of sister States therefore subordinates the requirements of the Full Faith and Credit Clause to the policy of New York.

To justify the New York law as a "mere survival of a pre-existing right" is only another proof that "the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion." *American Bank & Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350, 358. There can be no "right" until the termination of the marriage, and the whole question in the case is which State shall be able to determine the incidents of the dissolution of the marriage status. Nor is analysis furthered by analogizing the "right" to alimony to the dower "right," thence sliding to the conclusion that since New York would not have to recognize a Nevada decree cutting off dower, it does not have to recognize the Nevada decree cutting off alimony. The differences between a "right" to alimony and a dower "right" are so decisive that I need not spell out why an assumed decision with respect to dower does not reach our problem.

We are also told that "the interest of the wife in not becoming single *and* penniless is greater than her interest in not becoming single." This is doubtless a correct statement of fact and might furnish a basis for legislation

of a kind not at issue in this case, since the New York law is based on its right to disregard all *ex parte* alimony decrees and not on an interest it may have in the indigent condition of former wives.[3]

For me, the rigorous commands of the Full Faith and Credit Clause are determinative. I cannot say that the Nevada judgment denying alimony is more "obnoxious" to New York policy (as expressed in § 1170–b of its Civil Practice Act) than its judgment of divorce. Since New York is required to give full faith and credit to the one, it is to the other.

MR. JUSTICE HARLAN, dissenting.

The Court holds today, as I understand its opinion, that Nevada, lacking personal jurisdiction over Mrs. Vanderbilt, had no power to adjudicate the question of support, and that any divorce decree purporting so to do is to that extent wholly void—presumably in Nevada as well as in New York—under the Due Process Clause of the Fourteenth Amendment, pursuant to the doctrine of *Pennoyer* v. *Neff*, 95 U. S. 714.

I cannot agree with such a holding. In the first place, as I see this case, there is no necessity to pass on this question at all. Our problem should be, initially at least, not whether this decree, insofar as it affects property, is "void" for lack of due process, but whether it binds New York

[3] We are not told what a third State is to do if suit is brought there. Does New York or Nevada law control? Since, under this view, the husband's *ex parte* judgment denying alimony to the wife is a valid one, at least in Nevada, I would suppose that the wife could get a support judgment *ex parte* in New York. Then, there would be not merely a problem of choice of law in the third State, which has no domiciliary connection with either party, but rather a question of which judgment is entitled to full faith and credit in the third State.

under the Full Faith and Credit Clause. In other words, we need not, in the first instance, decide what the Due Process Clause forbids Nevada to do, but merely what the Full Faith and Credit Clause compels New York to do. One of the wisest of our constitutional commentators has warned us to beware the "constricting necessitarianism" of deeming the two questions to be one and the same:

> "In a problem so fraught with infelicities whatever mediation is devised, there is wisdom in confining pronouncements closely to what is imperative in the particular case. It is not logically necessary to deny Nevada's mastery within her own boundaries in order to deny her power of projection beyond them. Freedom of home manufacture and consumption does not necessarily entail freedom of export. Only if it is inexorable that what is meant by 'jurisdiction' must be either wholly absent or wholly unlimited need frailty in sister states be conditioned on total impotence at home." T. R. Powell, And Repent at Leisure, 58 Harv. L. Rev. 930, 936.

Were we compelled to reach the question, I would by no means be ready to hold that Nevada, in connection with a valid divorce proceeding, had no *power* to adjudicate an incident so inextricably knit to the marriage status as is support. I would agree with Judge Fuld, dissenting below, that the denial of power to Nevada rests on the "erroneous premise that a mere incident of the marital status, which 'in itself furnishes no foundation for a cause of action' . . . is the equivalent of an independent right." [1] Nor does it help to label Mrs. Vanderbilt's claim to support a "property" right and therefore an *in*

[1] 1 N. Y. 2d 342, 357, 135 N. E. 2d 553, 561.

personam, rather than an *in rem,* matter. If it is due process for Nevada to adjudicate the marriage status of a domiciliary without personal service over the absent spouse (as it clearly is, see *Williams* v. *North Carolina, I,* 317 U. S. 287), I see no reason why Nevada cannot, at least for the purposes of her own law, also adjudicate the incidents of that status.

I do not think, however, that this forecloses the issue before us. I revert, therefore, to what, for me, is the real question in this case: must New York respect Nevada's decree insofar as it purports to adjudicate the question of support? The answer to this question, I think, turns squarely on an issue of New York law, namely, whether Mrs. Vanderbilt was domiciled in New York at the time of the divorce.

If Mrs. Vanderbilt was a New York domiciliary at the time of the divorce, the situation would seem to me to be as follows: New York's law and policy is that the right of a married woman domiciled in New York to support survives an *ex parte* divorce, whether obtained in New York or elsewhere. The only question under the Full Faith and Credit Clause is whether New York is compelled to disregard her own law and policy in favor of the law of Nevada on the question of the survival of support rights subsequent to an *ex parte* divorce. My answer to this question is "no." The interest of New York in her domiciliaries seems to me to be of sufficient weight to justify allowing her to apply her own policy on the question of what effect *ex parte* divorces will be given as against the surviving support rights of her own domiciliaries. In my view it does not follow automatically that merely because New York must recognize the validity of Nevada's *ex parte* divorce, she must also recognize the effect Nevada would give to that divorce in connection with the wife's rights to support. The two questions are

governed by different considerations. I quote again from Professor Powell:

> "The 'irreconcilable conflict' between two states on the question of marital status is not so insuperable in dealing with matters of money. It is less irksome to support two wives than to go to jail because of them. Though with respect to status one state or the other must yield, with respect to maintenance such yielding is not necessary.
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> ". . . 'The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States.' The solution is a matter of judgment in each case, judgment based not only on the particularities of the individual case or type of case but upon the desirability of as much generality and predictability as is consistent with a fair degree of control by a state over the conduct and the relationships of persons who in every substantial sense are its own home folks. . . .
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> . . . . .
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> "[It is argued] that the state where the stay-behind spouse has long been domiciled has an interest in making a quondam husband continue a prior obligation to support her, and that this interest is stronger and more meritorious than any possible opposing interest to prevent it that can be accredited to the state which gave him a divorce after being blindly satisfied that he intended an indefinite stay there. This seems so sensible that it should be obvious to any one who had never become confused by studying law." Powell, *supra,* at 952, 954–955.

In effect, the situation before us seems to me to be analogous to dower. If New York law should provide that the dower rights of her domiciliaries survive *ex parte*

divorces, I would suppose that New York could give effect to that policy in spite of an *ex parte* Nevada divorce which purported to cut off the right to dower. The problem in each case is to weigh the policy of giving an *ex parte* judgment uniform effect throughout the nation, against the interest of a particular State in a particular local policy. Where status is concerned, this Court held that the interest in certainty as to whether one is married or single outweighs the interest of home States in the marital status of their domiciliaries, so that North Carolina was forced to swallow Nevada's views as to what is sufficient cause for divorce even though the North Carolina wife had not appeared in the Nevada proceeding. *Williams, I, supra.* But I see no reason why we should extend that, for me, already somewhat unpalatable mediation to the limits of its logic in order to hold that Nevada's views as to support as well as divorce must be forced onto other States, and that Nevada can not only compel wives domiciled elsewhere to become single against their will, but to be pauperized against their will as well. Of course, the reason for the distinction is not that the wife's right to support is "worth" more than her interest in remaining a wife. But the interest of the wife in not becoming single *and* penniless is greater than her interest in not becoming single. In other words, merely because it is held that the wife must be deprived of one benefit *ex parte,* in the interest of national uniformity, does not *compel* us to hold that the other benefit must vanish with it, where the interest in national uniformity is not as compelling.[2]

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[2] "It is easier to have a flat rule than to make distinctions based on judgment. Yet, from the standpoint of partitioning power among the several states, there may well be wisdom in having a gap between what due process will not forbid and what full faith and credit will not require. Certainly in suits over property and money there may be grounds that are thought good enough to justify a state in exert-

In deciding this case we must always remember that the *reason* why the Nevada *ex parte* divorce has the effect of a judgment in New York even on the question of status is because this Court found, in measuring the competing interests, that uniformity should prevail. It will not do, therefore, to say that once that is done the Court is foreclosed from weighing competing interests in determining the effect of the Nevada adjudication as to questions other than status. One cannot rest on the inexorability that the Nevada decree is a "judgment" and eliminate the fact that it was held to be a judgment outside Nevada as to status for reasons which do not necessarily apply to the question of support, any more than one can solve the problem by labeling support as a "property" right.[3]

Quite a different case is presented, it seems to me, where a wife becomes a domiciliary of New York after the *ex parte* divorce and is then granted support. In

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ing its power so far as it relies wholly on its own strength and yet not so good that other states should be bound to lend a hand." Powell, *supra*, at 936; and see *id.*, n. 14.

[3] For the most compendious exposition of the many situations where this Court has held that the Full Faith and Credit Clause does not demand *automatic* respect in a sister State for a judgment valid in the State where rendered, see the dissent of Mr. Justice Stone and Mr. Justice Cardozo in *Yarborough* v. *Yarborough*, 290 U. S. 202, 213. There can hardly be dispute over the proposition that "in the assertion of rights, defined by a judgment of one state, within the territory of another, there is often an inescapable conflict of interest of the two states, and there comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate domestic interest of the other. That point may vary with the circumstances of the case; and in the absence of provisions more specific than the general terms of the congressional enactment this Court must determine for itself the extent to which one state may qualify or deny rights claimed under proceedings or records of other states." *Id.*, at 215 (footnotes omitted).

such a case New York could not pretend to be assuring the wife the mere survival of a pre-existing right, because the wife could have had no pre-divorce rights in New York at all. New York would merely be *granting* the wife a marital right in the teeth of a valid Nevada adjudication that there is no marriage. And, of course, at the time of the divorce New York would have had no interest in the situation of any kind. In such a case, therefore, it seems to me that the Full Faith and Credit Clause would require New York to respect the Nevada judgment as to support rights. Furthermore, even aside from the judgment, as a matter of choice of law I should think New York would be forced to look to the law of a State which had a substantial contact with these parties at the time of the divorce in determining the effect to be given to the divorce decree. It seems to me unfortunate that this Court should permit spouses divorced by valid decrees to comb the country, after the divorce, in search of any State where the divorcing spouse has property and which has favorable support laws, in order there to obtain alimony. I would therefore by no means hold the Nevada adjudication "void" and therefore of no effect in any State.[4]

Thus decision here, as I see it, turns on the domicile of Mrs. Vanderbilt at the time of the divorce. On this question I am left in some doubt. Section 1165–a of the New York Civil Practice Act makes one year's residence necessary to suits for support. This is amenable to the interpretation that New York would not recognize Mrs. Vanderbilt as domiciled in that State until the lapse of a year, that is, after the decree of divorce here involved. See *de Meli* v. *de Meli,* 120 N. Y. 485, 24 N. E. 996. On the other hand, the opinion below intimates that the one-

[4] See Morris, Divisible Divorce, 64 Harv. L. Rev. 1287.

year residency can be regarded as merely a procedural prerequisite to filing suit under § 1170–b, and does not affect Mrs. Vanderbilt's status as a domiciliary of New York *ab initio*.[5] In view of this uncertainty in the state law, I would remand to the state court for reconsideration in light of the above-stated principles.

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[5] I draw that implication from the following passage in the opinion of the Court of Appeals: "But when the husband, abandoning his wife, left their California domicile to establish a Nevada domicile for his own purposes, the abandoned wife had a right to set up a New York domicile for herself and bring the matrimonial domicile to New York with her . . . . That right she exercised in this instance before the Nevada judgment was entered and she satisfied New York's residence requirements before suing for a separation . . . . We need not decide whether she would have the same right to come into New York, even after a foreign-State divorce, to take advantage of section 1170–b." 1 N. Y. 2d, at 351, 135 N. E. 2d, at 558.

KINGSLEY BOOKS, INC., ET AL. *v.* BROWN, CORPORATION COUNSEL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 107. Argued April 22, 1957.—Decided June 24, 1957.

In a proceeding under § 22–a of the New York Code of Criminal Procedure, a State Court, sitting in equity, found that certain booklets displayed for sale by appellants were clearly obscene, and it enjoined their further distribution and ordered their destruction. *Held:* Resort to this remedy by the State was not violative of the freedom of speech and press protected by the Due Process Clause of the Fourteenth Amendment from encroachment by the States. Pp. 437–445.

(a) A State could constitutionally convict appellants for keeping for sale booklets found to be obscene. *Alberts* v. *California, post,* p. 476. P. 440.

(b) Nothing in the Due Process Clause of the Fourteenth Amendment restricts a State to the criminal process in seeking to protect its people from the dissemination of pornography. P. 441.

(c) The injunction here sustained no more amounts to a "prior restraint" on freedom of speech or press than did the criminal prosecution in *Alberts* v. *California, supra,* where the defendant was fined, sentenced to imprisonment, and put on probation for two years on condition that he not violate the obscenity statute. Pp. 441–444.

(d) The Due Process Clause does not subject the States to the necessity of having trials by jury in misdemeanor prosecutions, and the procedure prescribed by § 22–a of the New York statute for determination whether a publication is obscene does not differ in essential procedural safeguards from that provided under many state statutes making the distribution of obscene publications a misdemeanor. Pp. 443–444.

(e) The provision in § 22–a for the seizure and destruction of instruments of ascertained wrongdoing is a resort to a legal remedy long sanctioned in Anglo-American law. P. 444.

(f) *Near* v. *Minnesota,* 283 U. S. 697, distinguished. P. 445.

1 N. Y. 2d 177, 134 N. E. 2d 461, affirmed.

Emanuel Redfield argued the cause and filed a brief for appellants.

Seymour B. Quel argued the cause for appellee. With him on the brief were *Peter Campbell Brown* and *Fred Iscol.*

Ephraim London filed a brief for the New York Civil Liberties Union, as *amicus curiae,* urging reversal.

Louis J. Lefkowitz, Attorney General, *John R. Davison,* Solicitor General, and *Ruth Kessler Toch,* Assistant Attorney General, filed a brief for the State of New York, as *amicus curiae,* urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a proceeding under § 22–a of the New York Code of Criminal Procedure (L. 1941, c. 925), as amended in 1954 (L. 1954, c. 702). This section supplements the existing conventional criminal provision dealing with pornography by authorizing the chief executive, or legal officer, of a municipality to invoke a "limited injunctive remedy," under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure, in default of surrender, of the condemned publications.[1]

[1] "§ 22–a. Obscene prints and articles; jurisdiction. The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

"1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character,

A complaint dated September 10, 1954, charged appellants with displaying for sale paper-covered obscene booklets, fourteen of which were annexed, under the general title of "Nights of Horror." The complaint prayed

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which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph figure or image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

"2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

"3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

"4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

"5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

that appellants be enjoined from further distribution of the booklets, that they be required to surrender to the sheriff for destruction all copies in their possession, and, upon failure to do so, that the sheriff be commanded to seize and destroy those copies. The same day the appellants were ordered to show cause within four days why they should not be enjoined *pendente lite* from distributing the booklets. Appellants consented to the granting of an injunction *pendente lite* and did not bring the matter to issue promptly, as was their right under subdivision 2 of the challenged section, which provides that the persons sought to be enjoined "shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial." After the case came to trial, the judge, sitting in equity, found that the booklets annexed to the complaint and introduced in evidence were clearly obscene—were "dirt for dirt's sake"; he enjoined their further distribution and ordered their destruction. He refused to enjoin "the sale and distribution of later issues" on the ground that "to rule against a volume not offered in evidence would . . . impose an unreasonable prior restraint upon freedom of the press." 208 Misc. 150, 167, 142 N. Y. S. 2d 735, 750.

Not challenging the construction of the statute or the finding of obscenity, appellants took a direct appeal to the New York Court of Appeals, a proceeding in which the constitutionality of the statute was the sole question open to them. That court (one judge not sitting) found no constitutional infirmity: three judges supported the unanimous conclusion by detailed discussion, the other three deemed a brief disposition justified by "ample authority." 1 N. Y. 2d 177, 189, 134 N. E. 2d 461, 468. A claim under the Due Process Clause of the Fourteenth Amendment made throughout the state litigation brought the case here on appeal. 352 U. S. 962.

Neither in the New York Court of Appeals, nor here, did appellants assail the legislation insofar as it outlaws obscenity. The claim they make lies within a very narrow compass. Their attack is upon the power of New York to employ the remedial scheme of § 22–a. Authorization of an injunction *pendente lite,* as part of this scheme, during the period within which the issue of obscenity must be promptly tried and adjudicated in an adversary proceeding for which "[a]dequate notice, judicial hearing, [and] fair determination" are assured, 208 Misc. 150, 164, 142 N. Y. S. 2d 735, 747, is a safeguard against frustration of the public interest in effectuating judicial condemnation of obscene matter. It is a brake on the temptation to exploit a filthy business offered by the limited hazards of piecemeal prosecutions, sale by sale, of a publication already condemned as obscene. New York enacted this procedure on the basis of study by a joint legislative committee. Resort to this injunctive remedy, it is claimed, is beyond the constitutional power of New York in that it amounts to a prior censorship of literary product and as such is violative of that "freedom of thought, and speech" which has been "withdrawn by the Fourteenth Amendment from encroachment by the states." *Palko* v. *Connecticut,* 302 U. S. 319, 326–327. Reliance is particularly placed upon *Near* v. *Minnesota,* 283 U. S. 697.

In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that "the primary requirements of decency may be enforced against obscene publications." *Id.,* at 716. And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. *Alberts* v. *California, post,* p. 476, decided this day. The immediate problem then is whether New York can adopt as an

auxiliary means of dealing with such obscene merchandising the procedure of § 22–a.

We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner* v. *Texas,* 310 U. S. 141, 148. If New York chooses to subject persons who disseminate obscene "literature" to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. Just as *Near* v. *Minnesota, supra,* one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that "Liberty of speech, and of the press, is also not an absolute right," 283 U. S., at 708, it likewise made clear that "the protection even as to previous restraint is not absolutely unlimited." *Id.,* at 716. To be sure, the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship.

The judicial angle of vision in testing the validity of a statute like § 22–a is "the operation and effect of the statute in substance." *Id.,* at 713. The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who

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brings weighty learning to his support of constitutionally protected liberties: "What is needed," writes Professor Paul A. Freund, "is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis." The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539.

Wherein does § 22–a differ in its effective operation from the type of statute upheld in *Alberts?* Section 311 of California's Penal Code provides that "Every person who wilfully and lewdly . . . keeps for sale . . . any obscene . . . book . . . is guilty of a misdemeanor . . . ." Section 1141 of New York's Penal Law is similar. One would be bold to assert that the *in terrorem* effect of such statutes less restrains booksellers in the period before the law strikes than does § 22–a. Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell it on his own judgment rather than steer "nervously among the treacherous shoals." Warburg, Onward And Upward With The Arts, The New Yorker, April 20, 1957, 98, 101, in connection with *R.* v. *Martin Secker Warburg, Ltd.*, [1954] 2 All Eng. 683 (C. C. C.).

Criminal enforcement and the proceeding under § 22–a interfere with a book's solicitation of the public precisely at the same stage. In each situation the law moves after publication; the book need not in either case have yet passed into the hands of the public. The *Alberts* record does not show that the matter there found to be

obscene had reached the public at the time that the criminal charge of keeping such matter for sale was lodged, while here as a matter of fact copies of the booklets whose distribution was enjoined had been on sale for several weeks when process was served. In each case the bookseller is put on notice by the complaint that sale of the publication charged with obscenity in the period before trial may subject him to penal consequences. In the one case he may suffer fine and imprisonment for violation of the criminal statute, in the other, for disobedience of the temporary injunction. The bookseller may of course stand his ground and confidently believe that in any judicial proceeding the book could not be condemned as obscene, but both modes of procedure provide an effective deterrent against distribution prior to adjudication of the book's content—the threat of subsequent penalization.[2]

The method devised by New York in § 22–a for determining whether a publication is obscene does not differ in essential procedural safeguards from that provided under many state statutes making the distribution of obscene publications a misdemeanor. For example, while the New York criminal provision brings the State's criminal procedure into operation, a defendant is not thereby entitled to a jury trial. In each case a judge is the conventional trier of fact; in each, a jury may as a matter of discretion be summoned. Compare N. Y. City Criminal Courts Act, § 31, Sub. 1 (c) and Sub. 4, with N. Y. Civil Practice Act, § 430. (Appellants, as a matter of fact, did not request a jury trial, they did not attack

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[2] This comparison of remedies takes note of the fact that we do not have before us a case where, although the issue of obscenity is ultimately decided in favor of the bookseller, the State nevertheless attempts to punish him for disobedience of the interim injunction. For all we know, New York may impliedly condition the temporary injunction so as not to subject the bookseller to a charge of contempt if he prevails on the issue of obscenity.

the statute in the courts below for failure to require a jury, and they did not bring that issue to this Court.) Of course, the Due Process Clause does not subject the States to the necessity of having trial by jury in misdemeanor prosecutions.

Nor are the consequences of a judicial condemnation for obscenity under § 22–a more restrictive of freedom of expression than the result of conviction for a misdemeanor. In *Alberts,* the defendant was fined $500, sentenced to sixty days in prison, and put on probation for two years on condition that he not violate the obscenity statute. Not only was he completely separated from society for two months but he was also seriously restrained from trafficking in all obscene publications for a considerable time. Appellants, on the other hand, were enjoined from displaying for sale or distributing only the particular booklets theretofore published and adjudged to be obscene. Thus, the restraint upon appellants as merchants in obscenity was narrower than that imposed on Alberts.

Section 22–a's provision for the seizure and destruction of the instruments of ascertained wrongdoing expresses resort to a legal remedy sanctioned by the long history of Anglo-American law. See Holmes, The Common Law, 24–26; *Van Oster* v. *Kansas,* 272 U. S. 465; *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505, 510–511; *Lawton* v. *Steele,* 152 U. S. 133; and see *United States* v. *Urbuteit,* 335 U. S. 355, dealing with misbranded articles under § 304 (a) of the Food, Drug, and Cosmetic Act, 52 Stat. 1044. It is worth noting that although the *Alberts* record does not reveal whether the publications found to be obscene were destroyed, provision is made for that by §§ 313 and 314 of the California Penal Code. Similarly, § 1144 of New York's Penal Law provides for destruction of obscene matter following conviction for its dissemination.

It only remains to say that the difference between *Near* v. *Minnesota, supra,* and this case is glaring in fact. The two cases are no less glaringly different when judged by the appropriate criteria of constitutional law. Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. In the language of Mr. Chief Justice Hughes, "This is of the essence of censorship." 283 U. S., at 713. As such, it was found unconstitutional. This was enough to condemn the statute wholly apart from the fact that the proceeding in *Near* involved not obscenity but matters deemed to be derogatory to a public officer. Unlike *Near,* § 22–a is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive.

The judgment is

Affirmed.

MR. CHIEF JUSTICE WARREN, dissenting.

My views on the right of a State to protect its people against the purveyance of obscenity were expressed in *Alberts* v. *California, post,* p. 476, also decided today. Here we have an entirely different situation.

This is not a criminal obscenity case. Nor is it a case ordering the destruction of materials disseminated by a person who has been convicted of an offense for doing so, as would be authorized under provisions in the laws of New York and other States. It is a case wherein the New York police, under a different state statute, located books which, in their opinion, were unfit for public use because of obscenity and then obtained a court order for their condemnation and destruction.

The majority opinion sanctions this proceeding. I would not. Unlike the criminal cases decided today, this New York law places the book on trial. There is totally

lacking any standard in the statute for judging the book in context. The personal element basic to the criminal laws is entirely absent. In my judgment, the same object may have wholly different impact depending upon the setting in which it is placed. Under this statute, the setting is irrelevant.

It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature. To do otherwise is to impose a prior restraint and hence to violate the Constitution. Certainly in the absence of a prior judicial determination of illegal use, books, pictures and other objects of expression should not be destroyed. It savors too much of book burning.

I would reverse.

Opinion of MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BLACK, dissenting, announced by MR. JUSTICE BRENNAN.

There are two reasons why I think this restraining order should be dissolved.

First, the provision for an injunction *pendente lite* gives the State the paralyzing power of a censor. A decree can issue *ex parte*—without a hearing and without any ruling or finding on the issue of obscenity. This provision is defended on the ground that it is only a little encroachment, that a hearing must be promptly given and a finding of obscenity promptly made. But every publisher knows what awful effect a decree issued in secret can have. We tread here on First Amendment grounds. And nothing is more devastating to the rights that it guarantees than the power to restrain publication before even a hearing is held. This is prior restraint and censorship at its worst.

Second, the procedure for restraining by equity decree the distribution of all the condemned literature does violence to the First Amendment. The judge or jury which

finds the publisher guilty in New York City acts on evidence that may be quite different from evidence before the judge or jury that finds the publisher not guilty in Rochester. In New York City the publisher may have been selling his tracts to juveniles, while in Rochester he may have sold to professional people. The nature of the group among whom the tracts are distributed may have an important bearing on the issue of guilt in any obscenity prosecution. Yet the present statute makes one criminal conviction conclusive and authorizes a statewide decree that subjects the distributor to the contempt power. I think every publication is a separate offense which entitles the accused to a separate trial. Juries or judges may differ in their opinions, community by community, case by case. The publisher is entitled to that leeway under our constitutional system. One is entitled to defend every utterance on its merits and not to suffer today for what he uttered yesterday. Free speech is not to be regulated like diseased cattle and impure butter. The audience (in this case the judge or the jury) that hissed yesterday may applaud today, even for the same performance.

The regime approved by the Court goes far toward making the censor supreme. It also substitutes punishment by contempt for punishment by jury trial. In both respects it transgresses constitutional guarantees.

I would reverse this judgment and direct the restraining order to be dissolved.

MR. JUSTICE BRENNAN, dissenting.

I believe the absence in this New York obscenity statute of a right to jury trial is a fatal defect. Provision for jury trials in equity causes is made by § 430 of the New York Civil Practice Act,[1] but only for discretionary jury trials,

[1] Gilbert-Bliss' N. Y. Civ. Prac., Vol. 3B, 1942, § 430.

and advisory verdicts, to be followed or rejected by the trial judge as he deems fit and proper.[2]

In *Alberts* v. *California* and *Roth* v. *United States*, decided today, *post*, p. 476, the Court held to be constitutional the following standard for judging obscenity—whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The statutes there involved allowed a jury trial of right, and we did not reach the question whether the safeguards necessary for securing the freedoms of speech and press for material not obscene included a jury determination of obscenity.

The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, *i. e.*, that reasonable men may differ whether the material is obscene.[3]

I would reverse the judgment and direct the restraining order to be dissolved.

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[2] *Learned* v. *Tillotson*, 97 N. Y. 1; *Bolognino* v. *Bolognino*, 136 Misc. 656, 241 N. Y. Supp. 445 (Sup. Ct.), aff'd, 231 App. Div. 817, 246 N. Y. Supp. 883.

[3] *Parmelee* v. *United States*, 72 App. D. C. 203, 205, 113 F. 2d 729, 731; *United States* v. *Dennett*, 39 F. 2d 564, 568.

MALLORY *v.* UNITED STATES.

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

No. 521. Argued April 1, 1957.—Decided June 24, 1957.

Petitioner was convicted in a Federal District Court of rape and sentenced to death after a trial in which there was admitted in evidence a confession obtained under the following circumstances: He was arrested early in the afternoon and was detained at police headquarters within the vicinity of numerous committing magistrates. He was not told of his right to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent and that any statement made by him might be used against him. Not until after petitioner had confessed, about 9:30 p. m., was an attempt made to take him before a committing magistrate, and he was not actually taken before a magistrate until the next morning. *Held:* This was a violation of Rule 5 (a) of the Federal Rules of Criminal Procedure, which requires that an arrested person be taken before a committing magistrate "without unnecessary delay," and the conviction is reversed. *McNabb* v. *United States*, 318 U. S. 332; *Upshaw* v. *United States*, 335 U. S. 410. Pp. 449–456.

98 U. S. App. D. C. 406, 236 F. 2d 701, reversed and remanded.

William B. Bryant argued the cause for petitioner. With him on the brief were *Joseph C. Waddy* and *William C. Gardner.*

Edward L. Barrett, Jr. argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner was convicted of rape in the United States District Court for the District of Columbia, and, as authorized by the District Code, the jury imposed a

death sentence. The Court of Appeals affirmed, one judge dissenting. 98 U. S. App. D. C. 406, 236 F. 2d 701. Since an important question involving the interpretation of the Federal Rules of Criminal Procedure was involved in this capital case, we granted the petition for certiorari. 352 U. S. 877.

The rape occurred at six p. m. on April 7, 1954, in the basement of the apartment house inhabited by the victim. She had descended to the basement a few minutes previous to wash some laundry. Experiencing some difficulty in detaching a hose in the sink, she sought help from the janitor, who lived in a basement apartment with his wife, two grown sons, a younger son and the petitioner, his nineteen-year-old half-brother. Petitioner was alone in the apartment at the time. He detached the hose and returned to his quarters. Very shortly thereafter, a masked man, whose general features were identified to resemble those of petitioner and his two grown nephews, attacked the woman. She had heard no one descend the wooden steps that furnished the only means of entering the basement from above.

Petitioner and one of his grown nephews disappeared from the apartment house shortly after the crime was committed. The former was apprehended the following afternoon between two and two-thirty p. m. and was taken, along with his older nephews, also suspects, to police headquarters. At least four officers questioned him there in the presence of other officers for thirty to forty-five minutes, beginning the examination by telling him, according to his testimony, that his brother had said that he was the assailant. Petitioner strenuously denied his guilt. He spent the rest of the afternoon at headquarters, in the company of the other two suspects and his brother a good part of the time. About four p. m. the three suspects were asked to submit to "lie detector" tests, and they agreed. The officer in charge of the poly-

graph machine was not located for almost two hours, during which time the suspects received food and drink. The nephews were then examined first. Questioning of petitioner began just after eight p. m. Only he and the polygraph operator were present in a small room, the door to which was closed.

Following almost an hour and one-half of steady interrogation, he "first stated that he could have done this crime, or that he might have done it. He finally stated that he was responsible . . . ." (Testimony of polygraph operator, R. 70.) Not until ten p. m., after petitioner had repeated his confession to other officers, did the police attempt to reach a United States Commissioner for the purpose of arraignment. Failing in this, they obtained petitioner's consent to examination by the deputy coroner, who noted no indicia of physical or psychological coercion. Petitioner was then confronted by the complaining witness and "[p]ractically every man in the Sex Squad," and in response to questioning by three officers, he repeated the confession. Between eleven-thirty p. m. and twelve-thirty a. m. he dictated the confession to a typist. The next morning he was brought before a Commissioner. At the trial, which was delayed for a year because of doubt about petitioner's capacity to understand the proceedings against him, the signed confession was introduced in evidence.

The case calls for the proper application of Rule 5 (a) of the Federal Rules of Criminal Procedure, promulgated in 1946, 327 U. S. 821. That Rule provides:

> "(a) APPEARANCE BEFORE THE COMMISSIONER. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer

> empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

This provision has both statutory and judicial antecedents for guidance in applying it. The requirement that arraignment be "without unnecessary delay" is a compendious restatement, without substantive change, of several prior specific federal statutory provisions. (*E. g.*, 20 Stat. 327, 341; 48 Stat. 1008; also 28 Stat. 416.) See Dession, The New Federal Rules of Criminal Procedure: I, 55 Yale L. J. 694, 707. Nearly all the States have similar enactments.

In *McNabb* v. *United States,* 318 U. S. 332, 343–344, we spelled out the important reasons of policy behind this body of legislation:

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. . . . The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their

way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime."

Since such unwarranted detention led to tempting utilization of intensive interrogation, easily gliding into the evils of "the third degree," the Court held that police detention of defendants beyond the time when a committing magistrate was readily accessible constituted "willful disobedience of law." In order adequately to enforce the congressional requirement of prompt arraignment, it was deemed necessary to render inadmissible incriminating statements elicited from defendants during a period of unlawful detention.

In *Upshaw* v. *United States,* 335 U. S. 410, which came here after the Federal Rules of Criminal Procedure had been in operation, the Court made it clear that Rule 5 (a)'s standard of "without unnecessary delay" implied no relaxation of the *McNabb* doctrine.

The requirement of Rule 5 (a) is part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement. Provisions related to Rule 5 (a) contemplate a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate. Rule 4 (a) provides: "If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue . . . ." Rule 4 (b) requires that the warrant "shall command that the defendant be arrested and brought before the nearest available commissioner." And Rules 5 (b) and (c) reveal the function of the requirement of prompt arraignment:

"(b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the com-

plaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

"(c) PRELIMINARY EXAMINATION. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules."

The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession.

The circumstances of this case preclude a holding that arraignment was "without unnecessary delay." Petitioner was arrested in the early afternoon and was detained at headquarters within the vicinity of numerous committing magistrates. Even though the police had ample evidence from other sources than the petitioner for regarding the petitioner as the chief suspect, they first questioned him for approximately a half hour. When this inquiry of a nineteen-year-old lad of limited intelligence produced no confession, the police asked him to submit to a "lie-detector" test. He was not told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent and "that any statement made by him may be used against him." After four hours of further detention at headquarters, during which arraignment could easily have been made in the same building in which the police headquarters were housed, petitioner was examined by the lie-detector operator for another hour and a half before his story began to waver. Not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him.

We cannot sanction this extended delay, resulting in confession, without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard. In every case where the police resort to interrogation of

an arrested person and secure a confession, they may well claim, and quite sincerely, that they were merely trying to check on the information given by him. Against such a claim and the evil potentialities of the practice for which it is urged stands Rule 5 (a) as a barrier. Nor is there an escape from the constraint laid upon the police by that Rule in that two other suspects were involved for the same crime. Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

Reversed and remanded.

Syllabus.

MOREY, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL. *v.* DOUD ET AL., DOING BUSINESS AS BONDIFIED SYSTEMS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 475. Argued April 24, 1957.—Decided June 24, 1957.

The Illinois Community Currency Exchanges Act provides for the licensing, inspection, bonding and regulation of "currency exchanges" engaged in the business of issuing or selling money orders. It forbids them to do business on the premises of any other business; but it exempts from all of its provisions money orders sold or issued by the American Express Co., an old, established, world-wide enterprise of unquestioned solvency and high financial standing, which sells money orders through local drug and grocery stores. Appellees, a "currency exchange" issuing and selling money orders and its agent selling them in his own drugstore, sued to enjoin enforcement of the Act against them, on the ground of its unconstitutionality. *Held:* Application of the Act to appellees denies them the equal protecton of the laws guaranteed by the Fourteenth Amendment. Pp. 458–470.

(a) The Equal Protection Clause does not require that every state regulatory statute apply to all in the same business; but a statutory discrimination must be based on differences that are reasonably related to the purposes of the statute. *Smith* v. *Cahoon,* 283 U. S. 553. Pp. 465–466.

(b) Moreover, a discrimination cannot be justified by different business characteristics when it has no reasonable relation to those differences. *Hartford Co.* v. *Harrison,* 301 U. S. 459. P. 466.

(c) The discrimination in favor of the American Express Co. here involved does not have a reasonable relation to the purposes of the Act or to different business characteristics. Pp. 466–467.

(d) The effect of the discrimination here involved is to create a closed class by singling out American Express money orders for exemption from the requirements of the Act. Pp. 467–468.

(e) The exemption of its money orders gives the American Express Co. important economic and competitive advantages over appellees. Pp. 468–469.

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(f) Taking these factors in conjunction, application of the Act to appellees deprives them of equal protection of the laws. P. 469.

(g) This case need not be remitted to the Illinois courts for a determination whether the exception can be severed from the Act under its severability clause, because the Supreme Court of Illinois has indicated rather clearly that the exception is not severable. Pp. 469–470.

146 F. Supp. 887, affirmed.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for appellants. With him on the brief were *Latham Castle,* Attorney General, *Ben Schwartz,* Assistant Attorney General, and *Benjamin S. Adamowski.*

G. Kent Yowell and *John J. Yowell* argued the cause and filed a brief for appellees.

Mr. Justice Burton delivered the opinion of the Court.

This case concerns the validity of a provision in the Illinois Community Currency Exchanges Act, as amended,[1] excepting money orders of the American Express Company from the requirement that any firm selling or issuing money orders in the State must secure a license and submit to state regulation. The objection raised is that this exception results in a denial of equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States, to those who are subjected to the requirements of the Act. For the reasons hereafter stated, we hold that the Act is invalid as applied to them because of this discriminatory exception.

The appellees in this case are Doud, McDonald and Carlson, partners doing business as Bondified Systems,

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[1] Ill. Rev. Stat., 1955, c. 16½, §§ 30–56.3.

and Derrick, their agent. The partnership has an exclusive right to sell "Bondified" money orders in Illinois, directly or through agents.[2] It contemplates selling these money orders in Illinois through agents principally engaged in operating retail drug or grocery stores. Derrick is the proprietor of a drugstore in Illinois and operates a "Bondified" agency in that store.

Fearing enforcement against them of the provisions of the Act, these four individuals instituted this suit in the United States District Court for the Northern District of Illinois against the appellants, who are the Auditor of Public Accounts of the State of Illinois, the Attorney General of that State, and the State's Attorney of Cook County. The complaint alleged that the Act violated the Equal Protection Clause of the Fourteenth Amendment in that it unlawfully discriminated against the complainants and in favor of the American Express Company. An injunction against the enforcement of the Act was sought. Since the complaint attacked the validity of a state statute under the Constitution of the United States, the case was heard by a three-judge District Court, pursuant to 28 U. S. C. §§ 2281, 2284.

After hearing evidence, the District Court dismissed the complaint on the ground that it lacked jurisdiction to determine the constitutional question in the absence of an authoritative determination of that question by the Supreme Court of Illinois. 127 F. Supp. 853. On appeal, this Court held that the District Court erred in dismissing the case for lack of jurisdiction, and remanded it to the District Court. 350 U. S. 485.

On remand, the District Court considered on the merits the evidence previously heard, and unanimously held that

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[2] The registered trade-mark "Bondified" is owned by Checks, Incorporated, a Minnesota corporation, and the partnership, Bondified Systems, has acquired an exclusive license to use that trade-mark in selling and issuing money orders.

the Act violated the Equal Protection Clause and that appellees were entitled to the relief sought. 146 F. Supp. 887.[3] The decree enjoined appellants from enforcing the Act against appellees so long as they engage only in the business of issuing and selling money orders. The case came here on direct appeal under 28 U. S. C. § 1253, and we noted probable jurisdiction. 352 U. S. 923.

During the early 1930's, the closing of many banks in the Chicago area led to the development of simple banking facilities called currency exchanges. The principal activities of these exchanges were the cashing of checks for a fee and the selling of money orders. The fact that many of these exchanges went into business without adequate capital and without sufficient safeguards to protect the public resulted in the enactment of the Illinois Community Currency Exchanges Act in 1943.

This Act and its amendments provide a comprehensive scheme for the licensing and regulation of currency exchanges. The operation of a community currency exchange without a license is made a crime. § 32. An applicant for a license must submit specified information and pay an investigation fee of $25. § 34. A license cannot be issued unless the State Auditor determines that its issuance will "promote the convenience and advantage of the community in which the business of the applicant is proposed to be conducted . . . ." § 34.1.[4] A surety bond of between $3,000 and $25,000, and an insurance policy of between $2,500 and $35,000 must be

[3] In so holding, the District Court declined to follow the Supreme Court of Illinois in sustaining the Act against a similar attack. *McDougall* v. *Lueder,* 389 Ill. 141, 58 N. E. 2d 899. It accepted instead the precedent of a three-judge Federal District Court in Wisconsin which had held unconstitutional an identical provision of a Wisconsin statute. *Currency Services, Inc.* v. *Matthews,* 90 F. Supp. 40.

[4] See *Gadlin* v. *Auditor of Public Accounts,* 414 Ill. 89, 110 N. E. 2d 234.

filed. §§ 35, 36. An annual license fee of $50 is required. § 44.

A licensed exchange must maintain a minimum of $3,000 available in cash for the uses and purposes of its business, plus an amount of liquid funds sufficient to pay on demand all outstanding money orders issued. § 37. Each exchange must be an entity, financed and conducted as a separate business unit, and not conducted as a department of another business. No community currency exchange "hereafter licensed for the first time shall share any room with any other business, trade or profession nor shall it occupy any room from which there is direct access to a room occupied by any other business, trade or profession." § 38. Only one place of business may be maintained under one license, although more than one license may be issued to a licensee. § 43. Annual financial reports must be submitted and the State Auditor has a duty to investigate each exchange at least once a year. A fee of $20 must be paid for each day or part thereof of investigation. § 46.

The following definition of a "community currency exchange" is crucial to this case:

> " 'Community currency exchange' means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, *or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders* (*other than* United States Post Office money orders, *American Express Company money*

order[*s*], Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services." (Emphasis supplied.) § 31.[5]

As the activities of appellees concededly come within this definition of a "community currency exchange," the partnership and its druggist agent are subject to the licensing and regulatory provisions of the Act. Consequently, since the Act bars the sale of money orders as a part of another business, the partnership is precluded from establishing outlets for the sale of "Bondified" money orders in drug and grocery stores, and Derrick is unable to secure a license for the sale of those money orders in his store. § 38. Even if the partnership establishes outlets which are not a part of other businesses, those outlets will be licensed to sell "Bondified" money orders only if they show that the "convenience and advantage of the community" in which they propose to do business will be promoted by the issuance of licenses to them. § 34.1. Finally, any "Bondified" outlets will each have to pay the specified licensing and inspection fees and each will have to secure the required surety bond and insurance policy.

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[5] Appellees do not question the exception from the Act of the money orders of the United States Post Office, the Postal Telegraph Company and the Western Union Telegraph Company. In *Currency Services, Inc.* v. *Matthews*, 90 F. Supp. 40, 43, a three-judge District Court upheld the exception of these money orders from a similar Wisconsin statute. The court concluded that the State was without authority to regulate the sale of the United States Post Office money orders, and that the exception of Western Union money orders was reasonable since that company was regulated both by the Federal Communications Commission and by a state commission. It noted that the Postal Telegraph Company has merged with the Western Union Telegraph Company.

The American Express Company, on the other hand, because its money orders are excepted, is relieved of these licensing and regulatory requirements, and appears to be exempt from any regulation in Illinois. The American Express Company, an unincorporated joint stock association organized in 1868 under the laws of New York, conducts a world-wide business which includes the sale of money orders. It sells money orders in Illinois in substantially the same manner as is contemplated by the "Bondified" partnership, through authorized agents located in drug and grocery stores. Since American Express money orders are not subject to the Act, they are sold legally in those stores as a part of their business. American Express outlets may be established without regard to the "convenience and advantage" of the community in which they operate. Finally, those outlets need not pay licensing and inspection fees nor file surety bonds and insurance policies with the State.

In determining the constitutionality of the Act's application to appellees in the light of its exception of American Express money orders, we start with the established proposition that the "prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489. The rules for testing a discrimination have been summarized as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79.

To these rules we add the caution that "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37–38; *Hartford Co.* v. *Harrison*, 301 U. S. 459, 462.

The Act creates a statutory class of sellers of money orders. The money orders sold by one company, American Express, are excepted from that class. There is but one "American Express Company." If the exception is to be upheld, it must be on the basis on which it is cast—an exception of a particular business entity and not of a generic category.

The purpose of the Act's licensing and regulatory provisions clearly is to protect the public when dealing with currency exchanges.[6] Because the American Express Company is a world-wide enterprise of unquestioned solvency and high financial standing, the State argues that the legislative classification is reasonable. It contends that the special characteristics of the American Express Company justify excepting its money orders from the requirements of an Act aimed at local companies do-

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[6] See *McDougall* v. *Lueder*, 389 Ill. 141, 149–150, 58 N. E. 2d 899, 903–904; *Willis* v. *Fidelity & Deposit Co.*, 345 Ill. App. 373, 384–385, 103 N. E. 2d 513, 518–519.

ing local business,[7] and that appellees are in no position to complain about competitive disadvantages since the "Fourteenth Amendment does not protect a business against the hazards of competition," citing *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163, 170.

That the Equal Protection Clause does not require that every state regulatory statute apply to all in the same business is a truism. For example, where size is an index to the evil at which the law is directed, discriminations between the large and the small are permissible.[8] Moreover, we have repeatedly recognized that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489. On the other hand, a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found.[9] *Smith* v. *Cahoon,* 283 U. S. 553, involved a state statute which required motor vehicles, operating on local highways as carriers for hire, to furnish bonds or insurance policies for the protection of the public against injuries received through negligence in these operations. The Act excepted motor vehicles carrying specified products. This Court held that

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[7] See *McDougall* v. *Lueder,* 389 Ill. 141, 151, 58 N. E. 2d 899, 904.

[8] See *Engel* v. *O'Malley,* 219 U. S. 128, 138 (exception of businesses in which the average sum received for safekeeping or transmission was more than $500 from licensing requirements intended to protect the small depositor); see also, *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628 (exception of railroads less than 50 miles in length from a statute regulating the heating of railroad passenger cars and the placing of guards and guard posts on railroad bridges); *Miller* v. *Strahl,* 239 U. S. 426 (exception of hotels with less than 50 rooms from a statute requiring hotelkeepers to take certain fire precautions).

[9] See *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37.

the exception violated the Equal Protection Clause since the statutory purpose of protecting the public could not reasonably support a discrimination between the carrying of exempt products like farm produce and of regulated products like groceries. " 'Such a classification is not based on anything having relation to the purpose for which it is made.' " *Id.*, at 567.

Of course, distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved.[10] This is so even where the discrimination is by name.[11] But distinctions cannot be so justified if the "discrimination has no reasonable relation to these differences." *Hartford Co.* v. *Harrison*, 301 U. S. 459, 463. In that case, this Court held that a state statute which permitted mutual insurance companies to act through salaried resident employees, but which excluded stock insurance companies from the same privilege, violated the Equal Protection Clause.

The principles controlling in the *Smith* and *Hartford Co.* cases, *supra*, are applicable here. The provisions in the Illinois Act, such as those requiring an annual inspection of licensed community currency exchanges by the State Auditor, make it clear that the statute was intended to afford the public *continuing* protection. The discrimination in favor of the American Express Company does not conform to this purpose. The exception of its money

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[10] See *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389 (exception of farmers' mutual insurance companies doing only farm business from a statute establishing rate regulation for fire insurance companies); *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 (different regulatory requirements for reciprocals and mutual companies).

[11] See *Erb* v. *Morasch*, 177 U. S. 584 (exception of a named railroad from an ordinance limiting the speed of trains in a city); cf. *Williams* v. *Mayor*, 289 U. S. 36.

orders apparently rests on the legislative hypothesis that the characteristics of the American Express Company make it unnecessary to regulate their sales. Yet these sales, by virtue of the exception, will continue to be unregulated whether or not the American Express Company retains its present characteristics. On the other hand, sellers of competing money orders are subject to the Act even though their characteristics are, or become, substantially identical with those the American Express Company now has. Moreover, the Act's blanket exception takes no account of the characteristics of the local outlets that sell American Express money orders, and the distinct possibility that they in themselves may afford less protection to the public than do the retail establishments that sell competing money orders. That the American Express Company is a responsible institution operating on a world-wide basis does not minimize the fact that when the public buys American Express money orders in local drug and grocery stores it relies in part on the reliability of the selling agents.

The effect of the discrimination is to create a closed class by singling out American Express money orders. The singling out of the money orders of one company is in a sense the converse of a case like *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 114–115. See also, *McFarland* v. *American Sugar Co.*, 241 U. S. 79. In the *Cotting* case this Court held that a regulatory statute that in fact applied to only one stockyard in a State violated the Equal Protection Clause. Although statutory discriminations creating a closed class have been upheld,[12]

[12] See *Watson* v. *Maryland*, 218 U. S. 173 (exception of physicians who practiced prior to a specified date and treated at least 12 persons within a year prior thereto from examination and certificate requirements); *Sampere* v. *New Orleans*, 166 La. 776, 117 So. 827, aff'd *per curiam*, 279 U. S. 812 (exception of existing business establish-

a statute which established a closed class was held to violate the Equal Protection Clause where, on its face, it was "an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date." *Mayflower Farms, Inc.* v. *Ten Eyck,* 297 U. S. 266, 274. The statute involved in that case granted a differential from the regulated price at which dealers could sell milk to those dealers in a specified class who were in business before April 10, 1933.

Unlike the American Express Company, appellees and others are barred from selling money orders in retail establishments. Even if competing outlets can successfully be established as separate businesses, their ability to secure licenses depends upon a showing of "convenience and advantage." Perhaps such a showing could not be made because the unregulated American Express Company had already established outlets in the community. And even if licenses were secured, the licensees would be required to pay licensing and investigatory fees and purchase surety bonds and insurance policies—costs that the American Express Company and its agents are not required to bear.[13] The fact that the activities of the American Express Company are far-flung does not minimize the impact on local affairs and on competitors of its sale of money orders in Illinois. This is not a case in which the Fourteenth Amendment is being invoked to protect a business from the general hazards of competi-

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ments from a zoning restriction); *Stanley* v. *Public Utilities Commission,* 295 U. S. 76 (exception of carriers which had furnished adequate, responsible and continuous service over a given route from a specified date in the past from the requirement of showing public convenience and necessity to secure a license).

[13] See *Currency Services, Inc.* v. *Matthews,* 90 F. Supp. 40, 44, n. 2, to the effect that costs such as these may be prohibitive.

tion. The hazards here have their roots in the statutory discrimination.

Taking all of these factors in conjunction—the remote relationship of the statutory classification to the Act's purpose or to business characteristics, and the creation of a closed class by the singling out of the money orders of a named company, with accompanying economic advantages—we hold that the application of the Act to appellees deprives them of equal protection of the laws.[14]

The State urges that if the exception of American Express money orders is unconstitutional, the case should be remitted to the Illinois courts for a determination whether the exception can be severed from the Act under its severability clause. § 56.3. However, even if such

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[14] In *Wedesweiler* v. *Brundage,* 297 Ill. 228, 130 N. E. 520, the Supreme Court of Illinois held that the Equal Protection Clause was violated by a statute which excepted express, steamship and telegraph companies from its prohibition against the transmission of money to foreign countries by natural persons, firms or partnerships. That court concluded that the discrimination "has no reference to character, solvency, financial responsibility, security, business or monetary facilities, incorporation, method of doing business, public inspection, supervision or report, or any other thing having any relation to the protection of the public from loss by reason of the dishonesty, incompetence, ignorance or irresponsibility of persons engaging in that business." 297 Ill., at 237, 130 N. E., at 523. See also, *State on inf. Taylor* v. *Currency Services, Inc.,* 358 Mo. 983, 218 S. W. 600.

The *Wedesweiler* case was distinguished by the Supreme Court of Illinois in *McDougall* v. *Lueder,* 389 Ill. 141, 150, 58 N. E. 2d 899, 904, on the ground that in the earlier case the regulated firms were "in direct competition" with the excepted companies. Apparently the court treated the regulated firm in the *McDougall* case as not being in direct competition with the American Express Company since the firm was engaged in the business of cashing checks, as well as in that of selling money orders, while the American Express Company merely sold money orders. Such a distinction is not involved in the facts of this case and we express no opinion on it.

a procedure is otherwise appropriate,[15] we deem it unnecessary here since the Supreme Court of Illinois has indicated rather clearly that the exception is not severable.[16] The State also contends that appellees do not come into court with clean hands and have not demonstrated the imminence of irreparable injury, and hence that they are not entitled to equitable relief. These arguments are adequately disposed of in the opinion of the District Court.[17]

The judgment of the District Court is

Affirmed.

MR. JUSTICE BLACK, dissenting.

The Illinois statute involved here provides a state-wide regulatory plan to protect the public from irresponsible and insolvent sellers of money orders. The Act specifically exempts the American Express Company's money orders from its regulatory provisions because, as the Court recognizes, that company "is a world-wide enter-

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[15] See *Guinn* v. *United States,* 238 U. S. 347, 366; *Myers* v. *Anderson,* 238 U. S. 368, 380–381; *Dorchy* v. *Kansas,* 264 U. S. 286, 291.

[16] In *McDougall* v. *Lueder,* 389 Ill. 141, 151, 58 N. E. 2d 899, 904, the Supreme Court of Illinois stated that "The General Assembly would surely never have passed the act if they had thought that the said companies [Western Union, Postal Telegraph and American Express] would be made subject to its rules and regulations." This statement takes on added significance in the light of the court's ruling in the same case that another provision of the Act, which it held invalid, could be severed since "there is no presumption that the General Assembly would not have enacted the remainder of the statute without" the invalid provision. 389 Ill., at 155, 58 N. E. 2d, at 906.

As the question of severability is a question of state law, the judgment of the Supreme Court of Illinois is binding here. See *Dorchy* v. *Kansas,* 264 U. S. 286, 290; *Chas. Wolff Packing Co.* v. *Court of Industrial Relations,* 267 U. S. 552, 562.

[17] See *Doud* v. *Hodge,* 146 F. Supp. 887, 889–890.

prise of unquestioned solvency and high financial standing." I cannot agree with the Court that this exemption denies actual and potential competitors of the American Express Company equal protection of the laws within the meaning of the Fourteenth Amendment. Only recently this Court held that "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 489. And here, whatever one may think of the merits of this legislation, its exemption of a company of known solvency from a solvency test applied to others of unknown financial responsibility can hardly be called "invidious." Unless state legislatures have power to make distinctions that are not plainly unreasonable, then the ability of the States to protect their citizens by regulating business within their boundaries can be seriously impaired. I feel it necessary to express once again my objection to the use of general provisions of the Constitution to restrict narrowly state power over state domestic economic affairs.[1]

I think state regulation should be viewed quite differently where it touches or involves freedom of speech, press, religion, petition, assembly, or other specific safeguards of the Bill of Rights. It is the duty of this Court to be alert to see that these constitutionally preferred rights are not abridged.[2] But the Illinois statute here

[1] See, *e. g.*, my dissents in *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 562–564; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 462; *Adamson* v. *California*, 332 U. S. 46, 79–84. Cf. *Tigner* v. *Texas*, 310 U. S. 141; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92; *Slaughter-House Cases*, 16 Wall. 36, 81–82.

[2] *Schneider* v. *State*, 308 U. S. 147, 161. And see my dissenting opinions in *Beauharnais* v. *Illinois*, 343 U. S. 250, 267, and *Feldman* v. *United States*, 322 U. S. 487, 494. Cf. *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 556; and my concurring opinion in *Oyama* v. *California*, 332 U. S. 633, 647.

does not involve any of these basic liberties. And since I believe that it is not "invidiously discriminatory," I would not hold it invalid.

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

The sole question before the Court is whether the Fourteenth Amendment of the United States Constitution, in prohibiting a State from denying any person "the equal protection of the laws," has barred Illinois from formulating its domestic policy as it did, in an area concededly within the regulatory power of that State. As is usually true of questions arising under the Equal Protection Clause, the answer will turn on the way in which that clause is conceived. It is because of differences in judicial approach that the divisions in the Court in applying the clause have been frequent and marked. It is, I believe, accurate to summarize the matter by saying that the great divide in the decisions lies in the difference between emphasizing the actualities or the abstractions of legislation.

The more complicated society becomes, the greater the diversity of its problems and the more does legislation direct itself to the diversities. Statutes, that is, are directed to less than universal situations. Law reflects distinctions that exist in fact or at least appear to exist in the judgment of legislators—those who have the responsibility for making law fit fact. Legislation is essentially empiric. It addresses itself to the more or less crude outside world and not to the neat, logical models of the mind. Classification is inherent in legislation; the Equal Protection Clause has not forbidden it. To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic.

The controlling importance of the differences in approach to a problem arising under the Equal Protection Clause is sharply illustrated by one's view of the decisions in cases like *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, and *Hartford Co.* v. *Harrison,* 301 U. S. 459. The Court relies on them. For me they are false leads. Both these decisions prevailed by the narrowest margin; both evoked powerful dissents; both manifest the requirement of nondiscriminatory classification as an exercise in logical abstractions. They breathe the spirit of decisions like *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, and *Colgate* v. *Harvey,* 296 U. S. 404, which were respectively overruled in *Tigner* v. *Texas,* 310 U. S. 141, and *Madden* v. *Kentucky,* 309 U. S. 83. The last two cases heeded the admonition that "it is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness . . . ." *Louisville & Nashville R. Co.* v. *Barber Asphalt Co.,* 197 U. S. 430, 434.

In regulating its banking facilities, Illinois was drawing on one of the oldest and most far-reaching of legislative powers. The public needs to be protected in the issuing and selling of money orders, and people with limited means are especially to be safeguarded. If Illinois chose, the State itself could take over the money order business. See *Noble State Bank* v. *Haskell,* 219 U. S. 104, 113. Just as it was found that there was nothing in the Constitution of the United States to bar a State from engaging in the businesses of manufacturing and marketing farm products and of providing homes for its people, *Green* v. *Frazier,* 253 U. S. 233, so, surely, there is nothing to prevent Illinois from engaging in this business directly, or through a money dispensary similar to the mode by which some States engage in the liquor business. I know of nothing in the Fourteenth Amendment that would bar the State from discharging its responsibility to

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its citizens by having the business conducted by what the Court recognizes to be "a world-wide enterprise of unquestioned solvency and high financial standing," to wit, the American Express Co.

I regretfully find myself unable to appreciate why the State, instead of thus dealing with the problem, may not choose to allow small units to carry on a business so fraught with public interests under the regulations devised by the statute under review, while at the same time it finds such measures of control needless in a case of "a world-wide enterprise of unquestioned solvency and high financial standing." The rational differentiation is of course that the latter enterprise contains within itself, in the judgment of Illinois, the necessary safeguards for solvency and reliability in issuing money orders and redeeming them. Surely this is a distinction of significance in fact that the law cannot view with a glass eye.

But it is suggested that the American Express Co. may not continue to retain "its present characteristics," while sellers of competing money orders may continue to be subject to the Act, even though their characteristics become "substantially identical with those the American Express Co. now has." What is this but to deny a State the right to legislate on the basis of circumstances that exist because a State may not in speculatively different circumstances that may never come to pass have such right? Surely there is time enough to strike down legislation when its constitutional justification is gone. Invalidating legislation is serious business and it ought not to be indulged in because in a situation not now before the Court, nor even remotely probable, a valid statute may lose its foundation. The Court has had occasion to deal with such contingency more than once. Regulatory measures have been sustained that later, in changed circumstances, were found to be unconstitutional. Compare *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19,

with *Newton* v. *Consolidated Gas Co.,* 258 U. S. 165, and *Block* v. *Hirsh,* 256 U. S. 135, with *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543.

" 'Legislation which regulates business may well make distinctions depend upon the degree of evil.' *Heath & Milligan Mfg. Co.* v. *Worst,* 207 U. S. 338, 355, 356. It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and small. But in this case size is an index." *Engel* v. *O'Malley,* 219 U. S. 128, 138. Neither the record nor our own judicial information affords any basis for concluding that Illinois may not put the United States Post Office, the Western Union Co., and the American Express Co. in one class and all the other money order issuers in another. Illinois may not the less relieve the American Express Co. from regulations to which multitudinous small issuers are subject because that company has its own reliabilities that may well be different from those of the United States Post Office and the Western Union Telegraph Co. The vital fact is that the American Express Co. is decisively different from those money order issuers that are within the regulatory scheme.

Sociologically one may think what one may of the State's recognition of the special financial position obviously enjoyed by the American Express Co. Whatever one may think is none of this Court's business. In applying the Equal Protection Clause, we must be fastidiously careful to observe the admonition of Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo that we do not "sit as a super-legislature." (See their dissenting opinion in the ill-fated case of *Colgate* v. *Harvey,* 296 U. S. 404, 441. See also *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 214–215.)

ROTH *v.* UNITED STATES.

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

No. 582. Argued April 22, 1957.—Decided June 24, 1957.*

1. In the *Roth* case, the constitutionality of 18 U. S. C. § 1461, which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," and Roth's conviction thereunder for mailing an obscene book and obscene circulars and advertising, are sustained. Pp. 479–494.
2. In the *Alberts* case, the constitutionality of § 311 of West's California Penal Code Ann., 1955, which, *inter alia*, makes it a misdemeanor to keep for sale, or to advertise, material that is "obscene or indecent," and Alberts' conviction thereunder for lewdly keeping for sale obscene and indecent books and for writing, composing, and publishing an obscene advertisement of them, are sustained. Pp. 479–494.
3. Obscenity is not within the area of constitutionally protected freedom of speech or press—either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States. Pp. 481–485.

   (a) In the light of history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. Pp. 482–483.

   (b) The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. P. 484.

   (c) All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests; but implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. Pp. 484–485.

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*Together with No. 61, *Alberts* v. *California*, appeal from the Superior Court of California, Los Angeles County, Appellate Department, argued and decided on the same dates.

4. Since obscenity is not protected, constitutional guaranties were not violated in these cases merely because, under the trial judges' instructions to the juries, convictions could be had without proof either that the obscene material would perceptibly create a clear and present danger of antisocial conduct, or probably would induce its recipients to such conduct. *Beauharnais* v. *Illinois*, 343 U. S. 250. Pp. 485–490.

   (a) Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest—*i. e.*, material having a tendency to excite lustful thoughts. P. 487.

   (b) It is vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest. Pp. 487–488.

   (c) The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. Pp. 488–489.

   (d) In these cases, both trial courts sufficiently followed the proper standard and used the proper definition of obscenity. Pp. 489–490.

5. When applied according to the proper standard for judging obscenity, 18 U. S. C. § 1461, which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character," does not (1) violate the freedom of speech or press guaranteed by the First Amendment, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt. Pp. 491–492.

6. When applied according to the proper standard for judging obscenity, § 311 of West's California Penal Code Ann., 1955, which, *inter alia*, makes it a misdemeanor to keep for sale or to advertise material that is "obscene or indecent," does not (1) violate the freedom of speech or press guaranteed by the Fourteenth Amendmend against encroachment by the States, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt. 491–492.

7. The federal obscenity statute, 18 U. S. C. § 1461, punishing the use of the mails for obscene material, is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7; and it

does not unconstitutionally encroach upon the powers reserved to the States by the Ninth and Tenth Amendments. Pp. 492–493.

8. The California obscenity statute here involved is not repugnant to Art. I, § 8, cl. 7, since it does not impose a burden upon, or interfere with, the federal postal functions—even when applied to a mail-order business. Pp. 493–494.

237 F. 2d 796, affirmed.

138 Cal. App. 2d Supp. 909, 292 P. 2d 90, affirmed.

David von G. Albrecht and *O. John Rogge* argued the cause for petitioner in No. 582. With them on the brief were *David P. Siegel, Peter Belsito* and *Murray A. Gordon.*

Stanley Fleishman argued the cause for appellant in No. 61. With him on the brief were *Sam Rosenwein* and *William B. Murrish.*

Roger D. Fisher argued the cause for the United States in No. 582. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Olney.*

Fred N. Whichello and *Clarence A. Linn,* Assistant Attorney General of California, argued the cause for appellee in No. 61. With them on the brief were *Edmund G. Brown,* Attorney General, *William B. McKesson* and *Lewis Watnick.*

Briefs of *amici curiae* urging reversal were filed in No. 582 by *Morris L. Ernst, Harriett F. Pilpel* and *Nancy F. Wechsler,* for Ernst, *Irwin Karp* and *Osmond K. Fraenkel,* for the Authors League of America, Inc., *Abe Fortas, William L. McGovern, Abe Krash* and *Maurice Rosenfield,* for the Greenleaf Publishing Co. et al., *Horace S. Manges,* for the American Book Publishers Council, Inc., and *Emanuel Redfield,* for the American Civil Liberties Union.

A. L. Wirin filed a brief for the American Civil Liberties Union, Southern California Branch, as *amicus curiae,* in support of appellant in No. 61.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The constitutionality of a criminal obscenity statute is the question in each of these cases. In *Roth,* the primary constitutional question is whether the federal obscenity statute [1] violates the provision of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." In *Alberts,* the primary constitutional question is whether the obscenity provisions of the California Penal Code [2] invade the freedoms of speech and press as they may be incorporated in

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[1] The federal obscenity statute provided, in pertinent part:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1461.

The 1955 amendment of this statute, 69 Stat. 183, is not applicable to this case.

[2] The California Penal Code provides, in pertinent part:

"Every person who wilfully and lewdly, either:

. . . . . .

"3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or other-

the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment.

Other constitutional questions are: whether these statutes violate due process,[3] because too vague to support conviction for crime; whether power to punish speech and press offensive to decency and morality is in the States alone, so that the federal obscenity statute violates the Ninth and Tenth Amendments (raised in *Roth*); and whether Congress, by enacting the federal obscenity statute, under the power delegated by Art. I, § 8, cl. 7, to establish post offices and post roads, pre-empted the regulation of the subject matter (raised in *Alberts*).

Roth conducted a business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted by a jury in the District Court for the Southern District of New York upon 4 counts of a 26-count indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute. His conviction was affirmed by the Court of Appeals for the Second Circuit.[4] We granted certiorari.[5]

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wise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

"4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . .

. . . . . .

"6. . . . is guilty of a misdemeanor. . . ." West's Cal. Penal Code Ann., 1955, § 311.

[3] In *Roth*, reliance is placed on the Due Process Clause of the Fifth Amendment, and in *Alberts*, reliance is placed upon the Due Process Clause of the Fourteenth Amendment.

[4] 237 F. 2d 796.

[5] 352 U. S. 964. Petitioner's application for bail was granted by MR. JUSTICE HARLAN in his capacity as Circuit Justice for the Second Circuit. 1 L. Ed. 2d 34, 77 Sup. Ct. 17.

Alberts conducted a mail-order business from Los Angeles. He was convicted by the Judge of the Municipal Court of the Beverly Hills Judicial District (having waived a jury trial) under a misdemeanor complaint which charged him with lewdly keeping for sale obscene and indecent books, and with writing, composing and publishing an obscene advertisement of them, in violation of the California Penal Code. The conviction was affirmed by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.[6] We noted probable jurisdiction.[7]

The dispositive question is whether obscenity is utterance within the area of protected speech and press.[8] Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press. *Ex parte Jackson,* 96 U. S. 727, 736–737; *United States* v. *Chase,* 135 U. S. 255, 261; *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508; *Hoke* v. *United States,* 227 U. S. 308, 322; *Near* v. *Minnesota,* 283 U. S. 697, 716; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572; *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 158; *Winters* v. *New York,* 333 U. S. 507, 510; *Beauharnais* v. *Illinois,* 343 U. S. 250, 266.[9]

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[6] 138 Cal. App. 2d Supp. 909, 292 P. 2d 90. This is the highest state appellate court available to the appellant. Cal. Const., Art. VI, § 5; see *Edwards* v. *California,* 314 U. S. 160.

[7] 352 U. S. 962.

[8] No issue is presented in either case concerning the obscenity of the material involved.

[9] See also the following cases in which convictions under obscenity statutes have been reviewed: *Grimm* v. *United States,* 156 U. S. 604; *Rosen* v. *United States,* 161 U. S. 29; *Swearingen* v. *United States,*

The guaranties of freedom of expression [10] in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel,[11] and all of those States made either blasphemy or profanity, or both, statutory crimes.[12] As early as

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161 U. S. 446; *Andrews* v. *United States*, 162 U. S. 420; *Price* v. *United States*, 165 U. S. 311; *Dunlop* v. *United States*, 165 U. S. 486; *Bartell* v. *United States*, 227 U. S. 427; *United States* v. *Limehouse*, 285 U. S. 424.

[10] Del. Const., 1792, Art. I, § 5; Ga. Const., 1777, Art. LXI; Md. Const., 1776, Declaration of Rights, § 38; Mass. Const., 1780, Declaration of Rights, Art. XVI; N. H. Const., 1784, Art. I, § XXII; N. C. Const., 1776, Declaration of Rights, Art. XV; Pa. Const., 1776, Declaration of Rights, Art. XII; S. C. Const., 1778, Art. XLIII; Vt. Const., 1777, Declaration of Rights, Art. XIV; Va. Bill of Rights, 1776, § 12.

[11] Act to Secure the Freedom of the Press (1804), 1 Conn. Pub. Stat. Laws 355 (1808); Del. Const., 1792, Art. I, § 5; Ga. Penal Code, Eighth Div., § VIII (1817), Digest of the Laws of Ga. 364 (Prince 1822); Act of 1803, c. 54, II Md. Public General Laws 1096 (Poe 1888); *Commonwealth* v. *Kneeland*, 37 Mass. 206, 232 (1838); Act for the Punishment of Certain Crimes Not Capital (1791), N. H. Laws 1792, 253; Act Respecting Libels (1799), N. J. Rev. Laws 411 (1800); *People* v. *Croswell*, 3 Johns. (N. Y.) 337 (1804); Act of 1803, c. 632, 2 Laws of N. C. 999 (1821); Pa. Const., 1790, Art. IX, § 7; R. I. Code of Laws (1647), Proceedings of the First General Assembly and Code of Laws 44–45 (1647); R. I. Const., 1842, Art. I, § 20; Act of 1804, 1 Laws of Vt. 366 (Tolman 1808); *Commonwealth* v. *Morris*, 1 Brock. & Hol. (Va.) 176 (1811).

[12] Act for the Punishment of Divers Capital and Other Felonies, Acts and Laws of Conn. 66, 67 (1784); Act Against Drunkenness, Blasphemy, §§ 4, 5 (1737), 1 Laws of Del. 173, 174 (1797); Act to Regulate Taverns (1786), Digest of the Laws of Ga. 512, 513 (Prince 1822); Act of 1723, c. 16, § 1, Digest of the Laws of Md. 92 (Herty 1799); General Laws and Liberties of Mass. Bay, c. XVIII, § 3 (1646), Mass. Bay Colony Charters & Laws 58 (1814); Act of 1782, c. 8, Rev. Stat. of Mass. 741, § 15 (1836); Act of 1798, c. 33, §§ 1, 3, Rev. Stat. of Mass. 741, § 16 (1836); Act for the Punishment of Certain Crimes Not Capital (1791), N. H. Laws 1792, 252, 256; Act

1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services. Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814). Thus, profanity and obscenity were related offenses.

In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais* v. *Illinois,* 343 U. S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.[13]

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for the Punishment of Profane Cursing and Swearing (1791), N. H. Laws 1792, 258; Act for Suppressing Vice and Immorality, §§ VIII, IX (1798), N. J. Rev. Laws 329, 331 (1800); Act for Suppressing Immorality, § IV (1788), 2 Laws of N. Y. 257, 258 (Jones & Varick 1777–1789); *People* v. *Ruggles,* 8 Johns. (N. Y.) 290 (1811); Act . . . for the More Effectual Suppression of Vice and Immorality, § III (1741), 1 N. C. Laws 52 (Martin Rev. 1715–1790); Act to Prevent the Grievous Sins of Cursing and Swearing (1700), II Statutes at Large of Pa. 49 (1700–1712); Act for the Prevention of Vice and Immorality, § II (1794), 3 Laws of Pa. 177, 178 (1791–1802); Act to Reform the Penal Laws, §§ 33, 34 (1798), R. I. Laws 1798, 584, 595; Act for the More Effectual Suppressing of Blasphemy and Prophaneness (1703), Laws of S. C. 4 (Grimké 1790); Act, for the Punishment of Certain Capital, and Other High Crimes and Misdemeanors, § 20 (1797), 1 Laws of Vt. 332, 339 (Tolman 1808); Act, for the Punishment of Certain Inferior Crimes and Misdemeanors, § 20 (1797), 1 Laws of Vt. 352, 361 (Tolman 1808); Act for the Effectual Suppression of Vice, § 1 (1792), Acts of General Assembly of Va. 286 (1794).

[13] Act Concerning Crimes and Punishments, § 69 (1821), Stat. Laws of Conn. 109 (1824); *Knowles* v. *State,* 3 Day (Conn.) 103 (1808);

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This objective was made explicit as early as 1774 in a letter of the Continental Congress to the inhabitants of Quebec:

> "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." 1 Journals of the Continental Congress 108 (1774).

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.[14] But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for

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Rev. Stat. of 1835, c. 130, § 10, Rev. Stat. of Mass. 740 (1836); *Commonwealth* v. *Holmes,* 17 Mass. 335 (1821); Rev. Stat. of 1842, c. 113, § 2, Rev. Stat. of N. H. 221 (1843); Act for Suppressing Vice and Immorality, § XII (1798), N. J. Rev. Laws 329, 331 (1800); *Commonwealth* v. *Sharpless,* 2 S. & R. (Pa.) 91 (1815).

[14] *E. g., United States* v. *Harriss,* 347 U. S. 612; *Breard* v. *Alexandria,* 341 U. S. 622; *Teamsters Union* v. *Hanke,* 339 U. S. 470; *Kovacs* v. *Cooper,* 336 U. S. 77; *Prince* v. *Massachusetts,* 321 U. S. 158; *Labor Board* v. *Virginia Elec. & Power Co.,* 314 U. S. 469; *Cox* v. *New Hampshire,* 312 U. S. 569; *Schenck* v. *United States,* 249 U. S. 47.

that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations,[15] in the obscenity laws of all of the 48 States,[16] and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.[17] This is the same judgment expressed by this Court in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572:

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .*" (Emphasis added.)

We hold that obscenity is not within the area of constitutionally protected speech or press.

It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish

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[15] Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511; Treaties in Force 209 (U. S. Dept. State, October 31, 1956).

[16] Hearings before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, pursuant to S. Res. 62, 84th Cong., 1st Sess. 49–52 (May 24, 1955).

Although New Mexico has no general obscenity statute, it does have a statute giving to municipalities the power "to prohibit the sale or exhibiting of obscene or immoral publications, prints, pictures, or illustrations." N. M. Stat. Ann., 1953, §§ 14–21–3, 14–21–12.

[17] 5 Stat. 548, 566; 11 Stat. 168; 13 Stat. 504, 507; 17 Stat. 302; 17 Stat. 598; 19 Stat. 90; 25 Stat. 187, 188; 25 Stat. 496; 26 Stat. 567, 614–615; 29 Stat. 512; 33 Stat. 705; 35 Stat. 1129, 1138; 41 Stat. 1060; 46 Stat. 688; 48 Stat. 1091, 1100; 62 Stat. 768; 64 Stat. 194; 64 Stat. 451; 69 Stat. 183; 70 Stat. 699.

incitation to impure sexual *thoughts,* not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts.* In *Roth,* the trial judge instructed the jury: "The words 'obscene, lewd and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts.*" (Emphasis added.) In *Alberts,* the trial judge applied the test laid down in *People* v. *Wepplo,* 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, namely, whether the material has "a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires." (Emphasis added.) It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct,[18] or will probably induce its recipients to such conduct.[19] But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in *Beauharnais* v. *Illinois, supra,* at 266:

> "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech,

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[18] *Schenck* v. *United States,* 249 U. S. 47. This approach is typified by the opinion of Judge Bok (written prior to this Court's opinion in *Dennis* v. *United States,* 341 U. S. 494) in *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101, aff'd, *sub nom. Commonwealth* v. *Feigenbaum,* 166 Pa. Super. 120, 70 A. 2d 389.

[19] *Dennis* v. *United States,* 341 U. S. 494. This approach is typified by the concurring opinion of Judge Frank in the *Roth* case, 237 F. 2d, at 801. See also Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295 (1954).

> for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest.[20] The portrayal of sex, *e. g.*, in art, literature and scientific works,[21] is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. As to all such problems,

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[20] *I. e.*, material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines *prurient*, in pertinent part, as follows:

". . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . ."

Pruriency is defined, in pertinent part, as follows:

". . . Quality of being prurient; lascivious desire or thought. . . ."

See also *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U. S. 230, 242, where this Court said as to motion pictures: ". . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to*. . . ." (Emphasis added.)

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10 (2) (Tent. Draft No. 6, 1957), *viz.*:

". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ." See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*

[21] See, *e. g.*, *United States* v. *Dennett*, 39 F. 2d 564.

this Court said in *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times.* . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.*" (Emphasis added.)

The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth.[22] Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.[23] It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated

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[22] Madison's Report on the Virginia Resolutions, 4 Elliot's Debates 571.

[23] See note 14, *supra.*

excerpt upon particularly susceptible persons. *Regina* v. *Hicklin*, [1868] L. R. 3 Q. B. 360.[24] Some American courts adopted this standard [25] but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[26] The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

Both trial courts below sufficiently followed the proper standard. Both courts used the proper definition of obscenity. In addition, in the *Alberts* case, in ruling on a motion to dismiss, the trial judge indicated that, as the

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[24] But see the instructions given to the jury by Mr. Justice Stable in *Regina* v. *Martin Secker Warburg*, [1954] 2 All Eng. 683 (C. C. C.).

[25] *United States* v. *Kennerley*, 209 F. 119; *MacFadden* v. *United States*, 165 F. 51; *United States* v. *Bennett*, 24 Fed. Cas. 1093; *United States* v. *Clarke*, 38 F. 500; *Commonwealth* v. *Buckley*, 200 Mass. 346, 86 N. E. 910.

[26] *E. g.*, *Walker* v. *Popenoe*, 80 U. S. App. D. C. 129, 149 F. 2d 511; *Parmelee* v. *United States*, 72 App. D. C. 203, 113 F. 2d 729; *United States* v. *Levine*, 83 F. 2d 156; *United States* v. *Dennett*, 39 F. 2d 564; *Khan* v. *Feist, Inc.*, 70 F. Supp. 450, aff'd, 165 F. 2d 188; *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182, aff'd, 72 F. 2d 705; *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585; *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 62 N. E. 2d 840; *Missouri* v. *Becker*, 364 Mo. 1079, 272 S. W. 2d 283; *Adams Theatre Co.* v. *Keenan*, 12 N. J. 267, 96 A. 2d 519; *Bantam Books, Inc.* v. *Melko*, 25 N. J. Super. 292, 96 A. 2d 47; *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101, aff'd, *sub nom. Commonwealth* v. *Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389; cf. *Roth* v. *Goldman*, 172 F. 2d 788, 794–795 (concurrence).

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trier of facts, he was judging each item as a whole as it would affect the normal person,[27] and in *Roth,* the trial judge instructed the jury as follows:

> ". . . The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . .
>
> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.
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> . . . . . .
>
> "In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."

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[27] In *Alberts,* the contention that the trial judge did not read the materials in their entirety is not before us because not fairly comprised within the questions presented. U. S. Sup. Ct. Rules, 15 (1)(c)(1).

It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. *Winters* v. *New York,* 333 U. S. 507. The federal obscenity statute makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character." [28] The California statute makes punishable, *inter alia,* the keeping for sale or advertising material that is "obscene or indecent." The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

Many decisions have recognized that these terms of obscenity statutes are not precise.[29] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." *United States* v. *Petrillo,* 332 U. S. 1, 7–8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark ". . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on

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[28] This Court, as early as 1896, said of the federal obscenity statute: ". . . Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious." *Rosen* v. *United States,* 161 U. S. 29, 42.

[29] *E. g., Roth* v. *Goldman,* 172 F. 2d 788, 789; *Parmelee* v. *United States,* 72 App. D. C. 203, 204, 113 F. 2d 729, 730; *United States* v. *4200 Copies International Journal,* 134 F. Supp. 490, 493; *United States* v. *One Unbound Volume,* 128 F. Supp. 280, 281.

which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ." *Id.*, at 7. See also *United States* v. *Harriss*, 347 U. S. 612, 624, n. 15; *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 340; *United States* v. *Ragen*, 314 U. S. 513, 523–524; *United States* v. *Wurzbach*, 280 U. S. 396; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497; *Fox* v. *Washington*, 236 U. S. 273; *Nash* v. *United States*, 229 U. S. 373.[30]

In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.

Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that "*Congress* shall make *no law* . . . abridging the freedom of speech, or of the press . . . ." (Emphasis added.) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment.[31] We

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[30] It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop* v. *United States*, 165 U. S. 486, 499–500.

[31] For the same reason, we reject, in this case, the argument that there is greater latitude for state action under the word "liberty" under the Fourteenth Amendment than is allowed to Congress by the language of the First Amendment.

therefore hold that the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7.[32] In *United Public Workers* v. *Mitchell,* 330 U. S. 75, 95–96, this Court said:

> ". . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. . . ."

Alberts argues that because his was a mail-order business, the California statute is repugnant to Art. I, § 8, cl. 7, under which the Congress allegedly pre-empted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material. The federal statute deals only with actual

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[32] In *Public Clearing House* v. *Coyne,* 194 U. S. 497, 506–508, this Court said:

"The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson,* 96 U. S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded . . . . It may . . . refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy . . . . For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked. . . ."

mailing; it does not eliminate the power of the state to punish "keeping for sale" or "advertising" obscene material. The state statute in no way imposes a burden or interferes with the federal postal functions. ". . . The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . ." *Railway Mail Assn.* v. *Corsi,* 326 U. S. 88, 96.

The judgments are

Affirmed.

MR. CHIEF JUSTICE WARREN, concurring in the result.

I agree with the result reached by the Court in these cases, but, because we are operating in a field of expression and because broad language used here may eventually be applied to the arts and sciences and freedom of communication generally, I would limit our decision to the facts before us and to the validity of the statutes in question as applied.

Appellant Alberts was charged with wilfully, unlawfully and lewdly disseminating obscene matter. Obscenity has been construed by the California courts to mean having a substantial tendency to corrupt by arousing lustful desires. *People* v. *Wepplo,* 78 Cal. App. 2d Supp. 959, 178 P. 2d 853. Petitioner Roth was indicted for unlawfully, wilfully and knowingly mailing obscene material that was calculated to corrupt and debauch the minds and morals of those to whom it was sent. Each was accorded all the protections of a criminal trial. Among other things, they contend that the statutes under which they were convicted violate the constitutional guarantees of freedom of speech, press and communication.

That there is a social problem presented by obscenity is attested by the expression of the legislatures of the forty-eight States as well as the Congress. To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments.

The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

The personal element in these cases is seen most strongly in the requirement of *scienter*. Under the California law, the prohibited activity must be done "wilfully and lewdly." The federal statute limits the crime to acts done "knowingly." In his charge to the jury, the district judge stated that the matter must be "calculated" to corrupt or debauch. The defendants in both these cases were engaged in the business of purveying textual or

graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.

I agree with the Court's decision in its rejection of the other contentions raised by these defendants.

MR. JUSTICE HARLAN, concurring in the result in No. 61, and dissenting in No. 582.

I regret not to be able to join the Court's opinion. I cannot do so because I find lurking beneath its disarming generalizations a number of problems which not only leave me with serious misgivings as to the future effect of today's decisions, but which also, in my view, call for different results in these two cases.

I.

My basic difficulties with the Court's opinion are threefold. First, the opinion paints with such a broad brush that I fear it may result in a loosening of the tight reins which state and federal courts should hold upon the enforcement of obscenity statutes. Second, the Court fails to discriminate between the different factors which, in my opinion, are involved in the constitutional adjudication of state and federal obscenity cases. Third, relevant distinctions between the two obscenity statutes here involved, and the Court's own definition of "obscenity," are ignored.

In final analysis, the problem presented by these cases is how far, and on what terms, the state and federal governments have power to punish individuals for disseminating books considered to be undesirable because of their

nature or supposed deleterious effect upon human conduct. Proceeding from the premise that "no issue is presented in either case, concerning the obscenity of the material involved," the Court finds the "dispositive question" to be "whether obscenity is utterance within the area of protected speech and press," and then holds that "obscenity" is not so protected because it is "utterly without redeeming social importance." This sweeping formula appears to me to beg the very question before us. The Court seems to assume that "obscenity" is a peculiar *genus* of "speech and press," which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether "obscenity," as an abstraction, is protected by the First and Fourteenth Amendments, and the question whether a *particular* book may be suppressed becomes a mere matter of classification, of "fact," to be entrusted to a fact-finder and insulated from independent constitutional judgment. But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as "obscene," for, if "obscenity" is to be suppressed, the

question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. Many juries might find that Joyce's "Ulysses" or Bocaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are "utterly without redeeming social importance." In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based. I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

My second reason for dissatisfaction with the Court's opinion is that the broad strides with which the Court has proceeded has led it to brush aside with perfunctory ease the vital constitutional considerations which, in my opinion, differentiate these two cases. It does not seem to matter to the Court that in one case we balance the power of a State in this field against the restrictions of the Fourteenth Amendment, and in the other the power of the Federal Government against the limitations of the First Amendment. I deal with this subject more particularly later.

Thirdly, the Court has not been bothered by the fact that the two cases involve different statutes. In California the book must have a "tendency to deprave or corrupt its readers"; under the federal statute it must tend "to stir sexual impulses and lead to sexually impure

thoughts." [1] The two statutes do not seem to me to present the same problems. Yet the Court compounds confusion when it superimposes on these two statutory definitions a third, drawn from the American Law Institute's Model Penal Code, Tentative Draft No. 6: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest." The bland assurance that this definition is the same as the ones with which we deal flies in the face of the authors' express rejection of the "deprave and corrupt" and "sexual thoughts" tests:

> "Obscenity [in the Tentative Draft] is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is

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[1] In *Alberts* v. *California*, the state definition of "obscenity" is, of course, binding on us. The definition there used derives from *People* v. *Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, the question being whether the material has "a substantive tendency to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire."

In *Roth* v. *United States*, our grant of certiorari was limited to the question of the constitutionality of the statute, and did not encompass the correctness of the definition of "obscenity" adopted by the trial judge as a matter of statutory construction. We must therefore assume that the trial judge correctly defined that term, and deal with the constitutionality of the statute as construed and applied in this case.

The two definitions do not seem to me synonymous. Under the federal definition it is enough if the jury finds that the book as a whole leads to certain thoughts. In California, the further inference must be drawn that such thoughts will have a substantive "tendency to deprave or corrupt"—*i. e.*, that the thoughts induced by the material will affect character and action. See American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10 (2), Comments, p. 10.

> unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which 'tends to corrupt or debase.' If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual misbehavior follows from contact with obscenity. Evidence of such consequences is lacking . . . . On the other hand, 'appeal to prurient interest' refers to qualities of the material itself: the capacity to attract individuals eager for a forbidden look . . . ." [2]

As this passage makes clear, there is a significant distinction between the definitions used in the prosecutions before us, and the American Law Institute formula. If, therefore, the latter is the correct standard, as my Brother BRENNAN elsewhere intimates,[3] then these convictions should surely be reversed. Instead, the Court merely assimilates the various tests into one indiscriminate potpourri.

I now pass to the consideration of the two cases before us.

II.

I concur in the judgment of the Court in No. 61, *Alberts* v. *California*.

The question in this case is whether the defendant was deprived of liberty without due process of law when he was convicted for selling certain materials found by the judge to be obscene because they would have a "tendency

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[2] *Ibid.*

[3] See dissenting opinion of MR. JUSTICE BRENNAN in *Kingsley Books, Inc.* v. *Brown*, No. 107, *ante*, p. 447.

to deprave or corrupt its readers by exciting lascivious thoughts or arousing lustful desire."

In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgments under the Fourteenth Amendment is a narrow one. We do not decide whether the policy of the State is wise, or whether it is based on assumptions scientifically substantiated. We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power. See Jackson, J., dissenting in *Beauharnais* v. *Illinois,* 343 U. S. 250, 287. The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of "ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 324–325.

What, then, is the purpose of this California statute? Clearly the state legislature has made the judgment that printed words *can* "deprave or corrupt" the reader—that words can incite to antisocial or immoral action. The assumption seems to be that the distribution of certain types of literature will induce criminal or immoral sexual conduct. It is well known, of course, that the validity of this assumption is a matter of dispute among critics, sociologists, psychiatrists, and penologists. There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime, or delinquency. Others disagree. Clearly it is not our function to decide this question. That function belongs to the state legislature. Nothing in the Constitution requires California to accept as truth the most advanced and sophisticated psychiatric opinion. It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the

moral fabric of society. In fact the very division of opinion on the subject counsels us to respect the choice made by the State.

Furthermore, even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided. Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality. It seems to me that nothing in the broad and flexible command of the Due Process Clause forbids California to prosecute one who sells books whose dominant tendency might be to "deprave or corrupt" a reader. I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader.

What has been said, however, does not dispose of the case. It still remains for us to decide whether the state court's determination that this material should be suppressed is consistent with the Fourteenth Amendment; and that, of course, presents a federal question as to which we, and not the state court, have the ultimate responsibility. And so, in the final analysis, I concur in the judgment because, upon an independent perusal of the material involved, and in light of the considerations dis-

cussed above, I cannot say that its suppression would so interfere with the communication of "ideas" in any proper sense of that term that it would offend the Due Process Clause. I therefore agree with the Court that appellant's conviction must be affirmed.

III.

I dissent in No. 582, *Roth* v. *United States.*

We are faced here with the question whether the federal obscenity statute, as construed and applied in this case, violates the First Amendment to the Constitution. To me, this question is of quite a different order than one where we are dealing with state legislation under the Fourteenth Amendment. I do not think it follows that state and federal powers in this area are the same, and that just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same. I agree with Mr. Justice Jackson that the historical evidence does not bear out the claim that the Fourteenth Amendment "incorporates" the First in any literal sense. See *Beauharnais* v. *Illinois, supra.* But laying aside any consequences which might flow from that conclusion, cf. Mr. Justice Holmes in *Gitlow* v. *New York,* 268 U. S. 652, 672,[4] I prefer to rest my views about this case on broader and less abstract grounds.

The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many

[4] "The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."

instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results. Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest, that is, the power to act, in the particular area involved.

The Federal Government has, for example, power to restrict seditious speech directed against it, because that Government certainly has the substantive authority to protect itself against revolution. Cf. *Pennsylvania* v. *Nelson,* 350 U. S. 497. But in dealing with obscenity we are faced with the converse situation, for the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric.[5]

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[5] The hoary dogma of *Ex parte Jackson,* 96 U. S. 727, and *Public Clearing House* v. *Coyne,* 194 U. S. 497, that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., dissenting, in *Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U. S. 407, 430–433; Holmes, J., dissenting, in *Leach* v. *Carlile,* 258 U. S. 138, 140; *Cates* v. *Haderline,* 342 U. S. 804, reversing 189 F. 2d 369; *Door* v. *Donaldson,* 90 U. S. App. D. C. 188, 195 F. 2d 764.

What Mr. Justice Jackson said in *Beauharnais, supra,* 343 U. S., at 294–295, about criminal libel is equally true of obscenity:

> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquillity. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power . . . . When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests."

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation." [6] Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be

[6] Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 493.

classed as obscene in another.[7] And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.

I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nation-wide federal censorship, and in view of the

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[7] To give only a few examples: Edmund Wilson's "Memoirs of Hecate County" was found obscene in New York, see *Doubleday & Co.* v. *New York*, 335 U. S. 848; a bookseller indicted for selling the same book was acquitted in California. "God's Little Acre" was held to be obscene in Massachusetts, not obscene in New York and Pennsylvania.

fact that the constitutionality of this conviction must be weighed against the First and not the Fourteenth Amendment. So viewed, I do not think that this conviction can be upheld. The petitioner was convicted under a statute which, under the judge's charge,[8] makes it criminal to sell books which "tend to stir sexual impulses and lead to sexually impure thoughts." I cannot agree that any book which tends to stir sexual impulses and lead to sexually impure thoughts necessarily is "utterly without redeeming social importance." Not only did this charge fail to measure up to the standards which I understand the Court to approve, but as far as I can see, much of the great literature of the world could lead to conviction under such a view of the statute. Moreover, in no event do I think that the limited federal interest in this area can extend to mere "thoughts." The Federal Government has no business, whether under the postal or commerce power, to bar the sale of books because they might lead to any kind of "thoughts." [9]

It is no answer to say, as the Court does, that obscenity is not protected speech. The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as "hard-core" pornography. Nor do I think the statute can fairly be read as directed

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[8] While the correctness of the judge's charge is not before us, the question is necessarily subsumed in the broader question involving the constitutionality of the statute as applied in this case.

[9] See American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10, Comments, p. 20: "As an independent goal of penal legislation, repression of sexual thoughts and desires is hard to support. Thoughts and desires not manifested in overt antisocial behavior are generally regarded as the exclusive concern of the individual and his spiritual advisors."

only at *persons* who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography. Such a statute would raise constitutional questions of a different order. That being so, and since in my opinion the material here involved cannot be said to be hard-core pornography, I would reverse this case with instructions to dismiss the indictment.

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

When we sustain these convictions, we make the legality of a publication turn on the purity of thought which a book or tract instills in the mind of the reader. I do not think we can approve that standard and be faithful to the command of the First Amendment, which by its terms is a restraint on Congress and which by the Fourteenth is a restraint on the States.

In the *Roth* case the trial judge charged the jury that the statutory words "obscene, lewd and lascivious" describe "that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts." He stated that the term "filthy" in the statute pertains "to that sort of treatment of sexual matters in such a vulgar and indecent way, so that it tends to arouse a feeling of disgust and revulsion." He went on to say that the material "must be calculated to corrupt and debauch the minds and morals" of "the average person in the community," not those of any particular class. "You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

The trial judge who, sitting without a jury, heard the *Alberts* case and the appellate court that sustained the

judgment of conviction, took California's definition of "obscenity" from *People* v. *Wepplo,* 78 Cal. App. 2d Supp. 959, 961, 178 P. 2d 853, 855. That case held that a book is obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire."

By these standards punishment is inflicted for thoughts provoked, not for overt acts nor antisocial conduct. This test cannot be squared with our decisions under the First Amendment. Even the ill-starred *Dennis* case conceded that speech to be punishable must have some relation to action which could be penalized by government. *Dennis* v. *United States,* 341 U. S. 494, 502–511. Cf. Chafee, The Blessings of Liberty (1956), p. 69. This issue cannot be avoided by saying that obscenity is not protected by the First Amendment. The question remains, what is the constitutional test of obscenity?

The tests by which these convictions were obtained require only the arousing of sexual thoughts. Yet the arousing of sexual thoughts and desires happens every day in normal life in dozens of ways. Nearly 30 years ago a questionnaire sent to college and normal school women graduates asked what things were most stimulating sexually. Of 409 replies, 9 said "music"; 18 said "pictures"; 29 said "dancing"; 40 said "drama"; 95 said "books"; and 218 said "man." Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 73.

The test of obscenity the Court endorses today gives the censor free range over a vast domain. To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an *undesirable* impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment. As recently stated by two of our outstanding authorities on obscenity, "The danger of influencing a change in the current moral standards of the community, or of shocking

or offending readers, or of stimulating sex thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom." Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 387.

If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.

> "There are a number of reasons for real and substantial doubts as to the soundness of that hypothesis. (1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus, even assuming that reading sometimes has an adverse effect upon moral conduct, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency, but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very

> group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence, and so much more potent in their effect, that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates [*sic*] the relative unimportance of literature in sex thoughts as compared with other factors in society." Lockhart & McClure, *op. cit. supra,* pp. 385–386.

The absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control.

As noted, the trial judge in the *Roth* case charged the jury in the alternative that the federal obscenity statute outlaws literature dealing with sex which offends "the common conscience of the community." That standard is, in my view, more inimical still to freedom of expression.

The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or

of the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency "to excite lustful thoughts." This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that "censorship of obscenity has almost always been both irrational and indiscriminate." Lockhart & McClure, *op. cit. supra,* at 371. The test adopted here accentuates that trend.

I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.

I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community. I can understand the motives of the Anthony Comstocks who would impose Victorian standards on the community. When speech alone is involved, I do not think that government, consistently with the First Amendment, can become the sponsor of any of these movements. I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be

concerned with antisocial conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.

The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.

The Court today suggests a third standard. It defines obscene material as that "which deals with sex in a manner appealing to prurient interest." * Like the standards applied by the trial judges below, that standard does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit. Under the First Amendment, that standard is no more valid than those which the courts below adopted.

I do not think that the problem can be resolved by the Court's statement that "obscenity is not expression pro-

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*The definition of obscenity which the Court adopts seems in substance to be that adopted by those who drafted the A. L. I., Model Penal Code. § 207.10 (2) (Tentative Draft No. 6, 1957).

"Obscenity is defined in terms of material which appeals predominantly to prurient interest in sexual matters and which goes beyond customary freedom of expression in these matters. We reject the prevailing tests of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." *Id.*, at 10.

tected by the First Amendment." With the exception of *Beauharnais* v. *Illinois,* 343 U. S. 250, none of our cases has resolved problems of free speech and free press by placing any form of expression beyond the pale of the absolute prohibition of the First Amendment. Unlike the law of libel, wrongfully relied on in *Beauharnais,* there is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment. In fact, the first reported court decision in this country involving obscene literature was in 1821. Lockhart & McClure, *op. cit. supra,* at 324, n. 200. I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has "no redeeming social importance." The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 498; *Labor Board* v. *Virginia Power Co.,* 314 U. S. 469, 477–478. As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless.

I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.

UNITED STATES *v.* LOUISIANA.

ON MOTIONS OF THE UNITED STATES FOR JUDGMENT AND OF LOUISIANA FOR LEAVE TO TAKE DEPOSITIONS.

No. 11, Original. Argued April 8, 1957.—Decided June 24, 1957.

Leave to intervene in this suit is granted to the States of Alabama, Florida, Mississippi and Texas, without prejudice to the present motions of the United States and Louisiana, which are continued.

Solicitor General Rankin argued the cause for the United States, plaintiff. With him on the brief were *Attorney General Brownell, Oscar H. Davis, John F. Davis, George S. Swarth* and *Fred W. Smith.*

Jack P. F. Gremillion, Attorney General, *W. Scott Wilkinson,* Special Assistant Attorney General, and *Victor A. Sachse* argued the cause for the State of Louisiana, defendant. With them on the brief were *Edward M. Carmouche* and *John L. Madden,* Special Assistant Attorneys General, *Bailey Walsh, Hugh M. Wilkinson* and *Marc Dupuy, Jr.*

By leave of the Court, 353 U. S. 980, *Price Daniel,* Governor, *Will Wilson,* Attorney General, *James H. Rogers,* Assistant Attorney General, and *J. Chrys Dougherty* filed a brief for the State of Texas, as *amicus curiae,* urging that the Court's decision in this case should be limited to the State of Louisiana.

PER CURIAM.

The Court has before it the motions of the United States for judgment and of Louisiana for leave to take depositions. As a result of its consideration of these matters, including the representations made by the State of Texas in its *amicus curiae* brief, the Court is of the opinion that the issues in this litigation are so related to

the possible interests of Texas, and other States situated on the Gulf of Mexico, in the subject matter of this suit, that the just, orderly, and effective determination of such issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court.

Accordingly, to that end, the Court, acting pursuant to Rules 9 (2) and (6) of its Revised Rules, Rule 21 of the Federal Rules of Civil Procedure, and the general equity powers of the Court, grants leave to each of the States of Alabama, Florida, Mississippi, and Texas to intervene in this suit within 60 days from the date of this opinion, with leave to the United States, within 60 days thereafter, to file an amended or supplemental complaint adding as parties to this suit any of such States as shall not have so intervened. The bringing in of such additional parties shall be without prejudice to the present motions of the United States and Louisiana, subject only to such terms as justice may require *vis-à-vis* the additional parties. Meanwhile such motions are continued.

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

McBRIDE *v.* TOLEDO TERMINAL RAILROAD CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 972. Decided June 24, 1957.

In an action under the Federal Employers' Liability Act in an Ohio state court against respondent railroad, a jury awarded damages to petitioner for injuries sustained when his foot slipped off a ladder on the side of a boxcar. The trial judge entered judgment for the railroad, notwithstanding the verdict, on the ground that the evidence was not sufficient to support the verdict. A court of appeals reversed. The State Supreme Court reversed the judgment of the court of appeals and affirmed that of the trial court. On a petition to this Court for certiorari, *held:* Certiorari is granted; the judgment of the State Supreme Court is reversed; and the cause is remanded.

166 Ohio St. 129, 140 N. E. 2d 319, reversed and remanded.

C. Richard Grieser for petitioner.

Robert B. Gosline for respondent.

PER CURIAM.

The petition for writ of certiorari is granted, the judgment of the Supreme Court of Ohio is reversed, and the cause is remanded. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957).

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITTAKER joins, dissents for the reasons given in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 559 (1957).

MR. JUSTICE FRANKFURTER, dissenting.

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, I gave my reasons for deeming it an abuse of the Court's discretionary certiorari jurisdiction to make cases arising under the Federal Employers' Liability Act a class excep-

tion to the Court's principle against granting certiorari when all that is involved is the evaluation of evidence. The circumstances of the present case vividly emphasize the objections to such an exception.

All that is to be determined in this case is whether there were sufficient facts to warrant a jury in finding that the lighting in the situation in which petitioner worked, assumed to be inadequate, caused in whole or in part the injury to petitioner. The trial judge in the Court of Common Pleas thought not. On review, the Court of Appeals of Lucas County reversed: two judges thought there were enough facts to justify a jury's finding of causation while the dissenting judge agreed with the trial court. On review of this reversal, the Supreme Court of Ohio, with one of its seven judges not sitting, unanimously reversed the Court of Appeals and restored the judgment of the trial court. 166 Ohio St. 129, 140 N. E. 2d 319. Thus, this issue of the sufficiency of evidence for a jury's finding of relevant causation was passed on by the three courts in the hierarchy of Ohio's judiciary. Of the ten judges, eight found the evidence insufficient for a jury to guess at and two thought they should be allowed to guess—for determination of causation is inescapably guessing, informed guessing if you will, but guessing.

Congress saw fit to give the state courts jurisdiction of the rights it created by the Federal Employers' Liability Act. Presumably, it had confidence in the state courts for enforcement of these rights. It emphasized this confidence by a special Act, passed more than forty years ago, which withdrew from this Court what theretofore had been appealability as of right of judgments of state courts in Federal Employers' Liability Act cases. It left adjudications brought in the state courts with the state courts, except in instances applicable generally to the jurisdiction on writ of certiorari, to be exercised, that

is, "only where there are special and important reasons therefor." Rule 19 of the Revised Rules of this Court.

It cannot be too often repeated. This Court has said again and again that a difference of opinion in weighing evidence is not included among "special and important reasons" for granting certiorari. One would suppose that an examination of the evidence by three courts and ten judges of Ohio would be proof that the facts in the case have been conscientiously canvassed. A different case would be presented were this Court to find that the Ohio Supreme Court applied wrong legal standards to the particular facts before it or evinced hostility to the federal statute. Either one of these grounds would present a fair basis on which to seek review here of the decision of the Ohio Supreme Court. But that is not the basis on which review was sought and on which it is granted. In agreeing to take the case, the Court merely accedes to the natural desire of an unsuccessful plaintiff to have one more court guess whether there were enough facts on which the jury should be allowed to do its guessing. And so the nine members of the highest tribunal in the land, preoccupied with more than enough cases involving the gravest issues of national importance, are asked to take on the task of making an independent study of the record below, (for I must assume that those who review the merits have examined the 294 pages of the record), the four opinions below, and the briefs of parties, after three courts and ten judges of Ohio have conscientiously dealt with questions that are not specialized questions of federal law and indeed constitute probably the most recurring staple business of the courts throughout the country.

I must respectfully decline to assume this task. This Court from time to time is compelled to hold that a federal court has abused some discretionary judicial power. Abuse of judicial discretion is a technical phrase to express a misconception of the judicial function as exercised in a

particular situation. There is no appeal from such abuse of judicial discretion by this Court. When there is such a misuse of power, as I deem it to be in making an exception, in effect if not formally, of cases under the Federal Employers' Liability Act that turn merely on evaluation of evidence, only the individual conscience remains. Since this case underscores the reasons for declining to associate myself in what I regard as a misuse of the power properly vested in a minority of this Court in granting certiorari, I have no choice but to conclude that the writ of certiorari in this case has been improvidently granted and, having been granted, should be dismissed.

MR. JUSTICE BURTON, dissenting.

For the reasons stated by the Supreme Court of Ohio, 166 Ohio St. 129, 140 N. E. 2d 319, I believe that petitioner's injuries were not caused, "in whole or in part," by the possible inadequacy of the lighting.

FARLEY *v.* UNITED STATES.

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

No. 686, Misc. Decided June 24, 1957.

Under 28 U. S. C. § 1915, petitioner applied to a Federal District Court for leave to appeal *in forma pauperis* from his conviction of bank robbery and asked for a transcript of the trial record. Though conflicting affidavits concerning petitioner's contentions of errors at his trial had been filed, the District Court refused his request for a transcript of the record and denied his application for leave to appeal *in forma pauperis*, on the ground that his appeal was "not taken in good faith." Petitioner then applied to the Court of Appeals for permission to appeal *in forma pauperis;* but that Court denied his request, indicating that his claimed errors were without substance. *Held:* Petitioner has not been afforded an adequate opportunity to show the Court of Appeals that his claimed errors are not frivolous so as to enable that Court to review properly the District Court's certification that the appeal was in bad faith. Accordingly, the judgment of the Court of Appeals is vacated and the cause is remanded to it for further proceedings. Pp. 521–523.

242 F. 2d 338, judgment vacated and cause remanded.

Petitioner *pro se.*

Solicitor General Rankin for the United States.

PER CURIAM.

The petition for writ of certiorari is granted, as is the motion for leave to proceed *in forma pauperis.*

Petitioner was convicted of bank robbery in the United States District Court for the Eastern District of New York and sentenced to 20 years imprisonment. Under 28 U. S. C. § 1915 he applied to the District Court for leave to appeal *in forma pauperis.* Petitioner, who was assisted by court-appointed counsel in preparing his application, contended that the evidence was insufficient to justify

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his conviction and that the trial court had committed reversible error by permitting the United States Attorney to ask him irrelevant and prejudicial questions about another criminal offense. Petitioner requested that the District Court make available a transcript of the trial record so he could substantiate his claimed errors. In reply the United States Attorney filed an affidavit asserting that the evidence was sufficient to sustain petitioner's conviction. However the affidavit did not directly controvert petitioner's claim that the prosecuting attorney had been allowed to inject irrelevant and prejudicial matter into the trial. Counsel for petitioner then filed an affidavit in answer supporting petitioner's allegation of errors.

The District Court refused the request for a transcript of the trial record and denied the application for leave to appeal *in forma pauperis* on the ground that the appeal was "not taken in good faith" because it was "frivolous and without merit" and "[t]he evidence amply supported the verdict." Petitioner then asked the Court of Appeals for permission to appeal *in forma pauperis* but that court denied his request indicating that his claimed errors were without substance. 242 F. 2d 338. And see 238 F. 2d 575.

As things now stand conflicting affidavits have been introduced concerning petitioner's contention of errors at the trial. If the allegations made by petitioner and his counsel are correct then it seems quite clear to us that his appeal cannot be characterized as frivolous. Before his allegation of errors can be accurately evaluated, however, to ascertain if they do have any merit he should be furnished with a transcript of the trial record—unless counsel can agree on a statement of the relevant facts or some other means are devised to make the minutes of the trial available to petitioner—so that he has an opportunity to substantiate his allegations and point out their significance and so that they can be appraised on a dependable

record. Cf. *Johnson* v. *United States,* 352 U. S. 565. In our judgment petitioner has not yet been afforded an adequate opportunity to show the Court of Appeals that his claimed errors are not frivolous so as to enable that court to review properly the District Court's certification that the appeal was in bad faith. Accordingly the judgment below must be vacated and the case remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent.

WILSON, SECRETARY OF DEFENSE, ET AL. *v.* GIRARD.

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

No. 1103. Argued July 8, 1957.—Decided July 11, 1957.

The United States and Japan became involved in a controversy as to whether an American soldier should be tried by a Japanese court for causing the death of a Japanese woman in Japan. While on duty guarding a machine gun on a firing range, he fired from a grenade launcher an empty cartridge case which struck the Japanese woman, causing her death. American authorities took the position that he was acting at the time "in performance of official duty," within the meaning of Paragraph 3 of Article XVII of an Administrative Agreement between the United States and Japan, as amended by a Protocol, and, therefore, the United States had the "primary right" to try him in a situation of concurrent jurisdiction. Japanese authorities contended that he was acting beyond the scope of official duty and that, therefore, Japan had the "primary right" to exercise jurisdiction. After lengthy negotiations, and with the approval of the President, the Secretary of State, and the Secretary of Defense, the United States yielded to the Japanese position, and agreed, under a provision of the amended Administrative Agreement, to waive whatever jurisdiction it might have and deliver him to Japanese authorities for trial. Japan then indicted him for causing death by wounding. He sought a writ of habeas corpus in the United States District Court for the District of Columbia, which denied the writ but granted declaratory relief and enjoined his delivery to Japanese authorities. This Court granted certiorari under 28 U. S. C. § 1254 (1). *Held:* The judgment granting an injunction and declaratory relief is reversed; the judgment denying a writ of habeas corpus is affirmed. Pp. 525–530.

1. In the light of the Senate's ratification of the Security Treaty between the United States and Japan after consideration of the accompanying Administrative Agreement, and the Senate's subsequent ratification of the NATO Agreement, with knowledge of the commitment to Japan under the Administrative Agreement to

*Together with No. 1108, *Girard* v. *Wilson et al.*, also on certiorari to the same Court, argued and decided on the same dates.

enter into a similar arrangement, the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol embodying the provisions governing jurisdiction to try criminal offenses. Pp. 526–529.

2. As applied here, there is no constitutional or statutory barrier to the provision of the Protocol under which the United States waived jurisdiction to try the soldier and agreed to deliver him to Japanese authorities for trial. Pp. 529–530.

3. In the absence of encroachments upon constitutional or statutory limitations, the wisdom of the arrangement here involved is exclusively for the determination of the Executive and Legislative Branches of the Government. P. 530.

152 F. Supp. 21, affirmed in part and reversed in part.

Solicitor General Rankin argued the cause for petitioners in No. 1103 and respondents in No. 1108. With him on the briefs were *Attorney General Brownell, Oscar H. Davis, Roger Fisher, Leonard B. Sand* and *Ralph S. Spritzer* in No. 1103, and *Mr. Fisher* and *Beatrice Rosenberg* in No. 1108.

Joseph S. Robinson and *Earl J. Carroll* argued the cause for Girard. With them on the brief was *Dayton M. Harrington.*

PER CURIAM.

Japan and the United States became involved in a controversy whether the respondent Girard should be tried by a Japanese court for causing the death of a Japanese woman. The basis for the dispute between the two Governments fully appears in the affidavit of Robert Dechert, General Counsel of the Department of Defense, an exhibit to a government motion in the court below, and the joint statement of Secretary of State John Foster Dulles and Secretary of Defense Charles E. Wilson, printed as appendices to this opinion, *post,* pp. 531, 544.

Girard, a Specialist Third Class in the United States Army, was engaged on January 30, 1957, with members of

his cavalry regiment in a small unit exercise at Camp Weir range area, Japan. Japanese civilians were present in the area, retrieving expended cartridge cases. Girard and another Specialist Third Class were ordered to guard a machine gun and some items of clothing that had been left nearby. Girard had a grenade launcher on his rifle. He placed an expended 30-caliber cartridge case in the grenade launcher and projected it by firing a blank. The expended cartridge case penetrated the back of a Japanese woman gathering expended cartridge cases and caused her death.

The United States ultimately notified Japan that Girard would be delivered to the Japanese authorities for trial. Thereafter, Japan indicted him for causing death by wounding. Girard sought a writ of habeas corpus in the United States District Court for the District of Columbia. The writ was denied, but Girard was granted declaratory relief and an injunction against his delivery to the Japanese authorities. 152 F. Supp. 21. The petitioners appealed to the Court of Appeals for the District of Columbia, and, without awaiting action by that court on the appeal, invoked the jurisdiction of this Court under 28 U. S. C. § 1254 (1). Girard filed a cross-petition for certiorari to review the denial of the writ of habeas corpus. We granted both petitions. U. S. Supreme Court Rule 20; 354 U. S. 928.

A Security Treaty between Japan and the United States, signed September 8, 1951, was ratified by the Senate on March 20, 1952, and proclaimed by the President effective April 28, 1952.[1] Article III of the Treaty authorized the making of Administrative Agreements between the two Governments concerning "[t]he conditions which shall govern the disposition of armed

[1] 3 U. S. Treaties and Other International Agreements 3329; T. I. A. S. No. 2491.

forces of the United States of America in and about Japan . . . ." Expressly acting under this provision, the two Nations, on February 28, 1952, signed an Administrative Agreement covering, among other matters, the jurisdiction of the United States over offenses committed in Japan by members of the United States armed forces, and providing that jurisdiction in any case might be waived by the United States.[2] This Agreement became effective on the same date as the Security Treaty (April 28, 1952) and was considered by the Senate before consent was given to the Treaty.

Article XVII, paragraph 1, of the Administrative Agreement provided that upon the coming into effect of the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," [3] signed June 19, 1951, the United States would conclude with Japan an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Agreement. The NATO Agreement became effective August 23, 1953, and the United States and Japan signed on September 29, 1953, effective October 29, 1953, a Protocol Agreement [4] pursuant to the covenant in paragraph 1 of Article XVII.

Paragraph 3 of Article XVII, as amended by the Protocol, dealt with criminal offenses in violation of the laws of both Nations and provided:

> "3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> "(a) The military authorities of the United States shall have the primary right to exercise jurisdiction

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[2] 3 U. S. Treaties and Other International Agreements 3341; T. I. A. S. No. 2492.

[3] 4 U. S. Treaties and Other International Agreements 1792; T. I. A. S. No. 2846.

[4] 4 U. S. Treaties and Other International Agreements 1846; T. I. A. S. No. 2848.

over members of the United States armed forces or the civilian component in relation to

> "(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;
>
> "(ii) offenses arising out of any act or omission done in the performance of official duty.

"(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

"(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

Article XXVI of the Administrative Agreement established a Joint Committee of representatives of the United States and Japan to consult on all matters requiring mutual consultation regarding the implementation of the Agreement; and provided that if the Committee ". . . is unable to resolve any matter, it shall refer that matter to the respective Governments for further consideration through appropriate channels."

In the light of the Senate's ratification of the Security Treaty after consideration of the Administrative Agreement, which had already been signed, and its subsequent ratification of the NATO Agreement, with knowledge of the commitment to Japan under the Administrative Agreement, we are satisfied that the approval of Article III of the Security Treaty authorized the making of the

Administrative Agreement and the subsequent Protocol embodying the NATO Agreement provisions governing jurisdiction to try criminal offenses.

The United States claimed the right to try Girard upon the ground that his act, as certified by his commanding officer, was "done in the performance of official duty" and therefore the United States had primary jurisdiction. Japan insisted that it had proof that Girard's action was without the scope of his official duty and therefore that Japan had the primary right to try him.

The Joint Committee, after prolonged deliberations, was unable to agree. The issue was referred to higher authority, which authorized the United States representatives on the Joint Committee to notify the appropriate Japanese authorities, in accordance with paragraph 3 (c) of the Protocol, that the United States had decided not to exercise, but to waive, whatever jurisdiction it might have in the case. The Secretary of State and the Secretary of Defense decided that this determination should be carried out. The President confirmed their joint conclusion.

A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction. *The Schooner Exchange* v. *M'Faddon,* 7 Cranch 116, 136. Japan's cession to the United States of jurisdiction to try American military personnel for conduct constituting an offense against the laws of both countries was conditioned by the covenant of Article XVII, section 3, paragraph (c) of the Protocol that

> ". . . The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

The issue for our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches.

The judgment of the District Court in No. 1103 is reversed, and its judgment in No. 1108 is affirmed.

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

APPENDIX A.*

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WILLIAM S. GIRARD United States Army Specialist 3/C, Petitioner vs. CHARLES E. WILSON Secretary of Defense et al, Respondents	H. C. 47–57

AFFIDAVIT WITH RESPECT TO FACTS

COMMONWEALTH OF PENNSYLVANIA }
CITY AND COUNTY OF PHILADELPHIA } SS.

ROBERT DECHERT, being first duly sworn, deposes and says:

I am the General Counsel of the Department of Defense. Personnel of my office collect, collate, and maintain files on the arrangements with regard to the exercise of criminal jurisdiction entered into between the United States and foreign countries. I have reviewed and am familiar with the various communications relating to the incident involving Specialist Third Class William S. Girard which occurred in Japan on 30 January 1957 and state, as a result of such review, and upon information and belief, that the facts surrounding that incident are as follows:

*This affidavit was offered by the Government and accepted by the court below under seal. In this posture it is part of the record before us. At the oral argument no objection was made by the Government or counsel for Girard against removing the seal. As the Court considers that the issues in this case should be decided on a fully disclosed record, the affidavit is ordered unsealed.

The Situation at Camp Weir Firing Range, January 30.

On the afternoon of 30 January 1957, about 30 members of Company F, 8th Cavalry Regiment, were engaged in a small unit exercise at Camp Weir range area, Japan, involving an attack by one squad on a hill defended by another squad. Specialist 3/C William S. Girard was in the "attacking" force. The Commanding Officer of the 8th Cavalry Regiment, COLONEL HERBERT A. JORDAN, states that during the morning he was appalled at the large numbers of Japanese civilian trespassers present in the area and interfering with the conduct of the exercise. He estimates that their number was in excess of 150. In one case a group of six to eight civilians pounced on a machine gun position as soon as the gun ceased firing and, before the gunner could clear his weapon, physically pushed him away from the gun in order to retrieve expended cartridge cases.

The maneuver area consists of approximately eight square miles. It is provided by the Japanese Government for part-time use of United States forces. The Japanese Defense Force uses the same area about 40% of the time. When the area is not in use by either the United States or Japanese armed forces, Japanese civilians are permitted to farm or otherwise use the area. The Japanese civilians of the local village follow the practice of scavenging the expended brass cartridge cases from the maneuver area.

Upon the failure of efforts of military personnel to move the trespassers out of the danger area, Col. Jordan directed that all ball ammunition be withdrawn from the troops, and that blank ammunition be substituted in the afternoon exercise. He also directed that the Japanese police be contacted for assistance in clearing trespassers from the area, so that normal field training might be resumed. Up until the early afternoon, when the shooting incident occurred, this assistance was not forthcoming.

The Shooting Incident.

After one squad had attacked the hill and before the squads had changed their respective positions so that the attacking force became the defending force, and vice versa, two soldiers, Girard and Specialist 3/C Victor N. Nickel, of the "defending" force, were ordered by their platoon leader, SECOND LIEUTENANT BILLY M. MAHON, who was personally directing their activities to guard a machine gun and some items of personal clothing that had been left on a nearby ridge.

GIRARD in an early statement made during the course of the investigation, stated that he was ordered to get the Japanese away. He is quoted as having stated that he did not receive orders to fire at them to get them away. There is no evidence, other than the statement of Girard, that he was ordered to get the Japanese away.

LIEUT. MAHON stated that he was advised that a machine gun and several field jackets had been left on the other side of Hill 655 and that he instructed Specialist 3/C Girard and Specialist 3/C Nickel to guard the machine gun and keep the Japanese from stealing personal equipment. There were about 20 or 30 Japanese in the area; some were near the machine gun. SPECIALIST 3/C VICTOR N. NICKEL said the Japanese were "just collecting the cartridges, so there was no need of chasing them away".

Girard had a grenade launcher on his rifle. He had been armed with this same weapon during the morning exercises in which he had participated and during which he had fired 80 rounds of ball ammunition. After the two soldiers had arrived on the ridge, Girard, on two occasions, placed an expended 30-caliber cartridge case in the grenade launcher and projected it by firing a blank. At his second shot, a Japanese woman, Mrs. Naka Sakai, fell. An autopsy disclosed that an expended 30-caliber cartridge case had penetrated her back in an upward

direction to a depth of 3½–4 inches, causing her death. The exact distance between Girard and the victim at the time of the incident is uncertain. The Japanese witnesses put it about eighteen meters (approximately 20 yards). On one occasion, Girard stepped off what he thought to be the distance and found it to be 29 feet; on other occasions, he has estimated it to be 20–30 yards. Nickel puts it as 25–30 yards. Girard has stated that he did not intentionally point the rifle at the woman and did not believe the cartridge case would injure anyone if it hit them.

According to the U. S. military authorities in Japan, the act of firing an empty shell case from a grenade launcher is not authorized.

ONOSAKI, a Japanese witness, stated that Girard, after enticing him and the victim toward Girard by throwing some brass on the ground and indicating that it was all right for them to pick it up, suddenly shouted for them to get out and thereupon fired one shot in the direction of Onosaki. As the victim was running away, Onosaki stated that Girard, holding his rifle at the waist, fired a second shot at the victim at a distance of about eight to ten meters. This testimony is corroborated in part by other Japanese who were located at a distance of from 100–150 meters.

Both Girard and Nickel have made a number of statements. NICKEL at first denied knowing anything about the incident. GIRARD admitted only that he had fired one round over the heads of the Japanese. Both gradually changed their testimony. NICKEL, but not Girard, admits to throwing brass on the ground. GIRARD admits that he knew his weapon, fired in the manner in which he fired it, was fairly accurate at short ranges, but denies that he knew of its striking power; he further states that he fired from the waist over the

woman's head and did not intend to hit or wound her, but only to scare the Japanese away.

In one statement, NICKEL, after admitting that he had collected a pile of empty cartridges and had on about five occasions thrown them toward the Japanese, the nearest of whom was a little over 10 yards away, has this to say: "To tell you the truth I don't know if Girard had told you this or not, but Girard told me to throw those cartridges. The purpose was to scare the Japanese off by firing over their heads when they came to pick up the cartridges." After stating that about six Japanese came down to pick up the cartridges, NICKEL concludes: "He (Girard) stood up carrying the gun, and went about two feet to my right. Japanese people started to run away, probably thinking that they were being chased. This one Mama-San also ran. Then Girard fired holding the gun at his hip . . . he held the gun at the hip and fired in the direction of the woman . . . at an angle of about 45 degrees from his body. He fired over the head of this person . . . I regard myself as a friend of Girard in my company. If I said I saw (the incident), I would be letting him down, so I lied. Then I went to Camp Drew and received various advice from an investigator there. Then I decided to tell the truth. One other reason is that Girard told the investigator that Nickel was watching."

In this connection, GIRARD says: ". . . while I was going toward the machine gun, I did talk to Nickel. I do not recall what I talked to him about . . . but I am positive that nothing was spoken about cartridges . . . I do not remember telling him to throw some cartridges. If I said I did not positively talk to him about it I'd be telling a lie . . . what I want to say is, as far as I can remember, I do not recall talking about it." GIRARD states that he has qualified as a marksman [average shot]

and a sharpshooter [better than average shot] with the M–1 with which he was armed on the day in question, and that he twice has qualified as an expert with the .45 caliber pistol; that he has seen soldiers fire empty cartridges out of a grenade launcher on about 10 occasions; and he said, "I did not have an exact idea how far an empty cartridge would travel, but I knew that it travelled quite a ways . . . prior to that incident I knew that the empty cartridge fired like that would travel straight forward."

At a later time Specialist 3/C Nickel requested that he be permitted to make a further statement with respect to the case. Upon this occasion he stated that Girard had asked him to gather up some empty cartridge cases for the purpose of luring the Japanese people closer to their position; that he and Girard were in a foxhole together and that at Girard's request, in order to draw the Japanese closer, he, Nickel, threw empty cartridge cases from the foxhole; that Girard said, "throw the brass a little closer"; that Girard motioned with his hands for the brass pickers to come closer and said, "Daijobu", which meant for them to come closer; that Girard fired at the Japanese man, and then fired at the Japanese woman and shot her; that Girard was in a standing position and fired from the shoulder; that he (Girard) tried to get the Japanese to take the woman's body away after he shot her; and that Girard told him (Nickel) that if "they" asked how he held his weapon to say he fired from the waist and also to say that "We did not throw any brass."

The Certificate as to Official Duty

On 7 February 1957 Girard's commanding officer filed a certificate of official duty with the local Japanese authorities. That certificate read as follows:

COMPANY F
8TH CAVALRY REGIMENT

7 February 1957

SUBJECT: Certificate as to Official Duty

THRU: Provost Marshal
Regional Camp Whittington
APO 201

TO: Chief Procurator
Maebashi District
Maebashi City, Honshu, Japan

1. Pursuant to the provisions of paragraph 43 of the Agreed Views of the Criminal Jurisdiction Subcommittee with respect to the Protocol amending Article XVII of the Administrative Agreement between the United States and Japan, I certify that GIRARD, William S, RA 16 452 809, Specialist Third Class, Company F, 8th Cavalry Regiment, APO 201, was in the performance of his official duty at 1350 hours, 30 January 1957, Camp Weir Range Area, when he was involved in the following incident: On 30 January 1957, 2nd Battalion, 8th Cavalry Regiment, was engaged in routine training at Camp Weir Range Area. Company F was conducting blank firing exercises. Specialist Third Class William S. GIRARD was instructed by his platoon leader to move near a position near an unguarded machine gun to guard the machine gun and items of field equipment that were in the immediate area. GIRARD, following instructions, moved to the designated position near the machine gun. While performing his duties as guard, he fired an expended cartridge case, as a warning, which struck and killed

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SAKAI, Naka, Kami-Shinden, Somamura, Gumma Prefecture, who had entered the range area for the purpose of gathering expended cartridge cases.

2. The United States will exercise jurisdiction in this case, unless notification is given immediately that proof to the contrary exists.

3. Should this incident result in trial of the above individual by general court-martial, you will be notified of the date of trial in accordance with the provisions of paragraph 45 of the above mentioned Agreed Views.

CARL C. ALLIGOOD
1st Lt. Infantry
Commanding

The Japanese Notice of "Existence of Contrary Proof".

On 9 February 1957 the local Japanese authorities notified the United States commanding officer who had issued the certificate of official duty that they considered that proof contrary to the certificate existed. This notification stated:

MAEBASHI DISTRICT PUBLIC
PROCURATOR'S OFFICE

Maebashi, 9 February 1957

TO: Mr. CARL C. ALLIGOOD,
1st Lt Infantry, Command, F Co.,
2nd Bn 8th Cavalry Regiment

Re: Notification of the existence of the contrary proof.

Dear Sir:

Reference is made to the letter from you dated on 8 February 1957, regarding to the "On Duty" status of the case involving SP3 GIRARD S. WILLIAM, which we received on 8 February 1957.

This is to inform you that this office considers the proof contrary thereto exists, basing upon our examinations.

/s/ Nagami Sakai
Chief Procurator
Maebashi Public Procurator's Office

The Japanese Statement in the Criminal Jurisdiction Sub-Committee of the Joint Committee

In accordance with the provisions of Agreed View No. 43, on 16 February 1957 the Japanese brought the matter up in the Joint Committee and requested that it be referred to the Criminal Jurisdiction Subcommittee. On 7 March 1957 the United States representative agreed to this procedure. The matter was discussed in the Subcommittee on 12 March 1957 at which time the Japanese submitted a summary which contained the following:

"He (Girard) and Nickel went to the gun and, about 13.15 hrs he picked up and threw expended cartridge cases in the direction of the slope south of the hill, and, beckoning Hidehara Onozeki (male) and Naka Sakai (female) who had been at a place in the south-west of Hill 655 to gather empty cartridge cases, etc., cried out to them 'PAPA-SAN, DAIJOBU', 'MAMA-SAN, DAIJOBU' ('Old man, O.K., old lady, O.K.'), etc. in Japanese and thus let the 2 Japanese pick up expended cartridge cases he had thrown. Then he, pointing to the nearby hole for Naka Sakai, cried out to her in Japanese 'MAMA - SAN, TAKUSAN - NE' ('Old lady, plenty more!'), and hinting thereby that there remained some expended cartridge cases in it, induced her to go to the hole. But, at that moment, Hideharu Onozeki who was picking up expended cartridge cases on the said slope became suspicious of the suspects behaviour and tried to run away. Then the suspect suddenly shouted to Ono-

seki 'GE-ROU! HEY!' and fired a blank shot towards him, placing an expended cartridge case in the grenade launcher attached to the rifle which he had carried with him. Then he cried out 'GE-ROU! HEY!' to Naka Sakai who was in the hole, and, when he saw her running off towards the north slope of the hill, he, holding the stock of the rifle under his arm, fired standing a blank shot toward her about eight (8) meters away with an expended cartridge case put in the grenade launcher, just in the same manner as he had done to Hideharu Onozeki, as the result of which he made her sustain a penetrating wound on the left side of her back which proved fatal on the spot because of the loss of blood resulting from a cut in the main artery."

The Japanese conclusion was stated as follows:

"Sp–3 William S. Girard, the suspect in this case, had been instructed to guard a machine gun and equipment at the time of occurrence of the case. It is evident, however, as shown in the above finding of facts, that the incident arose when he, materially deviating from the performance of such duty of his, wilfully threw expended cartridge cases away towards Naka Sakai and Hideharu Onozeki, and, thus inviting them to come near to him, he fired towards them. Therefore, the incident is not considered to have arisen out of an act or omission done in the performance of official duty."

Discussions in the Criminal Jurisdiction Subcommittee of the Joint Committee.

At the same time the following exchange occurred:

U. S.: Do you agree that Girard was on duty as a guard, and that the incident arose while he was on such duty?

Japan: We admit that he was on duty, but it is our position that the shooting had no connection with his duty of guarding the machine gun. The act of Girard in

throwing out brass and enticing the victim toward him had no connection with guarding the machine gun.

U. S.: Your statement of fact does not take into account Girard's statement of his intent. That is, that he fired for the purpose of scaring the Japanese away and thus insure the safety of the machine gun.

Japan: The evidence shows that there was no danger to the Machine gun. Nickel made a statement to this effect. Thus, we do not consider that Girard actually fired to protect the machine gun. The Japanese were only picking up brass in the vicinity; they were not interfering in any way with Girard's mission to guard the machine gun. There was thus no necessity or reason for Girard to shoot at them to insure the safety of the machine gun. Its safety was never in danger. Further, according to the statement of Lt. Mahon, firing an empty cartridge from a grenade launcher is not authorized, and any superior of Girard's observing such an action by Girard would have been obliged to interfere and prevent Girard from firing his weapon in this manner.

U. S.: However, if we give full weight to Girard's statement, we must conclude that he did, in fact, fire to scare the Japanese away and thus insure safety of the machine gun. He may have been mistaken in believing that it was necessary to act in this manner, but we cannot escape the fact that, according to his own statement, he fired for this purpose. If you were to believe Girard's statement, would you consider that he was acting in the performance of official duty?

Japan: Your question is based on a supposition that is not supported by the evidence, and we are not prepared to answer it.

U. S.: In determining official duty in this case, is it not important to consider Girard's intent as disclosed by his own statement?

Japan: In determining that the incident did not arise in the performance of official duty, we considered all the

evidence. A number of Japanese witnesses were interrogated immediately after the incident. We considered their testimony as well as the testimony of Girard and Nickel. In determining Girard's intent, it is necessary to consider all the evidence, not just his version of the incident. When all of the evidence is considered, it appears that Girard's statement that he fired to scare the Japanese away and thus protect the machine gun is not worthy of belief, as the weight of the evidence contradicts Girard's statement. It is our position that the evidence shows that the firing had no significant connection with the guarding of the machine gun.

Investigation of the Incident.

Investigations of the facts relating to the alleged offense were conducted by both the U. S. Army in Japan, and the local Japanese authorities.

Interpretation of "Official Duty".

The following interpretation of the term "official duty" appears in a circular of the United States Army Forces, Far East which was published in January 1956:

"The term 'official duty' as used in Article XVII, Official Minutes, and the Agreed Views is not meant to include all acts by members of the armed forces and civilian component during periods while they are on duty, but is meant to apply only to acts which are required to be done as a function of those duties which the individuals are performing. Thus, a substantial departure from the acts a person is required to perform in a particular duty usually will indicate an act outside of his 'official duty.' "

Action in the Joint Committee.

As a result of lengthy discussions extending from early March to mid-May 1957, it was finally agreed in the Joint Committee that the United States military authorities

would notify the appropriate Japanese authorities, in accordance with paragraph 3c of Article XVII of the Administrative Agreement, that the United States had decided not to exercise jurisdiction in the case. This action was thereafter taken.

The Action of the Secretary of Defense and the Secretary of State.

On June 4, 1957 the Secretary of State John Foster Dulles and Secretary of Defense Charles E. Wilson announced that after careful review of all available facts in the case, they had concluded that the Joint Committee's agreement that Girard be tried in the courts of Japan was reached in full accord with procedures established by the Treaty and Agreement, and that in order to preserve the integrity of the pledges of the U. S., this determination by the Joint Committee must be carried out.

Present Status of Girard.

At the present time Specialist 3/C Girard is administratively restricted to the limits of Camp Whittington.

Girard voluntarily enlisted in the Regular Army on October 28, 1954 for a three year term which will expire on October 27, 1957.

/s/ ROBERT DECHERT
ROBERT DECHERT
General Counsel
Department of Defense

Subscribed and sworn to before me this 8th day of June 1957.

My commission expires: March 6, 1961.

(SEAL) /s/ LAURA E. LITCHARD
NOTARY PUBLIC

APPENDIX B.

JOINT STATEMENT OF SECRETARY OF STATE, JOHN FOSTER DULLES and SECRETARY OF DEFENSE, CHARLES E. WILSON

The case of U. S. Army Specialist 3rd Class William S. Girard has far-reaching implications, involving as it does the good faith of the United States in carrying out a joint decision reached under procedures established by treaty and agreement with Japan.

The case involves actions by Girard which caused the death of Naka Sakai, a Japanese woman, on January 30, 1957. The issue arose as to whether or not Girard should be tried by U. S. court-martial or by a Japanese court. After careful deliberation in the Joint U. S.-Japan Committee established by the two Governments pursuant to treaty arrangements, the U. S. representative on this Committee was authorized to agree, and on May 16, 1957, did agree, that the United States would not exercise its asserted right of primary jurisdiction in this case. In view of this completed action, attempting to prolong the dispute over the jurisdictional issue would create a situation which could basically affect U. S. relations not only with Japan, but also with many other nations.

For these reasons, Secretary of State John Foster Dulles and Secretary of Defense Charles E. Wilson have carefully reviewed all the available facts in the case. They have now concluded that the Joint Committee's agreement that Girard be tried in the courts of Japan was reached in full accord with procedures established by the Treaty and Agreement, and that in order to preserve the integrity of the pledges of the United States, this determination by the Joint Committee must be carried out.

. . . . .

The Secretaries' review disclosed the following:

The incident occurred in a maneuver area provided by the Japanese Government for part-time use of United States forces. The Japanese Defense Force uses the same area about 40% of the time. When the area is not in use by either the United States or Japanese armed forces, Japanese civilians are permitted to farm or otherwise use the area.

Efforts to keep civilians away from the area during such military exercises have not proved effective. In this particular case, red boundary flags were, as customary, erected as a warning to civilians to keep off, and local authorities were notified of the proposed exercises. But, as was frequently the case, a number of Japanese civilians were in the area gathering empty brass cartridge cases at the time of the incident. These civilians had created such a risk of injury to themselves in the morning exercises when live ammunition was used that the American officer in charge withdrew live ammunition from the troops prior to the afternoon exercises. In the interval between two simulated attacks during the afternoon, Girard and another soldier, Specialist 3rd Class Victor M. Nickel, were ordered by their platoon leader, a Lieutenant, to guard a machine gun and several field jackets at the top of a hill. Girard and Nickel were not issued live ammunition for this duty.

It was while these soldiers were performing this duty that the incident occurred. Mrs. Naka Sakai, a Japanese civilian, died a few moments after being hit in the back by an empty brass rifle shell case fired by Girard from his rifle grenade launcher. She was not over 30 yards from Girard and was going away from him when he fired the rifle. Girard had previously fired similarly in the vicinity of a Japanese man, who was not hit.

Girard's action in firing empty shell cases from the rifle grenade launcher was not authorized. He asserted

that he fired from the waist, intending only to frighten the Japanese civilians. Others stated, but Girard denied, that empty shell cases were thrown out to entice the Japanese to approach.

. . . . . .

Under the U. S.-Japanese Security Treaty and Article XVII of the Administrative Agreement under that Treaty, as established by the Protocol adopted September 23, 1953, the authorities of Japan have the prior right to jurisdiction to try members of the United States armed forces for an injury caused to a Japanese national, unless such injury is one "arising out of any act or omission done in the performance of official duty."

The Japanese authorities have taken the position that Girard's action in firing the shell cases was outside the scope of his guard duty and was, therefore, not "done in the performance of official duty."

The Commanding General of Girard's division certified that Girard's action was done in the performance of official duty.

In accordance with the procedure established under the Treaty and Administrative Agreement, the disputed matter was, on March 7, 1957, taken before the Joint U. S.-Japan Committee established under the provisions of the Treaty and Administrative Agreement previously referred to.

Various meetings were held between the United States and Japanese representatives on the Joint Committee. As is customary, a representative of the American Embassy in Tokyo also attended these meetings in the capacity of observer. Both sides continued to press their respective claims to primary jurisdiction, and the Committee was unable to reach agreement.

The Commanding General, Far East Command, reported the facts to the Department of the Army, the

executive agent for the Department of Defense. The Department of Defense considered having the Joint Committee refer the matter in dispute to the two Governments for settlement, but rejected this procedure as inadvisable under the circumstances. Department of Defense instructions were accordingly issued, through the Department of the Army, to the Far East Command to the effect that the U. S. representative on the Joint Committee should continue to press the claim for jurisdiction, but that, in case of continued deadlock, he was authorized to waive jurisdiction to Japan. After three weeks of additional negotiations, the U. S. representative waived jurisdiction in the name of the United States.

Girard was subsequently indicted by the Japanese judicial authorities for causing a death by wounding—the least serious homicide charge for which he could have been indicted under Japanese law. In determining whether Girard's actions were in violation of law, all the facts, as presented by both sides, must now be weighed by the Japanese court, just as they would by a U. S. court-martial, if trial were held under U. S. jurisdiction.

In accordance with Public Law 777 of the 84th Congress, the United States Government will pay for counsel chosen by Girard to defend him in this trial. Pursuant to the Administrative Agreement under the Japanese Treaty, Girard will be guaranteed a prompt trial, the right to have representation by counsel satisfactory to him, full information as to all charges against him, the right to confront all witnesses, the right to have his witnesses compelled to attend court, the right to have a competent interpreter, the right of communication with United States authorities, and the presence of a United States representative as an official observer at the trial. This observer is required to report to United States authorities on all aspects of the trial and the fairness of the court proceedings.

The U. S. authorities will, of course, see that all evidence is available to Girard and his counsel, and will render every proper assistance to him and his counsel in protection of his rights.

. . . . .

United States troops are stationed in many countries as part of our own national defense and to help strengthen the Free World struggle against Communist imperialism. The matter of jurisdiction in cases of offenses against the laws of host countries, whether by our servicemen abroad or by servicemen of other countries in the United States, is dealt with by mutual agreements.

In the operation of this system in Japan there has been the greatest measure of mutual trust and cooperation. Since the present arrangement became effective in October 1953, Japan, in the overwhelming majority of the cases in which it had primary right to try American personnel, has waived that right in favor of U. S. action. There is every reason to believe that trial of U. S. Army Specialist 3rd Class William S. Girard in the Japanese courts will be conducted with the utmost fairness.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 548 and 901 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

DECISIONS PER CURIAM AND ORDERS JUNE 10 THROUGH JULY 11, 1957.

JUNE 10, 1957.

Decisions Per Curiam.

No. 844. RINGHISER *v.* CHESAPEAKE & OHIO RAILWAY CO. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The petition for certiorari is granted, and the judgment is reversed and the cause is remanded. The trial judge set aside the jury verdict for the petitioner because, *inter alia,* it was held that the respondent "had no duty to anticipate that a car was being used for such a purpose." There was evidence, however, as the trial court found, that to respondent's knowledge employees used gondola cars for the purpose. In that circumstance there were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did. *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500; cf. *Wilkerson* v. *McCarthy,* 336 U. S. 53. *C. Richard Grieser* for petitioner. *Richard T. Rector* for respondent. Reported below: 241 F. 2d 416.

MR. JUSTICE FRANKFURTER is of the opinion that the writ of certiorari should not be granted. Since the writ has been granted, he would dismiss it as improvidently granted for the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 524.

MR. JUSTICE CLARK, dissenting.

As MR. JUSTICE DOUGLAS said in *Wilkerson* v. *McCarthy,* 336 U. S. 53, 68 (1949), "The liability which [the FELA] imposed was the liability for negligence." Believing that the Congress was looking to the courts to

see that the railroads were held to strict accountability under the Federal Employers' Liability Act [1] for any negligence whatever resulting in injury to an employee, the Court has taken cases that in ordinary course it would have denied as involving only particular facts rather than questions "of importance to the public," *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393 (1923). As in the seamen's Jones Act [2] cases, the Court feels a duty under this Federal Act to examine each case to make certain that its mandate is honored.[3] There has been no breach in this policy since its establishment soon after the amendment of the Act in 1939. In my opinion, however, the judgment today goes beyond the most generous interpretation that may be given to the Act. The petitioner suffered the grievous injury which resulted in the loss of a leg while using, as a toilet, one of the railroad's cars standing on a switch track. While petitioner was "answering his call of nature" in the car, it moved slightly from a contact with two other cars that were being switched. This contact caused some steel plates in the car to shift, crushing petitioner's right leg.

The Court does not find a failure on the part of the railroad to provide a safe place for the petitioner to work insofar as toilet facilities are concerned. The railroad thus is not found negligent in this respect. But the Court seizes upon a statement in the trial judge's memorandum that "There is evidence that employees sometimes used gondola cars in lieu of toilets. The Court must assume

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[1] 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*

[2] 41 Stat. 1007, 46 U. S. C. § 688 *et seq.*

[3] Since the October Term 1949 there have been some 17 cases, including 8 this Term, involving the sufficiency of the evidence under the Federal Employers' Liability Act. In 15 of these cases we of the majority, recognizing the responsibility that the Congress has placed on us to enforce the purpose of the Act, entered judgment for the injured employee.

that this was known to the defendant." The trial judge found, however, that the railroad could not anticipate that this particular gondola car would be used for that purpose because it was loaded with freight—steel plates—and was standing on a track that was being used for normal switching operations. The judge points out that petitioner himself thought that the car was empty when he climbed into it. If the car had not been loaded the petitioner would not have suffered the injury which resulted. For these reasons the trial judge found that the railroad could not anticipate that its employee would so use a loaded car or that the resultant injury would occur. In addition, the petitioner had admitted that he "certainly [did] not feel that the yard crew was careless in any manner . . . . This was a very easy impact and the two standing cars did not move over a foot at the most."

In the light of such a record it appears to me that negligence could not be imputed to the railroad. Of course, if the majority is saying that the railroad must inspect every loaded car awaiting switching, lest an employee be using it as a toilet, then I could easily understand the action here. But this it does not say, for it would be not only an unrealistic but an untenable burden to place on the railroad. The Court cites two cases, neither of which appears to me to be apposite. In *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 502 (1957), "petitioner was supplied with a crude hand torch and was instructed to burn off the weeds and vegetation along [the railroad's track]." The mishap occurred while he was performing these services. There was a "likelihood that petitioner . . . would suffer just such an injury as he did." *Id.*, at 504. In *Wilkerson* v. *McCarthy, supra*, the railroad had constructed a pit in its yards for the repair of car wheels. It was 40 feet long, 11 feet deep, and over 4 feet wide and was under a series of 3 or more railroad tracks. A permanent board about 22 inches wide was constructed

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across the pit and was used by the employees of the railroad to walk across it. While there was a chain placed around a portion of the pit it was not sufficient to stop employees from using the board for crossing purposes. An employee slipped on the board which was greasy and oily and was injured by a fall to the bottom of the pit. There was thus a very hazardous practice which, a jury might find, the railroad took inadequate precautions to prohibit. The railroad was held responsible. The practice here may be unsanitary, but it is not foreseeably hazardous. This accident resulted from a combination of freak circumstances rather than from actionable negligence.

While I was not on the Court when *Wilkerson* was decided, I fully agree with its holding and likewise adhere to my joining the Court in the *Rogers* case. The factual situations in those cases are far removed from the facts here. In my opinion the decision today extends the doctrine of these cases far beyond any theory of liability for negligence that the Congress intended under the Federal Employers' Liability Act.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITTAKER joins, dissenting.

The facts of this case, as summarized by District Judge Cecil, are these:

> "On October 7, 1950, Boyd R. Ringhiser, the plaintiff herein, arose in the afternoon, made preparation to report for duty at 4:45 p. m., had a bowel movement, made a mental calculation and thereby set in motion a chain of events which created a result both unusual and tragic.
>
> "The sequence of these events is as follows: The plaintiff's bowel movement was unsatisfactory; 'This won't do,' said he to himself (statement made by plaintiff at trial, but ordered stricken); he took a

dose of salts and washed it down with sweet cider; he got in his car and drove to Parson's Yard, the switching yard of the defendant, and had a bowel movement at the roundhouse. He then got on his engine and maneuvered it to track twelve, where it was coupled on to a train scheduled for Walbridge Yard at Toledo. While sitting in his engine waiting for his air brake test, he had an urgent call of nature and 'had to go quick.' He dismounted from his locomotive cab to go to a toilet a short distance west. A long train of empties passed between him and the object of his immediate attention. He could not wait for this train to pass and went to No. 8 switch track and climbed into a low-sided gondola car to answer his call of nature. While thus engaged, a yard crew switched two cars into No. 8 switch track. These cars came in contact with the car ahead of plaintiff's car and it likewise came in contact with plaintiff's car. The gondola car in which plaintiff had taken his position was loaded with steel plates and when the cars made contact the plates shifted, caught plaintiff's right leg and crushed it so that a few days later, it had to be amputated."

On these facts I do not think the accident was a reasonably foreseeable consequence of any act or omission of the railroad. I therefore dissent.

No. 892. MOUSHON *v.* NATIONAL GARAGES, INC. Appeal from the Supreme Court of Illinois. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Robert G. Day* for appellant. *Thomas C. Angerstein, Sidney Z. Karasik, Paul R. Connolly* and *Charles T. Shanner* for appellee. Reported below: 9 Ill. 2d 407, 137 N. E. 2d 842.

No. 883. UNITED STEELWORKERS OF AMERICA *v.* GALLAND-HENNING MANUFACTURING CO. 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 on the authority of *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U. S. 448, decided June 3, 1957, and the cause is remanded to the Court of Appeals. MR. JUSTICE BURTON, with whom MR. JUSTICE HARLAN joins, concurs in the result in this case for the reasons set forth in his concurrence in *Textile Workers* v. *Lincoln Mills,* 353 U. S., at 459. MR. JUSTICE FRANKFURTER dissents on the grounds of his dissenting opinion in *Textile Workers* v. *Lincoln Mills,* 353 U. S., at 460. MR. JUSTICE BLACK took no part in the consideration or decision of this case. *Arthur J. Goldberg* and *David E. Feller* for petitioner. *Philip W. Croen* and *John H. Wessel* for respondent. Reported below: 241 F. 2d 323.

No. 579, Misc. DELBRIDGE *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. In the light of the memorandum of the Solicitor General, the order of the Court of Appeals is vacated and the cause is remanded to the District Court for reconsideration of the application for leave to appeal *in forma pauperis,* and for consideration of such other relief as may be proper and just, after review of the full transcript of the criminal trial. *Johnson* v. *United States,* 352 U. S. 565. See also *Berger* v. *United States,* 295 U. S. 78, 88–89. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle R. Cappello* for the United States.

No. 925. CABOT ET AL. *v.* ALPHEN ET AL. Appeal from the Superior Court of Massachusetts. *Per Curiam:* The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question. *Richard Wait* for appellants. *William H. Kerr* for Alphen et al., and *John F. Cogan, Jr.* for the Boston Common Garage, Inc., appellees.

Miscellaneous Orders.

No. 15. YATES *v.* UNITED STATES. Certiorari, 350 U. S. 947, to the United States Court of Appeals for the Ninth Circuit. Argued October 9–10, 1956. This case is restored to the calendar for reargument. *Ben Margolis* and *Leo Branton, Jr.* for petitioner. *A. L. Wirin* entered an appearance for petitioner. *Solicitor General Rankin, Assistant Attorney General Tompkins, Kevin T. Maroney* and *Philip R. Monahan* for the United States. Reported below: 227 F. 2d 851.

No. 570. BROWN *v.* UNITED STATES. Certiorari, 352 U. S. 908, to the United States Court of Appeals for the Sixth Circuit. Argued April 4, 1957. This case is restored to the calendar for reargument. *Geo. W. Crockett, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Ralph S. Spritzer* and *Beatrice Rosenberg* for the United States. Reported below: 234 F. 2d 140.

No. 733, Misc. PEARSON *v.* GRAY, WARDEN. The motion of petitioner to dismiss motion for leave to file petition for writ of habeas corpus is granted.

No. 752, Misc. PANARIELLO *v.* NEW YORK; and
No. 764, Misc. WALKER *v.* MARYLAND. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also Nos. 844, 883 and Misc. No. 579, supra.*)

No. 643. LEE YOU FEE *v.* DULLES, SECRETARY OF STATE. C. A. 7th Cir. Certiorari granted. *Jack Wasserman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 236 F. 2d 885.

No. 586, Misc. CICENIA *v.* LAGAY, SUPERINTENDENT, NEW JERSEY PRISON FARM. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. Petitioner *pro se*. *Charles V. Webb, Jr.* and *C. William Caruso* for respondent. Reported below: 240 F. 2d 844.

No. 707, Misc. CROOKER *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of California granted limited to questions 1 and 2 presented by the petition for the writ which read as follows:

"1. Was the defendant denied due process of law by the refusal of the investigation officers to allow him to consult with an attorney upon demand being made to do so while he was in custody?

"2. Was the defendant denied due process of law by the admission into evidence of a confession which was taken from him while in custody and after he had been in such custody for fourteen hours and had not been allowed to consult with his attorney?"

Reported below: 47 Cal. 2d 348, 303 P. 2d 753.

Certiorari Denied.

No. 937. S. E. C. CORPORATION, FORMERLY KNOWN AS CANADAY COOLER CO., INC., *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Rollin Browne* and *Paul Van Anda* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for the United States. Reported below: 241 F. 2d 416.

No. 941. WESTERN FIRE & CASUALTY CO. *v.* GENERAL INSURANCE CO. OF AMERICA ET AL. C. A. 5th Cir. Certiorari denied. *Chas. C. Crenshaw* for petitioner. *Neth L. Leachman* for respondents. Reported below: 241 F. 2d 289.

No. 947. NIEPERT, EXECUTOR, *v.* CLEVELAND ELECTRIC ILLUMINATING CO. C. A. 6th Cir. Certiorari denied. *Louis S. Belkin* for petitioner. *James C. Davis* for respondent. Reported below: 241 F. 2d 916.

No. 963. MASSEY *v.* BRINDLEY ET AL. Court of Civil Appeals of Texas, Third Supreme Judicial District. Certiorari denied. *Robert Lee Guthrie* and *Searcy L. Johnson* for petitioner. *James P. Hart* and *Byron Skelton* for respondents. Reported below: 296 S. W. 2d 296.

No. 964. CARPINTERIA LEMON ASSN. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Ivan G. McDaniel* for petitioners. *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard, Dominick L. Manoli* and *Samuel M. Singer* for respondent. Reported below: 240 F. 2d 554.

No. 1013. MASSENGALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 240 F. 2d 781.

No. 970. BEN HUR COAL CO. *v.* WELLS ET AL., DOING BUSINESS AS STARR COAL CO. C. A. 10th Cir. Certiorari denied. *G. C. Spillers* and *G. C. Spillers, Jr.* for petitioner. *Fenelon Boesche, Richard B. McDermott* and *T. Hillas Eskridge* for respondents. Reported below: 242 F. 2d 481.

No. 979. INTERNATIONAL DERRICK & EQUIPMENT CO. AND ITS SUCCESSOR, DRESSER EQUIPMENT CO., *v.* CROIX ET AL. C. A. 5th Cir. Certiorari denied. *Paul J. Sedgwick* and *L. W. Anderson* for petitioners. *James O. Bean* for respondents. Reported below: 241 F. 2d 216.

No. 991. STANLEY *v.* STANLEY. Court of Civil Appeals of Texas, Seventh Supreme Judicial District. Certiorari denied. *Cleo G. Clayton* and *Cleo G. Clayton, Jr.* for petitioner. *Howard F. Saunders* for respondent. Reported below: 294 S. W. 2d 132.

No. 1016. HUNT TOOL CO. *v.* LAWRENCE ET AL. C. A. 5th Cir. Certiorari denied. *J. Vincent Martin* for petitioner. *Earl Babcock* for respondents. Reported below: 242 F. 2d 347.

No. 515. BUCKEYE COTTON OIL CO. (NOW MERGED INTO THE BUCKEYE CELLULOSE CORP.) *v.* LOCAL 19, WAREHOUSE, PROCESSING & DISTRIBUTIVE WORKERS UNION, RETAIL, WHOLESALE & DEPARTMENT STORE UNION (CIO). C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Harris K. Weston* for petitioner. Reported below: 236 F. 2d 776.

No. 675, Misc. HARVEY, ALIAS MCCARGO, *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 520. SIGNAL-STAT CORPORATION *v.* LOCAL 475, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, (UE). C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Herbert Burstein* for petitioner. *David Scribner* and *Basil R. Pollitt* for respondent. Reported below: 235 F. 2d 298.

No. 616, Misc. BRODSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Steven E. Keane* and *Victor M. Harding* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 241 F. 2d 107.

No. 674, Misc. CWIKLINSKI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 677, Misc. LEBRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 241 F. 2d 885.

No. 682, Misc. SHERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 241 F. 2d 329.

No. 700, Misc. STRAUCH *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 709, Misc. WOODS *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 687, Misc. BRULE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 240 F. 2d 589.

No. 694, Misc. KIMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hugh N. Clayton* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 240 F. 2d 301.

No. 715, Misc. BRYAN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 732, Misc. ANGLIN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 99 U. S. App. D. C. 400, 240 F. 2d 638.

No. 738, Misc. PETERS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 739, Misc. HELWIG *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 742, Misc. GENTNER *v.* MARTIN, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *James N. Lafferty* and *Victor H. Blanc* for respondent.

No. 746, Misc. SZOCKI *v.* CAVELL, WARDEN. Court of Common Pleas of Erie County, Pennsylvania. Certiorari denied.

No. 745, Misc. WEINBERGER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 750, Misc. QUON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 241 F. 2d 161.

No. 762, Misc. WAGER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 766, Misc. YOUNG *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 767, Misc. MORGAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 774, Misc. PEARSON *v.* GRAY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 243 F. 2d 23.

No. 684, Misc. CLARK *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 299 S. W. 2d 128.

No. 698, Misc. FLETCHER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 387 Pa. 602, 128 A. 2d 897.

No. 701, Misc. LYON *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 296 S. W. 2d 262.

No. 938. MOCCIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Michael P. Direnzo* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States.

No. 942. WASHINGTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph Sitnick* and *William R. Lichtenberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 100 U. S. App. D. C. —, 243 F. 2d 43.

No. 958. CAMPBELL *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *Nicholas J. Chase* for petitioner. *T. C. Callison,* Attorney General of South Carolina, and *James S. Verner,* Assistant Attorney General, for respondent. Reported below: 230 S. C. 432, 96 S. E. 2d 476.

No. 974. UNION PAVING CO. *v.* DOWNER CORPORATION. District Court of Appeal of California, Third Appellate District. Certiorari denied. *Henry C. Clausen* for petitioner. *Forrest E. Macomber* for respondent. Reported below: 146 Cal. App. 2d 708, 304 P. 2d 756.

No. 683, Misc. COLES *v.* SMITHER & CO., INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Wm. Edison Owen* for petitioner. *Charles E. Pledger, Jr.* and *Randolph C. Richardson* for respondent. Reported below: 100 U. S. App. D. C. —, 242 F. 2d 220.

No. 693, Misc. KITCHIN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 300 S. W. 2d 420.

No. 728, Misc. SEFTON *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *Toy R. Gregory* for petitioner. Reported below: 73 Nev. —, 306 P. 2d 771.

No. 743, Misc. MINOR *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 100 U. S. App. D. C. —, 240 F. 2d 888.

No. 765, Misc. SHEFFIELD *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Eugene Stanley* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *M. E. Culligan,* Special Assistant Attorney General, for respondent. Reported below: 232 La. 53, 93 So. 2d 691.

Rehearing Denied.

No. 632, Misc. DAVIS *v.* UNITED STATES, 353 U. S. 960;
No. 635, Misc. GRAY *v.* UNITED STATES, 353 U. S. 946;
No. 641, Misc. LEGG *v.* TENEYCKE ET AL., 353 U. S. 960; and
No. 676, Misc. KALLOS ET UX. *v.* NEW YORK, 353 U. S. 956. Petitions for rehearing denied.

JUNE 17, 1957.

Decisions Per Curiam.

No. 911. DOOLEY *v.* VIRGINIA. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *G. Galt Bready* and *James L. Dooley* for appellant. *J. Lindsay Almond, Jr.,* Attorney General of Virginia, and *C. F. Hicks,* Assistant Attorney General, for appellee. Reported below: 198 Va. 32, 92 S. E. 2d 348.

No. 914. GULF OIL CORP. *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL. Appeal from the United States District Court for the Western District of Oklahoma. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN would note probable jurisdiction and set the case for argument. *Richard B. McDermott* and *James B. Diggs* for appellant. *Mac Q. Williamson,* Attorney General of Oklahoma, *Richard M. Huff,* Assistant Attorney General, *Charles R. Nesbitt* and *Ferrill H. Rogers* for appellees. Reported below: 147 F. Supp. 640.

No. 933. COVEY, COMMITTEE, *v.* TOWN OF SOMERS. 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 jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *Adolph I. King, Samuel M. Sprafkin* and *Mandel Matthew Einhorn* for appellant. *Otto E. Koegel* and *Harry H. Chambers* for appellee. Reported below: 2 N. Y. 2d 250, 140 N. E. 2d 277.

No. 936. STARR ET AL. *v.* NASHVILLE HOUSING AUTHORITY ET AL. Appeal from the United States District Court for the Middle District of Tennessee. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Berman* v. *Parker,* 348 U. S. 26. *Robert E. Sher, Abraham J. Harris* and *William Waller* for appellants. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the Housing and Home Finance Agency et al., *Albert Williams* and *Kenneth Harwell* for the Nashville Housing Authority, and *K. Harlan Dodson, Jr.* for the City of Nashville, appellees. Reported below: 145 F. Supp. 498.

No. 927. CLEVELAND ELECTRIC ILLUMINATING CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Ohio. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Nuel D. Belnap* and *Harold E. Spencer* for the Cleveland Electric Illuminating Co., and *C. F. Taplin, Jr.* for the Ohio Coal Association, appellants. *Solicitor General Rankin, Robert W. Ginnane* and *Samuel R. Howell* for the United States and the Interstate Commerce Commission, and *Howard F. Burns, R. B. Claytor, Hugh B. Cox, Anthony P. Donadio, John P. Fishwick, Richard J. Murphy, W. A. Wilkinson* and *Edward A. Kaier* for the Baltimore & Ohio Railroad Co. et al., appellees. Reported below: 147 F. Supp. 622.

No. 468. CARR *v.* BEVERLY HILLS CORP. ET AL. 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, the judgment of the Court of Appeals is reversed on the authority of *Smith* v. *Sperling, ante,* p. 91, decided June 10, 1957, and *Swanson* v. *Traer, ante,* p. 114, decided June 10, 1957, and the cause is remanded to the District Court for proceedings in conformity with this opinion. MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER dissent for the reasons stated in their dissent in *Smith* v. *Sperling, ante,* p. 98. *Thomas Dodd Healy* and *George E. Danielson* for petitioner. *Paul R. Watkins* for the Beverly Hills Corporation, and *Frederic H. Sturdy* for Lordan et al., respondents. Reported below: 237 F. 2d 323.

No. 781, Misc. STANLEY *v.* NEW YORK. Appeal from the Appellate Division of the Supreme Court of New York, Second Judicial Department. *Per Curiam:* The appeal is dismissed.

No. 956. CURTIS *v.* KELLY, SHERIFF. Appeal from the Supreme Court of Florida. *Per Curiam:* The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *M. H. Rosenhouse* for appellant. Reported below: 91 So. 2d 184.

Miscellaneous Orders.

No. 9, Original. TEXAS *v.* NEW MEXICO. It is ordered by this Court that *John Raeburn Green, Esquire,* be and he is hereby, awarded the sum of $25,000 as compensation for his services as Special Master in this case, and that his disbursements totaling $7,611.27 be allowed. It is further ordered that the fee and disbursements of the Special Master be paid by the parties in the following proportions: Texas, 50%; New Mexico, 25%; and the Middle Rio Grande Conservancy District, 25%.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. The petition for an order approving payment on account of fees and expenses of the Special Master is granted and the parties are ordered to make payments to cover the expenses of the Special Master in the following proportions: Arizona, 28%; California, 28%; United States, 28%; Nevada, 12%; New Mexico, 2%; and Utah, 2%.

They are further ordered to make payments totaling $50,000 to *Simon H. Rifkind, Esquire,* Special Master, on account of the fee to be awarded by this Court as compensation for his services as Special Master. Such payments are to be made in the proportions set forth above.

This order is subject to any further award, allowance or division of costs or fees as this Court may deem proper.

THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 50. SAN DIEGO BUILDING TRADES COUNCIL ET AL. *v.* GARMON ET AL., 353 U. S. 26. The motion to retax costs is denied. *James W. Archer* and *J. Sterling Hutcheson* for movants. *Walter Wencke, Charles P. Scully, Mathew Tobriner* and *John C. Stevenson* for petitioners in opposition. Reported below: 45 Cal. 2d 657, 291 P. 2d 1.

No. 718, Misc. COVEY, COMMITTEE, *v.* COURT OF APPEALS OF NEW YORK ET AL. Motion for leave to file petition for writ of mandamus denied. *Adolph I. King, Samuel M. Sprafkin* and *Mandel Matthew Einhorn* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *John R. Davison,* Solicitor General, for respondents. *Otto E. Koegel* and *Harry H. Chambers* filed a brief for the Town of Somers in opposition to the motion.

No. 723, Misc. LAYCOCK *v.* MATHES, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *Norman L. Easley* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Melvin Richter* for Kenney, respondent.

No. 779, Misc. DOWLING *v.* MARYLAND ET AL.;
No. 780, Misc. MEDLEY *v.* MARYLAND;
No. 788, Misc. SANCHEZ *v.* SWENSON, WARDEN;
No. 793, Misc. HAYMAN *v.* HERITAGE, WARDEN; and
No. 799, Misc. AMBROSELLI *v.* MAILLER, CHAIRMAN, NEW YORK PAROLE BOARD, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 918. HANSON, EXECUTRIX, ET AL. *v.* DENCKLA ET AL. Appeal from the Supreme Court of Florida. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Wil-*

liam H. Foulk and *Manley P. Caldwell* for appellants. *D. H. Redfearn, C. Robert Burns, R. H. Ferrell, Sol A. Rosenblatt* and *Charles Roden* for appellees.

Certiorari Granted. (*See also No. 175, ante, p. 234, and No. 468, supra.*)

No. 977. LEWIS ET AL. *v.* HANSON, EXECUTRIX AND TRUSTEE, ET AL. Supreme Court of Delaware. Certiorari granted. *Arthur G. Logan* for petitioners. Reported below: —— Del. ——, 128 A. 2d 819.

No. 1032. ABRAMOWITZ *v.* BRUCKER. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 100 U. S. App. D. C. ——, 243 F. 2d 834.

No. 862. HOOVER MOTOR EXPRESS CO., INC., *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *Judson Harwood* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 241 F. 2d 459.

No. 932. TANK TRUCK RENTALS, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari granted. *Paul A. Wolkin* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 242 F. 2d 14.

No. 983. COMMISSIONER OF INTERNAL REVENUE *v.* SULLIVAN ET AL. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for petitioner. *E. J. Blair* and *Eugene Bernstein* for Sullivan et al., respondents. Reported below: 241 F. 2d 46, 242 F. 2d 558.

No. 1008. FIDELITY-PHILADELPHIA TRUST CO. ET AL., EXECUTORS, *v.* SMITH, COLLECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari granted. *Robert T. McCracken* for petitioners. *Solicitor General Rankin* for respondent. Reported below: 241 F. 2d 690.

Certiorari Denied. (*See also Nos. 933 and 956, supra.*)

No. 949. MONOLITH PORTLAND MIDWEST CO. *v.* RECONSTRUCTION FINANCE CORP. C. A. 9th Cir. Certiorari denied. *Joseph T. Enright* and *Norman Elliott* for petitioner. *Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 240 F. 2d 444.

No. 952. GORDON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 242 F. 2d 122.

No. 966. SCHULTZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 243 F. 2d 349.

No. 967. HASKELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Harvey B. Cochran* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 241 F. 2d 790.

No. 980. ORLEANS PARISH SCHOOL BOARD *v.* BUSH ET AL. C. A. 5th Cir. Certiorari denied. *Gerard A. Rault* and *W. Scott Wilkinson* for petitioner. *Robert L. Carter* for respondents. Reported below: 242 F. 2d 156.

No. 968. McConnon *v.* United States; and

No. 982. Postma *v.* United States. C. A. 2d Cir. Certiorari denied. *Isadore Katz* for petitioner in No. 968. *Barney Samelstein* for petitioner in No. 982. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 242 F. 2d 488.

No. 978. Personal Industrial Loan Corp. (now known as Beneficial Industrial Loan Corp.) *v.* Forgay. C. A. 10th Cir. Certiorari denied. *Jackson R. Collins* and *Linn K. Twinem* for petitioner. Reported below: 240 F. 2d 18.

No. 987. Eagle Lion Films, Inc., *v.* Szekely, also known as Pen. C. A. 2d Cir. Certiorari denied. *Louis Nizer* and *Sidney Davis* for petitioner. *Harold J. Sherman* for respondent. Reported below: 242 F. 2d 266.

No. 1002. Fried *v.* United States et al. C. A. 2d Cir. Certiorari denied. *Morris K. Siegel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Ellis N. Slack* and *A. F. Prescott* for the United States, respondent. Reported below: 241 F. 2d 504.

No. 1007. Block Drug Co. et al. *v.* University of Illinois Foundation. C. A. 7th Cir. Certiorari denied. *Benjamin B. Schneider* for petitioners. *Charles J. Merriam* and *John Rex Allen* for respondent. Reported below: 241 F. 2d 6.

No. 1017. Smoot Sand & Gravel Corp. *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. *David R. Shelton* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 241 F. 2d 197.

No. 1021. LESTER *v.* AETNA CASUALTY & SURETY CO. C. A. 5th Cir. Certiorari denied. *Leonard Lloyd Lockard* for petitioner. *Richard H. Switzer* for respondent. Reported below: 240 F. 2d 676.

No. 1026. V. E. IRONS, INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Vincent A. Kleinfeld* for petitioners. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 244 F. 2d 34.

No. 1039. BRODY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *John F. Cogan, Jr.* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 243 F. 2d 378.

No. 985. KANSAS CITY STAR CO. *v.* UNITED STATES; and

No. 986. SEES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications. *John T. Cahill, Thurlow M. Gordon, Henry N. Ess, Elton L. Marshall* and *Carl E. Enggas* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman* for the United States. Reported below: 240 F. 2d 643.

No. 753, Misc. THOMPSON ET AL. *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 388 Pa. 572, 131 A. 2d 449.

No. 759, Misc. MILLER ET AL. *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. C. A. 2d Cir. Certiorari denied. *John Francis Noonan* for petitioners. *Pierre W. Evans* for respondent. Reported below: 241 F. 2d 116.

No. 768, Misc. RICE *v.* CLEMMER, DIRECTOR, DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for respondents. Reported below: 242 F. 2d 870.

No. 769, Misc. MORGAN *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 771, Misc. BURKE *v.* DISTRICT COURT. Petition for writ of certiorari to the Supreme Court of Iowa denied.

No. 777, Misc. APFELBAUM *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 784, Misc. FRENCH *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied.

No. 786, Misc. CATHCART *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 244 F. 2d 74.

No. 789, Misc. KENNEDY *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 794, Misc. HAMM *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Reported below: 300 S. W. 2d 562.

No. 795, Misc. LUCIANO *v.* WILKINSON, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for respondent.

No. 796, Misc. O'CONNOR *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 797, Misc. DOPKOWSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 800, Misc. YORK *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 801, Misc. SHELTON *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 803, Misc. MCALLISTER *v.* PINTO, SUPERINTENDENT, NEW JERSEY STATE PRISON FARM. Supreme Court of New Jersey. Certiorari denied.

No. 806, Misc. ZAMBRANO *v.* CALIFORNIA ADULT AUTHORITY ET AL. Supreme Court of California. Certiorari denied.

No. 807, Misc. THOMAS *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Releford McGriff* for petitioner. Reported below: 92 So. 2d 621.

No. 782, Misc. CULVER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. Reported below: 23 N. J. 495, 129 A. 2d 715.

No. 948. UNITED PRESS ASSOCIATIONS *v.* CHARLES ET AL. C. A. 9th Cir. Certiorari denied. *John H. Dimond* for petitioner. Reported below: 245 F. 2d 21.

No. 962. TUTTLE *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *S. Hazard Gillespie, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 244 F. 2d 605.

No. 973. HOWARTH *v.* HOWARTH. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Lawrence M. Cahill* for petitioner. Reported below: 146 Cal. App. 2d 694, 304 P. 2d 147.

No. 984. ASPEN PICTURES, INC., *v.* OCEANIC STEAMSHIP CO. ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Leonard Horwin* for petitioner. *Gregory A. Harrison* and *Marion B. Plant* for respondents. Reported below: 148 Cal. App. 2d 238, 306 P. 2d 933.

No. 990. GERSHENHORN ET AL. *v.* WALTER R. STUTZ ENTERPRISES ET AL. Supreme Court of Nevada. Certiorari denied. *Herbert Jones* and *Alvin Gershenson* for petitioners. *W. Bruce Beckley* for respondents. Reported below: 72 Nev. 293, 312, 304 P. 2d 395, 306 P. 2d 121.

No. 1000. MARTINEZ ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Isabelle Cappello* for the United States.

No. 1055. TURNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 244 F. 2d 404.

No. 763, Misc. CURTIS ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 99 U. S. App. D. C. 351, 240 F. 2d 37.

No. 628, Misc. POPIK *v.* OHIO ET AL. Court of Appeals of Franklin County, Ohio. Certiorari denied.

No. 775, Misc. CEPERO *v.* PAN AMERICAN WORLD AIRWAYS ET AL. C. A. 2d Cir. Certiorari denied.

No. 778, Misc. BRUINSMA *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: —— Tex. Cr. R. ——, 298 S. W. 2d 838.

No. 792, Misc. MARTIN *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 141 N. E. 2d 107.

No. 798, Misc. AKERS *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 808, Misc. BRIGMON *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 213 Md. 628, 131 A. 2d 245.

Rehearing Denied.

No. 240. ARNOLD *v.* PANHANDLE & SANTA FE RAILWAY CO., 353 U. S. 360;

No. 540. CIVIL AERONAUTICS BOARD *v.* HERMANN ET AL., 353 U. S. 322;

No. 816. ATWOOD *v.* LYDICK, 353 U. S. 949; and

No. 909. HOHENSEE ET AL. *v.* UNITED STATES, 353 U. S. 976. Petitions for rehearing denied.

No. 5. KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL., 353 U. S. 252. Rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

No. 422. Office Employes International Union, Local No. 11, AFL–CIO, *v.* National Labor Relations Board, 353 U. S. 313. Motion of International Brotherhood of Teamsters et al. for leave to file petitions for rehearing of the order denying motion for leave to intervene, 353 U. S. 904, and for rehearing of the case on the merits denied.

No. 466. Securities and Exchange Commission *v.* Louisiana Public Service Commission et al., 353 U. S. 368. Rehearing denied. Mr. Justice Clark took no part in the consideration or decision of this application.

No. 722. Landell, Executor, et al. *v.* Northern Pacific Railway Co., 352 U. S. 1017. Motion for leave to file petition for rehearing out of time denied. Mr. Justice Whittaker took no part in the consideration or decision of this motion.

June 21, 1957.

No. 1103. Wilson, Secretary of Defense, et al. *v.* Girard; and

No. 1108. Girard *v.* Wilson et al. On petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petitions for writs of certiorari are granted. The cases are consolidated and assigned for argument on Monday, July 8, next. A maximum of four hours is allowed for argument, to be equally divided. In each case, the brief for petitioners will be served and filed on or before July 1, 1957. The briefs for respondents will be served and filed within five days from receipt of the petitioners' briefs. *Attorney General Brownell* and *Solicitor General Rankin* for petitioners in No. 1103. *Joseph S. Robinson, Earl J. Carroll* and *Dayton M. Harrington* for petitioner in No. 1108. Reported below: 152 F. Supp. 21.

JUNE 24, 1957.

Decisions Per Curiam.

No. 306. RALEY ET AL. *v.* OHIO. Appeal from the Supreme Court of Ohio. *Per Curiam:* The judgment of the Supreme Court of Ohio is vacated and the case is remanded for consideration in the light of *Sweezy* v. *New Hampshire,* 354 U. S. 234, and *Watkins* v. *United States,* 354 U. S. 178. MR. JUSTICE BURTON would note probable jurisdiction and set the case for argument. MR. JUSTICE CLARK dissents from this disposition of the case for the reasons stated in his dissenting opinions in *Sweezy* v. *New Hampshire* and *Watkins* v. *United States, supra. Louis C. Capelle* and *Morse Johnson* for appellants. Reported below: 164 Ohio St. 529, 133 N. E. 2d 104.

No. 206, Misc. MORGAN *v.* OHIO. Appeal from the Supreme Court of Ohio. *Per Curiam:* The judgment of the Supreme Court of Ohio is vacated and the case is remanded for consideration in the light of *Sweezy* v. *New Hampshire,* 354 U. S. 234, and *Watkins* v. *United States,* 354 U. S. 178. MR. JUSTICE BURTON would note probable jurisdiction and set the case for argument. MR. JUSTICE CLARK dissents from this disposition of the case for the reasons stated in his dissenting opinions in *Sweezy* v. *New Hampshire* and *Watkins* v. *United States, supra. Ann Fagan Ginger* and *Thelma C. Furry* for appellant. Reported below: 164 Ohio St. 529, 133 N. E. 2d 104.

No. 462. FLAXER *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari in this case is granted. The judgment of the Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded for consideration in light of *Watkins* v. *United States,* 354

U. S. 178. MR. JUSTICE BURTON took no part in the consideration or decision of this case. MR. JUSTICE CLARK dissents for the reasons stated in his dissenting opinion in *Watkins* v. *United States, supra.* *David Rein* and *Joseph Forer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Tompkins* and *Doris H. Spangenburg* for the United States. Reported below: 98 U. S. App. D. C. 324, 235 F. 2d 821.

No. 742. BARENBLATT *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari in this case is granted. The judgment of the Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded for consideration in light of *Watkins* v. *United States,* 354 U. S. 178. MR. JUSTICE BURTON took no part in the consideration or decision of this case. MR. JUSTICE CLARK dissents for the reasons stated in his dissenting opinion in *Watkins* v. *United States, supra.* *David Scribner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Tompkins, Philip R. Monahan* and *Doris H. Spangenburg* for the United States. Reported below: 100 U. S. App. D. C. ——, 240 F. 2d 875.

No. 884. SACHER *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari in this case is granted. The judgment of the Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded for consideration in light of *Watkins* v. *United States,* 354 U. S. 178. MR. JUSTICE BURTON took no part in the consideration or decision of this case. MR. JUSTICE CLARK dissents for the reasons stated in his dissenting opinion in *Watkins* v. *United States, supra.* *Frank J. Donner* and

David Rein for petitioner. *Solicitor General Rankin, Assistant Attorney General Tompkins, Harold D. Koffsky, Philip R. Monahan* and *Doris H. Spangenburg* for the United States. Reported below: 99 U. S. App. D. C. 360, 240 F. 2d 46.

No. 9, Misc. WELLMAN ET AL. *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. The judgment of the Court of Appeals for the Sixth Circuit is vacated and the case is remanded for consideration in light of *Yates* v. *United States,* 354 U. S. 298; *Schneiderman* v. *United States,* 354 U. S. 298; and *Richmond* v. *United States,* 354 U. S. 298. MR. JUSTICE CLARK dissents for the reasons given in his dissenting opinion in *Yates* v. *United States; Schneiderman* v. *United States;* and *Richmond* v. *United States, supra. Ernest Goodman* for petitioners. *Solicitor General Rankin* and *Simon E. Sobeloff,* then Solicitor General, for the United States. Reported below: 227 F. 2d 757.

No. 835. ADAMS NEWARK THEATER CO. ET AL. *v.* CITY OF NEWARK ET AL. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Alberts* v. *California,* 354 U. S. 476; *Kingsley Books, Inc.,* v. *Brown,* 354 U. S. 436; and *Roth* v. *United States,* 354 U. S. 476. THE CHIEF JUSTICE would note probable jurisdiction and set the case for argument. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. *Sylvan C. Balder* and *Isadore Gottlieb* for appellants. *Vincent J. Casale* for appellees. Reported below: 22 N. J. 472, 126 A. 2d 340.

No. 674. UNITED STATES *v.* HUNT ET AL.; and

No. 675. UNITED STATES *v.* OLLHOFF ET AL. Appeals from the United States District Court for the District of Minnesota. *Per Curiam:* The judgments are reversed. *United States* v. *Korpan,* 354 U. S. 271. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Robert A. Sprecher* and *Harry E. Ryan* for appellees. Reported below: 146 F. Supp. 143.

No. 723. UNITED STATES *v.* MACK;

No. 724. UNITED STATES *v.* CALI; and

No. 725. UNITED STATES *v.* EDWARDS. Appeals from the United States District Court for the District of Arizona. *Per Curiam:* The judgments are reversed. *United States* v. *Korpan,* 354 U. S. 271. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Robert A. Sprecher* for appellees.

No. 726. UNITED STATES *v.* HATCH. Appeal from the United States District Court for the Eastern District of Louisiana. *Per Curiam:* The judgment is reversed. *United States* v. *Korpan,* 354 U. S. 271. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Robert A. Sprecher* for appellee.

No. 727. UNITED STATES *v.* HARRIS ET AL. Appeal from the United States District Court for the Western District of Arkansas. *Per Curiam:* The judgment is reversed. *United States* v. *Korpan,* 354 U. S. 271. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Robert A. Sprecher* for appellees.

No. 931. BRYAN ET AL. *v.* AUSTIN, SUPERINTENDENT, SCHOOL DISTRICT NO. 7, ORANGEBURG COUNTY, SOUTH CAROLINA, ET AL. Appeal from the United States District Court for the Eastern District of South Carolina. *Per Curiam:* In view of the repeal of South Carolina Act No. 741 of 1956 by Act No. 324 of 1957 after the decision below, 148 F. Supp. 563, the cause has become moot. Accordingly, the judgment of the District Court is vacated and the case is remanded to it, with leave to the appellants to amend their pleadings either to safeguard any rights that may have accrued to them by virtue of the operation of the repealed Act or to set forth a cause of action based on the operation of the new Act. Rule 15 of the Federal Rules of Civil Procedure. *Thurgood Marshall, Robert L. Carter* and *Jack Greenberg* for appellants. *Robert McC. Figg, Jr.* and *David W. Robinson* for appellees. Reported below: 148 F. Supp. 563.

No. 934. GUNDAKER CENTRAL MOTORS, INC., *v.* GASSERT, DIRECTOR, DIVISION OF MOTOR VEHICLES OF NEW JERSEY, ET AL. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. *Ward Kremer* for appellant. *Grover C. Richman, Jr.*, Attorney General of New Jersey, and *John F. Crane*, Deputy Attorney General, for Gassert, appellee. Reported below: 23 N. J. 71, 127 A. 2d 566.

Miscellaneous Orders.

The Court appoints Mr. William Leigh Ellis, of Michigan, to be Assistant Director of the Administrative Office of the United States Courts, pursuant to the provisions of § 601 of Title 28 of the United States Code.

Pursuant to the provisions of Title 28, U. S. C., § 42, It is ordered that MR. JUSTICE BLACK be, and he is hereby, temporarily assigned to the Ninth and District of Columbia Circuits as Circuit Justice;

That MR. JUSTICE FRANKFURTER be, and he is hereby, temporarily assigned to the Second and Seventh Circuits as Circuit Justice; and

That MR. JUSTICE BRENNAN be, and he is hereby, temporarily assigned to the Fourth and Sixth Circuits as Circuit Justice.

No. 838, Misc. EUBANKS *v.* LOUISIANA. On petition for writ of certiorari to the Supreme Court of Louisiana. It is ordered that execution of the sentence of death imposed upon the petitioner be, and the same is hereby, stayed pending final disposition of the petition for writ of certiorari. In the event certiorari is granted, this stay is to continue until final disposition of the case. *Leopold Stahl* for petitioner. Reported below: 232 La. 289, 94 So. 2d 262.

No. 34. ROWOLDT *v.* PERFETTO, ACTING OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 350 U. S. 993, to the United States Court of Appeals for the Eighth Circuit. Argued November 13–14, 1956. This case is restored to the calendar for reargument. *David Rein, Joseph Forer* and *Ann Fagan Ginger* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 228 F. 2d 109.

No. 572. PEREZ *v.* BROWNELL, ATTORNEY GENERAL. Certiorari, 352 U. S. 908, to the United States Court of Appeals for the Ninth Circuit. Argued May 1, 1957. This case is restored to the calendar for reargument. *Charles A. Horsky, Fred Okrand, A. L. Wirin, Jack Wasserman* and *Salvatore C. J. Fusco* for petitioner.

Solicitor General Rankin, Assistant Attorney General Olney, Oscar H. Davis and *J. F. Bishop* for respondent. *John W. Willis* filed a brief for Mendoza-Martinez, as *amicus curiae,* in support of petitioner. Reported below: 235 F. 2d 364.

No. 415. NISHIKAWA *v.* DULLES, SECRETARY OF STATE. Certiorari, 352 U. S. 907, to the United States Court of Appeals for the Ninth Circuit. Argued May 1–2, 1957. This case is restored to the calendar for reargument. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Oscar H. Davis* and *Beatrice Rosenberg* for respondent. Reported below: 235 F. 2d 135.

No. 710. TROP *v.* DULLES, SECRETARY OF STATE, ET AL. Certiorari, 352 U. S. 1023, to the United States Court of Appeals for the Second Circuit. Argued May 2, 1957. This case is restored to the calendar for reargument. *Osmond K. Fraenkel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Oscar H. Davis* and *J. F. Bishop* for respondents. Reported below: 239 F. 2d 527.

No. 589. GREEN *v.* UNITED STATES. Certiorari, 352 U. S. 915, to the United States Court of Appeals for the District of Columbia Circuit. Argued April 25, 1957. This case is restored to the calendar for reargument. *George Blow, George Rublee, II,* and *Charles E. Ford* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Leonard B. Sand, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 98 U. S. App. D. C. 413, 236 F. 2d 708.

No. 816, Misc. HICKS *v.* HOLLAND, CIRCUIT COURT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

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No. 590. LAMBERT *v.* CALIFORNIA. Appeal from the Appellate Department of the Superior Court of California, Los Angeles County. (Probable jurisdiction noted, 352 U. S. 914.) *Warren M. Christopher, Esquire,* of Los Angeles, California, is invited to appear and present oral argument, as *amicus curiae,* in support of the appellant.

No. 873. ESKRIDGE *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Certiorari, 353 U. S. 922, to the Supreme Court of Washington. It is ordered that *Robert W. Graham, Esquire,* of Seattle, Washington, a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 149. SWANSON ET AL. *v.* TRAER ET AL. Certiorari, 352 U. S. 865, to the United States Court of Appeals for the Seventh Circuit. The motion to substitute B. J. Fallon, Jr., as Executor of the estate of Bernard J. Fallon, deceased, in the place and stead of Bernard J. Fallon, as a party respondent, is granted. *Avern B. Scolnik, Philip F. La Follette, William H. Bowman* and *James E. Doyle* for respondents-movants. Reported below: 230 F. 2d 228.

No. 1013. MASSENGALE *v.* UNITED STATES. Motion to dispense with printing of the petition for rehearing and the petition for rehearing granted. Upon further consideration of the petition for certiorari the Court adheres to its order of June 10, 1957, 354 U. S. 909, denying the petition for writ of certiorari.

No. 717, Misc. MCGOWEN *v.* TEXAS. The motion of petitioner to dismiss motion for leave to file petition for writ of error *coram nobis* is granted. *Preston Pope Reynolds* for petitioner.

No. 1014. GREEN ET AL. *v.* GREEN ET AL. The motion of petitioners to dispense with the printing of the petition for writ of certiorari and to incorporate prior record is granted. Motion for extension of time to file trial record denied. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *Arthur W. Sprague* for petitioners. *August F. Brandt* for respondents.

No. 812, Misc. BONDS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM;

No. 819, Misc. CORNELIOUS *v.* NEW YORK; and

No. 825, Misc. JORDAN *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See No. 972, ante, p. 517; No. 686, Misc., ante, p. 521; and Nos. 462, 742, 884 and No. 9, Misc., supra.*)

Certiorari Denied. (*See also Nos. 1013 and 1014, supra.*)

No. 837. LOCAL UNION NO. 698, RETAIL CLERKS' UNION (A. F. OF L.) *v.* ANDERSON ET AL., DOING BUSINESS AS WEST POINT MARKET. Supreme Court of Ohio. Certiorari denied. *Robert E. Shuff, S. G. Lippman* and *Joseph E. Finley* for petitioner. *Stanley Denlinger* and *C. C. Lipps* for respondents. Reported below: 165 Ohio St. 512, 137 N. E. 2d 752.

No. 1003. ATLANTA PRINTING PRESSMEN & ASSISTANTS UNION NO. 8, INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, AFL–CIO, *v.* PARKS, DOING BUSINESS AS AMERICAN BOX & PAPER CO. C. A. 5th Cir. Certiorari denied. *Herbert S. Thatcher* for petitioner. Reported below: 243 F. 2d 284.

No. 1009. RUSSELL *v.* TEXAS COMPANY ET AL. C. A. 9th Cir. Certiorari denied. *Harold Judson* for petitioner. *M. L. Countryman, Jr.* and *Cale Crowley* for the Northern Pacific Railway Co., respondent. Reported below: 238 F. 2d 636.

No. 1011. BERRYHILL *v.* PACIFIC FAR EAST LINE, INC. C. A. 9th Cir. Certiorari denied. *Jay A. Darwin* for petitioner. *John Hays* for respondent. Reported below: 238 F. 2d 385.

No. 1012. HILL ET AL. *v.* GREGORY. C. A. 7th Cir. Certiorari denied. *Tom L. Yates* and *Hugh M. Matchett* for petitioners. *L. Duncan Lloyd* for respondent. Reported below: 241 F. 2d 612.

No. 1019. 241 CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Bernard Weiss* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Morton K. Rothschild* for respondent. Reported below: 242 F. 2d 759.

No. 1022. FINK ET AL. *v.* CONTINENTAL FOUNDRY & MACHINE CO. ET AL. C. A. 7th Cir. Certiorari denied. *Samuel Morgan* for petitioners. *Harold A. Smith* and *Arthur D. Welton, Jr.* for respondents. Reported below: 240 F. 2d 369.

No. 1024. WEXLER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Samuel Barker* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *C. Guy Tadlock* for respondent. Reported below: 241 F. 2d 304.

No. 997. LUMBERMEN'S MUTUAL CASUALTY CO. *v.* WRIGHT ET AL. C. A. 5th Cir. Certiorari denied. *Albert E. Brault* for petitioner. Reported below: 242 F. 2d 1.

No. 1033. WALKER ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Melva M. Graney* for the United States. Reported below: 240 F. 2d 601.

No. 1066. REYNOLDS ET UX. *v.* LENTZ ET AL. C. A. 9th Cir. Certiorari denied. *Bailey E. Bell* for petitioners. *Edward V. Davis* for Lentz et ux., *Ralph E. Moody* for the Bank of Homer et al., and *J. Earl Cooper* for Anderson et al., respondents. Reported below: 243 F. 2d 589.

No. 1083. DANIELS, DOING BUSINESS AS HARRY C. DANIELS & CO., *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *David F. Root* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Robert L. Farrington, Neil Brooks* and *Donald A. Campbell* for the United States and the Secretary of Agriculture, respondents. Reported below: 242 F. 2d 39.

No. 1089. BARKEY IMPORTING CO. *v.* IRAVANI MOTTAGHI. C. A. 2d Cir. Certiorari denied. *Isidor J. Kresel* for petitioner. *Thomas F. Meehan* for respondent. Reported below: 244 F. 2d 238.

No. 580, Misc. SMITH *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *John J. O'Connell,* Attorney General of Washington, and *Michael R. Alfieri,* Assistant Attorney General, for respondent.

No. 1090. SCOTT *v.* SEGARRA-SERRA. C. A. 1st Cir. Certiorari denied. *Benicio F. Sanchez* and *Felix Ochoteco, Jr.* for petitioner. *Walter L. Newsom, Jr.* for respondent. Reported below: 242 F. 2d 315.

No. 598, Misc. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 239 F. 2d 698.

No. 608, Misc. NICHOLS *v.* MCGEE, DIRECTOR, CALIFORNIA STATE DEPARTMENT OF CORRECTIONS, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, and *Clarence A. Linn,* Assistant Attorney General, for respondents.

No. 679, Misc. SAUER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Loren Miller* for petitioner. *Solicitor General Rankin, Assistant Attorney General Olney, Robert S. Erdahl* and *Isabelle R. Cappello* for the United States. Reported below: 241 F. 2d 640.

No. 729, Misc. ALEXANDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 241 F. 2d 351.

No. 811, Misc. GRAY *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 815, Misc. CREECH *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 737, Misc. NIRENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. Reported below: 242 F. 2d 632.

No. 761, Misc. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 242 F. 2d 867.

No. 772, Misc. KAPLAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 241 F. 2d 521.

No. 821, Misc. STOKES *v.* NORTH CAROLINA. C. A. 2d Cir. Certiorari denied.

No. 827, Misc. ALBERT *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 519, Misc. DAVIS *v.* PEPERSACK, WARDEN. Petition for writ of certiorari to the Court of Appeals of Maryland denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. Reported below: 211 Md. 606, 125 A. 2d 841.

No. 802, Misc. STONEKING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 618. SPOKANE BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. *v.* AUDUBON HOMES, INC. Supreme Court of Washington. Certiorari denied. *Samuel B. Bassett* for petitioners. Reported below: 49 Wash. 2d 145, 298 P. 2d 1112.

No. 1005. EDWARDS *v.* VELVAC, INC., ET AL. C. A. 7th Cir. Certiorari denied. *J. Preston Swecker* and *William L. Mathis* for petitioner. *Ira Milton Jones* for respondents.

No. 1006. BARCLAY HOME PRODUCTS, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Smith W. Brookhart, Ralph E. Becker* and *Benjamin H. Dorsey* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, W. Louise Florencourt, Earl W. Kintner* and *Robert B. Dawkins* for respondent. Reported below: 100 U. S. App. D. C. —, 241 F. 2d 451.

No. 1010. WOODLAW ET AL., EXECUTORS, *v.* EARLE, FORMER COLLECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George W. Mead* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Louise Foster* for respondent. Reported below: 245 F. 2d 119.

No. 814, Misc. MATUSOW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Stanley Faulkner* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 244 F. 2d 532.

No. 818, Misc. HODGE *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 147 Cal. App. 2d 591, 305 P. 2d 957.

Rehearing Granted. (*See No. 1013, ante, p. 936.*)

Rehearing Denied.

Nos. 430 and 834. ACHILLI *v.* UNITED STATES, 353 U. S. 373;

No. 435. MULCAHEY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *v.* CATALANOTTE, 353 U. S. 692;

No. 866. SUN OIL CO. *v.* STATE MINERAL BOARD ET AL., 353 U. S. 962;

No. 889. TALLEY *v.* SEARS, ROEBUCK & CO., 353 U. S. 965;

No. 915. ATKINS *v.* UNITED STATES, 353 U. S. 974;

No. 960. GRAY ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., 353 U. S. 966;

No. 1017. SMOOT SAND & GRAVEL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE, 354 U. S. 922;

No. 591, Misc. SHERIDAN *v.* UNITED STATES, 353 U. S. 980;

No. 618, Misc. TOUHY *v.* ILLINOIS, 353 U. S. 962;

No. 725, Misc. FAUBERT *v.* GROAT ET AL., 353 U. S. 980; and

No. 765, Misc. SHEFFIELD *v.* LOUISIANA, 354 U. S. 915. Petitions for rehearing denied.

No. 64. LIBSON SHOPS, INC., *v.* KOEHLER, DISTRICT DIRECTOR OF INTERNAL REVENUE, 353 U. S. 382. Rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

No. 370. BALTIMORE & OHIO RAILWAY CO. *v.* JACKSON, 353 U. S. 325. Motion of the Association of American Railroads for leave to file brief, as *amicus curiae*, in support of the petition for rehearing granted. Rehearing denied.

No. 390, Misc. VICK *v.* MEMPHIS AND SHELBY COUNTY BAR ASSOCIATION, INC., 352 U. S. 975. Motion for leave to file second petition for rehearing denied.

JULY 8, 1957.

Order.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Claims pursuant to 28 U. S. C. § 294, is ordered entered on the minutes of this Court pursuant to 28 U. S. C. § 295.

Rehearing Denied.

No. 72. LEHMANN, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, *v.* UNITED STATES EX REL. CARSON OR CARASANITI, 353 U. S. 685;

No. 403. RABANG *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, 353 U. S. 427;

No. 619. JACKSON *v.* TAYLOR, ACTING WARDEN, 353 U. S. 569;

No. 620. FOWLER *v.* WILKINSON, WARDEN, 353 U. S. 583;

No. 820. SMITH *v.* UNITED STATES, 353 U. S. 983;

No. 922. LELLES *v.* UNITED STATES, 353 U. S. 974;

No. 939. MARKHAM ET AL. *v.* BURCHFIELD ET AL., 353 U. S. 988;

No. 677, Misc. LEBRON *v.* UNITED STATES, *ante*, p. 911;

No. 775, Misc. CEPERO *v.* PAN AMERICAN WORLD AIRWAYS ET AL., *ante*, p. 927; and

No. 795, Misc. LUCIANO *v.* WILKINSON, WARDEN, *ante*, p. 924. Petitions for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 445. LAKE TANKERS CORP. *v.* HENN, ADMINISTRATRIX, *ante*, p. 147. Rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

No. 603. VERHAAGEN ET AL. *v.* REEDER, CITY MANAGER OF NORFOLK, ET AL., 353 U. S. 974. Rehearing denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

JULY 11, 1957.

Rehearing Denied.

No. 79. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695, A. F. L., ET AL. *v.* VOGT, INC., *ante*, p. 284. Rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

No. 596. UNITED STATES *v.* KORPAN, *ante*, p. 271;
No. 674. UNITED STATES *v.* HUNT ET AL., *ante*, p. 932;
No. 675. UNITED STATES *v.* OLLHOFF ET AL., *ante*, p. 932;
No. 723. UNITED STATES *v.* MACK, *ante*, p. 932;
No. 724. UNITED STATES *v.* CALI, *ante*, p. 932;
No. 725. UNITED STATES *v.* EDWARDS, *ante*, p. 932;
No. 726. UNITED STATES *v.* HATCH, *ante*, p. 932; and
No. 727. UNITED STATES *v.* HARRIS ET AL., *ante*, p. 932.
Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1954, 1955, AND 1956

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1954	1955	1956	1954	1955	1956	1954	1955	1956	1954	1955	1956
Number of cases on dockets	11	15	14	843	1,020	1,160	712	821	878	1,566	1,856	2,052
Number disposed of during terms	0	4	3	721	865	900	640	768	798	1,361	1,637	1,701
Number remaining on dockets	11	11	11	122	155	260	72	53	80	205	219	351

	TERMS				TERMS		
	1954	1955	1956		1954	1955	1956
Distribution of cases disposed of during terms:				Distribution of cases remaining on dockets:			
Original cases	0	4	3	Original cases	11	11	11
Appellate cases on merits	189	222	236	Appellate cases on merits	67	79	136
Petitions for certiorari	532	643	664	Petitions for certiorari	55	76	124
Miscellaneous docket applications	640	768	798	Miscellaneous docket applications	72	53	80

JULY 12, 1957.

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