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UNITED STATES REPORTS

VOLUME 357

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1957

JUNE 9 THROUGH JUNE 30, 1958

(END OF TERM)

WALTER WYATT
REPORTER OF DECISIONS

UNITED STATES
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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.[1]
SHERMAN MINTON, Associate Justice.

WILLIAM P. ROGERS, Attorney General.
J. LEE RANKIN, Solicitor General.
JOHN T. FEY, Clerk.[2]
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

Notes on p. IV.

NOTES.

[1] MR. JUSTICE REED (retired) was designated and assigned to perform judicial duties in the United States Court of Claims for a limited period. See *post*, p. 901.

[2] Mr. John T. Fey, Clerk of the Court, resigned, effective at the close of business on August 14, 1958, and Mr. James R. Browning was appointed as his successor. See *post*, pp. VII, 915.

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 23, 1958, the Court temporarily assigned MR. JUSTICE FRANKFURTER to the Sixth Circuit as Circuit Justice from July 19 to September 1, 1958. (See *post*, p. 923.)

RESIGNATION OF THE CLERK OF THE COURT AND APPOINTMENT OF SUCCESSOR.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 16, 1958.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE BURTON, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN and MR. JUSTICE WHITTAKER.

THE CHIEF JUSTICE said:

"On behalf of the Court, I announce with regret the resignation of one of its trusted officers, Mr. John T. Fey, who for the past two years has served as Clerk of the Court. He has served faithfully and well. He leaves on August 14 to take an important and challenging position, the Presidency of the historic University of Vermont. We all wish for him many years of happiness in his new post.

"Mr. James R. Browning, who for many years held a responsible position in the Department of Justice, and now is an attorney in this city, will succeed Mr. Fey, and assume his duties on August 15, 1958."

For order of appointment of Mr. Browning, entered June 16, 1958, see *post*, p. 915.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1957.

NATIONAL LABOR RELATIONS BOARD *v.* DUVAL JEWELRY COMPANY OF MIAMI, INC., ET AL.

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

No. 234. Argued May 20, 1958.—Decided June 9, 1958.

In a proceeding under the National Labor Relations Act by a union to obtain a representation election among the employees of a retail store, subpoenas *duces tecum* were issued, directed to respondents, who moved before both the Board and the hearing officer to revoke them. The Board refused to entertain the motions on the ground that, under its rules and regulations, they required an initial ruling by the hearing officer. That officer denied the motions; the ruling was not appealed; respondents refused to comply with the subpoenas; and the Board instituted proceedings in the District Court to enforce them. The District Court quashed them, and the Court of Appeals sustained the District Court, on the ground that the Board alone could rule on motions to revoke subpoenas *duces tecum* in representation proceedings. *Held:* Though § 11 (1) of the Act gives a person served with a subpoena *duces tecum* the right to petition the Board to revoke it, there is no illegality in the Board's delegation of authority to the hearing officer to make a preliminary ruling on such a motion, since the Board reserves to itself the final decision. Therefore, the judgment is reversed and the cause is remanded for further proceedings. Pp. 2–8.

(a) *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking Co.,* 331 U. S. 111, distinguished. P. 7.

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(b) That special permission of the Board is required for an appeal is not important, since that is merely a method of ascertaining whether a substantial question is raised concerning the validity of the subordinate's ruling, and a decision by the Board that no substantial question is raised satisfies the requirements of § 11 (1). Pp. 7–8.

234 F. 2d 427, reversed and cause remanded.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard, Dominick L. Manoli* and *Duane Beeson.*

Theo Hamilton argued the cause and filed a brief for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This controversy grows out of an effort of a union to obtain a representation election [1] among the employees of respondent, Duval Jewelry Co., a retail store. The latter moved to dismiss on the ground that its interstate operations were inadequate to meet the jurisdictional

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[1] Section 9 (c) (1) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. § 159, provides in part:

"Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . . . .

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

tests of the Act. Five subpoenas *duces tecum* and one subpoena *ad testificandum* were issued.[2] The persons to whom the subpoenas were directed moved before both the Board and the hearing officer to revoke the sub-

[2] Section 11 (1) of the Act provides in part:

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application."

Section 102.58 (c) of the Board's Rules and Regulations, 29 CFR, 1958 Cum. Pocket Supp., § 102.58 (c), provides:

"Applications for subpenas may be filed in writing by any party, with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpenas requested. Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director or the hearing officer, as the case may be, shall make a simple statement

poenas.[3] The Board refused to entertain the motions to revoke on the grounds that those motions, under its Rules and Regulations,[4] require an initial ruling by the hearing officer. That officer after granting an opportunity for a hearing denied the motions to revoke. That ruling was not appealed; and respondents refused to comply with the subpoenas. Thereupon the Board instituted this proceeding in the District Court for enforcement of them.[5]

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of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure, copies or transcripts of the data or evidence submitted by them."

For the counterpart of this regulation in unfair labor practice cases see § 102.31.

The subpoenas in the instant case were issued by the regional director upon application of the Board's attorney assigned to the case. These subpoenas contained the seal of the Board and the facsimile signature of a Board member. See § 102.31 (a) of the Board's Rules and Regulations.

[3] Section 11 (1) of the Act contains the following provision respecting the revocation of subpoenas:

"Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required."

[4] See § 102.58 (c), *supra*, note 2.

[5] Section 11 (2) of the Act provides:

"In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides

The District Court quashed the subpoenas holding them unreasonable and oppressive. It also held they had been invalidly issued. 141 F. Supp. 860. The Court of Appeals reversed the District Court on the subpoena *ad testificandum;* and no question concerning it is before us. But it upheld the District Court as respects the subpoenas *duces tecum,* on the ground that the Board alone could rule on motions to revoke subpoenas *duces tecum* in representation proceedings. 243 F. 2d 427. The case is here on a writ of certiorari, 355 U. S. 809, which we granted because of a conflict among the Circuits. See, *e. g., Labor Board* v. *Lewis,* 249 F. 2d 832, 836–837; *Labor Board* v. *Gunaca,* 135 F. Supp. 790, aff'd 230 F. 2d 542.

There is a degree of delegation of authority in connection with a motion to revoke a subpoena *duces tecum.* The Board's Rules and Regulations provide that a motion to revoke is first heard by the regional director or by the hearing officer.[6] But the ruling of that subordinate official is not final. Machinery is provided in the Rules for an appeal from that ruling to the Board.[7]

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or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

[6] See § 102.58 (c), *supra,* note 2.

[7] Section 102.57 (c) provides:

"All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved, as provided in § 102.58 (c). Unless expressly authorized by the rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board *except by special permission of the Board,* but shall be considered by the Board when it reviews the entire record. *Requests to the Board for special permission to appeal* from such rulings of the

We are advised that in practice the aggrieved party asks the Board for leave to appeal, stating the grounds relied upon. The Board in deciding whether to grant the appeal considers the merits. If no substantial question has been raised, leave to appeal is denied. If a substantial question is presented, leave to appeal is granted. Sometimes when leave to appeal is granted, action is forthwith taken on the merits, the ruling of the hearing officer being reversed or modified.[8] Or where an immediate ruling by the Board on a motion to revoke is not required, the Board defers its ruling until the entire case is transferred to it in normal course.[9]

Section 11 (1) of the Act, as noted,[10] gives a person served with a subpoena *duces tecum* the right to "petition the Board to revoke"; and that section provides that

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regional director or the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party." (Italics added.)

The foregoing regulation applies in representation proceedings. For its counterpart in unfair labor practice cases see § 102.26.

[8] The Board has submitted the following statistics:

"An analysis of the Board's records for the three-year period May 1, 1955, through April 30, 1958, reveals that there were thirteen requests for permission to appeal specially from rulings by hearing officers and trial examiners on petitions to revoke subpenas; that five of these requests were granted by the Board; and that on four of these appeals the hearing officer or trial examiner was reversed and the subpenas revoked, and that on one appeal the hearing officer or trial examiner was sustained."

[9] See note 2, *supra*. In *Hertner Electric Co.*, 115 N. L. R. B. 820, 821–822; *Jamestown Sterling Corp.*, 106 N. L. R. B. 466, 469; *International Furniture Co.*, 106 N. L. R. B. 127, 128, n. 2; *Bell Aircraft Corp.*, 98 N. L. R. B. 1277, 1282, n. 4; *Burnup & Sims, Inc.*, 95 N. L. R. B. 1130, n. 1; *Morrison Turning Co.*, 83 N. L. R. B. 687, 688, the Board decided the cases on the merits and also reviewed the decisions of the hearing officer or trial examiner to either revoke or refuse to revoke a subpoena.

[10] See note 3, *supra*.

"the Board shall revoke . . . such subpena if in its opinion" the statutory requirements are not satisfied. The limited nature of the delegated authority distinguishes the case from *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking Co.,* 331 U. S. 111, where the person endowed with the power to issue subpoenas delegated the function to another. While there is delegation here, the ultimate decision on a motion to revoke is reserved to the Board, not to a subordinate. All that the Board has delegated is the preliminary ruling on the motion to revoke. It retains the final decision on the merits. One who is aggrieved by the ruling of the regional director or hearing officer can get the Board's ruling. The fact that special permission of the Board is required for the appeal [11] is not important. Motion for leave to appeal is the method of showing that a substantial question is raised concerning the validity of the subordinate's ruling. If the Board denies leave, it has decided that no substantial question is presented. We think that no more is required of it under the statutory system embodied in § 11. No matter how strict or stubborn the statutory requirement may be, the law does not "preclude practicable administrative procedure in obtaining the aid of assistants in the department." See *Morgan* v. *United States,* 298 U. S. 468, 481; *Eagles* v. *Samuels,* 329 U. S. 304, 315, 316. It is not of help to say that on some matters the Board has original jurisdiction, on others appellate jurisdiction. We are dealing with a matter on which the Board has the final say. As in the case of many other matters coming before hearing examiners, it merely delegates the right to make a preliminary ruling. Much of the work of the Board necessarily has to be done through agents. Section 5 of the Act provides that "The Board may, by one or more

[11] See note 7, *supra.*

of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States." As we have seen,[12] hearings on these representation cases "may be conducted by an officer or employee of the regional office." Certainly preliminary rulings on subpoena questions are as much in the purview of a hearing officer as his rulings on evidence and the myriad of questions daily presented to him. He does not, of course, have the final word. Ultimate decision on the merits of all the issues coming before him is left to the Board. That is true of motions to revoke subpoenas *duces tecum,* as well as other issues of law and fact. That degree of delegation seems to us wholly permissible under this statutory system. We need not go further and consider the legality of the more complete type of delegation to which most of the argument in the case has been directed.

The judgment is reversed and the cause is remanded to the Court of Appeals for proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE WHITTAKER, concurring.

I concur in the Court's decision, but desire briefly to state my reasons.

Although in a strict legal sense the Board has not delegated its duty under § 11 (1) to rule upon motions to revoke subpoenas *duces tecum,* but has, by § 102.58 (c) of its Rules and Regulations, merely given to its regional directors, hearing officers or examiners the task of making preliminary or interim rulings on such motions—recognizing, in § 102.57 (c) of its Rules and Regulations, its statutory duty finally to rule upon such motions either upon an immediate, though discretionary, interlocutory appeal *or* upon review of the completed record in the

[12] See § 9 (c) (1), *supra,* note 1.

course of its decision of the whole proceeding—yet, as a practical matter, neither such discretionary appeal nor review of the completed record affords any certainty of the protection specified by Congress, in § 11 (1), to be given by the Board against an improper or oppressive subpoena *duces tecum*. For, notwithstanding its duty under § 11 (1), the Board, under § 102.57 (c) of its Rules and Regulations, may refuse to allow such interlocutory appeal and, hence, refuse to rule upon the motion to revoke in advance of the time fixed by such subpoena for compliance. It is obvious that, after the illegal or oppressive subpoena has been enforced, the Board on its review of the completed record can no more relieve the consummated oppression than it can unring a bell. But, as the Court's opinion points out, Congress has provided, in § 11 (2), that the Board's subpoenas may be enforced *only* by a United States District Court, and thus an effective means exists to revoke an illegal or oppressive subpoena *duces tecum* before the damage has been done. For this practical reason I accept the legalisms of the Board's nondelegation argument and concur in the decision of the Court.

LEWIS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 684. Argued May 21, 1958.—Decided June 9, 1958.

In an unfair labor practice proceeding under the National Labor Relations Act, subpoenas *duces tecum* and *ad testificandum* directed to petitioners were issued by the Regional Director under the seal of the Board and the facsimile signature of a member, at the request of the Board's General Counsel. Petitioners moved that the Board revoke the subpoenas; the Board referred the motions to the trial examiner; he denied them; petitioners refused to comply; and the Board sued in the District Court for their enforcement. *Held:* The District Court should have ordered compliance with the subpoenas. Pp. 11–16.

1. The Board's action in referring the motions to the trial examiner was not illegal. Pp. 12–14.

(a) Under § 11 (1) of the Act, the Board's express authority to revoke subpoenas extends only to those "requiring the production of any evidence," not to those requiring the attendance and testimony of witnesses. P. 12.

(b) The Board did not act illegally in delegating to the trial examiner the power to make a preliminary ruling on the motions to revoke the subpoenas *duces tecum*, since the final decision was reserved to the Board. *Labor Board* v. *Duval Jewelry Co.*, *ante*, p. 1. Pp. 12–13.

(c) The Board's power under § 6 of the Act "to make . . . such rules and regulations as may be necessary to carry out the provisions of this Act" includes the power to make the revocation procedure applicable to subpoenas *ad testificandum*. P. 14.

2. Since the issuance of subpoenas by "The Board, or any member thereof" upon application of any party is mandatory under § 11 (1), it involves no exercise of discretion but is a mere ministerial act which the Board may lawfully delegate to its agents. Pp. 14–15.

3. The General Counsel of the Board is a "party" in an unfair labor practice proceeding, within the meaning of § 11 (1), and subpoenas may lawfully be issued upon his request. Pp. 15–16.

249 F. 2d 832, affirmed.

Ray L. Johnson, Jr. argued the cause for petitioners. With him on a brief was *William M. Farrer* for Lewis et al., petitioners.

Norton J. Come argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Duane Beeson.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to *Labor Board* v. *Duval Jewelry Co., ante,* p. 1, decided this day. While the latter was a representation proceeding under the National Labor Relations Act, the present case is an unfair labor practice proceeding. It was commenced on the issuance of a complaint charging violations of § 8 of the Act, 61 Stat. 136, 140, 29 U. S. C. § 158, both by petitioner-employer and by petitioner-union. Subpoenas *duces tecum* and *ad testificandum* were issued by the Regional Director under the seal of the Board and the facsimile signature of a member. On the day of the hearing petitioners all moved that the subpoenas be revoked. One ground was that they had not been properly issued. Another was that they were issued at the request of the General Counsel of the Board who, it was alleged, was not a "party" to the proceeding within the meaning of the Act.[1] The motions, which were addressed to the Board,

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[1] Section 11 (1) of the Act provides:

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon

were referred to the trial examiner over objection of petitioners. He denied them. Petitioners refused to appear in response to the subpoenas; and the hearing was continued until they could be enforced. Thereafter the present suit was instituted in the District Court for their enforcement. The District Court denied enforcement on the authority of *Labor Board* v. *Pesante,* 119 F. Supp. 444. The Court of Appeals reversed. 249 F. 2d 832. The case is here on a writ of certiorari. 355 U. S. 929.

1. *Delegation of authority over the revocation of subpoenas.*—The express authority of the Board to revoke extends only to subpoenas "requiring the production of any evidence," not to subpoenas requiring the attendance and testimony of witnesses.[2] So the argument that Congress has disallowed delegation extends only to the subpoenas *duces tecum.* What we have said in *Labor Board* v. *Duval Jewelry Co., supra,* disposes of the argument that the Board has no authority to delegate to a trial examiner the power to rule on motions to revoke those

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application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

[2] See § 11 (1), *supra,* note 1.

subpoenas [3] reserving to itself the final decision in the matter.[4] The provisions of those Rules being substantially the same in this type of case as in the representation cases, the results in the two cases should be the same. We

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[3] Section 102.31 (b) of the Board's Rules and Regulations, 29 CFR, 1958 Cum. Pocket Supp., provides:

"Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena upon him, petition in writing to revoke the subpena. All petitions to revoke subpenas shall be served upon the party at whose request the subpena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The trial examiner or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the official record except upon the request of the party aggrieved by the ruling."

[4] Section 102.26 of the Rules provides:

"All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in § 102.31. Unless expressly authorized by the rules and regulations, rulings by the regional director and by the trial examiner on motions, by the trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Board, pursuant to § 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director

therefore find it unnecessary to consider the argument pressed on us that § 7 (b) of the Administrative Procedure Act,[5] 60 Stat. 237, 241, 5 U. S. C. § 1006, grants a power withheld by the National Labor Relations Act. The power to make the revocation procedure applicable to subpoenas *ad testificandum* seems clear from the authority of the Board contained in § 6 of the Act "to make . . . such rules and regulations as may be necessary to carry out the provisions of this Act."

2. *Issuance of subpoenas by the Regional Director.*— The Act makes clear[6] that the issuance of subpoenas is mandatory. "The Board, or any member thereof, shall upon application of any party . . . forthwith issue . . . subpenas . . . ." The only function remaining is min-

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or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party."

[5] Section 7 (b) provides:

"In hearings which section 4 or 5 requires to be conducted pursuant to this section—

. . . . . .

"Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act."

It should be noted that representation proceedings such as were involved in *Labor Board* v. *Duval Jewelry Co., supra,* are excepted from some of the requirements of the Administrative Procedure Act. See § 4.

[6] See § 11 (1), *supra,* note 1.

isterial.[7] Consequently the Board supplies blank subpoenas bearing its seal and the facsimile signature of a Board member to its regional offices and trial examiners. Upon application of a proper party the subordinate official automatically issues the subpoena to the applicant. There is here involved no delegation of any act entailing the exercise of discretion, as in *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357. The agents issuing the subpoenas perform ministerial acts only. We cannot read the Act to mean that these burdensome details should be performed by Board members in faraway Washington, D. C. The command of the Act is to issue the subpoena "forthwith" on "application of any party." Identification of the party hardly rises to the dignity of the discretionary act which is confided solely to the agency heads. This has been the consistent view of the law in the lower courts; [8] and we think it is the correct one.

3. *The General Counsel of the Board as a "party."*— The Act does not define the term "party"; but it does make clear that the role of the General Counsel is a major one. By § 3 (d) of the Act he is given "final authority"

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[7] Section 11 (1) was rewritten by the Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. § 151 *et seq.* Senator Taft said concerning it, 93 Cong. Rec. 6445:

"Section 11 authorizes the Board to conduct hearings and investigations and to subpena witnesses. This section was not changed in the Senate amendment and was modified by the conferees in *only one respect.* The Board is required upon application of any party to issue a subpena as a matter of course. A procedure is established whereby the person subpenaed may move to quash the subpena if the evidence requested thereby does not relate to any matter under investigation or does not describe with sufficient particularity the evidence required." (Italics added.)

[8] See *Labor Board* v. *John S. Barnes Corp.,* 178 F. 2d 156; *Edwards* v. *Labor Board,* 189 F. 2d 970; *Jackson Packing Co.* v. *Labor Board,* 204 F. 2d 842; *Labor Board* v. *Gunaca,* 135 F. Supp. 790, aff'd 230 F. 2d 542.

respecting the investigation of charges, the issuance of complaints, and the prosecution of complaints before the Board.[9] The General Counsel is, indeed, indispensable to the prosecution of the case. He vindicates the public interest, performing functions previously performed by the Board itself.[10] See *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 352. Plainly the issuance of subpoenas may often be essential to the performance of that role. To relegate him to a lesser role than that of a "party" is to overlook the critical role he performs in enforcement of the Act.

Affirmed.

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[9] Section 3 (d) reads as follows:

"There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

[10] Section 3 (d) of the Act effected an important change over the earlier Wagner Act. It was designed to separate the prosecuting from the adjudicating function, to place the former in the General Counsel, and to make him an independent official appointed by the President and confirmed by the Senate for a term of years. See H. R. Rep. No. 245, 80th Cong., 1st Sess. 26; H. R. Rep. No. 510, 80th Cong., 1st Sess. 37; statement of Senator Taft, 93 Cong. Rec. 6859.

UNITED STATES *v.* DOW.

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

No. 102. Argued March 5, 1958.—Decided June 9, 1958.

In condemnation proceedings, the Government obtained a judgment of "immediate possession" of a pipe-line right-of-way across a tract of land, and it entered into physical possession in 1943 and laid the pipe line through the tract. In 1945, the owners conveyed the tract of land to respondent by a deed which was construed by the trial court as intended to convey "all their right, title and interest" in the tract "or in the award to be made for the same." In 1946, the Government, acting under the Declaration of Taking Act, filed a declaration covering the pipe-line right-of-way, deposited compensation in court and obtained a judgment on the declaration of taking. *Held:* The "taking" occurred in 1943 when the Government entered into physical possession of the land; the assignment of the claim for compensation was invalid under the Assignment of Claims Act; and the respondent was not entitled to receive the compensation award. Pp. 18–27.

(a) In view of the trial court's express finding that the grantors intended to convey their right to the compensation award, the transfer of the claim was a voluntary assignment, rather than an assignment taking effect by operation of law, and, therefore, it was prohibited by the Assignment of Claims Act. P. 20.

(b) Since compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, is entitled to receive the compensation award. Pp. 20–21.

(c) When the Government enters into possession of property prior to the acquisition of title, it is the former event which constitutes the act of taking and gives rise to the claim for compensation. Pp. 21–22.

(d) A different result is not required by the fact that, after the conveyance, the Government filed a declaration of taking and obtained title under the Declaration of Taking Act. Pp. 22–26.

(e) In cases like this, the total compensation should not be divided between the first and second owners of the property, the former taking that portion of the award attributable to the Government's use of the property until the passage of title, and the latter receiving the balance. Pp. 26–27.

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(f) Equitable considerations do not require that respondent receive part or all of the compensation award in the circumstances of this case. P. 27.

238 F. 2d 898, reversed.

Assistant Attorney General Morton argued the cause for the United States. With him on the brief were *Solicitor General Rankin* and *Roger P. Marquis.*

L. Keith Simmer argued the cause for respondent. With him on the brief were *John C. White* and *Milton K. Eckert.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The issue in this case arises out of a condemnation proceeding in which the United States acquired an easement pursuant to its power of eminent domain. The principal question presented is whether the claim to "just compensation" vested in the owners of the land at the time the United States entered into possession of the easement pursuant to court order in 1943 or whether such claim vested in the respondent, Dow, who acquired the land in 1945, at the time the United States filed a declaration of taking in 1946, under the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. §§ 258a–258e.

In March 1943 the United States instituted a condemnation proceeding in the District Court for the Southern District of Texas to acquire a right-of-way for a pipe line over certain lands in Harris County, Texas, owned by the estate and heirs of John F. Garrett and James Bute. Among the lands condemned was Parcel 1, a narrow strip of some 2.7 acres out of a 617-acre tract, the property involved in the present suit. The Government proceeded under various statutes, including the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. § 257, and Title II of the Second War Powers Act of

March 27, 1942, 56 Stat. 176, 177. As requested in the petition, the District Court ordered the United States into the "immediate possession" of this strip. Within the next ten days the United States entered into physical possession and began laying the pipe line through the tract. The line was completed in 1943 and has been in continuous use since that time.

In November 1945 the 617-acre tract was conveyed to Dow by a general warranty deed which specifically excepted the pipe-line right-of-way as being subject to the condemnation proceedings. In May 1946 the Government filed a declaration of taking, under the Declaration of Taking Act, covering this pipe-line strip. Estimated compensation was deposited in court and judgment on the declaration of taking was entered. A few months later the Government amended its petition to name additional parties, including Dow, who were alleged to be asserting an interest in the land. The question of compensation was referred to commissioners under the Texas practice, which at that time was applicable to federal condemnation proceedings. See *United States* v. *Miller,* 317 U. S. 369, 379–380. After a hearing, at which Dow appeared, the commissioners, in 1948, awarded $4,450 for imposition of the pipe-line easement.

After a lengthy unexplained delay in the proceedings, the Government in May 1955 filed a motion for summary judgment against Dow. In March 1956 the District Court granted this motion and dismissed Dow as a party. The District Court found as a fact that Dow's grantors had intended to convey to him "all their right, title and interest in the said Parcel No. 1 or in the award to be made for the same." It then went on to rule that under the Assignment of Claims Act, 31 U. S. C. § 203, this was a prohibited assignment of a claim against the United States, and that the deed was therefore ineffective to convey to Dow the compensation award. The Court

of Appeals reversed, holding that no assignment was involved because no claim to compensation against the United States "arose and vested" until the filing of the declaration of taking in 1946, and that, because Dow by that time had become owner of the land, he was entitled to the award. 238 F. 2d 898. Because the question presented bears importantly on rights resulting from federal condemnation proceedings, we granted the Government's petition for certiorari. 353 U. S. 972.

It is well established, as the Court of Appeals recognized, that the Assignment of Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property. *United States* v. *Shannon,* 342 U. S. 288. In view of the express finding of the District Court that Dow's grantors intended to convey to him their right to the condemnation award, we think that the transfer of the claim in this case must be considered to have been such a voluntary assignment, rather than, as Dow argues, an assignment taking effect by operation of law, and thus not within the Act's prohibition. Cf. *United States* v. *Aetna Casualty & Surety Co.,* 338 U. S. 366, 373–376; see *23 Tracts of Land* v. *United States,* 177 F. 2d 967, 970. We would not be justified in relaxing the rigor of the Act, especially in view of the fact that under its very terms the way was left open for the parties to accomplish a transfer of the award by valid means.* Accordingly, Dow can prevail only if the "taking" occurred while he was the owner. For it is undisputed that "[since] compensation is due at the time of taking, the owner at that time, not the owner at an

*The Assignment of Claims Act provides that assignments of claims which it would otherwise nullify are nevertheless valid if "they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. . . ."

earlier or later date, receives the payment." *Danforth* v. *United States,* 308 U. S. 271, 284; cf. *United States* v. *Dickinson,* 331 U. S. 745. We hold, contrary to the Court of Appeals, that the "taking" did not occur in 1946 when the Government filed its declaration of taking, but rather when the United States entered into possession of the land in 1943. It follows that the landowners in 1943 were entitled to receive the compensation award and that Dow is not entitled to recover in this action.

Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act, 28 U. S. C. §§ 1346 (a)(2) and 1491, to recover just compensation. See *Hurley* v. *Kincaid,* 285 U. S. 95, 104. Under the second procedure the Government may either employ statutes which require it to pay over the judicially determined compensation before it can enter upon the land, Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. § 257; Act of August 18, 1890, 26 Stat. 316, 50 U. S. C. § 171, or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained. Act of July 18, 1918, 40 Stat. 904, 911, 33 U. S. C. § 594; Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177 (employed by the Government in the present case).

Although in both classes of "taking" cases—condemnation and physical seizure—title to the property passes to the Government only when the owner receives compensation, see *Albert Hanson Lumber Co.* v. *United States,* 261 U. S. 581, 587, or when the compensation is deposited

into court pursuant to the Taking Act, see *infra,* the passage of title does not necessarily determine the date of "taking." The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking. It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues. See *United States* v. *Lynah,* 188 U. S. 445, 470–471; *United States* v. *Rogers,* 255 U. S. 163; *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299. The owner at the time the Government takes possession "rather than the owner at an earlier or later date, is the one who has the claim and is to receive payment." *23 Tracts of Land* v. *United States, supra,* at 970.

Had the Government not subsequently filed a declaration of taking in this case, there is no reason to believe that these ordinary rules would not have been applicable; the owners of the parcel when the Government entered into possession in 1943 would then have been entitled to compensation. No suggestion to the contrary has been made by Dow. Instead, Dow contends that although there was an entry into possession in 1943 which was an appropriation of the property sufficient to amount to a "taking," the subsequent filing of a declaration of taking vitiated the effect of the earlier entry, and rendered the filing date the time of the taking. We think that this contention is founded on a mistaken view of the Declaration of Taking Act and must be rejected.

Section 1 of the Declaration of Taking Act provides: "Upon the filing said declaration of taking [prior to judgment in a condemnation proceeding] and of the deposit in the court . . . of the estimated compensation . . . title . . . shall vest in the United States . . . and said lands shall be deemed to be condemned and taken for the

use of the United States, and the right to just compensation . . . shall vest in the persons entitled thereto . . . ." Although it has been recognized that the "exact effect of these provisions is not entirely clear," *Catlin* v. *United States,* 324 U. S. 229, 240, past cases in this Court have established certain unchallenged principles pertinent to the present controversy. The Taking Act does not bestow independent authority to condemn lands for public use. On the contrary, it provides a proceeding "ancillary or incidental to suits brought under other statutes," *Catlin* v. *United States, supra,* at 240. Such a proceeding can be instituted either at the commencement of the condemnation suit under the "other statutes" or, as in this case, after such a suit has been commenced and either before or after the Government has taken possession. In both situations the Taking Act enables the United States to acquire title simply by depositing funds "for or on account" of the just compensation to be awarded the owners, rather than by making payment pursuant to a court order. In those cases where the Government has not yet entered into possession, the filing of the declaration enables it to enter immediately and relieves it of the burden of interest from the time of filing to the date of judgment in the eminent domain proceedings. See *United States* v. *Miller, supra,* at 380–381.

The scheme of the Taking Act makes it plain that when the Government files a declaration before it has entered into possession of the property the filing constitutes the "taking." But neither the language nor the history of the Act provides a reliable indication as to the intention of Congress in cases, such as the one before us, where a declaration is filed *after* the Government has taken possession. Nevertheless, a number of considerations have led us to the view that in such cases the date of "taking" is the date on which the Government entered and appropriated the property to public use.

In the first place, to adopt the solution urged by Dow would be to undermine policies determining the other incidents of the Government's obligation to provide just compensation. As already noted, in cases where there has been an entry into possession before the filing of a declaration of taking, such entry has been considered the time of "taking" for purposes of valuing the property and fixing the date on which the Government's obligation to pay interest begins to run. To rule that the date of "taking" is the time of filing would confront us with a Hobson's choice. On the one hand, it would certainly be bizarre to hold that there were two different "takings" of the same property, with some incidents of the taking determined as of one date and some as of the other. On the other hand, to rule that for all purposes the time of taking is the time of filing would open the door to anomalous results. For example, if the value of the property changed between the time the Government took possession and the time of filing, payment as of the latter date would not be an accurate reflection of the value of what the property owner gave up and the Government acquired. In the graphic language of Chief Justice Shaw: "If a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other." *Parks* v. *Boston,* 15 Pick. (Mass.) 198, 208. See also *Anderson* v. *United States,* 179 F. 2d 281. Similarly, because interest for delay in payment would not begin to accrue until payment of compensation is due, the Government would be absolved of interest until it chose to file a declaration of taking, even though it had already been in possession, to the exclusion of the property owner, for some time. Cf. *Seaboard Air Line R. Co.* v. *United States, supra.*

There is another reason why we cannot regard the time of filing as the time of the "taking" in cases where the Government has already entered into possession. Because of the uncertainty when, if ever, a declaration would be filed after the Government's entry, manipulations might be encouraged which could operate to the disadvantage of either the landowner or the United States. The Government tells us that the declaration of taking procedure may be invoked "solely in the discretion of the administrative officer." It would thus lie within the power of such an officer to reduce the "just" compensation due the property owner by staying his hand until a market situation favorable to the Government had developed. Conversely, landowners might be in a position to increase unduly the Government's liability. For instance, if a single tract of land were worth more than the sum of its component parcels, cf. *United States* v. *Runner,* 174 F. 2d 651, owners of adjacent condemned properties could consolidate their holdings after the Government's entry solely for the purpose of obtaining a larger award.

We cannot attribute to Congress the intention to promulgate a rule which would open the door to such obvious incongruities and undesirable possibilities.

We are not persuaded by any of the countervailing considerations put forward by Dow. It is claimed that much needed certainty would ensue in condemnation matters were the Court to hold that the Government's filing under the Taking Act invariably established the date of the "taking" of this property. But certainty is not lacking under the rule advocated by the Government, which fixes the "taking" at the time of the entry into physical possession—a fact readily ascertainable whether or not the Government makes use of condemnation proceedings, and whether or not it ever files a declaration of taking.

It is also argued that a property owner might be prejudiced under the Government's view because the project could be abandoned and the condemnation proceedings discontinued before title passed to the Government. But the possibility of such an abandonment exists whenever the Government enters into possession of property without filing a declaration of taking and without otherwise providing compensation for acquisition of the title. In any event, such an abandonment does not prejudice the property owner. It merely results in an alteration in the property interest taken—from full ownership to one of temporary use and occupation. *O'Connor* v. *United States,* 155 F. 2d 425; *Moody* v. *Wickard,* 78 U. S. App. D. C. 80, 136 F. 2d 801; cf. *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U. S. 641, 660. In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily. See *Kimball Laundry Co.* v. *United States,* 338 U. S. 1; *United States* v. *Petty Motor Co.,* 327 U. S. 372; *United States* v. *General Motors Corp.,* 323 U. S. 373.

Nor can we accept the suggestion that in cases like the present one the total compensation should be divided between the first and second owners of the property, the former taking that portion of the award attributable to the Government's use of the property until the passage of title, and the latter receiving the balance. Cf. *United States* v. *40,379 Square Feet of Land,* 58 F. Supp. 246. To require the Government to deal with more than one party, particularly when division of the condemnation award would entail a complex apportionment, might severely impede the orderly progress of condemnation proceedings and would conflict with the policies underlying the Anti-Assignment Act. See *Hobbs* v. *McLean,* 117 U. S. 567, 576; *United States* v. *Aetna Casualty & Surety Co., supra.*

Dow relies on *Danforth* v. *United States, supra,* and *United States* v. *Dickinson, supra,* but neither case is in point on the issue before us. In *Danforth* the Court rejected the landowner's claim for interest on the ground, *inter alia,* that the construction of a set-back levee near his land did not amount to a "taking" because the Government by such action had not yet appropriated the property to its use. The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use. In the present case there is no dispute over the fact that the United States appropriated Parcel 1 on the date that it entered into physical possession under order of the District Court.

Finally, we see no merit in the suggestion that it is inequitable to deny Dow recovery in this action. Dow took his deed with full notice of the condemnation proceeding brought by the United States. There were readily available contractual means by which he could have protected himself *vis-à-vis* his grantors against the contingency that his claim against the United States would be subsequently invalidated by the Anti-Assignment Act. And whatever may be the equities between the former owners and Dow, or between the Government and the former owners, whose claim to compensation Dow asserts may be barred by the statute of limitations, such equities cannot serve to prevent the application of the correct rule of law as between the Government and Dow in this case. Cf. *McKenzie* v. *Irving Trust Co.,* 323 U. S. 365, 369.

Reversed.

THE COLONY, INC., *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 306. Argued April 3, 1958.—Decided June 9, 1958.

Under the Internal Revenue Code of 1939, the Commissioner assessed deficiencies in a taxpayer's income taxes within an extended period provided in waivers executed by the taxpayer more than three but less than five years after the returns were filed. There was no claim that the returns were fraudulent or that the taxpayer had inaccurately reported its gross receipts. Instead, the deficiencies were based upon the Commissioner's determination that the taxpayer had understated the gross profits on sales of certain lots of land for residential purposes as a result of having erroneously included in their cost certain unallowable items of development expense. This resulted in an understatement of the taxpayer's gross income by more than 25% of the amount reported. *Held:* The five-year period of limitations prescribed in § 275 (c) for cases in which the taxpayer "omits from gross income an amount properly includible therein" which exceeds 25% of the gross income reported is not applicable, and the assessment was barred by the three-year limitation of § 275 (a). Pp. 29–38.

(a) In § 275 (c), the words "omits from gross income an amount properly includible therein" refers to situations in which specific items of income are *left out* of the computation of gross income, and they do not apply to errors in the computation of gross income resulting from a mistaken overstatement of the cost of property sold. Pp. 32–33.

(b) The legislative history of § 275 (c) supports this conclusion. Pp. 33–35.

(c) In enacting § 275 (c), Congress was not concerned with the mere size of an error in reporting gross income but with a restricted type of situation where the taxpayer's failure to report some items of taxable income put the Commissioner at a special disadvantage in detecting errors. Pp. 36–38.

244 F. 2d 75, reversed.

A. Robert Doll argued the cause for petitioner. With him on the brief were *B. H. Barnett* and *Richard C. Oldham.*

Joseph F. Goetten argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Grant W. Wiprud.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The sole question in this case is whether assessments by the Commissioner of two asserted tax deficiencies were barred by the three-year statute of limitations provided in the Internal Revenue Code of 1939.

Under the 1939 Code the general statute of limitations governing the assessment of federal income tax deficiencies is fixed at three years from the date on which the taxpayer filed his return, § 275 (a), 53 Stat. 86, except in cases involving a fraudulent return or failure to file a return, where a tax may be assessed at any time. § 276 (a), 53 Stat. 87. A special five-year period of limitations is provided when a taxpayer, even though acting in good faith, "omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return . . . ." § 275 (c), 53 Stat. 86. In either case the period of limitation may be extended by a written waiver executed by the taxpayer within the statutory or any extended period of limitation. § 276 (b), 53 Stat. 87.[1]

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[1] The pertinent provisions of the 1939 Code are:

"SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

"Except as provided in section 276—

"(a) GENERAL RULE.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection

The Commissioner assessed deficiencies in the taxpayer's income taxes for each of the fiscal years ending October 31, 1946, and 1947, within the extended period provided in waivers which were executed by the taxpayer more than three but less than five years after the returns were filed. There was no claim that the taxpayer had inaccurately reported its gross receipts. Instead, the deficiencies were based upon the Commissioner's determination that the taxpayer had understated the gross profits on the sales of certain lots of land for residential purposes as a result of having overstated the "basis" of such lots by erroneously including in their cost certain unallowable items of development expense. There was no claim that the returns were fraudulent.

The Tax Court sustained the Commissioner. It held that substantial portions of the development costs were properly disallowed, and that these errors by the taxpayer

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of such taxes shall be begun after the expiration of such period.

. . . . .

"(c) OMISSION FROM GROSS INCOME.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

. . . . .

"SEC. 276. SAME—EXCEPTIONS.

"(a) FALSE RETURN OR NO RETURN.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

"(b) WAIVER.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

had resulted in the understatement of the taxpayer's total gross income by 77.2% and 30.7%, respectively, of the amounts reported for the taxable years 1946 and 1947. In addition, the Tax Court held that in these circumstances the five-year period of limitation provided for in § 275 (c) was applicable. It took the view that the statutory language, "omits from gross income an amount properly includible therein," embraced not merely the omission from a return of an item of income received by or accruing to a taxpayer, but also an understatement of gross income resulting from a taxpayer's miscalculation of profits through the erroneous inclusion of an excessive item of cost. 26 T. C. 30. On the taxpayer's appeal to the Court of Appeals the only question raised was whether the three-year or the five-year statute of limitations governed the assessment of these deficiencies. Adhering to its earlier decision in *Reis* v. *Commissioner,* 142 F. 2d 900, the Court of Appeals affirmed. 244 F. 2d 75. We granted certiorari because this decision conflicted with rulings in other Courts of Appeals on the same issue,[2] and

[2] In conflict with this case are decisions in four different Courts of Appeals. *Uptegrove Lumber Co.* v. *Commissioner,* 204 F. 2d 570 (C. A. 3d Cir.); *Deakman-Wells Co.* v. *Commissioner,* 213 F. 2d 894 (C. A. 3d Cir.); *Slaff* v. *Commissioner,* 220 F. 2d 65 (C. A. 9th Cir.); *Davis* v. *Hightower,* 230 F. 2d 549 (C. A. 5th Cir.); *Goodenow* v. *Commissioner,* 238 F. 2d 20 (C. A. 8th Cir.). The Court of Claims has also held to the contrary of the present case. *Lazarus* v. *Commissioner,* 136 Ct. Cl. 283, 142 F. Supp. 897.

Three Courts of Appeals decisions antedating *Uptegrove Lumber Co.* v. *Commissioner, supra,* provided support for the Government's construction of § 275 (c). *Foster's Estate* v. *Commissioner,* 131 F. 2d 405 (C. A. 5th Cir.); *Ketcham* v. *Commissioner,* 142 F. 2d 996 (C. A. 2d Cir.); *O'Bryan* v. *Commissioner,* 148 F. 2d 456 (C. A. 9th Cir.). But neither *Foster's Estate* nor *O'Bryan* can be regarded as the controlling authority within their respective circuits in view of the more recent decisions in *Davis* v. *Hightower, supra,* and *Slaff* v. *Commissioner, supra. Ketcham* is distinguishable on its facts.

The Sixth Circuit has consistently maintained its current posi-

because the question as to the proper scope of § 275 (c), although resolved for the future by § 6501 (e)(1)(A) of the Internal Revenue Code of 1954, p. 37, *infra,* remains one of substantial importance in the administration of the income tax laws for earlier taxable years. 355 U. S. 811.

In determining the correct interpretation of § 275 (c) we start with the critical statutory language, "omits from gross income an amount properly includible therein." The Commissioner states that the draftsman's use of the word "amount" (instead of, for example, "item") suggests a concentration on the quantitative aspect of the error—that is, whether or not gross income was understated by as much as 25%. This view is somewhat reinforced if, in reading the above-quoted phrase, one touches lightly on the word "omits" and bears down hard on the words "gross income," for where a cost item is overstated, as in the case before us, gross income is affected to the same degree as when a gross-receipt item of the same amount is completely omitted from a tax return.

On the other hand, the taxpayer contends that the Commissioner's reading fails to take full account of the word "omits," which Congress selected when it could have chosen another verb such as "reduces" or "understates," either of which would have pointed significantly in the Commissioner's direction. The taxpayer also points out that normally "statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them." *DeGanay* v. *Lederer,* 250 U. S. 376, 381. "Omit" is defined in Webster's New International Dictionary (2d ed. 1939) as "To leave out or unmentioned; not to insert, include, or name,"

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tion. The Tax Court has also regularly upheld the Commissioner. *E. g., American Liberty Oil Co.* v. *Commissioner,* 1 T. C. 386; *Estate of Gibbs* v. *Commissioner,* 21 T. C. 443.

and the Court of Appeals for the Sixth Circuit has elsewhere similarly defined the word. *Ewald* v. *Commissioner,* 141 F. 2d 750, 753. Relying on this definition, the taxpayer says that the statute is limited to situations in which specific receipts or accruals of income items are *left out* of the computation of gross income. For reasons stated below we agree with the taxpayer's position.

Although we are inclined to think that the statute on its face lends itself more plausibly to the taxpayer's interpretation, it cannot be said that the language is unambiguous. In these circumstances we turn to the legislative history of § 275 (c). We find in that history persuasive evidence that Congress was addressing itself to the specific situation where a taxpayer actually omitted some income receipt or accrual in his computation of gross income, and not more generally to errors in that computation arising from other causes.

Section 275 (c) first appeared in the Revenue Act of 1934. 48 Stat. 680. As introduced in the House the bill simply added the gross-income provision to § 276 of the Revenue Act of 1932, 47 Stat. 169, relating to fraudulent returns and cases where no return had been filed, and carried with it no period of limitations. The intended coverage of the proposed provision was stated in a Report of a House Ways and Means Subcommittee as follows:

> "Section 276 provides for the assessment of the tax without regard to the statute of limitations in case of a failure to file a return or in case of a false or fraudulent return with intent to evade tax.
>
> "Your subcommittee is of the opinion that the limitation period on assessment should also not apply to certain cases where the taxpayer has understated his gross income on his return by a large amount, even though fraud with intent to evade tax cannot be established. It is, therefore, recommended that

> the statute of limitations shall not apply where the taxpayer has failed to disclose in his return an amount of gross income in excess of 25 percent of the amount of the gross income stated in the return. The Government should not be penalized when a taxpayer is so negligent as to leave out items of such magnitude from his return." Hearings before the House Committee on Ways and Means, 73d Cong., 2d Sess. 139.

This purpose of the proposal was related to the full Committee in the following colloquy between Congressman Cooper of Tennessee, speaking for the Subcommittee, and Mr. Roswell Magill, representing the Treasury:

> "Mr. COOPER. What we really had in mind was just this kind of a situation: Assume that a taxpayer left out, say, a million dollars; he just forgot it. We felt that whenever we found that he did that we ought to get the money on it, the tax on it.
>
> "Mr. MAGILL. I will not argue against you on that score.
>
> "Mr. COOPER. In other words, if a man is so negligent and so forgetful, or whatever the reason is, that he overlooks an item amounting to as much as 25 percent of his gross income, that we simply ought to have the opportunity of getting the tax on that amount of money." House Hearings, *supra,* at 149.

The full Committee revealed the same attitude in its report:

> "It is not believed that taxpayers who are so negligent as to leave out of their returns items of such magnitude should be accorded the privilege of pleading the bar of the statute." H. R. Rep. No. 704, 73d Cong., 2d Sess. 35.

The Senate Finance Committee approved of the intended coverage and language of the bill, except that it believed the statute of limitations should not be kept open indefinitely in the case of an honest but negligent taxpayer. Its report stated:

> ". . . Your committee is in general accord with the policy expressed in this section of the House bill. However, it is believed that in the case of a taxpayer who makes an honest mistake, it would be unfair to keep the statute open indefinitely. For instance, a case might arise where a taxpayer failed to report a dividend because he was erroneously advised by the officers of the corporation that it was paid out of capital or he might report as income for one year an item of income which properly belonged in another year. Accordingly, your committee has provided for a 5-year statute in such cases." S. Rep. No. 558, 73d Cong., 2d Sess. 43–44.

Except for embodying the five-year period of limitation, § 275 (c), as passed, reflects no change in the original basic objective underlying its enactment.

As rebutting these persuasive indications that Congress merely had in mind failures to report particular income receipts and accruals, and did not intend the five-year limitation to apply whenever gross income was understated, the Commissioner stresses the occasional use of the phrase "understates gross income" in the legislative materials. The force of this contention is much diluted, however, when it is observed that wherever this general language is found its intended meaning is immediately illuminated by the use of such phrases as "failed to disclose" or "to leave out" items of income. See *Uptegrove Lumber Co.* v. *Commissioner,* 204 F. 2d 570, 572.

The Commissioner also suggests that in enacting § 275 (c) Congress was primarily concerned with providing for a longer period of limitations where returns contained relatively large errors adversely affecting the Treasury, and that effect can be given this purpose only by adopting the Government's broad construction of the statute. But this theory does not persuade us. For if the mere size of the error had been the principal concern of Congress, one might have expected to find the statute cast in terms of errors in the total tax due or in total taxable net income. We have been unable to find any solid support for the Government's theory in the legislative history. Instead, as the excerpts set out above illustrate, this history shows to our satisfaction that the Congress intended an exception to the usual three-year statute of limitations only in the restricted type of situation already described.

We think that in enacting § 275 (c) Congress manifested no broader purpose than to give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item. On the other hand, when, as here, the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage. And this would seem to be so whether the error be one affecting "gross income" or one, such as overstated deductions, affecting other parts of the return. To accept the Commissioner's interpretation and to impose a five-year limitation when such errors affect "gross income," but a three-year limitation when they do not, not only would be to read § 275 (c) more broadly than is justified by the evident reason for its enactment, but also to create a patent incongruity in the

tax law. See *Uptegrove Lumber Co.* v. *Commissioner, supra,* at 573.

Finally, our construction of § 275 (c) accords with the interpretations in the more recent decisions of four different Courts of Appeals. See note 2, *supra.* The force of the reasoning in these opinions was recognized by the Court of Appeals in the present case, which indicated that it might have agreed with those courts had the matter been *res nova* in its circuit. 244 F. 2d, at 76. And without doing more than noting the speculative debate between the parties as to whether Congress manifested an intention to clarify or to change the 1939 Code, we observe that the conclusion we reach is in harmony with the unambiguous language of § 6501 (e)(1)(A) of the Internal Revenue Code of 1954.[3]

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[3] "SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

. . . . . .

"(e) OMISSION FROM GROSS INCOME.—Except as otherwise provided in subsection (c)—

"(1) INCOME TAXES.—In the case of any tax imposed by subtitle A—

"(A) GENERAL RULE.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagraph—

"(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

"(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item." 68A Stat. 803, 804–805.

We hold that both tax assessments before us were barred by the statute of limitations.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BLACK would follow the interpretation consistently given § 275 (c) by the Tax Court for many years and affirm the judgment of the Court of Appeals in this case. See cases cited in note 2 of the Court's opinion.

Syllabus.

COMMISSIONER OF INTERNAL REVENUE *v.* STERN, TRANSFEREE.

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

No. 311. Argued April 7, 1958.—Decided June 9, 1958.

Because the assets of the estate of respondent's husband were insufficient to meet his liability for income tax deficiencies found to have been due before his death, the Commissioner proceeded under § 311 of the Internal Revenue Code of 1939 against respondent as the beneficiary of life insurance policies held by him and on which he had retained the right to change the beneficiaries and to draw down the cash surrender values. There were no findings that he had paid any of the premiums with intent to defraud his creditors or that he was insolvent at any time prior to his death, and no tax lien had attached. *Held:* The laws of Kentucky, where respondent and her husband resided, govern the question of respondent's liability and create no liability of respondent to the Government in the circumstances of this case. Pp. 40–47.

1. Section 311 neither creates nor defines a substantive liability but merely provides a new procedure by which the Government may collect taxes. Pp. 42–44.

2. There being no federal statute creating or defining liability of respondent in this case, and Congress having manifested no desire for uniformity of liability, the creation of federal decisional law to further uniformity of liability in such cases would be unwarranted; and the existence and extent of liability should be determined by state law until Congress speaks to the contrary. Pp. 44–45.

3. Congress having imposed no liability on respondent and no tax lien having attached, the Government's substantive rights in this case are precisely those which other creditors would have under Kentucky law, and respondent is not liable to the Government because Kentucky law imposes no liability against respondent in favor of her husband's creditors in the circumstances of this case. Pp. 45–47.

242 F. 2d 322, affirmed.

John F. Davis argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott.*

Walter E. Barton argued the cause for respondent. With him on the brief were *William H. Beck* and *William B. Martin.*

Benj. H. Saunders, K. Martin Worthy and *Arthur Peter* filed a brief for the Life Insurance Association of America, as *amicus curiae,* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent petitioned the Tax Court for redetermination of the liability assessed against her for her deceased husband's unpaid income tax deficiencies. The Tax Court held that, as beneficiary of proceeds of her husband's life insurance exceeding the amount of the deficiencies, the respondent was liable for the full amount of the deficiencies. The Court of Appeals reversed, 242 F. 2d 322, holding that the respondent was not liable even to the extent of the amount of the cash surrender values of the policies, which was less than the amount of the deficiencies. We granted certiorari. 355 U. S. 810.

Dr. Milton J. Stern died a resident of Lexington, Kentucky, on June 12, 1949. Nearly six years later the Tax Court held that Dr. Stern had been deficient in his income taxes for the years 1944 through 1947 and was liable for the amount, including interest and penalties, of $32,777.51. Because the assets of the estate were insufficient to meet this liability, the Commissioner proceeded under § 311 of the Internal Revenue Code of 1939 [1] against respondent, Dr. Stern's widow, as the bene-

[1] Section 311 provides:

"(a) METHOD OF COLLECTION.—The amounts of the following liabilities shall, except as hereinafter in this section provided, be

ficiary of life insurance policies held by him. The proceeds and the cash surrender value of these policies at Dr. Stern's death totaled $47,282.02 and $27,259.68 respectively. The right to change the beneficiary and to draw down the cash surrender value of each policy had been retained until death by Dr. Stern. There were no findings that Dr. Stern paid any premiums with intent to defraud his creditors or that he was insolvent at any time prior to this death.

The Court of Appeals rested its decision upon two grounds: (1) that the respondent beneficiary was not a transferee within the meaning of § 311, *Tyson* v. *Commissioner,* 212 F. 2d 16; and (2) that in any event Kentucky statutes, Ky. R. S., 1948, §§ 297.140, 297.150, limit the beneficiary's liability to creditors of the deceased insured to the amount of the premiums paid by the insured in fraud of creditors, and consequently there was no liability since there was no evidence that Dr. Stern paid any premium in fraud of his creditors. Without intimating any view as to the correctness of the first holding of the Court of Appeals we find it unnecessary to decide whether the respondent was a transferee within the mean-

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assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

"(1) TRANSFEREES.—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

. . . . . .

"(f) DEFINITION OF 'TRANSFEREE'.—As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee." 53 Stat. 90, 91.

ing of § 311 [2] because we hold that the Kentucky statutes govern the question of the beneficiary's liability and create no liability of the respondent to the Government in the circumstances of this case.

First. Section 311 (a) provides that "The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax . . . imposed upon the taxpayer by this chapter" shall be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter . . . ." The decisions of the Court of Appeals and the Tax Court have been in conflict on the question whether the substantive liability enforced under § 311 is to be determined by state or federal law. Compare, *e. g., Rowen* v. *Commissioner,* 215 F. 2d 641, and *Botz* v. *Helvering,* 134 F. 2d 538, with *United States* v. *Bess,* 243 F. 2d 675, and *Stoumen* v. *Commissioner,* 27 T. C. 1014. This Court has expressly left the question open. *Phillips* v. *Commissioner,* 283 U. S. 589, 602.

The courts have repeatedly recognized that § 311 neither creates nor defines a substantive liability but provides merely a new procedure by which the Government may collect taxes. *Phillips* v. *Commissioner, supra; Hatch* v. *Morosco Holding Co.,* 50 F. 2d 138; *Liquidators of Exchange National Bank* v. *United States,* 65 F. 2d 316; *Harwood* v. *Eaton,* 68 F. 2d 12; *Weil* v.

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[2] The Court of Appeals in this case followed its own prior decision in *Tyson* v. *Commissioner,* 212 F. 2d 16, in holding that Mrs. Stern as beneficiary was not a "transferee" of any part of the proceeds within the meaning of § 311. Other Courts of Appeals have held that the beneficiary is a transferee only to the extent of the cash surrender value existing at the time of the insured's death. *Rowen* v. *Commissioner,* 215 F. 2d 641; *United States* v. *Bess,* 243 F. 2d 675. The Tax Court, on the other hand, has held that the beneficiary is the transferee of the entire proceeds. *Stoumen* v. *Commissioner,* 27 T. C. 1014.

Commissioner, 91 F. 2d 944; *Tooley* v. *Commissioner,* 121 F. 2d 350.[3] Prior to the enactment of § 280 of the Revenue Act of 1926, 44 Stat. 9, 61, the predecessor of § 311, the rights of the Government as creditor, enforceable only by bringing a bill in equity or an action at law, depended upon state statutes or legal theories developed by the courts for the protection of private creditors, as in cases where the debtor had transferred his property to another. *Phillips* v. *Commissioner, supra,* at 592, n. 2; cf. *Pierce* v. *United States,* 255 U. S. 398; *Hospes* v. *Northwestern Mfg. & Car Co.,* 48 Minn. 174, 50 N. W. 1117. This procedure proved unduly cumbersome, however, in comparison with the summary administrative remedy allowed against the taxpayer himself, Rev. Stat. § 3187, as amended by the Revenue Act of 1924, 43 Stat. 343. The predecessor section of § 311 was designed "to provide for the enforcement of such liability to the Government by the procedure provided in the act for the enforcement of tax deficiencies." S. Rep. No. 52, 69th Cong., 1st Sess. 30. "Without in any way changing the extent of such liability of the transferee under existing law, . . . [this section] enforces such liability . . . in the same manner as liability for a tax deficiency is enforced; that is, notice by the commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the courts. Such a proceeding is in lieu of the present equity

[3] The Government argues that since § 311 and § 900 were originally enacted as correlative provisions of the Revenue Act of 1926 a substantive liability is imposed upon the beneficiary for both unpaid income and estate taxes of the decedent. But the 1939 Code "contains no provision in respect to income tax collection comparable to Section 827 (b) of the Code which expressly imposes liability for the estate tax on a 'beneficiary, who receives . . . property included in the gross estate under section [811 (f)].'" *Rowen* v. *Commissioner,* 215 F. 2d 641, 646.

proceeding . . . ." H. R. Conf. Rep. No. 356, 69th Cong., 1st Sess. 43–44. Therefore, since § 311 is purely a procedural statute we must look to other sources for definition of the substantive liability. Since no federal statute defines such liability, we are left with a choice between federal decisional law and state law for its definition.

Second. The Government urges that, to further "uniformity of liability," we reject the applicability of Kentucky law in favor of having the federal courts fashion governing rules. Cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. But a federal decisional law in this field displacing state statutes as determinative of liability would be a sharp break with the past. Federal courts, in cases where the Government seeks to collect unpaid taxes from persons other than the defaulting taxpayer, have applied state statutes, *Hutton* v. *Commissioner,* 59 F. 2d 66; *Weil* v. *Commissioner, supra; United States* v. *Goldblatt,* 128 F. 2d 576; *Botz* v. *Helvering, supra,* and the Government itself has urged reliance upon such statutes in similar cases, G. C. M. 2514, VI–2 Cum. Bull. 99; G. C. M. 3491, VII–1 Cum. Bull. 147. The Congress was aware of the use of state statutes when the enactment of the predecessor section to § 311 was under consideration, for the Congress in disclaiming any intention "to define or change existing liability," S. Rep. No. 52, 69th Cong., 1st Sess. 30, identified "existing liability" as liability ensuing "[b]y reason of the trust fund doctrine and various State statutory provisions . . . ." H. R. Conf. Rep. No. 356, *supra,* at 43.

It is true that, in addition to reliance upon state statutes, the Government invoked principles judicially developed for the protection of private creditors, in cases where the debtor had transferred his property to another and been left insolvent. Cf. *Pierce* v. *United States, supra; Hospes* v. *Northwestern Mfg. & Car Co., supra.* In such cases the federal courts applied a "general law"

which did not distinguish between federal and state decisional law. But the fact remains that the varying definitions of liability under state statutes resulted in an absence of uniformity of liability. Yet Congress, with knowledge that this was "existing law" at the time the predecessor section to § 311 was enacted, has refrained from disturbing the prevailing practice. Uniformity is not always the federal policy. Under § 70 of the Bankruptcy Act, for instance, state law is applied to determine what property of the bankrupt has been transferred in fraud of creditors. 30 Stat. 565, as amended, 11 U. S. C. § 110. What is a good transfer in one jurisdiction might not be so in another.

Since Congress has not manifested a desire for uniformity of liability, we think that the creation of a federal decisional law would be inappropriate in these cases. In diversity cases, the federal courts must now apply state decisional law in defining state-created rights, obligations, and liabilities. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. They would, of course, do so in diversity actions brought by private creditors. Since the federal courts no longer formulate a body of federal decisional law for the larger field of creditors' rights in diversity cases, any such effort for the small field of actions by the Government as a creditor would be necessarily episodic. That effort is plainly not justified when there exists a flexible body of pertinent state law continuously being adapted to changing circumstances affecting all creditors. Accordingly we hold that, until Congress speaks to the contrary, the existence and extent of liability should be determined by state law.

Third. The Court of Appeals held in this case that under the applicable Kentucky law the beneficiary of a life insurance policy is not liable to the insured's creditors, at least where, as here, the premiums have not been paid

in fraud of creditors, Ky. R. S., 1948, §§ 297.140, 297.150,[4] and that therefore no liability of the respondent exists under state law to any creditor, including the Government. The parties do not contest this construction of local law.

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[4] Kentucky Revised Statutes provided:

"297.140 *Life insurance for benefit of a married woman; premiums paid in fraud of creditors.* (1) A policy of insurance on the life of any person expressed to be for the benefit of, or duly assigned, transferred or made payable to, any married woman, or to any person in trust for her, or for her benefit, by whomsoever such transfer may be made, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors or any other person effecting or transferring the policy or his creditors.

"(2) A married woman may, without consent of her husband, contract, pay for, take out and hold a policy of insurance upon the life or health of her husband or children, or against loss by his or their disablement by accident. The premiums paid on the policy shall be held to have been her separate estate, and the policy shall inure to her separate use and benefit and that of her children, free from any claim of her husband or others.

"(3) If the premium on any policy mentioned in this section is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of the creditors, subject to the statute of limitations.

"297.150 *Life insurance for benefit of another; premiums paid in fraud of creditors.* (1) When a policy of insurance is effected by any person on his own life or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than the person effecting the insurance or his legal representatives, shall be entitled to its proceeds against the creditors and representatives of the person effecting the same.

"(2) Subject to the statute of limitations, the amount of any premiums for such insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy, but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payment, the company received written notice by or in behalf of some creditor, with specification of the amount claimed, claiming to recover for certain premiums paid in fraud of creditors."

The Government, however, argues in its brief, "Just as in the situation where a tax lien has attached it is held that state law may not destroy that lien, so here, where a tax liability is imposed by Congress, the state may not provide exemptions." We agree that state law may not destroy a tax lien which has attached in the insured's lifetime. We held today in *United States* v. *Bess, post,* p. 51, that a New Jersey statute, similar to the Kentucky statutes, could not defeat the attachment in the insured's lifetime of a federal tax lien under § 3670 against the cash surrender value of the policy, or prevent enforcement of the lien out of the proceeds received by the beneficiary on the insured's death. We might also agree that a State may not provide exemptions from a tax liability imposed by Congress. The fallacy in the Government's argument is in the premise that Congress has imposed a tax liability against the beneficiary. We have concluded that Congress has not seen fit to define that liability and that none exists except such as is imposed by state law. Thus there is no problem here of giving effect to state exemption provisions when federal law imposes such liability. The Government's substantive rights in this case are precisely those which other creditors would have under Kentucky law. The respondent is not liable to the Government because Kentucky law imposes no liability against respondent in favor of Dr. Stern's other creditors.

Affirmed.

MR. JUSTICE BLACK, whom THE CHIEF JUSTICE and MR. JUSTICE WHITTAKER join, dissenting.

We are concerned here with a suit against the United States to determine the liability of a party for federal income taxes. In my judgment it is a mistake to look to state law to decide that liability. The laws of the several States are bound to vary widely with respect to the

responsibility of transferees for the obligations of their transferors. Therefore application of state law leads to the anomalous result that transferees will be liable for federal taxes in one State but not in another even though they stand in precisely the same position. I believe that such uneven application of what this Court has characterized as "a nationwide scheme of taxation," *Burnet* v. *Harmel,* 287 U. S. 103, 110, is thoroughly unwise and is not required by the Constitution, by Act of Congress, or by any compelling practical considerations.

In my view, liability for federal taxes should be determined by uniform principles of federal law, in the absence of the plainest congressional mandate to the contrary.* Where as here Congress has provided no standards which define the liability of a transferee for the taxes of his transferor the federal courts themselves should fashion a uniform body of controlling rules which fairly implement the collection of government revenues. Cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *Standard Rice Co.,* 323 U. S. 106; *United States* v. *Standard Oil Co.,* 332 U. S. 301; *Priebe & Sons, Inc.,* v. *United States,* 332 U. S. 407; *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U. S. 448. It can hardly be denied that uniformity in the imposition

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*"[A]s we have often had occasion to point out, the revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application. Hence their provisions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law." *United States* v. *Pelzer,* 312 U. S. 399, 402–403.

Of course state law must be consulted to determine what property rights and interests a taxpayer actually has. But once these rights and interests are thus established, their consequence for purposes of federal taxation is a matter of federal law. *Watson* v. *Commissioner,* 345 U. S. 544; *Morgan* v. *Commissioner,* 309 U. S. 78; *Burnet* v. *Harmel,* 287 U. S. 103.

and collection of federal taxes has always been regarded as extremely desirable in this country. Indeed those who framed the Constitution deemed it so important that they expressly required that "all Duties, Imposts and Excises [levied by Congress] shall be uniform throughout the United States." Art. I, § 8. Cf. Art. I, §§ 2, 9. Taxpayers should be treated equally without regard to the fortuity of residence; and the additional complication and inconvenience in the administration of an already complex federal tax system which is certain to follow an attempt to apply the differing laws of 48 States to transferee liability ought to be avoided, if at all possible.

Here, Congress has never directed that the tax liability of a transferee be determined by state law. The legislative history of § 280 of the Revenue Act of 1926 certainly falls far short of a congressional mandate to that effect. Prior to that Act the federal courts had applied general principles of equity to determine the liability of transferees for federal taxes, without regard to state law, except for a few instances where state statutes apparently were more favorable to the Commissioner. Both Senate and House Committees emphasized that § 280 was simply a procedural provision not affecting the substantive liability of a transferee as it had been previously developed by the federal courts. S. Rep. No. 52, 69th Cong., 1st Sess. 30; H. R. Conf. Rep. No. 356, 69th Cong., 1st Sess. 43–44. And the House Conference Committee went on to express the hope that the newly created Board of Tax Appeals would gradually fashion a uniform body of principles to govern transferee liability. H. R. Conf. Rep. No. 356, *supra,* at 44. All this is hardly consistent with the notion that state law was to be decisive; if anything, it indicates precisely the contrary. It might be added that the Tax Court, measuring up to the expectations of the House Committee, has persistently endeavored to develop consistent standards to determine transferee lia-

bility despite the opposition of several Courts of Appeals. See, *e. g., Muller* v. *Commissioner,* 10 T. C. 678; *Leary* v. *Commissioner,* 18 T. C. 139; *Bales* v. *Commissioner,* 22 T. C. 355; *Stoumen* v. *Commissioner,* 27 T. C. 1014.

I would hold, as a matter of federal law, that where a transferee receives property from a taxpayer who is left with insufficient assets to pay his federal taxes the transferee is liable for those taxes to the extent he has not given fair consideration for the property received. This has been the rule applied by those courts which have heretofore determined transferee liability on the basis of federal law. See, *e. g., Pearlman* v. *Commissioner,* 153 F. 2d 560; *Updike* v. *United States,* 8 F. 2d 913; *Stoumen* v. *Commissioner,* 27 T. C. 1014. Such a rule has long-standing antecedents in the federal courts which may be traced back, in part, at least as far as the noted decision by Justice Story in *Wood* v. *Drummer,* 30 Fed. Cas. 435. It would operate to prevent tax evasion, and yet not impose an unfair burden on transferees.

Turning to the present case, I agree with the Court in *United States* v. *Bess, post,* p. 51, that the cash surrender values of insurance policies, but not the proceeds, are property of the insured for purposes of the federal tax laws which pass to the beneficiary of the policy upon the insured's death. Here it appears that the insured had insufficient assets at the time of his death to satisfy his unpaid income taxes. Therefore I would hold the beneficiary of his policies, Mrs. Stern, responsible for the unpaid taxes to the extent of the cash surrender value of those policies just before he died.

UNITED STATES *v.* BESS.

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

No. 395. Argued April 7, 1958.—Decided June 9, 1958.*

This is a civil action brought by the Government to recover, in equity, from the beneficiary of life insurance policies the amount of federal income taxes owed by the insured at the time of his death and for some of which liens had attached to all his property under § 3670 of the Internal Revenue Code of 1939 before his death. The insured, a resident of New Jersey, had retained the right to change the beneficiaries of the policies and, except as to one policy, the right to draw down or borrow against the cash surrender values and to assign the policies. He had paid all the premiums and none was paid in fraud of his creditors. Some of his federal income tax liabilities were paid out of the assets of his estate, but others remained unpaid when his estate was adjudged insolvent. *Held:* Because of the tax liens which had attached to all of the insured's property before his death, the beneficiary is liable to the extent of the cash surrender values of his policies. Pp. 52–59.

1. Had there been no lien, the beneficiary would not be liable, because, under New Jersey law, the beneficiary of a life insurance policy is entitled to its benefits against all creditors except to the extent of the amount of any premiums paid in fraud of creditors. *Commissioner* v. *Stern, ante,* p. 39. Pp. 53–54.

2. Because, prior to the death of the insured, liens had attached under § 3670 to all of his assets, including the cash surrender values of his life insurance policies, the beneficiary is liable to the extent of such cash surrender values. Pp. 54–59.

(a) Under New Jersey law, the insured did not possess, prior to his death, "property" or "rights to property," within the meaning of § 3670, in the proceeds of his life insurance policies; but he did possess such "property" or "rights to property" in their cash surrender values; and the federal tax lien attached under § 3670, even if, under state law, his property right represented by the cash surrender values was not subject to creditors' liens. Pp. 55–57.

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*Together with No. 410, *Bess* v. *United States,* also on certiorari to the same Court.

(b) For the purposes of § 3670, there was a transfer of property from the insured to the beneficiary, and the lien which had attached to the cash surrender values before his death followed that property into the hands of the beneficiary. Pp. 57–59.

243 F. 2d 675, affirmed.

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott.*

Morris J. Oppenheim argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The United States filed this civil action in the District Court for the District of New Jersey to recover, in equity, from the beneficiary of life insurance policies the amount of federal income taxes owed by the insured at the time of his death.

Herman Bess died a resident of Monmouth County, New Jersey, on June 29, 1950. His wife, Molly G. Bess, was the beneficiary of eight insurance policies on his life from which she received $63,576.95 in proceeds. The cash surrender value of these policies at his death was $3,362.53. Seven of the policies were issued to Mr. Bess from 1934 to 1937 and the eighth, a group policy, in 1950. He retained the right until death to change the beneficiary, to draw down or borrow against the cash surrender value and to assign the policies, except that under the group insurance policy he retained only the right to change the beneficiary. Mr. Bess paid all premiums and it is conceded that none was paid in fraud of his creditors.

The federal income taxes were owing for the several years from 1945 to 1949. The assets of Mr. Bess' estate were applied to payment of the amounts owing for 1948 and 1949, but a total of $8,874.57 remained owing for 1945, 1946 and 1947 when the estate was adjudged insol-

vent by the Monmouth County Court in 1952. The amounts owing were $4,159.31 for 1945, $3,789.32 for 1946, and $925.94 for 1947.

The District Court held Mrs. Bess liable for the total taxes owing of $8,874.57. 134 F. Supp. 467. The Court of Appeals for the Third Circuit reduced the judgment to the amount of the total cash surrender value of the policies of $3,362.53. 243 F. 2d 675. We granted certiorari on the Government's petition and Mrs. Bess' cross-petition, 355 U. S. 861, and set the case for argument with *Commissioner* v. *Stern, ante,* p. 39. The Government seeks in No. 395 the reinstatement of the District Court's judgment in the full amount of the taxes owing. Mrs. Bess seeks in No. 410 the reversal of the Court of Appeals judgment in the amount of the cash surrender value.

I.

As in *Commissioner* v. *Stern,* the Government argues that Mrs. Bess, as beneficiary of her husband's life-insurance policies, is liable for his unpaid federal income taxes.[1] We held today in the *Stern* case that recovery of unpaid federal income taxes from a beneficiary of insurance, in the absence of a lien, can be sustained only to the extent that state law imposes such liability in favor of other creditors of the insured. Under New Jersey law the beneficiary of a policy of life insurance is entitled to its proceeds against all creditors except to the extent of the amount of any premiums for the insurance paid in fraud of creditors. N. J. Stat. Ann., 1939, § 17:34–29;

[1] The proceeding against Mrs. Bess was not by the summary method authorized by § 311 of the Internal Revenue Code of 1939 but by the alternative method of a proceeding in equity in the District Court, *Leighton* v. *United States,* 289 U. S. 506. The courts below erred in applying § 311 in this case. As we held in *Commissioner* v. *Stern, ante,* § 311 is a purely procedural statute and has no bearing upon the liability of Mrs. Bess.

Slurszberg v. *Prudential Ins. Co.*, 15 N. J. Misc. 423, 192 A. 451; *Middlesex County Welfare Board* v. *Motolinsky*, 134 N. J. Eq. 323, 35 A. 2d 463. If in the instant case no lien were involved, our holding in *Commissioner* v. *Stern* would require an affirmance in No. 395 and a reversal in No. 410, since it is conceded that Mr. Bess did not pay any premiums in fraud of his creditors.

II.

However, the Government contends that it is also seeking in this action to enforce, as to the 1945 and 1946 deficiencies, liens perfected under § 3670 of the Internal Revenue Code of 1939 against the property of Mr. Bess in his lifetime. Section 3670 provides that "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 53 Stat. 448. On July 30, 1948, and again on August 9, 1948, before Mr. Bess died, notice and demand were made upon him for payment of the deficiencies formally consented to by him as owing for 1945 and 1946. He made periodic payments on the amount owing for 1945, reducing that amount from $11,514 to $4,713.59 before his death. This balance was further reduced to $4,159.31 by a payment of $554.28 from his estate pursuant to an order of the Monmouth County Court. However, no payment on account of the $3,789.32 owing for 1946 was made either in his lifetime or after his death.

First. As to the tax lien theory, Mrs. Bess contends that the Government did not assert this basis for recovery before the District Court and therefore should not be heard to assert that theory in this Court. But the essential facts pertinent to a decision on the merits of the tax lien theory were stipulated in the District Court. Moreover, the issue was fully briefed and argued both in the

Court of Appeals and in this Court. We therefore see no basis for any inference of prejudice in the circumstances, and accordingly proceed to a determination of the question.

Second. Mrs. Bess argues that in any event no lien attached to any property of Mr. Bess since a lien does not attach under § 3670 unless and until the delinquent taxpayer "neglects or refuses to pay the same after demand." She urges that the facts stipulated as to the payments on account of 1945 taxes made by Mr. Bess in his lifetime prove that he did not neglect or refuse to pay taxes after demand. Since, in the view we take of this case, the liability of Mrs. Bess is limited to the cash surrender value of $3,362.53, it suffices that whatever may be the case as to the 1945 taxes the requisite neglect or refusal was plainly established as to the 1946 delinquency of $3,789.32, for it is admitted that Mr. Bess neither paid nor attempted to pay anything on account of those taxes.

Third. We must now decide whether Mr. Bess possessed in his lifetime, within the meaning of § 3670, any "property" or "rights to property" in the insurance policies to which the perfected lien for the 1946 taxes might attach. Since § 3670 creates no property rights but merely attaches consequences, federally defined, to rights created under state law, *Fidelity & Deposit Co.* v. *New York City Housing Authority,* 241 F. 2d 142, 144, we must look first to Mr. Bess' right in the policies as defined by state law.

(a) It is not questioned that the rights of the insured are measured by the policy contract as enforced by New Jersey law. Manifestly the insured could not enjoy the possession of the proceeds in his lifetime. His right to change the beneficiary, even to designate his estate to receive the proceeds, gives him no right to receive the proceeds while he lives. Cf. *Rowen* v. *Commissioner,* 215 F. 2d 641, 644. It would be anomalous to view as

"property" subject to lien proceeds never within the insured's reach to enjoy, and which are reducible to possession by another only upon the insured's death when his right to change the beneficiary comes to an end. We therefore do not believe that Mr. Bess had "property" or "rights to property" in the proceeds, within the meaning of § 3670, to which the federal tax lien might attach. *Cannon* v. *Nicholas,* 80 F. 2d 934; see *United States* v. *Burgo,* 175 F. 2d 196. This conclusion is in harmony with the decision in *Everett* v. *Judson,* 228 U. S. 474, that the cash surrender value of a policy on the life of a bankrupt is the extent of the property which is vested in the trustee under § 70 a of the Bankruptcy Act.

(b) The cash surrender value of the policy, however, stands on a different footing. The insured has the right under the policy contract to compel the insurer to pay him this sum upon surrender of the policy. This right may be borrowed against, assigned or pledged. *Slurszberg* v. *Prudential Ins. Co., supra.* Thus Mr. Bess "possessed just prior to his death, a chose in action in the amount stated [*i. e.,* the cash surrender value] which he could have collected from the insurance companies in accordance with the terms of the policies." 243 F. 2d 675, 678. It is therefore clear that Mr. Bess had "property" or "rights to property," within the meaning of § 3670, in the cash surrender value. *United States* v. *Hoper,* 242 F. 2d 468; *Knox* v. *Great West Life Assurance Co.,* 212 F. 2d 784; *United States* v. *Royce Shoe Co.,* 137 F. Supp. 786; *Smith* v. *Donnelly,* 65 F. Supp. 415; *United States* v. *Aetna Life Ins. Co.,* 46 F. Supp. 30.

But it is contended that under state law the insured's property right represented by the cash surrender value is not subject to creditors' liens, whether asserted by a private creditor, *Slurszberg* v. *Prudential Ins. Co., supra,* or by a state agency, *Middlesex County Welfare Board* v. *Motolinsky, supra.* However, once it has been deter-

mined that state law creates sufficient interests in the insured to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States. Such state laws "are not laws for the United States . . . unless they have been made such by Congress itself." *Fink* v. *O'Neil,* 106 U. S. 272, 276; cf. *Commissioner* v. *Tower,* 327 U. S. 280.[2] The provisions of the Internal Revenue Act creating liens upon taxpayer's property for unpaid income taxes, unlike § 6 of the Bankruptcy Act, 30 Stat. 548, as amended, 11 U. S. C. § 24, do not specifically provide for recognition of such state laws. The fact that in § 3691 Congress provided specific exemptions from distraint is evidence that Congress did not intend to recognize further exemptions which would prevent attachment of liens under § 3670. *Knox* v. *Great West Life Assurance Co., supra; United States* v. *Heffron,* 158 F. 2d 657; *Shambaugh* v. *Scofield,* 132 F. 2d 345; *Smith* v. *Donnelly, supra.*

Fourth. The transfer of property subsequent to the attachment of the lien does not affect the lien, for "it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere . . . ." *Burton* v. *Smith,* 13 Pet. 464, 483; see *Michigan* v. *United States,* 317 U. S. 338, 340. The question therefore is whether the cash surrender values with the lien attached were transferred to Mrs. Bess as beneficiary when Mr. Bess died.

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[2] Once a federal tax lien attaches to the insured's interest, of course, the Government, in a proper action joining the appropriate parties, can enforce the lien in the insured's lifetime and thereby recover the cash surrender value. *Knox* v. *Great West Life Assurance Co.,* 212 F. 2d 784; *Kyle* v. *McGuirk,* 82 F. 2d 212; *Smith* v. *Donnelly,* 65 F. Supp. 415. See also *Cannon* v. *Nicholas,* 80 F. 2d 934; *United States* v. *Royce Shoe Co.,* 137 F. Supp. 786. Compare *United States* v. *Metropolitan Life Ins. Co.,* 130 F. 2d 149; *United States* v. *Gilmore,* 147 F. Supp. 902.

It is argued that the right to receive the cash surrender value expires with the death of the insured and that thus no property of his passes to the beneficiary. The contention is that the beneficiary receives the proceeds of the policies as performance by the insurance company of a separate promise to pay upon the death of the insured. It is said to follow that "there is no logical escape from holding that the 'surrender value' comes to an end on the insured's death, if we dispose of the controversy in accordance with the ordinary rules governing contracts." *United States* v. *Behrens,* 230 F. 2d 504, 506–507. This is to say that the cash surrender value is no part of the proceeds, but represents merely the right of the insured to cancel the policy and thereupon receive back from the insurer the amount accumulated from premiums paid in the past and held to cover the risk to be incurred in the future.[3] Therefore it is said that the property represented by the cash surrender value disappears on the

[3] "In the level premium system of life insurance the net level premium must be higher than the monetary value of the annual risk during the early policy years, and the excess must be accumulated with interest to provide funds for payment of claims after the age is reached where the value of the annual risk exceeds the net level premium in the annual premium being paid. It is the necessary accumulation of these funds that makes possible nonforfeiture benefits. On surrender of a policy the insurer, being relieved of the obligation to provide death benefits during future years where the annual value of the risk exceeds the annual net level premium, no longer needs to retain the surrendering policyholder's contributions to the funds previously accumulated for such purpose. Since the surrendering policyholder made a contribution to these funds during the period from date of issue to date of surrender, he is *equitably* entitled to a return *equal to the prorata share* of the funds actually accumulated *from premiums paid by his group of policyholders* and no longer needed to assure solvency of the company for the protection of continuing policyholders." Krueger and Waggoner, The Life Insurance Policy Contract (1953 ed.), 194. (Footnote omitted; emphasis added.)

insured's death and no lien can survive in any part of the proceeds.

But the courts have long recognized that the surplus of the paid premiums accumulated to make up the cash surrender value should be treated for some purposes as though in fact a "fund" held by the insurer for the benefit of the insured. Judge Addison Brown stated in *In re McKinney,* 15 F. 535, 537:

> "Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured deposited with the company in advance to make up the deficiency in later premiums . . . . So long as the policy remains in force the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical, though not the legal, relation of the company to this fund."

This view was approved in *Hiscock* v. *Mertens,* 205 U. S. 202, 211, and *Burlingham* v. *Crouse,* 228 U. S. 459, 469. See also *United States* v. *Behrens, supra,* at 507. Thus in economic reality the insurer pays the beneficiary the insured's "fund," plus another amount sufficient to perform the insurer's promise to pay the proceeds on the insured's death. *Rowen* v. *Commissioner, supra,* at 647. Therefore we hold that, for purposes of § 3670, there was a transfer of property from the insured to Mrs. Bess, and that the lien attached to the property before his death followed the property into her hands.

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE WHITTAKER concur in the opinion of the Court insofar as it holds that the United States had a valid lien

against the cash surrender value of the insurance policies involved here which was enforceable against the beneficiary, Mrs. Bess. They would also affirm the judgment of the Court of Appeals on the basis of the dissenting opinion of MR. JUSTICE BLACK in *Commissioner* v. *Stern*, *ante*, p. 47.

MR. JUSTICE HARLAN, whom MR. JUSTICE BURTON joins, concurring in part and dissenting in part.

Insofar as the Government's action here rests on a theory of liability in equity for debts of another person, I agree with the Court that Mrs. Bess' liability is to be determined by reference to state law and that consequently the Government cannot prevail on this basis since state law here imposes no liability. I think, however, that the Government fares no better by asserting a right to the cash surrender values of the policies by virtue of the statutory lien created by § 3670 of the Internal Revenue Code of 1939.

In my view the correct analysis of the surrender-value issue has been given in a Second Circuit case, *United States* v. *Behrens*, 230 F. 2d 504, which also involved the enforcement of federal tax liens asserted under § 3670. There Judge Learned Hand, although he felt constrained to apply the principles of an earlier Second Circuit case, *Rowen* v. *Commissioner*,* 215 F. 2d 641, and thereby held

*In the *Rowen* case, when a member of the Court of Appeals for the Second Circuit, I subscribed to a holding that one in the position of the petitioner in *Commissioner* v. *Stern*, *ante*, p. 39, should be deemed a ". . . transferee of property of a taxpayer . . ." within the meaning of § 311 (a) of the Internal Revenue Code of 1939 insofar as cash surrender values of life insurance policies were concerned. Further reflection however has led me to question the analysis in the *Rowen* decision on this score. In any event I do not view that decision, which was concerned with the interpretation to be accorded § 311, as necessarily having application to a case involving a federal tax lien.

for the Government, observed in speaking for himself and Judge Medina:

> "Considered strictly upon the basis of the legal rights created, the lien on the 'surrender values' came to an end with Behrens's death. The obligation of an insurer in a policy of life insurance is made up of a number of promises, of which one is to pay to the beneficiary the amount of the insurance—the 'proceeds'—and another is to pay the 'surrender value' to the insured upon his demand. The performances of these promises are not only separate, but inconsistent with each other: the payment of the 'surrender value' cancels the promise to pay the 'proceeds' and the promise to pay the 'proceeds' assumes that the insured has not demanded and received the 'surrender value.' The premiums when paid become the property of the insurer and the insured has no interest in them, although it is true that in New York, as in most states, a life insurance company's finances are regulated by statute in much detail in order to protect policyholders. . . . It follows from what we have said that there is no logical escape from holding that the 'surrender value' comes to an end on the insured's death, if we dispose of the controversy in accordance with the ordinary rules governing contracts." 230 F. 2d, at 506–507.

Agreeing with this reasoning, I believe that although the cash surrender values of life insurance policies were here properly considered property of a taxpayer to which federal tax liens attached during the taxpayer's life, these values cannot be deemed to exist after the taxpayer's death. It follows that the lien terminated at the time of death. The "fund" theory of surrender values referred to in the cases cited in the Court's opinion has in my view no application when it comes to determining the

specific reach of a lien under § 3670. Accordingly, I would affirm the judgment of the Court of Appeals insofar as it denied the Government relief with respect to the proceeds of these policies above their surrender values, and reverse it insofar as it held the petitioner-respondent Bess liable to the extent of the surrender values.

FLORA *v.* UNITED STATES.

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

No. 492. Argued May 20, 1958.—Decided June 16, 1958.

A taxpayer must pay the full amount of an income tax deficiency assessed by the Commissioner of Internal Revenue before he may challenge its correctness by a suit in a federal district court for refund under 28 U. S. C. § 1346 (a)(1). Pp. 63–76.

246 F. 2d 929, affirmed.

Randolph W. Thrower argued the cause for petitioner. With him on the brief was *A. G. McClintock*. *W. A. Sutherland* and *Mac Asbill, Jr.* entered an appearance for petitioner.

John N. Stull argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum.*

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

The issue in this case is whether a taxpayer must pay the full amount of an income tax deficiency before he may challenge its correctness by a suit for refund under 28 U. S. C. § 1346 (a)(1).

During 1950 petitioner suffered losses on the sale of certain commodities and futures. He reported them as ordinary losses, but the Commissioner of Internal Revenue characterized them as capital losses. A deficiency assessment was levied in the amount of $28,908.60, including interest. Petitioner made two payments that totaled $5,058.54, and then submitted a claim for refund of that amount. The claim was disallowed. On Aug. 3, 1956, petitioner brought this action under 28 U. S. C. § 1346 (a)(1) for refund. The United States moved to

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dismiss for want of jurisdiction and for failure to state a claim upon which relief could be granted. The district judge held that because petitioner had not paid the full amount of the deficiency he "should not maintain" the action. Because the question had not been resolved by the Court of Appeals, however, he deemed it advisable to pass upon the merits, and upon doing so entered judgment for defendant United States. 142 F. Supp. 602. The Court of Appeals for the Tenth Circuit vacated the judgment and remanded with instructions to dismiss, holding that the complaint "failed to state a claim" because petitioner had not paid the entire assessment for the period in question. 246 F. 2d 929.[1] We granted certiorari, 355 U. S. 881, to resolve the conflict between that decision and *Bushmiaer* v. *United States,* 230 F. 2d 146 (C. A. 8th Cir.).[2]

The pertinent jurisdictional statute, 28 U. S. C. § 1346 (a)(1), reads as follows:

> "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> "(1) Any civil action against the United States for the recovery of any internal-revenue *tax* alleged to have been erroneously or illegally assessed or collected, or any *penalty* claimed to have been collected without authority or any *sum* alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . ." (Emphasis supplied.)

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[1] See also *Suhr* v. *United States,* 18 F. 2d 81 (C. A. 3d Cir.). But cf. *Sirian Lamp Co.* v. *Manning,* 123 F. 2d 776 (C. A. 3d Cir.).

[2] See also *Sirian Lamp Co.* v. *Manning,* 123 F. 2d 776 (C. A. 3d Cir.); *Coates* v. *United States,* 111 F. 2d 609 (C. A. 2d Cir.). But cf. *Bendheim* v. *Commissioner,* 214 F. 2d 26, 28 (C. A. 2d Cir.); *Elbert* v. *Johnson,* 164 F. 2d 421, 423–424 (C. A. 2d Cir.).

In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed. The principle of strict construction of waivers of sovereign immunity, *United States* v. *Michel,* 282 U. S. 656, and the sharp division of opinion among the lower courts on the meaning of the pertinent statutory language suggest the presence of ambiguity in what might otherwise be termed a clear authorization to sue for the refund of "any sum." Consequently, a thorough consideration of the relevant legislative history is required.

Section 1346 was originally enacted as Section 1310 (c) of the Revenue Act of 1921.[3] Its essential language seems to have been copied from R. S. § 3226, the predecessor of the present claim-for-refund statute, 26 U. S. C. (Supp. V) § 7422 (a). Those statutes use language identical to that appearing above to provide that no suit for the refund of a "tax," "penalty," or "sum" shall be maintained until similar relief has been sought from the Secretary or his delegate.[4] The meaning that has been ascribed to this language in the claim-for-refund statute provides the key to what Congress intended when it used that language in the jurisdictional provision.

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[3] 42 Stat. 311.

[4] 26 U. S. C. (Supp. V) § 7422 (a): "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof." R. S. § 3226 is quoted in note 7, *infra.*

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The original claim-for-refund statute, Section 19 of the Revenue Act of July 13, 1866, provided that no suit should be maintained in any court for the recovery of "any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue . . . ."[5] On this "appeal" the Commissioner was empowered to "remit, refund, and pay back" all taxes or penalties improperly assessed or collected.[6] When the appeal requirement was restated in Section 3226 of the Revised Statutes,[7] Congress added the "penalty" and "sum" clauses, bringing together for the first time the three-way division that survives in 26 U. S. C. (Supp. V) § 7422 (a) and 28 U. S. C. § 1346 (a)(1). The revisers left no indication of what significance, if any, was to be attached to this addition.

During the period of this formative legislation refund suits could not be brought against the United States because of its sovereign immunity. Tax litigation took the form of an action of assumpsit against the collector.

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[5] 14 Stat. 152.

[6] 14 Stat. 111.

[7] "No suit shall be maintained in any court for the recovery of [1] any internal tax alleged to have been erroneously or illegally assessed or collected, or of [2] any penalty claimed to have been collected without authority, or of [3] any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue . . . ." R. S. § 3226.

This language is practically identical to that used by the 1866 Act in giving the Commissioner his refunding powers. 14 Stat. 111, restated in R. S. § 3220. The first category dates back to the 1863 Act. 12 Stat. 729. The third category was added in 1864. 13 Stat. 239. The 1866 Act rounded out the three categories by adding the second. 14 Stat. 111. An examination of the legislative history discloses no indication of the purpose of these successive additions.

See *Philadelphia* v. *Collector,* 5 Wall. 720.[8] Such suits were of course subject to the provision in Section 19 of the 1866 Act that they must be preceded by "appeal" to the Commissioner. The meaning of that command, which later became R. S. § 3226 and eventually, as amended, 26 U. S. C. (Supp. V) § 7422 (a), was considered in *Cheatham* v. *United States,* 92 U. S. 85. There, in response to an appeal, the Commissioner of Internal Revenue had set aside the first assessment of taxpayer's 1864 income taxes and directed the local assessor to make a second one. The taxpayer paid the second assessment and sued the collector for refund. The Court held that by failing to appeal from the second assessment the taxpayer failed to comply with Section 19 and hence had no right of action. In the course of its opinion the Court made this careful statement of the remedies then available to taxpayers who sought to contest the correctness of their tax:

> "So also, in the internal-revenue department, the statute which we have copied allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, *on paying the tax* the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.
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> . . . . .

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[8] Initially such suits depended upon diversity jurisdiction. *Collector* v. *Hubbard,* 12 Wall. 1. Later Congress created jurisdiction for "all causes arising under any law providing internal revenue . . . ." R. S. § 629 Fourth. With slight modification that provision became Section 24 Fifth of the Judicial Code, 36 Stat. 1092, and is presently 28 U. S. C. § 1340. See *Lowe Bros. Co.* v. *United States,* 304 U. S. 302, 305.

". . . While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made *the payment of the tax claimed,* whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. . . . If the compliance with this condition [that suit must be brought within six months of the Commissioner's decision] requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable. . . .

"The objecting party can take his appeal. He can, if the decision is delayed beyond twelve months, rest his case on that decision; or he can *pay the amount claimed,* and commence his suit at any time within that period. So, after the decision, he can pay at once, and commence suit within the six months . . . ." [9] (Emphasis added.)

From this carefully considered dictum it is unmistakably clear that the Court understood the statutes of that time to require full payment of an assessed tax as a condition precedent to the right to sue the collector for a refund. This understanding of the statutory scheme appears to have prevailed for the succeeding fifty or sixty years. It was never suggested that the addition in R. S. § 3226 of the clause beginning "any sum" effected any change. The *Cheatham* case was decided after that

[9] 92 U. S., at 88–89.

addition was made, and it gave no indication that the "condition precedent" of which it spoke had already been abrogated by Congress. Consistent with that understanding, there does not appear to be a single case before 1940 in which a taxpayer attempted a suit for refund of income taxes without paying the full amount the Government alleged to be due. Court opinions that took occasion to comment on the extent of payment are consistent with the *Cheatham* declaration,[10] and that case has continued to be cited with approval to the present day.[11] Such was the understanding of the necessity for full payment in the suit against the collector.

Since the statute now under consideration, 28 U. S. C. § 1346 (a)(1), employs language identical to that in the statute under which the full-payment understanding developed, R. S. § 3226, a construction requiring full payment would appear to be more consistent with the established meaning of the statutory language. Furthermore, the situation with respect to tax suits against the United States at the time 28 U. S. C. § 1346 (a)(1) was enacted, the express purpose of its enactment, and subse-

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[10] *Kings County Savings Institution* v. *Blair,* 116 U. S. 200, 205 (1886) ("No claim for the refunding of taxes can be made according to law and the regulations until after the taxes have been paid [and] . . . no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law."); *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 609 (1895) (dissenting opinion) ("The same authorities [including the *Cheatham* case] have established the rule that the proper course, in a case of illegal taxation, is to pay the tax under protest or with notice of suit, and then bring an action against the officer who collected it."); *Dodge* v. *Osborn,* 240 U. S. 118, 120 (1916) ("The remedy of a suit to recover back the tax after it is paid is provided by statute . . . ."); see note 20, *infra.*

[11] *E. g., Phillips* v. *Commissioner,* 283 U. S. 589, 595; *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 395–396; *Dobson* v. *Commissioner,* 320 U. S. 489, 496.

quent expressions of congressional intent all suggest that the principle of full payment was to be preserved.

The jurisdictional provision that is now 28 U. S. C. § 1346 (a)(1) was first enacted in Section 1310 (c) of the Revenue Act of 1921.[12] At that time the United States was already suable in the District Courts. Since 1887 the Tucker Act had allowed suit against the United States for claims less than $10,000 "founded upon . . . any law of Congress . . . ,"[13] and that language included suits to obtain refund of income taxes. *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28. Since R. S. § 3226 was cast in the broadest of terms, its requirement that refund suits be preceded by an "appeal" to the Commissioner clearly applied to the Tucker Act cases, *United States* v. *Michel*, 282 U. S. 656, and the related requirement that full payment must be made prior to suit seems to have been assumed to be equally applicable. For amounts in excess of the $10,000 Tucker Act limitation the taxpayer could invoke his old remedy against the collector.

The complementary nature of the two District Court remedies was impaired when this Court re-emphasized the rule requiring the collector to be sued personally. A suit against the office or the successor in office of a deceased collector could not be maintained. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1 (1921). Senator Jones of New Mexico interrupted floor debate on the Revenue Act of 1921 to call attention to this decision. In his view it meant that when the particular collector was dead a taxpayer suing for more than $10,000 had to bring suit in the Court of Claims. In addition to the extra expense and inconvenience of litigating in Washington, a Court of Claims

[12] 42 Stat. 311.

[13] 24 Stat. 505, 28 U. S. C. § 1346 (a)(2).

judgment carried no interest. The Senator proposed an amendment, stating:

> "What is here proposed is that we shall remedy that situation by providing that where the collector to whom the revenue was paid has died then the claimant may sue the United States. It simply brings about an equitable situation and prevents the taxpayer from having to suffer the hardships which would be brought upon him simply through the accident of the death of the collector to whom he paid the money. I offer the amendment for the purpose of remedying that situation." [14]

The amendment, which was accepted without further comment, conferred jurisdiction on the District Court,

> "Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the revenue act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or such was collected is dead at the time such suit or proceeding is commenced." [15]

The amendment's narrow-stated purpose refutes any suggestion that Congress intended further to expand or even

[14] 61 Cong. Rec. 7506–7507.

[15] 61 Cong. Rec. 7507. A second amendment provided that interest should be allowed in any judgment against the United States in these refund suits. *Ibid.* A special amendment in 1925 added the right to bring such refund suits when the collector "is not in office." 43 Stat. 972.

to restate the jurisdiction of the District Court in refund suits brought against the United States. As we have seen, the District Courts already had such jurisdiction under the Tucker Act, and there is no indication that Congress intended any change in the terms on which that action was made available other than the change that was clearly set forth. The statute that is now 28 U. S. C. § 1346 (a)(1) was enacted merely to remove the jurisdictional amount limitation of the Tucker Act in the special situation where the collector could not be sued. See *Lowe Bros. Co.* v. *United States,* 304 U. S. 302, 305. The House Conference Report and a contemporary Treasury Department declaration confirm this view of the statute's effect.[16]

The similarity of essential language leaves no doubt that the terms of the jurisdictional provision were copied from the claim-for-refund statute, R. S. § 3226, as amended by Section 1318 of the Revenue Act of 1921.[17] The fact that this language had for many years been considered to require full payment before suing the collector, and the fact that the avowed purpose of the 1921 amendment was merely to cure an inadequacy in the suit against the collector, combine as persuasive indications that no change was intended in the full-payment principle declared in *Cheatham* v. *United States, supra.*

When Congress created the Board of Tax Appeals in 1924,[18] it demonstrated a clear understanding that refund suits could only be maintained upon full payment of the

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[16] H. R. Rep. No. 486, 67th Cong., 1st Sess. 57; II–1 Cum. Bull. 224, 225.

[17] 42 Stat. 314. The 1921 Act substituted "claim for refund or credit" where the statute formerly referred to an "appeal" to the Commissioner.

[18] 43 Stat. 336.

tax alleged to be due. The House Committee proposing the bill explained its purpose as follows:

> "The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment." [19]

Petitioner argues that the "hardship" the Board of Tax Appeals was created to alleviate was not the taxpayer's inability to sue without paying the whole tax—for petitioner erroneously concludes that the 1921 amendment conferred that right—but the Government's power to

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[19] H. R. Rep. No. 179, 68th Cong., 1st Sess. 7. The Senate Committee on Finance made a similar explanation. S. Rep. No. 398, 68th Cong., 1st Sess. 8.

collect the balance due while a refund suit was in progress. But the Committee Report quoted above clearly demonstrates that the hardship about which the Congress was concerned was the hardship of pre-litigation payment, not post-litigation collection. *Old Colony Trust Co.* v. *Commissioner of Internal Revenue,* 279 U. S. 716, 721.[20]

The final step in the evolvement of 28 U. S. C. § 1346 (a)(1) took place in the Act of July 30, 1954,[21] which removed the $10,000 jurisdictional limitation and eliminated the condition about the collector being dead or out of office. Far from indicating an intent to allow suit without full payment of the tax due, the legislative history of that amendment shows a clear understanding of the *Cheatham* requirement, and demonstrates a narrow purpose in no way inconsistent with that requirement. The House Report states:

> "The purpose of this bill is to permit taxpayers a greater opportunity to sue the United States in the district court of their own residence to recover taxes which they feel have been wrongfully collected. This is done by removing the jurisdictional limitation of $10,000 now imposed on such suits." [22]

In explaining the present state of the law the Report goes on to point out that a taxpayer may contest a deficiency assessment by a petition in the Tax Court. "The tax-

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[20] "The Board of Tax Appeals . . . was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment."

[21] 68 Stat. 589.

[22] H. R. Rep. No. 659, 83d Cong., 1st Sess. 1.

payer may, however," the Report continues, "elect to pay his tax and thereafter bring suit to recover the amount claimed to have been illegally exacted." [23]

The foregoing study of the legislative history of 28 U. S. C. § 1346 (a)(1) and related statutes leaves no room for contention that their broad terms were intended to alter in any way the *Cheatham* principle of "pay first and litigate later." [24] For many years that principle has been reinforced by the rule that no suit can be maintained for the purpose of restraining the assessment or collection of any tax.[25] More recently, Congress took care to except from the operation of the Federal Declaratory Judgments Act any controversies "with respect to Federal taxes." [26] To ameliorate the hardship produced by these requirements Congress created a special court where tax questions could be adjudicated in advance of any payment. But there is no indication of any intent to create the hybrid remedy for which petitioner contends.

It is suggested that a part-payment remedy is necessary for the benefit of a taxpayer too poor to pay the full amount of the tax. Such an individual is free to litigate in the Tax Court without any advance payment. Where the time to petition that court has expired, or where for some other reason a suit in the District Court seems more desirable, the requirement of full payment may in some instances work a hardship. But since any hardship would grow out of an opinion whose effect Congress in succes-

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[23] *Id.*, at 2. And see S. Rep. No. 115, 83d Cong., 1st Sess.

[24] *Allen* v. *Regents of University System of Ga.*, 304 U. S. 439, 456 (concurring opinion).

[25] 14 Stat. 475 (1867), re-enacted in R. S. § 3224, presently in force as 26 U. S. C. (Supp. V) § 7421.

[26] 49 Stat. 1027, 28 U. S. C. § 2201. See S. Rep. No. 1240, 74th Cong., 1st Sess. 11.

sive statutory revisions has made no attempt to alter, if any amelioration is required it is now a matter for Congress, not this Court.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE WHITTAKER, believing that *Bushmiaer* v. *United States*, 230 F. 2d 146 (C. A. 8th Cir.); *Sirian Lamp Co.* v. *Manning*, 123 F. 2d 776 (C. A. 3d Cir.), and *Coates* v. *United States*, 111 F. 2d 609 (C. A. 2d Cir.), properly apply the statutes involved and should be followed, would reverse the judgment below.

CITY OF CHICAGO *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.

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

No. 103. Argued March 5–6, 1958.—Decided June 16, 1958.*

After the railroads operating in and out of Chicago had for many years utilized an old motor carrier to transfer interstate passengers and their baggage between different railroad terminals in the City, the railroads terminated that arrangement and engaged a newly organized motor carrier to provide the same service. The City then amended its municipal code so as to require, in effect, that the operator of any new transfer service must obtain a certificate of convenience and necessity from the Commissioner of Licenses and the approval of the City Council before it could lawfully transfer any passengers for the railroads. The new motor carrier refused to apply for a certificate of convenience and necessity, and the City threatened to arrest and fine its drivers if they operated unlicensed vehicles. The new motor carrier and the railroads then sued in a Federal District Court for a judgment declaring the city ordinance either inapplicable or invalid. The old motor carrier intervened as a defendant. The District Court dismissed the complaint. The Court of Appeals reversed, holding that the city ordinance, as applied, was repugnant on its face to the Constitution and laws of the United States. *Held:* The judgment is affirmed. Pp. 78–79.

1. The judgment of the Court of Appeals was a proper subject of an appeal to this Court under 28 U. S. C. § 1254 (2), since it held a state statute invalid as repugnant to the Constitution and laws of the United States, and it was a "final" judgment within the meaning of that section. Pp. 82–83.

2. The old motor carrier had standing to secure review of the judgment below by appeal, since the case involved an actual controversy and it had a direct and substantial personal interest in the outcome. Pp. 83–84.

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*Together with No. 104, *Parmelee Transportation Co. et al.* v. *Atchison, Topeka & Santa Fe Railway Co. et al.*, on appeal from, and petition for certiorari to, the United States Court of Appeals for the Seventh Circuit, argued March 6, 1958.

3. There being no ambiguity in the city ordinance and no doubt that it applied to the new motor carrier, the courts below properly passed upon its validity without awaiting its interpretation by the state courts. P. 84.

4. The city ordinance, as applied to the new motor carrier, is repugnant on its face to the Constitution and laws of the United States, because the City has no power to decide whether the new motor carrier can operate a transfer service between terminals for the railroads, which is an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act. Pp. 84–89.

5. Since the city ordinance is completely invalid insofar as it applies to the new motor carrier, that company was not obligated to apply for a certificate of convenience and necessity and submit to administrative procedures incident thereto before bringing this action. P. 89.

240 F. 2d 930, affirmed.

Joseph F. Grossman argued the cause for petitioner in No. 103. With him on the brief was *John C. Melaniphy*.

Philip B. Kurland argued the cause for appellants-petitioners in No. 104. With him on the brief were *Lee A. Freeman* and *Brainerd Currie* for the Parmelee Transportation Co., appellant-petitioner. *John C. Melaniphy* filed an appearance for the City of Chicago, appellant-petitioner.

Amos M. Mathews argued the causes for respondents in No. 103 and appellees-respondents in No. 104. On the briefs were *Jerome F. Dixon* and *Albert J. Meserow* for the Railroad Transfer Service, Inc., and *Mr. Mathews* and *J. D. Feeney, Jr.* for the Atchison, Topeka & Santa Fe Railway Co. et al., respondents in No. 103 and appellees-respondents in No. 104.

Mr. Justice Black delivered the opinion of the Court.

Chicago is one of the Nation's great rail centers. Each day thousands of railroad passengers travel through that City on continuous journeys from one State to

another. Since the lines of all railroads which carry passengers into and out of Chicago come to an end in one of that City's eight terminals, through passengers frequently arrive at a station different from the one where they are to board their outgoing train and must transfer with their baggage in order to continue their trip. Because of the serious problems of scheduling and passenger convenience involved in this interchange, the railroads, as a group, have long provided for the transfer of through passengers from one station to another by a systematic and highly organized motor carrier operation. Generally the passengers receive a coupon covering this transfer service, without special charge, as part of their through ticket.

For many years the railroads had an arrangement with Parmelee Transportation Company under which it carried through passengers between stations. Apparently finding its service no longer desirable, the railroads notified Parmelee in June 1955 that they would discontinue using its transfer vehicles as of October 1, 1955. Subsequently they engaged Railroad Transfer Service, a corporation specially organized at their request for that purpose, as their exclusive transfer agent for a five-year period commencing with the termination of Parmelee's service.

At the time the railroads gave Parmelee their notice the City of Chicago had in effect a detailed plan for the regulation and licensing of public passenger vehicles for hire. Among other things, operation of any public passenger vehicle, including a vehicle engaged in the transfer of passengers between railroad stations, was prohibited unless it had been licensed by the City. Any person who operated one of these vehicles without a license was subject to arrest and punishment.

After the railroads announced they intended to use the facilities of Railroad Transfer Service instead of those of

Parmelee, the City Council proceeded to amend the Municipal Code so as to effect certain important changes with regard to the licensing of transfer vehicles. A new section, 28–31.1, was added. In substance, it provided that no license for a transfer vehicle would issue unless the City Commissioner of Licenses first determined that public convenience and necessity required additional interterminal service. In that event, the City Council reserved final discretion to determine how many, if any, new licenses were to be issued. In making his determination the Commissioner was authorized to consider public demand for the proposed additional transfer service, its economic feasibility, public safety and, generally, any other facts he might think relevant.[1] If § 28–31.1 validly

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[1] In full, the section read:

"28–31.1 Public Convenience and Necessity. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in section 28–22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

"1. The public demand for such service;

"2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;

"3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

"4. Any other facts which the commissioner may deem relevant.

"If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by

applied to Railroad Transfer Service that company was required to secure a certificate of convenience and necessity from the Commissioner plus the approval of the City Council before it could lawfully transfer any passengers for the railroads. On the other hand, Parmelee was permitted to continue operating without leave from the City since an exception in § 28–31.1 provided that no certificate was necessary for the renewal of an existing license. Parmelee's vehicles were all licensed, of course, at the time the section became effective.

As scheduled, Transfer began to carry passengers between stations on October 1, 1955.[2] However, it refused to apply for a certificate of convenience and necessity, taking the position that § 28–31.1 was either inapplicable to its vehicles or, if applicable, invalid. The City rejected this contention and threatened to arrest and fine Transfer's drivers if they operated unlicensed vehicles. Transfer and the railroads then filed this suit in United States District Court asking for a judgment declaring § 28–31.1 either inapplicable or invalid. The complaint asserted that the City's requirement of a certificate of convenience and necessity was inconsistent with the provisions of the Interstate Commerce Act as well as the Commerce Clause of the Constitution insofar as it applied to vehicles transferring interstate passengers from one railroad station to another under agreement with the railroads. The City filed no answer but moved for a summary judgment. Parmelee was permitted to intervene as a defendant.

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ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner." Chicago Municipal Code, c. 28, § 28–31.1.

[2] In accordance with its agreement with the railroads, Transfer's operation is limited exclusively to transporting through passengers from one railroad station to another. It carries no other passengers.

The district judge, pointing out that there were no genuine issues of fact, granted the City's motion and dismissed the complaint. But the Court of Appeals for the Seventh Circuit reversed. 240 F. 2d 930. It agreed with the District Court that § 28–31.1 applied to Transfer's operation, but held that the section as so applied was repugnant on its face to the Constitution and laws of the United States. We granted the City's petition for certiorari, 353 U. S. 972, but postponed assuming jurisdiction on an appeal by Parmelee until further consideration at the hearing on the merits, 353 U. S. 971. Counsel for Parmelee and Transfer were asked to discuss the following jurisdictional questions:

> "1. Whether Parmelee Transportation Co. has standing to seek review here on appeal or by writ of certiorari.
>
> "2. Whether the judgment of the Court of Appeals is 'final' so as to permit review by way of appeal under 28 U. S. C. § 1254 (2). Cf. *Slaker* v. *O'Connor,* 278 U. S. 188, 189; *South Carolina Electric & Gas Co.* v. *Flemming,* 351 U. S. 901."

First. The judgment of the Court of Appeals is the proper subject of an appeal. Under 28 U. S. C. § 1254 (2) this Court may review cases on appeal where a Court of Appeals has held a state statute invalid as repugnant to the Constitution, treaties or laws of the United States. In *Slaker* v. *O'Connor,* 278 U. S. 188, 189, the Court construed the substantially identical predecessor of § 1254 (2) [3] as requiring a "final" judgment in a case before an appeal could be taken. The *Slaker* case was followed without comment, as to § 1254 (2) itself, by the per curiam opinion in *South Carolina Electric & Gas Co.* v. *Flemming,* 351 U. S. 901. Counsel for Parmelee, rely-

[3] § 240 (b) of the Judiciary Act of 1925, 43 Stat. 939.

ing on the language and legislative history of § 1254 (2) and its predecessor, forcefully argue that the requirement of finality announced in the *Slaker* case is erroneous and should be overruled. We find it unnecessary however to pass on this contention here because we are convinced that the judgment below was "final" by any relevant standard.

By its decision the Court of Appeals resolved all disputed questions between the parties. From the beginning the only issues in the case were whether § 28–31.1 was applicable to Transfer and, if applicable, whether that section was consistent with federal law. The Court of Appeals held the section applied to Transfer but was unconstitutional. There was nothing more to litigate; all that remained for the District Court on remand was to formally enter judgment for the plaintiff. Compare *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 381–383.

Second. Parmelee has standing to secure review of the judgment below by appeal. It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition. Transfer, on the other hand, suggests that Parmelee has no standing because the city ordinance is invalid and Transfer's operation is lawful. It argues that a party has no right to complain about lawful competition, citing *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, and *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118. We do not regard either of these cases as controlling here. It seems to us that Transfer's argument confuses the merits of the controversy with the standing of Parmelee to litigate them. Cf. *Bell* v. *Hood,* 327 U. S. 678. Parmelee's standing could hardly depend on whether

or not it is eventually held that Transfer can lawfully operate without a certificate of convenience and necessity.[4]

Third. There is still another preliminary point which must be decided. The City argues that the courts below should not have passed on the validity of § 28–31.1 until state courts had authoritatively ruled that Transfer's terminal vehicles came within its provisions. The City asks that we vacate the judgment of the Court of Appeals and remand to the District Court with directions to hold the case until efforts to obtain an adjudication in the state courts have been exhausted. Under the circumstances we do not believe this procedure is warranted.

After full argument on that point, both the District Court and a unanimous Court of Appeals held that § 28–31.1 applied to Transfer. That was the position of the city in both courts and it made no move there to have the matter remitted to the state courts. After referring to the provisions of § 28–31.1 the City declared in its brief in the Court of Appeals: "A more accurate description of the business engaged in by Transfer would be hard to find." We think this is a fair summarization. We see no ambiguity in the section which calls for interpretation by the state courts. Cf. *Toomer* v. *Witsell,* 334 U. S. 385. Remission to those courts would involve substantial delay and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight.

Fourth. We agree with the Court of Appeals that § 28–31.1 is invalid insofar as it requires Transfer to secure a certificate of convenience and necessity before it can operate. By its terms § 28–31.1 gives the City Commissioner of Licenses, and ultimately the City Counsel itself, virtually unlimited discretion to determine who

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[4] Since No. 104 is properly here on appeal, the petition for certiorari in that case is denied.

may transfer interstate passengers and baggage between railroad terminals. Although counsel for the City denies that it will use this power to exclude proposed transfer operations wholly or primarily because of economic considerations (cf. *Buck* v. *Kuykendall,* 267 U. S. 307), it is clear that the City claims at least some power under § 28–31.1 to decide whether a motor carrier may transport passengers from one station to another. In our judgment the provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. § 1 *et seq.*, preclude the City from exercising any veto power over such transfer service when performed by the railroads or by their chosen agents.

Section 1 (4) of that Act reads:

> "It shall be the duty of every common carrier subject to this chapter . . . to establish reasonable through routes with other such carriers . . . [and] to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation . . . ."

Section 3 (4) provides:

> "All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines . . . ."

Complementing these provisions, § 15 (3) specifically empowers the Interstate Commerce Commission to establish reasonable through routes whenever necessary or desirable in the public interest.[5]

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[5] Section 12 generally authorizes and requires the Commission "to execute and enforce" all of the provisions of the Act.

As we understand these sections they not only authorize the railroads to take all reasonable and proper steps for the transfer of persons and property between their connecting lines, but impose affirmative obligations on them in this respect. See *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612; *Central Transfer Co.* v. *Terminal Railroad Association of St. Louis*, 288 U. S. 469, 473, n. 1. Although the railroads may not be obligated to furnish transfer service between terminals in every instance, it seems apparent that such service would often be necessary if the statutory requirements were to be observed. On this basis the Interstate Commerce Commission has held that it has authority to require motor service between terminals. See *Cartage, Rail to Steamship Lines at New York*, 269 I. C. C. 199. Here the railroads have furnished transfer facilities for the heavy flow of traffic between the numerous Chicago terminals for more than a century. It is agreed that transportation by motor vehicle is now the only practical means of moving this traffic from terminal to terminal. We think the transfer service involved is at least authorized, if not actually required, under the Act as a reasonable and proper facility for the interchange of passengers and their baggage between connecting lines.

Moreover, § 302 (c) of the Act provides that motor vehicle transportation between terminals, whether performed by a railroad or by an agent or contractor of its choosing, shall be regarded as railroad transportation and shall be subject to the same comprehensive scheme of regulation which applies to such transportation.[6] While

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[6] In pertinent part, § 302 (c) reads:

"Notwithstanding any provision of this section or of section 303 of this title, the provisions of [Chapter 8 of the Act regulating motor carriers] . . . shall not apply—

"(1) to transportation by motor vehicle by a carrier by railroad . . . incidental to transportation or service subject to [regulation by the Interstate Commerce Commission under Chapter 1 of the

the Interstate Commerce Commission has not yet adopted special regulations for interstation transfer service it obviously can do so at any time under this section. In the meantime many of the Commission's regulations which generally govern railroad transportation apply to this service. And even without Commission action a number of the provisions of the Interstate Commerce Act itself are self-executing in their application.

The various provisions set forth above manifest a congressional policy to provide for the smooth, continuous and efficient flow of railroad traffic from State to State subject to federal regulation. In our view it would be inconsistent with this policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers. We believe the Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities.

National rather than local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of inter-

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Act as railroad transportation or service] . . . in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title when performed by such carrier by railroad . . . .

"(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title . . . in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier . . . as part of, and shall be regulated in the same manner as, the transportation by railroad . . . to which such services are incidental." 49 U. S. C. § 302 (c).

state traffic between railroad terminals. Serious impediments to the efficient and uninterrupted flow of this traffic might well result if the City could deny the railroads the right to transfer passengers by their own vehicles or by those of their selected agents. For example, the railroads here undoubtedly have a better understanding of how to handle the transportation problems involved in expeditiously moving thousands of passengers from station to station each day than do local officials. Because of close time schedules, the great volume of traffic and its irregular ebb and flow, the railroads obviously need a cooperative and dependable transfer operator with suitable equipment who is willing to work in close harmony with them. The railroads have rejected as unsuitable the only transfer service now licensed to operate by the City. If local officials can prevent them from providing this service by some other means a breakdown in the organized transfer of passengers could result. At a minimum they would be forced to deal once again with the rejected operator. Moreover, it seems clear that if the City could deny a license to one operator it has the power, at least so far as the Interstate Commerce Act is concerned, to deny a license to all.

We are fully aware that use of local streets is involved, but no one suggests that Congress cannot require the city to permit interstate commerce to pass over those streets. Of course the City retains considerable authority to regulate how transfer vehicles shall be operated. It could hardly be denied, for example, that such vehicles must obey traffic signals, speed limits and other general safety regulations. Similarly the City may require registration of these vehicles and exact reasonable fees for their use of the local streets. Cf. *Fry Roofing Co.* v. *Wood,* 344 U. S. 157; *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542. All we hold here, and all we construe the Court of Appeals as holding, is that the City has no

power to decide whether Transfer can operate a motor vehicle service between terminals for the railroads because this service is an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act. Cf. *Castle* v. *Hayes Freight Lines,* 348 U. S. 61.

Fifth. Since we hold that § 28–31.1 is completely invalid insofar as it applies to Transfer, that company was not obligated to apply for a certificate of convenience and necessity and submit to the administrative procedures incident thereto before bringing this action. See *Smith* v. *Cahoon,* 283 U. S. 553, 562; *Public Utilities Commission of California* v. *United States,* 355 U. S. 534, 539–540. Cf. *Staub* v. *City of Baxley,* 355 U. S. 313, 319.

Affirmed.

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

In my opinion the Court has acted prematurely in striking down this Chicago ordinance as it relates to Transfer. I accept the premise that the railroads have the right to choose whom they please to perform the transfer services, subject only to the City's right to regulate how transfer vehicles shall be operated. Nevertheless, the validity of the ordinance should not be determined until Transfer has applied to Chicago for a "terminal" license and the local authorities have had an opportunity to act on the application. Not until then will it be known whether the ordinance, as it may be applied to Transfer's operations, trespasses upon paramount federal concerns. Proper regard for the City's legitimate interests in enforcing this local enactment entitles Chicago to that opportunity. Cf. *Public Utilities Comm'n of California* v. *United States,* 355 U. S. 534, 546 (dissenting opinion).

No provision of the Interstate Commerce Act purports to pre-empt Chicago's power to apply its ordinance to one in the position of Transfer. This is therefore not a case where particular provisions of federal and local legislation conflict in such a way that they cannot logically or practically stand together, cf. *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm'n,* 328 U. S. 152, nor one where there is such overall similarity between federal and state regulation that a congressional purpose to displace state action in its entirety can fairly be deduced. Cf. *Hines* v. *Davidowitz,* 312 U. S. 52; *Pennsylvania* v. *Nelson,* 350 U. S. 497. And because Transfer does not hold a certificate of necessity from the Interstate Commerce Commission, and seemingly cannot get one, see *Status of Parmelee Transportation Co.,* 288 I. C. C. 95, no conflict appears between federal and local regulatory policies respecting those performing transfer services. Cf. *Castle* v. *Hayes Freight Lines, Inc.,* 348 U. S. 61. The sole question is thus whether the ordinance must be struck down, when applied to Transfer's operations, as "inconsistent" with the policy of the Interstate Commerce Act to foster efficient interstate transportation.

In determining whether Chicago's ordinance should now be annulled it must be borne in mind that local authorities are not foreclosed from regulating matters of local concern merely because there may be some incidental, but not burdensome, effect on interstate commerce. At least since *Cooley* v. *Board of Wardens,* 12 How. 299, it has been recognized that because regulation of local incidents of interstate transportation is, as a practical matter, beyond the effective reach of Congress, there would frequently be an undesirable absence of needed regulation unless States and municipalities were free to act. See *California* v. *Thompson,* 313 U. S. 109; see also *H. P. Welch Co.* v. *New Hampshire,* 306 U. S. 79; *Eichholz* v.

Public Service Comm'n of Missouri, 306 U. S. 268. So much indeed is recognized by the Court today when it says that Chicago, as part of its "considerable authority" to regulate the operation of transfer vehicles, may exact fees for their use of the city streets and may require them to meet with safety regulations and to be registered with the City. And, of course, the Court's examples do not exhaust the scope of local regulatory power to insure safe transportation. Nor can I perceive why the City should not be permitted to exercise such power before permitting unlicensed vehicles to travel on its streets. On the other hand, I would agree that Chicago, under the guise of promoting safe and proper transportation, could not validly limit on "economic" grounds those with whom the railroads may contract to carry its interstate passengers through the City. Cf. *Buck* v. *Kuykendall,* 267 U. S. 307.

We do not yet know how Chicago will apply the ordinance. If it should grant Transfer a license, that will end the present controversy. If a license is denied, it will then be time enough to determine whether the basis for denial runs afoul of federal transportation policy. It is true that the ordinance gives the City broad authority, but that does not justify the assumption that such authority will be exercised beyond permissible bounds, especially since Chicago has acknowledged that it could not properly withhold a license "solely or even primarily" because existing transfer facilities were adequate or because additional licenses would adversely affect the competitive situation. Only by refraining from passing on the ordinance until Chicago has had a chance to act under it, do we respect the long-standing tradition of this Court not to interfere prematurely with the administration of state and local enactments. See, *e. g., Alabama Federation of Labor* v. *McAdory,* 325 U. S. 450; *Public Service Comm'n of Utah* v. *Wycoff Co.,* 344 U. S. 237.

Cf. *Spector Motor Service, Inc.*, v. *McLaughlin*, 323 U. S. 101.

The fact that this course of action would involve some further delay and expense does not, in my judgment, justify by-passing the municipal authorities. Transfer accepted the risk of such a result when it failed to apply for a license in the first instance. And if it is said that this course will expose the transfer operations to hazards in the interval, the answer is that the Federal District Court in Chicago possesses ample authority to prevent any interference with Transfer's activities pending final adjudication of the matters in controversy.

Some years ago, in a situation closely analogous to the one before us, this Court approved the decision of a three-judge District Court declining to entertain a complaint attacking the constitutionality of a Missouri statute which prohibited interstate carriers from using state highways without obtaining a permit from the State, on the ground that the complainant had not applied for such a permit. *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28; 309 U. S. 620. I believe that *Columbia Terminals* provides the guiding principle for the appropriate disposition of premature challenges to the validity of local ordinances. However, in view of the posture of the present litigation, I would follow a somewhat different course here, and would vacate the judgment of the Court of Appeals and remand the case to the District Court. Our mandate should enable the District Court to stay the operation of Chicago's ordinance and to retain jurisdiction over this case, pending Transfer's prompt steps to initiate license proceedings before the local authorities and the outcome of such proceedings.

Syllabus.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 127. Argued March 12, 1958.—Decided June 16, 1958.*

1. Under § 8 (b) (4) (A) of the National Labor Relations Act, as amended, a "hot cargo" provision in a collective bargaining agreement between a labor union and an employer, providing that employees "shall not be required to handle non-union material" or "shall not be allowed to handle or haul freight to or from an unfair company," may not be enforced by union inducement of employees to refuse to handle such goods, and the existence of such a "hot cargo" provision is not a defense to a charge of an unfair labor practice under that section. Pp. 98–108.
2. When the employer is a common carrier in interstate commerce, such enforcement of a "hot cargo" provision is a violation of § 8 (b) (4) (A), not because of a possible breach of the carrier's obligations under the Interstate Commerce Act, but for the same reasons that warrant the finding of a violation whenever employees have been induced by a union to refuse to handle such goods. Pp. 108–111.

241 F. 2d 147, affirmed.

101 U. S. App. D. C. 80, 247 F. 2d 71, affirmed in part, reversed in part and cause remanded.

Arthur Garrett argued the cause for petitioners in No. 127. With him on the brief was *John C. Stevenson.*

Dominick L. Manoli argued the causes for the National Labor Relations Board. With him on the briefs were

*Together with No. 273, *National Labor Relations Board* v. *General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL–CIO,* and No. 324, *Local 850, International Association of Machinists, AFL–CIO,* v. *National Labor Relations Board,* both on certiorari to the United States Court of Appeals for the District of Columbia Circuit, argued March 11–12, 1958.

Solicitor General Rankin, Jerome D. Fenton and *Norton J. Come.* With them on the briefs also were *Thomas J. McDermott* in No. 127 and *Stephen Leonard* in Nos. 273 and 324.

Louis P. Poulton argued the cause for petitioner in No. 324. With him on the brief were *Plato E. Papps* and *George W. Christensen.*

Herbert S. Thatcher argued the cause for respondent in No. 273. With him on the brief were *David Previant* and *L. N. D. Wells, Jr.*

Peter T. Beardsley and *Gerard D. Reilly* filed a brief for the American Trucking Associations, Inc., as *amicus curiae,* urging reversal in No. 273 and affirmance in No. 324.

William B. Barton filed a brief for the Chamber of Commerce of the United States, as *amicus curiae,* in Nos. 273 and 324.

J. Albert Woll, Thomas E. Harris and *Joseph M. Stone* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* in Nos. 127, 273 and 324.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These cases involve so-called "hot cargo" provisions in collective bargaining agreements. More particularly, they raise the question whether such a provision is a defense to a charge against a union of an unfair labor practice under § 8 (b)(4)(A) of the National Labor Relations Act, as amended, 61 Stat. 136, 141, 29 U. S. C. § 158 (b)(4)(A).

No. 127 arises out of a labor dispute between carpenter unions and an employer engaged in the building construction trade in Southern California. The Sand Door

and Plywood Company is the exclusive distributor in Southern California of doors manufactured by the Paine Lumber Company of Oshkosh, Wisconsin. Watson and Dreps are millwork contractors who purchase doors from Sand. Havstad and Jensen are general contractors who were, at the time of the dispute involved, engaged in the construction of a hospital in Los Angeles. Havstad and Jensen are parties to a master labor agreement negotiated with the United Brotherhood of Carpenters and Joiners of America on behalf of its affiliated district councils and locals, including petitioner unions. This agreement, comprehensively regulating the labor relations of Havstad and Jensen and its carpenter employees, includes a provision that, "workmen shall not be required to handle non-union material."

In August 1954 doors manufactured by Paine and purchased by Sand were delivered to the hospital construction site by Watson and Dreps. On the morning of August 17, Fleisher, business agent of petitioner Local 1976, came to the construction site and notified Steinert, Havstad and Jensen's foreman, that the doors were nonunion and could not be hung. Steinert therefore ordered employees to cease handling the doors. When Nicholson, Havstad and Jensen's general superintendent, appeared on the job and asked Fleisher why the workers had been prevented from handling the doors, he stated that they had been stopped until it could be determined whether the doors were union or nonunion. Subsequent negotiations between officers of Sand and the union failed to produce an agreement that would permit the doors to be installed.

On the basis of charges filed by Sand and a complaint duly issued, the National Labor Relations Board found that petitioners had induced and encouraged employees to engage in a strike or concerted refusal to handle Paine's doors in order to force Havstad and Jensen and

Sand to cease doing business with Paine, all in violation of § 8 (b)(4)(A). 113 N. L. R. B. 1210. The Court of Appeals for the Ninth Circuit enforced the Board's cease-and-desist order, 241 F. 2d 147, and we granted certiorari. 355 U. S. 808. The sole question tendered by the petition for certiorari concerned the relation between the hot cargo provision in the collective bargaining agreement and the charge of an unfair labor practice proscribed by § 8 (b)(4)(A).[1]

Nos. 273 and 324 arise out of a labor dispute in Oklahoma City in which certain unions are said to have induced the employees of five common carriers to cease handling the goods of another employer in violation of § 8 (b)(4)(A). American Iron and Machine Works was engaged in a controversy with Local 850 of the International Association of Machinists, the bargaining representative of its production and maintenance employees, and a strike had been called at the company's plants. Picketing at the plants prevented the carriers that normally served American Iron from making pickup and deliveries, so American Iron hauled freight in its own trucks to the loading platforms of the carriers. The Machinists followed the trucks to the carriers' platforms and picketed them there, without making it clear that their dispute was only with American Iron. In addition, there was evidence that they expressly requested

[1] We therefore find it unnecessary to consider other contentions now made by petitioners on issues resolved against them by both the Board and the Court of Appeals: (1) Whether Steinert, when he instructed the employees to stop handling the doors, acted as a representative of Havstad and Jensen, the employer, or in his capacity as a member of the union, bound to enforce its rules. (2) Whether there was substantial evidence to support the Board's conclusion that the union conduct was not primary activity outside the scope of § 8 (b)(4)(A). See *Irvine* v. *California*, 347 U. S. 128, 129–130; Rule 23 (c) of the Revised Rules of the Supreme Court of the United States.

employees of some of the carriers not to handle American Iron freight. Teamsters union Local 886, representative of the carriers' employees, instructed the employees to cease handling the freight. All the carriers except one expressly ordered their employees to move American Iron freight, but nevertheless they refused to do so. The Teamsters' contract with the carriers contained a provision that, "Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided, this is not a violation of the Labor Management Relations Act of 1947."

On the basis of charges filed by American Iron, the Board issued complaints against the unions and found that both the Machinists and Teamsters, by their appeals or instructions to the carriers' employees, had violated § 8 (b)(4)(A), notwithstanding the hot cargo provision in the collective bargaining agreement. 115 N. L. R. B. 800. The Court of Appeals for the District of Columbia Circuit set aside the order as to the Teamsters because of the hot cargo provision (No. 273), but enforced the order against the Machinists (No. 324). 101 U. S. App. D. C. 80, 247 F. 2d 71. We granted certiorari in all three cases because of conflicts among the circuits as to the meaning of § 8 (b)(4)(A), and because of the importance of the problem in the administration of the National Labor Relations Act, and ordered them consolidated for argument. 355 U. S. 808.[2]

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[2] Certain contentions of the unions in Nos. 273 and 324 can be quickly disposed of. The controversy was not rendered moot simply because, after the filing of the charges and before the complaint issued, picketing had ceased and the Machinists had entered into a collective bargaining agreement containing a no-strike clause. We cannot say that there was no danger of recurrent violation, see *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633, and that the Board was not justified in concluding that, under all the circumstances, it was desirable to add the sanction of its order to whatever

Section 8 (b)(4)(A) provides that, "It shall be an unfair labor practice for a labor organization or its agents . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ."

Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of "secondary boycotts" and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in § 8 (b)(4)(A). The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. It forbids a union to induce employees to strike against or to refuse to handle goods for their employer when an object is to force him or another person to cease doing business with some third party. Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person. Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited. A boycott voluntarily engaged in by a secondary employer for his own business

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agreement the parties had reached. The Machinists' contention that their activity was only legitimate primary activity is foreclosed by the Board's contrary finding on the basis of conflicting evidence.

reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute. Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees.

From these considerations of what is not prohibited by the statute, the true scope and limits of the legislative purpose emerge. The primary employer, with whom the union is principally at odds, has no absolute assurance that he will be free from the consequences of a secondary boycott. Nor have other employers or persons who deal with either the primary employer or the secondary employer and who may be injuriously affected by the restrictions on commerce that flow from secondary boycotts. Nor has the general public. We do not read the words "other person" in the phrase "forcing or requiring . . . any employer or other person" to extend protection from the effects of a secondary boycott to such other person when the secondary employer himself, the employer of the employees involved, consents to the boycott. When he does consent it cannot appropriately be said that there is a strike or concerted refusal to handle goods on the part of the employees. Congress has not seen fit to protect these other persons or the general public by any wholesale condemnation of secondary boycotts, since if the secondary employer agrees to the boycott, or it is brought about by means other than those proscribed in § 8 (b)(4)(A), there is no unfair labor practice.

It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views

on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted. But such ascertainment, that is, construing legislation, is nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern "brain" machines. Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate. Of course § 8 (b)(4)(A), like the entire Taft-Hartley Act, was designed to protect the public interest, but not in the sense that the public was to be shielded from secondary boycotts no matter how brought about. Congress' purpose was more narrowly conceived. It aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods.

In the light of the purpose of the statute as thus defined the cases now before the Court must be judged.

The question is whether a hot cargo provision, such as is found in the collective bargaining agreements in these cases, can be a defense to a charge of an unfair labor practice under § 8 (b)(4)(A) when, in the absence of such a provision, the union conduct would unquestionably be a violation. This question has had a checkered career in the decisions of the National Labor Relations Board since it first came before that tribunal some nine years ago. In the *Conway's Express* case, *In re International Brotherhood of Teamsters,* 87 N. L. R. B. 972 (1949), aff'd *sub nom. Rabouin* v. *Labor Board,* 195 F. 2d 906, the Board (Members Houston, Murdock, and Gray) found that there was nothing in a hot cargo provision as such repugnant to the policy of the statute, and that the union had not violated § 8 (b)(4)(A) when, pursuant to the provision, it had instructed employees not to handle goods, and the employers had apparently acquiesced. Chairman Herzog concurred in the finding that § 8 (b)(4)(A) had not been violated on the facts of the particular case, but was of the opinion that the hot cargo provision did not license the union itself to take action to induce the employees to refuse to handle goods. 87 N. L. R. B., at 983, n. 33. Member Reynolds dissented on the ground that a hot cargo provision was in conflict with the policy of the statute and could not be invoked as a defense to a charge of a violation of § 8 (b)(4)(A). In the *Pittsburgh Plate Glass* case, *Chauffeurs Union,* 105 N. L. R. B. 740 (1953), where the union had also induced employees not to handle goods and the employers had acquiesced in the enforcement of the hot cargo provisions, the Board without dissent (Members Houston, Murdock, Styles and Peterson; Chairman Herzog took no part) adhered to the *Conway* decision. Since "the employers in this proceeding consented to the 'unfair goods'

provision of the contracts, their employees' failure to handle these goods was not a strike or concerted refusal to work under Section 8 (b)(4)(A)." 105 N. L. R. B., at 744.

In the *McAllister* case, *International Brotherhood of Teamsters,* 110 N. L. R. B. 1769 (1954), the Board took a different position. Members Rodgers and Beeson were of the view that § 8 (b)(4)(A) prohibited all secondary boycotts and had been enacted as much for the protection of the primary employer and the public as the secondary employers, and that a contract between the secondary employers and the union was ineffective to waive the protection granted these other interests. They called for overruling the *Conway* case and a declaration that a hot cargo provision is no defense to a charge under § 8 (b)(4)(A). Chairman Farmer concurred in finding a violation of the statute, on the ground that the case was distinguishable from the *Conway* and *Pittsburgh Plate Glass* decisions in that the employers had not acquiesced in the employees' failure to handle the goods. He found nothing contrary to the statute in the execution of a hot cargo provision and mutual adherence to it by employer and union, but only in the inducement of employees to refuse to handle goods in the face of express instructions to do so. Members Murdock and Peterson dissented on the ground that since the employers had by the hot cargo provision consented in advance to the boycott, there was no strike or concerted refusal to handle goods within the meaning of the statute, apparently even assuming that the employers had instructed their employees to handle the goods.

Still further mutations in the position of the Board and the views of the individual members took place in the *Sand Door* case, *Local 1976, United Brotherhood of Carpenters,* 113 N. L. R. B. 1210 (1955), now here as No. 127. Chairman Farmer and Member Leedom maintained

that, although hot cargo clauses are not themselves in conflict with the statute, any direct appeal by a union to the employees of a secondary employer to induce them to refuse to handle goods, and in this manner to assert their rights under the contract, violates § 8 (b)(4)(A). The importance of the fact that, evidently, the employer in the case before the Board had not acquiesced in the stoppage was not made clear. Member Rodgers concurred in the result on the basis of the principal opinion in the *McAllister* case and his view that hot cargo clauses as such violate the policy of the statute. Members Murdock and Peterson, dissenting, adhered to the views they had expressed in *McAllister*. See also *Local 11, United Brotherhood of Carpenters (General Millwork Corp.)*, 113 N. L. R. B. 1084, 1086–1087, and Members Murdock and Peterson dissenting at 1088–1090, aff'd *sub nom. Labor Board* v. *Local 11, United Brotherhood of Carpenters,* 242 F. 2d 932 (C. A. 6th Cir.).

In the *American Iron* case, *General Drivers Union,* 115 N. L. R. B. 800 (1956), now here as Nos. 273 and 324, Members Leedom and Bean relied on the principal opinion in the *Sand Door* case, making it clear that any direct appeal to the employees was forbidden whether or not the employer acquiesced in the boycott. Member Rodgers concurred on the basis of his previous opinions. Members Murdock and Peterson dissented, noting that since there was a violation of the statute even if the employer acquiesced, the *Conway* doctrine had at last been clearly repudiated. See also *Milk Drivers Union (Crowley's Milk Co.)*, 116 N. L. R. B. 1408 (1956), orders reversed and enforcement denied *sub nom. Milk Drivers Union* v. *Labor Board,* 245 F. 2d 817 (C. A. 2d Cir.).

In a decision handed down after the granting of certiorari in the cases now before the Court, *Truck Drivers Union (Genuine Parts Co.)*, 119 N. L. R. B. 399 (1957), two members of the Board, Chairman Leedom and Mem-

ber Jenkins, rested on a broader ground than that taken in the principal opinion in the *Sand Door* and *American Iron* cases: when the secondary employer is a common carrier subject to the Interstate Commerce Act, 24 Stat. 379, as amended by Act of Aug. 9, 1935, 49 Stat. 543, amended, 49 U. S. C. §§ 301–327, a hot cargo clause is invalid at its inception and cannot be recognized by the Board as having any force or effect. It is also strongly suggested in the opinion filed by these members that it would be desirable to establish such a rule in respect to all employers, and that the mere existence of a hot cargo clause should be deemed prima facie evidence of inducement in violation of § 8 (b)(4)(A). Member Rodgers concurred on the basis of his earlier opinions, without considering the implications of the Interstate Commerce Act. Member Bean concurred solely on the basis of the *Sand Door* case. Member Murdock dissented, objecting particularly to what he conceived to be the extreme suggestion that the mere existence of a hot cargo provision should be deemed prima facie evidence of a violation of § 8 (b)(4)(A), and pointing out that a majority of the Board appears to have abandoned the theory of the *Sand Door* and *American Iron* cases even before this Court could review them.

The argument that a hot cargo clause is a defense to a charge of a violation of § 8 (b)(4)(A) may be thus stated. The employer has by contract voluntarily agreed that his employees shall not handle the goods. Because of this consent, even if it is sought to be withdrawn at the time of an actual work stoppage and boycott, it cannot be said, in the light of the statutory purpose, either that there is a "strike or a concerted refusal" on the part of the employees, or that there is a "forcing or requiring" of the employer. Only if consideration is confined to the circumstances immediately surrounding the boycott, in disregard of the broader history of the labor

relations of the parties, is it possible to say that the employer is coerced into engaging in the boycott. If the purpose of the statute is to protect neutrals from certain union pressures to involve them involuntarily in the labor disputes of others, protection should not extend to an employer who has agreed to a hot cargo provision, for such an employer is not in fact involuntarily involved in the dispute. This must at least be so when the employer takes no steps at the time of the boycott to repudiate the contract and to order his employees to handle the goods. The union does no more than inform the employees of their contractual rights and urge them to take the only action effective to enforce them.

The Board in the present cases has rejected the argument as not comporting with the legislative purpose to be drawn from the statute, projected onto the practical realities of labor relations. We agree, duly heedful of the strength of the argument to the contrary. There is nothing in the legislative history to show that Congress directly considered the relation between hot cargo provisions and the prohibitions of § 8 (b)(4)(A). Nevertheless, it seems most probable that the freedom of choice for the employer contemplated by § 8 (b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. Such a choice, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties. See *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 364. This is so because by the employer's intelligent exercise of such a choice under the impact of a concrete situation when judgment is most

responsible, and not merely at the time a collective bargaining agreement is drawn up covering a multitude of subjects, often in a general and abstract manner, Congress may rightly be assumed to have hoped that the scope of industrial conflict and the economic effects of the primary dispute might be effectively limited.

Certainly the language of the statute does not counter such an interpretation. The employees' action may be described as a "strike or concerted refusal," and there is a "forcing or requiring" of the employer, even though there is a hot cargo provision. The realities of coercion are not altered simply because it is said that the employer is forced to carry out a prior engagement rather than forced now to cease doing business with another. A more important consideration, and one peculiarly within the cognizance of the Board because of its closeness to and familiarity with the practicalities of the collective bargaining process, is the possibility that the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned. It may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act. Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers.

Thus inducements of employees that are prohibited under § 8 (b)(4)(A) in the absence of a hot cargo provision are likewise prohibited when there is such a provision. The Board has concluded that a union may not, on the assumption that the employer will respect his contractual obligation, order its members to cease handling

goods, and that any direct appeal to the employees to engage in a strike or concerted refusal to handle goods is proscribed. This conclusion was reached only after considerable experience with the difficulty of determining whether an employer has in fact acquiesced in a boycott, whether he did or did not order his employees to handle the goods, and the significance of an employer's silence. Of course if an employer does intend to observe the contract, and does truly sanction and support the boycott, there is no violation of § 8 (b)(4)(A). A voluntary employer boycott does not become prohibited activity simply because a hot cargo clause exists. But there remains the question whether the employer has in fact truly sanctioned and supported the boycott, and whether he has exercised the choice contemplated by the statute. The potentiality of coercion in a situation where the union is free to approach the employees and induce them to enforce their contractual rights by self-help is very great. Faced with a concerted work stoppage already in progress, an employer may find it substantially more difficult than he otherwise would to decide that business should go on as usual and that his employees must handle the goods. His "acquiescence" in the boycott may be anything but free. In order to give effect to the statutory policy, it is not unreasonable to insist, as the Board has done, that even when there is a contractual provision the union must not appeal to the employees or induce them not to handle the goods. Such a rule expresses practical judgment on the effect of union conduct in the framework of actual labor disputes and what is necessary to preserve to the employer the freedom of choice that Congress has decreed. On such a matter the judgment of the Board must be given great weight, and we ought not set against it our estimate of the relevant factors.

There is no occasion to consider the invalidity of hot cargo provisions as such. The sole concern of the Board

in the present cases was whether the contractual provision could be used by the unions as a defense to a charge of inducing employees to strike or refuse to handle goods for objectives proscribed by § 8 (b)(4)(A). As we have said, it cannot be so used. But the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice. Certainly the voluntary observance of a hot cargo provision by an employer does not constitute a violation of § 8 (b)(4)(A), and its mere execution is not, contrary to the suggestion of two members of the Board in the *Genuine Parts* case, *Truck Drivers Union,* 119 N. L. R. B. 399, prima facie evidence of prohibited inducement of employees. It does not necessarily follow from the fact that the unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties. All we need now say is that the contract cannot be enforced by the means specifically prohibited in § 8 (b)(4)(A).

In Nos. 273 and 324, the Board in its brief suggests that we should go further and find that the contract provisions in these cases are invalid as such because the secondary employers are common carriers subject to the Interstate Commerce Act, 24 Stat. 379, as amended by Act of Aug. 9, 1935, 49 Stat. 543, amended, 49 U. S. C. §§ 301–327. In the recent *Genuine Parts* case, already referred to, *Truck Drivers Union,* 119 N. L. R. B. 399, two members of the Board in fact took this position, stating that when common carriers are involved hot cargo clauses are "invalid at their inception and can be given no operative cognizance so far as the administration of this [the Labor Management Relations] Act is con-

cerned." This is true, it is said, because by entering a contract not to handle the goods the carrier violates its obligations under the Interstate Commerce Act to provide nondiscriminatory service and to observe just and reasonable practices. See Act of Aug. 9, 1935, § 216, 49 Stat. 558, amended, 49 U. S. C. § 316. The carrier's consent to boycott is therefore void, and it follows that it is likewise void for all purposes concerned with the Labor Management Relations Act. Since the *Genuine Parts* decision was handed down, the Interstate Commerce Commission has in fact ruled, in *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M. C. C. 617 (Dec. 16, 1957), that the carriers there involved were not relieved from their obligations under the Interstate Commerce Act by a hot cargo clause.

It is significant to note the limitations that the Commission was careful to draw about its decision in the *Galveston* case. It was not concerned to determine, as an abstract matter, the legality of hot cargo clauses, but only to enforce whatever duty was imposed on the carriers by the Interstate Commerce Act and their certificates. The Commission recognized that it had no general authority to police such contracts, and its sole concern was to determine whether a hot cargo provision could be a defense to a charge that the carriers had violated some specific statutory duty. It is the Commission that in the first instance must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer

to develop in a more cautious and pragmatic manner through case-by-case adjudication.

But it is said that the Board is not enforcing the Interstate Commerce Act or interfering with the Commission's administration of that statute, but simply interpreting the prohibitions of its own statute in a way consistent with the carrier's obligations under the Interstate Commerce Act. Because of that Act a carrier cannot effectively consent not to handle the goods of a shipper. Since he cannot effectively consent, there is, under § 8 (b)(4)(A), a "strike or concerted refusal," and a "forcing or requiring" of the carrier to cease handling goods just as much as if no hot cargo clause existed. But the fact that the carrier's consent is not effective to relieve him from certain obligations under the Interstate Commerce Act does not necessarily mean that it is ineffective for all purposes, nor should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes. Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a "strike or concerted refusal," or a "forcing or requiring" of an employer to cease handling goods is a matter of the federal policy governing labor relations. The Board is not concerned with whether the carrier has performed its obligations to the shipper, but whether the union has performed its obligation not to induce employees in the manner proscribed by § 8 (b)(4)(A). Common factors may emerge in the adjudication of these questions, but they are, nevertheless, distinct questions involving independent considerations. This is made clear by a situation in which the carrier has freely agreed with the union to engage in a boycott. He may have failed in his obligations under

the Interstate Commerce Act, but there clearly is no violation of § 8 (b)(4)(A); there has been no prohibited inducement of employees.

The case is not like that in *Southern S. S. Co.* v. *Labor Board,* 316 U. S. 31, where the Board was admonished not to apply the policies of its statute so single-mindedly as to ignore other equally important congressional objectives. A specific remedy ordered by the Board—reinstatement of employees who had engaged in a strike—worked directly to weaken the effectiveness of a statutory prohibition against mutiny by members of the crew of a vessel. Presumed illegality under the mutiny statute was not used to establish a violation of the labor statute. It was relied on to establish an abuse of discretion in giving a remedy. Much less was there any suggestion that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes.

The unions in Nos. 273 and 324 violated § 8 (b)(4)(A) for the reasons set forth in the first part of this opinion, and not as a consequence of prohibitions in the Interstate Commerce Act.

The judgments in Nos. 127 and 324 are affirmed. The judgment in No. 273 is reversed and the cause remanded to the Court of Appeals with instructions to grant enforcement of the order of the Board.

Nos. 127 and 324—*Affirmed.*
No. 273—*Reversed and remanded.*

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

The Court concedes that the voluntary observance of a hot cargo provision by an employer does not constitute a violation of § 8 (b)(4)(A) of the National Labor Rela-

tions Act,[1] 61 Stat. 136, 140, 29 U. S. C. § 158 (b)(4)(A). I fail to see, therefore, why enforcement of a provision in a collective bargaining agreement outlawing work in nonunion goods violates the Act.

The provision of the collective bargaining agreement in the *Carpenters* case is typical of those in issue here:

> "Workmen shall not be required to handle non-union material."

That provision was bargained for like every other clause in the collective agreement. It was agreed to by the employer. How important it may have been to the parties—how high or low in their scale of values—we do not know. But on these records it was the product of bargaining, not of coercion. The Court concedes that its inclusion in the contracts may not be called "forcing or requiring" the employer to cease handling other products within the meaning of the Act. Enforcing the collective bargaining agreement—standing by its terms—is not one of the coercive practices at which the Act was aimed. Enforcement of these agreements is conducive to peace. Disregard of collective agreements—the flouting of them—is disruptive. That was the philosophy of the

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[1] That provision of the Act reads as follows:

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

. . . . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . . ."

Conway's Express decision of the Labor Board, 87 N. L. R. B. 972, aff'd *sub nom. Rabouin* v. *Labor Board,* 195 F. 2d 906; and I think it squares with the Act.

The present decision is capricious. The boycott is lawful if the employer agrees to abide by this collective bargaining agreement. It is unlawful if the employer reneges.

The hostile attitude of labor against patronizing or handling "unfair" goods goes deep into our history. It is not peculiarly American, though it has found expression in various forms in our history [2] from the refusal of Americans to buy British tea, to the refusal of Abolitionists to buy slave-made products, to the refusal of unions to work on convict-made or on other nonunion goods. Unions have adhered to the practice because of their principle of mutual aid and protection. Section 7 of the Act, indeed, recognizes that principle in its guarantee that "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." We noticed in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 503, that the elimination of "competition from non-union made goods" was a legitimate labor objective.

The reason an employer may also agree to that phase of union policies, the reason he may acquiesce in the inclusion of such a clause in a particular collective agreement, may only be surmised. Perhaps he sees eye to eye with the union. Perhaps he receives important concessions in exchange for his assistance to the union.

Certain it is that where he voluntarily agrees to the "unfair" goods clause he is not forced or coerced in the

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[2] See Millis and Montgomery, Organized Labor (1945), 581 *et seq.;* Wolman, The Boycott in American Trade Unions (1916), cc. II, III.

statutory sense. What Judge Clark said in *Milk Drivers & Dairy Employees* v. *Labor Board,* 245 F. 2d 817, 822, has not yet been answered:

> "In the absence of a prior agreement, work to be done by employees is determined unilaterally by the employer; but where a collective agreement specifies the work to be done, that agreement defines the normal work of the employees and a 'strike' or 'refusal' must be a refusal to do that normal work. The employer obviously cannot impose additional work on the employees contrary to the agreement and then charge that their refusal to perform it constitutes an unfair practice. We see no difference in this respect between tasks exempted by the agreement because they are offensive to health or safety and tasks exempted because their performance is contrary to the interests of organized labor and, in this case, the local itself."

We act today more like a Committee of the Congress than the Court. We strain to outlaw bargaining contracts long accepted, long used.[3] Perhaps these particular pro-

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[3] "Sympathetic support by members of one union for organized workers in other plants or in other trades and industries often finds expression in union agreements. Any union looks upon nonunion conditions of work as a threat to its own union working standards. Consequently it is often provided in agreements that the employer may not require employees to work on material coming from or destined for manufacturers not operating under union agreements. Other agreements limit the prohibition to material coming from employers who have been declared 'unfair' to organized labor by an affiliated union. This reduces considerably the list of restricted manufacturers, since many employers who do not deal with organized labor have never been declared 'unfair' by unions having nominal jurisdiction. Another alternative merely prohibits work on materials coming from or destined for manufacturers whose employees are on strike. Agreements covering factory production workers may

visions have evils in them that should be declared contrary to the public interest. They are, however, so much a part of the very fabric of collective bargaining that we should leave this policy-making to Congress and not rush in to undo what a century or more of experience has imbedded into labor-management agreements. I have not found a word of legislative history which even intimates that these "unfair" goods provisions of collective bargaining agreements are unlawful.

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require that all building repairs and maintenance work as well as all hauling of goods and materials into and away from the employer's premises must be done by union workers." Union Agreement Provisions, U. S. Dept. of Labor, H. R. Doc. No. 723, 77th Cong., 2d Sess. 32. And see Collective Bargaining Provisions, U. S. Dept. of Labor, H. R. Doc. No. 282, 81st Cong., 1st Sess. 37; Strikes and Lockouts (Preliminary Draft), U. S. Dept. of Labor, February 1947, pp. 28–32; Strikes and Lockouts, Bureau of National Affairs, 1956, 77:351.

KENT ET AL. *v.* DULLES, SECRETARY OF STATE.

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

No. 481. Argued April 10, 1958.—Decided June 16, 1958.

At a time when an Act of Congress required a passport for foreign travel by citizens if a state of national emergency had been declared by the President and when the Proclamation necessary to make the Act effective had been made, the Secretary of State denied passports to petitioners because of their alleged Communistic beliefs and associations and their refusal to file affidavits concerning present or past membership in the Communist Party. *Held:* The Secretary was not authorized to deny the passports for these reasons under the Act of July 3, 1926, 22 U. S. C. § 211a, or § 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1185. Pp. 117–130.

(a) The right to travel is a part of the "liberty" of which a citizen cannot be deprived without due process of law under the Fifth Amendment. Pp. 125–127.

(b) The broad power of the Secretary under 22 U. S. C. § 211a to issue passports, which has long been considered "discretionary," has been construed generally to authorize the refusal of a passport only when the applicant (1) is not a citizen or a person owing allegiance to the United States, or (2) was engaging in criminal or unlawful conduct. Pp. 124–125, 127–128.

(c) This Court hesitates to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to withhold a passport from a citizen for any substantive reason he may choose. P. 128.

(d) No question concerning the exercise of the war power is involved in this case. P. 128.

(e) If a citizen's liberty to travel is to be regulated, it must be pursuant to the law-making functions of Congress, any delegation of the power must be subject to adequate standards, and such delegated authority will be narrowly construed. P. 129.

(f) The Act of July 3, 1926, 22 U. S. C. § 211a, and § 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1185, do not delegate to the Secretary authority to withhold passports to

citizens because of their beliefs or associations, and any Act of Congress purporting to do so would raise grave constitutional questions. Pp. 129–130.

(g) The only Act of Congress expressly curtailing the movement of Communists across our borders, §§ 2 and 6 of the Internal Security Act of 1950, has not yet become effective, because the Communist Party has not registered under that Act and there is not in effect a final order of the Board requiring it to do so. P. 121, n. 3, p. 130.

101 U. S. App. D. C. 278, 239, 248 F. 2d 600, 561, reversed.

Leonard B. Boudin argued the cause for petitioners. With him on the brief were *Victor Rabinowitz* and *David Rein. Daniel G. Marshall* was also on the brief for Briehl, petitioner.

Solicitor General Rankin argued the cause for respondent. With him on the brief were *Assistant Attorney General Doub, Samuel D. Slade* and *B. Jenkins Middleton.*

Osmond K. Fraenkel and *William J. Butler* filed a brief for the American Civil Liberties Union, as *amicus curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case concerns two applications for passports, denied by the Secretary of State. One was by Rockwell Kent who desired to visit England and attend a meeting of an organization known as the "World Council of Peace" in Helsinki, Finland. The Director of the Passport Office informed Kent that issuance of a passport was precluded by § 51.135 of the Regulations promulgated by the Secretary of State on two grounds: [1] (1) that he was a

[1] 22 CFR § 51.135 provides:

"In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United

Communist and (2) that he had had "a consistent and prolonged adherence to the Communist Party line." The letter of denial specified in some detail the facts on which those conclusions were based. Kent was also advised of his right to an informal hearing under § 51.137 of the Regulations. But he was also told that whether or not a hearing was requested it would be necessary, before a passport would be issued, to submit an affidavit as to whether he was then or ever had been a Communist.[2] Kent did not ask for a hearing but filed a new passport application listing several European countries he desired to visit. When advised that a hearing was still available to him, his attorney replied that Kent took the position

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States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

"(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

"(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

[2] Section 51.142 of the Regulations provides:

"At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings."

that the requirement of an affidavit concerning Communist Party membership "is unlawful and that for that reason and as a matter of conscience," he would not supply one. He did, however, have a hearing at which the principal evidence against him was from his book It's Me O Lord, which Kent agreed was accurate. He again refused to submit the affidavit, maintaining that any matters unrelated to the question of his citizenship were irrelevant to the Department's consideration of his application. The Department advised him that no further consideration of his application would be given until he satisfied the requirements of the Regulations.

Thereupon Kent sued in the District Court for declaratory relief. The District Court granted summary judgment for respondent. On appeal the case of Kent was heard with that of Dr. Walter Briehl, a psychiatrist. When Briehl applied for a passport, the Director of the Passport Office asked him to supply the affidavit covering membership in the Communist Party. Briehl, like Kent, refused. The Director then tentatively disapproved the application on the following grounds:

> "In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication 'Social Work Today'; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that

> you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Incorporated."

The Director advised Briehl of his right to a hearing but stated that whether or not a hearing was held, an affidavit concerning membership in the Communist Party would be necessary. Briehl asked for a hearing and one was held. At that hearing he raised three objections: (1) that his "political affiliations" were irrelevant to his right to a passport; (2) that "every American citizen has the right to travel regardless of politics"; and (3) that the burden was on the Department to prove illegal activities by Briehl. Briehl persisted in his refusal to supply the affidavit. Because of that refusal Briehl was advised that the Board of Passport Appeals could not under the Regulations entertain an appeal.

Briehl filed his complaint in the District Court which held that his case was indistinguishable from Kent's and dismissed the complaint.

The Court of Appeals heard the two cases *en banc* and affirmed the District Court by a divided vote. 101 U. S. App. D. C. 278, 239, 248 F. 2d 600, 561. The cases are here on writ of certiorari. 355 U. S. 881.

The Court first noted the function that the passport performed in American law in the case of *Urtetiqui* v. *D'Arbel,* 9 Pet. 692, 699, decided in 1835:

> "There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary

> with him. No inquiry is instituted by him to ascertain the fact of citizenship, or any proceedings had, that will in any manner bear the character of a judicial inquiry. It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."

A passport not only is of great value—indeed necessary—abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States. See *Browder* v. *United States,* 312 U. S. 335, 339; 3 Moore, Digest of International Law (1906), § 512. But throughout most of our history—until indeed quite recently—a passport, though a great convenience in foreign travel, was not a legal requirement for leaving or entering the United States. See Jaffe, The Right to Travel: The Passport Problem, 35 Foreign Affairs 17. Apart from minor exceptions to be noted, it was first [3] made a requirement by § 215 of the Act of June 27, 1952, 66 Stat. 190, 8 U. S. C. § 1185, which states that, after a prescribed proclamation by the President, it is "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United

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[3] Sections 2 and 6 of the Act of September 23, 1950, known as the Internal Security Act of 1950, 64 Stat. 987, 993, 50 U. S. C. §§ 781, 785, provide that it shall be unlawful, when a Communist organization is registered under the Act or when "there is in effect a final order of the Board requiring an organization to register," for any member having knowledge of such registry and order to apply for a passport or for any official to issue him one. But the conditions precedent have not yet materialized.

States unless he bears a valid passport." [4] And the Proclamation necessary to make the restrictions of this Act applicable and in force has been made.[5]

Prior to 1952 there were numerous laws enacted by Congress regulating passports and many decisions, rulings, and regulations by the Executive Department concerning them. Thus in 1803 Congress made it unlawful for an official knowingly to issue a passport to an alien certifying that he is a citizen. 2 Stat. 205. In 1815, just prior to the termination of the War of 1812, it made it illegal for a citizen to "cross the frontier" into enemy

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[4] That section provides in relevant part:

"(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

"(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

. . . . . .

"(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

. . . . . .

"(b) After such proclamation as is provided for in subsection (a) has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

[5] Proc. No. 3004, 67 Stat. C31.

territory, to board vessels of the enemy on waters of the United States or to visit any of his camps within the limits of the United States, "without a passport first obtained" from the Secretary of State or other designated official. 3 Stat. 199–200. The Secretary of State took similar steps during the Civil War. See Dept. of State, The American Passport (1898), 50. In 1850 Congress ratified a treaty with Switzerland requiring passports from citizens of the two nations. 11 Stat. 587, 589–590. Finally in 1856 Congress enacted what remains today as our basic passport statute. Prior to that time various federal officials, state and local officials, and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials requesting treatment according to the usages of international law. By the Act of August 18, 1856, 11 Stat. 52, 60–61, 22 U. S. C. § 211a, Congress put an end to those practices.[6] This provision, as codified by the Act of July 3, 1926, 44 Stat., Part 2, 887, reads,

> "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

Thus for most of our history a passport was not a condition to entry or exit.

It is true that, at intervals, a passport has been required for travel. Mention has already been made of the restrictions imposed during the War of 1812 and during the Civil War. A like restriction, which was the forerunner of that contained in the 1952 Act, was imposed by Congress in 1918.

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[6] See 9 Op. Atty. Gen. 350, 352.

The Act of May 22, 1918, 40 Stat. 559, made it unlawful, while a Presidential Proclamation was in force, for a citizen to leave or enter the United States "unless he bears a valid passport." See H. R. Rep. No. 485, 65th Cong., 2d Sess. That statute was invoked by Presidential Proclamation No. 1473 on August 8, 1918, 40 Stat. 1829, which continued in effect until March 3, 1921. 41 Stat. 1359.

The 1918 Act was effective only in wartime. It was amended in 1941 so that it could be invoked in the then-existing emergency. 55 Stat. 252. See S. Rep. No. 444, 77th Cong., 1st Sess. It was invoked by Presidential Proclamation No. 2523, November 14, 1941, 55 Stat. 1696. That emergency continued until April 28, 1952. Proc. No. 2974, 66 Stat. C31. Congress extended the statutory provisions until April 1, 1953. 66 Stat. 54, 57, 96, 137, 330, 333. It was during this extension period that the Secretary of State issued the Regulations here complained of.[7]

Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is "a discretionary act" on the part of the Secretary of State. The scholars,[8] the courts,[9] the Chief Executive,[10] and the Attorneys General,[11] all

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[7] Dept. Reg. No. 108.162, effective August 28, 1952, 17 Fed. Reg. 8013.

[8] See 2 Hyde, International Law (2d rev. ed. 1945), § 399; 3 Hackworth, Digest of International Law (1942), § 268.

[9] See *Perkins* v. *Elg*, 307 U. S. 325, 350.

[10] Exec. Order No. 654, June 13, 1907; *id.*, No. 2119–A, Jan. 12, 1915; *id.*, No. 2286–A, Dec. 17, 1915; *id.*, No. 2362–A, Apr. 17, 1916; *id.*, No. 2519–A, Jan. 24, 1917; *id.*, No. 4382–A, Feb. 12, 1926; *id.*, No. 4800, Jan. 31, 1928; *id.*, No. 5860, June 22, 1932; *id.*, No. 7856, Mar. 31, 1938, 3 Fed. Reg. 681, 22 CFR § 51.75. The present provision is that last listed and reads in part as follows:

"The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain

[*Footnote 11 is on page 125*]

so said. This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. See *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545; *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310. But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta.[12] Chafee,

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countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries."

The Department, however, did not feel that the Secretary of State could exercise his discretion willfully without cause. Acting Secretary Wilson wrote on April 27, 1907, "The issuance of passports is a discretionary act on the part of the Secretary of State, and he may, for reasons deemed by him to be sufficient, direct the refusal of a passport to an American citizen; but a passport is not to be refused to an American citizen, even if his character is doubtful, unless there is reason to believe that he will put the passports to an improper or unlawful use." Foreign Relations of the United States, Pt. II (1910), 1083. See 3 Moore, Digest of International Law (1906), § 512. Freund, Administrative Powers over Persons and Property (1928), 97, states ". . . in practice it is clear that the Department of State acts upon the theory that it must grant the passport unless there is some circumstance making it a duty to refuse it. Any other attitude would indeed be intolerable; it would mean an executive power of a political character over individuals quite out of harmony with traditional American legislative practice."

[11] 13 Op. Atty. Gen. 89, 92; 23 Op. Atty. Gen. 509, 511.

[12] Article 42 reads as follows:

"It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners

Three Human Rights in the Constitution of 1787 (1956), 171–181, 187 *et seq.*, shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall* v. *Nevada,* 6 Wall. 35, 44; *Williams* v. *Fears,* 179 U. S. 270, 274; *Edwards* v. *California,* 314 U. S. 160. "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." *Id.,* at 197.

Freedom of movement also has large social values. As Chafee put it:

> "Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities.[13] Then there are reasons close to the core of personal life—marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed

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and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above." And see Jaffe, *op. cit. supra,* 19–20; Sibley, The Passport System, 7 J. Soc. Comp. Leg. (N. S.) 26, 32–33; 1 Blackstone Commentaries 134–135.

[13] The use of foreign travel to promote educational interests is reviewed by Francis J. Colligan in 30 Dept. State Bull. 663.

> on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home." *Id.*, at 195–196. And see Vestal, Freedom of Movement, 41 Iowa L. Rev. 6, 13–14.

Freedom to travel is, indeed, an important aspect of the citizen's "liberty." We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.

The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." 32 Stat. 386, 22 U. S. C. § 212. Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States. See 3 Moore, Digest of International Law (1906), § 512; 3 Hackworth, Digest of International Law (1942), § 268; 2 Hyde, International Law (2d rev. ed.), § 401.

The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice. One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

More restrictive regulations were applied in 1918 and in 1941 as war measures. We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579.

In a case of comparable magnitude, *Korematsu* v. *United States,* 323 U. S. 214, 218, we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of "the gravest imminent danger to the public safety." There the Congress and the Chief Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here.

Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than "request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection" to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 420–430. Cf. *Cantwell* v. *Connecticut,* 310 U. S. 296, 307; *Niemotko* v. *Maryland,* 340 U. S. 268, 271. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo,* 323 U. S. 283, 301–302. Cf. *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 156; *United States* v. *Rumely,* 345 U. S. 41, 46. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here.

We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations. They do not seek to escape the law nor to violate it. They may or may not be Communists. But assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective.[14] It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations.

To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

Reversed.

MR. JUSTICE CLARK, with whom MR. JUSTICE BURTON, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER concur, dissenting.

On August 28, 1952, acting under authority vested by Executive Order No. 7856, 22 CFR § 51.77, the Secretary of State issued the regulations in question, § 51.142 of

[14] See note 3, *supra*.

which provides that a passport applicant may be required to make a statement under oath "with respect to present or past membership in the Communist Party." 22 CFR § 51.142. Since 1917, the Congress has required that every passport application "contain a true recital of each and every matter of fact which may be required by . . . any rules" of the Secretary of State, and that requirement must be satisfied "[b]efore a passport is issued to any person." 40 Stat. 227, 22 U. S. C. § 213. In the context of that background, the Secretary asked for, and petitioners refused to file, affidavits stating whether they then were or ever had been members of the Communist Party. Thereupon the Secretary refused to further consider petitioners' applications until such time as they filed the required affidavits.

The Secretary's action clearly must be held authorized by Congress if the requested information is relevant to any ground upon which the Secretary might properly refuse to issue a passport. The Court purports today to preclude the existence of such a ground by holding that the Secretary has not been authorized to deny a passport to a Communist whose travel abroad would be inimical to our national security.

In thus construing the authority of the Secretary, the Court recognizes that all during our history he has had discretion to grant or withhold passports. That power, first exercised without benefit of statute, was made the subject of specific legislative authority in 1856 when the Congress consolidated all power over passports in the hands of the Secretary. 11 Stat. 60–61. In 1874 the statutory language, "shall be authorized to grant and issue," was changed to "may grant and issue." 1874 R. S. § 4075. In slightly modified form, the Secretary's power has come through several re-enactments, *e. g.*, 44 Stat., Part 1, p. 657 in 1926, to its present-day embodiment in 44 Stat., Part 2, p. 887, 22 U. S. C. § 211a.

This discretionary authority, which we previously acknowledged in *Perkins* v. *Elg,* 307 U. S. 325, 349–350 (1939), was exercised both in times of peace and in periods of war. During war and other periods of national emergency, however, the importance of the Secretary's passport power was tremendously magnified by a succession of "travel-control statutes" making possession of a passport a legal necessity to leaving or entering this country. The first of these was enacted in 1815 just prior to the end of the War of 1812, when it was made illegal for any citizen to "cross the frontier" into enemy territory without a passport. 3 Stat. 199. After the same result was accomplished during the Civil War without congressional sanction, 3 Moore, Digest of International Law, 1015–1021, World War I prompted passage in 1918 of the second travel-control statute, 40 Stat. 559. The 1918 statute, directly antecedent to presently controlling legislation, provided that in time of war and upon public proclamation by the President that the public safety required additional travel restrictions, no citizen could depart from or enter into the country without a passport. Shortly thereafter, President Wilson made the required proclamation of public necessity, and provided that no citizen should be granted a passport unless it affirmatively appeared that his "departure or entry is not prejudicial to the interests of the United States." Proc. No. 1473, 40 Stat. 1829.

The legislative history of the 1918 Act sharply indicates that Congress meant the Secretary to deny passports to those whose travel abroad would be contrary to our national security. The Act came to the floor of the House of Representatives accompanied by the following explanation in the Report of the House Committee on Foreign Affairs, H. R. Rep. No. 485, 65th Cong., 2d Sess. 2–3:

> "That some supervision of travel by American citizens is essential appeared from statements made

before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined.

. . . . .

"It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. It is obviously impracticable to appeal to Congress for further legislation in each new emergency. Swift Executive action is the only effective counterstroke.

"The committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous suspicious departures for Cuba which it was impossible to prevent. Other individual cases of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons reasonably suspected of aiding Germany's purposes."

During debate of the bill on the floor of the House, its House spokesman stated:

> "The Government is now very much hampered by lack of authority to control the travel to and from this country, even of people suspected of not being loyal, and even of those whom they suspect of being in the employ of enemy governments." 56 Cong. Rec. 6029.
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> . . . . .
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> "Our ports are open, so far as the law is concerned, to alien friends, citizens, and neutrals, to come and go at will and pleasure, and that notwithstanding the Government may suspect the conduct and the intention of the individuals who come and go." *Id.* at 6065.

His counterpart in the Senate stated in debate:

> "The chief object of the bill is to correct a very serious trouble which the Department of State, the Department of Justice, and the Department of Labor are having with aliens and alien enemies and renegade American citizens, I am sorry to say, entering the United States from nests they have in Cuba and over the Mexican border. They can now enter and depart without any power of the departments or of the Government to intercept or delay them. There is no law that covers this case. It is believed that all the information which goes to Germany of the war preparations of the United States and of the transportation of troops to France passes through Mexico. The Government is having a great deal of trouble along that border. It is an everyday occurrence, and the emergency of this measure is very great. The bill is supplementary to the espionage

> laws and necessary for their efficient execution in detecting and punishing German spies." 56 Cong. Rec. 6192.

The implication is unmistakable that the Secretary was intended to exercise his traditional passport function in such a manner as would effectively add to the protection of this country's internal security.

That the Secretary so understood and so exercised his passport power in this period is evident from two State Department documents in 1920. A memorandum of the Under Secretary of State, dated November 30, 1920, declared, "Any assistance in the way of passport facilities, which this Government may render to a person who is working either directly or indirectly in behalf of the Soviet Government is a help to the Soviet Government . . . ." Memorandum Re Applicants for Passports Who are Bolshevists or Who are Connected with Bolshevist Government, Code No. 5000. Accordingly, it was recommended that passports be refused any person "who counsels or advocates publicly or privately the overthrow [of] organized Governments by force." *Id.* Among the examples stated were "[m]embers of the Communist Party." *Id.* Two weeks later, the State Department published office instructions, dated December 16, 1920, to our embassies throughout the world, implementing Code No. 5000 by prohibiting issuance of passports to "anarchists" and "revolutionary radicals." Expressly included among the proscribed classes of citizens were those who "believe in or advocate the overthrow by force or violence of the Government of the United States," as well as all those who "are members of or are affiliated with any organization" that believes in or advocates such overthrow.

By its terms a war statute, the 1918 Act expired in March 1921, see 41 Stat. 1359, after which no more travel

controls existed until 1941. In that year, Congress amended the 1918 Act so as to provide the same controls during the national emergency proclaimed by the President on May 27, 1941, should the President find and publicly proclaim that the interest of the United States required that such restrictions be reimposed. 55 Stat. 252. Shortly thereafter, President Roosevelt invoked this authority, 55 Stat. 1696, and implementing regulations were issued by the State Department. 22 CFR § 53. The legislative history of the 1941 amendment is as clear as that of the 1918 Act: the purpose of the legislation was to so use the passport power of the Secretary as to block travel to and from the country by those persons whose passage would not be in the best interests and security of the United States. The Report of the Senate Committee on the Judiciary, S. Rep. No. 444, 77th Cong., 1st Sess. 1–2, declared:

> "Since the outbreak of the present war it has come to the attention of the Department of State and of other executive departments that there are many persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments, and others who are engaged in activities inimical to the best interests of the United States, who desire to travel from time to time between the United States and foreign countries in connection with their activities . . . ."

During debate on the House floor, the "sole purpose" of the bill was stated to be establishment of "a sort of clearing house," where those persons wishing to enter or leave the country "would have to give their reasons why they were going or coming, and where it would be determined whether . . . their coming in or going out would be inimical to the interests of the United States." 87

Cong. Rec. 5052. See also 87 Cong. Rec. 5048–5053, 5386–5388. The carrying out of this legislative purpose resulted in a "complete change in emphasis of the work of the Division from that of an agency to afford protection to the individual to that of one whose principal purpose was to safeguard and maintain the security of the state." 12 Dept. State Bull. 1070. That transformation involved "the clearance *upon a basis of security for the state* of the entry and departure of hundreds of thousands of persons into and from the United States." *Id.* (Emphasis added.)

While the national emergency to which the 1941 amendment related was officially declared at an end on April 28, 1952, Proc. No. 2974, 66 Stat. C31, Congress continued the provisions of the Act in effect until April 1, 1953. 66 Stat. 54. In that interim period, Congress passed the Immigration and Nationality Act of 1952, which both repealed the 1918 Act as amended in 1941, 66 Stat. 279, and re-enacted it as § 215 of the 1952 Act, amending it only to the extent that its provisions would be subject to invocation "during the existence of any national emergency proclaimed by the President." 66 Stat. 190. There is practically no legislative history on this incorporation of the 1918 statute in the 1952 Act apart from a comment in the House Report that the provisions of § 215 are "incorporated in the bill . . . in practically the same form as they now appear in the act of May 22, 1918." H. R. Rep. No. 1365, 82d Cong., 2d Sess. 53. For that reason, the legislative history of the 1918 Act and the 1941 amendment, which I have set out at some detail, is doubly important in ascertaining the intent of the Congress as to the authority of the Secretary to deny passports under § 215 of the 1952 Act. Cf. *United States* v. *Plesha,* 352 U. S. 202, 205 (1957).

At the time of the 1952 Act, a national emergency proclaimed by President Truman on December 16, 1950, in

response to the Korean conflict, was—and still is today—in existence. Proc. No. 2914, 64 Stat. A454. In reliance on that, the President invoked the travel restrictions of § 215 on January 17, 1953. Proc. No. 3004, 67 Stat. C31. The proclamation by which this was done carefully pointed out that none of its provisions should be interpreted as revoking any regulation "heretofore issued relating to the departure of persons from, or their entry into, the United States." *Id.* Among the regulations theretofore issued were those now attacked relating to the issuance of passports to Communists, for they had been promulgated to be effective on August 28, 1952, shortly after passage of the 1952 Act. 17 Fed. Reg. 8013.

Congress, by virtue of § 215 of the 1952 Act, has approved whatever use of his discretion the Secretary had made prior to the June 1952 date of that legislation.[1] That conclusion necessarily follows from the fact that § 215 continued to make legal exit or entry turn on possession of a passport, without in any way limiting the discretionary passport power theretofore exercised by the Secretary. See *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310–311 (1957); *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545 (1954); *United States* v. *Cerecedo Hermanos y Compañia*, 209 U. S. 337, 339 (1908). But the Court then determines (1) that the Secretary's denial of passports in peacetime extended to only two categories of cases, those involving allegiance and those involving criminal activity, and (2) that the Secre-

[1] This is not seriously disputed by the majority. However, reference is made to a reluctance to interpret broadly the practice of the Secretary approved by Congress in the 1952 Act because the denial of passports on security grounds had not "jelled" at the time of the 1926 Act. But that overlooks (1) that it is congressional intent in the 1952 statute, not the 1926 statute, to which we look, and (2) that there is abundant evidence, set out in this opinion, of security denials before as well as after 1926.

tary's wartime exercise of his discretion, while admittedly more restrictive, has no relevance to the practice which Congress can be said to have approved in 1952. Since the present denials do not involve grounds either of allegiance or criminal activity, the Court concludes that they were beyond the pale of congressional authorization. Both of the propositions set out above are vital to the Court's final conclusion. Neither of them has any validity: the first is contrary to fact, and the second to common sense.

The peacetime practice of the State Department indisputably involved denial of passports for reasons of national security. The Report of the Commission on Government Security (1957), 470–473, summarizes the Department's policy on granting passports to Communists by excerpts from State Department documents. Shortly after the 1917 Russian Revolution, the Department "became aware of the scope and danger of the world-wide revolutionary movement and the attendant purpose to overthrow all existing governments, including our own." Thereafter "passports were refused to American Communists who desired to go abroad for indoctrination, instruction, etc. *This policy was continued until 1931* . . . ." (Emphasis added.) From 1931 "until World War II no persons were refused passports because they were Communists." After World War II, "[a]t first passports were refused," but upon reconsideration of the matter in 1948, "the decision was made that passports would be issued to Communists and supporters of communism who satisfied the Department that they did not intend, while abroad, to engage in the promotion of Communist activities." At the same time, however, it was decided that "passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States." Later in 1948 the policy was changed to give Communist journalists passports even though they were "actively

promoting the Communist cause." Nearly two years later, in September 1950, the latter leniency was reversed, after it was pointed out "that the Internal Security Act of 1950 clearly showed the desire of Congress that no Communists should be issued passports of this Government." [2] The matter was referred to the Department's Legal Adviser, "who agreed that it was the duty of the State Department to refuse passports to all Communists, including journalists."

Other evidence of peacetime denials for security reasons is more scattered, but nevertheless existent. Much of it centers around opposition to the Internal Security Act of 1950, for one of the stated aims of that legislation was denial of passports to Communists. The minority report of the Senate Committee on the Judiciary objected, "But this can be done under the existing discretionary powers of the Secretary of State . . . as evidenced by the recent denial or cancellation of a passport to Paul Robeson." S. Rep. No. 2369, Part 2, 81st Cong., 2d Sess. 10. President Truman, in vetoing that Act, stated: "It is claimed that this bill would deny passports to Communists. The fact is that the Government can and does deny passports to Communists under existing law." 96 Cong. Rec. 15631.[3]

In 1869 Attorney General Hoar advised the Secretary of State that good reason existed for the passport power being discretionary in nature, for it might sometimes be "most inexpedient for the public interests for this country to grant a passport to a citizen of the United States."

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[2] For a comprehensive story of Communism in America indicating the necessity for passport control, see Hoover, Masters of Deceit (1958).

[3] To the same effect see the statement of Senator Kilgore during Senate debate on the Act, 96 Cong. Rec. 14538, and an amendment offered to the Act in both the House, 96 Cong. Rec. 13756, and Senate, 96 Cong. Rec. 14599.

23 Op. Atty. Gen. 509, 511. As an example he referred to the case of "an avowed anarchist," for if such person were to seek a passport, "the public interests might require that his application be denied." *Ibid.* See also, 13 Op. Atty. Gen. 89, 92.

Orders promulgated by the Passport Office periodically have required denial of passports to "political adventurers" and "revolutionary radicals," the latter phrase being defined to include "those who wish to go abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States." See, shortly after the end of World War I, Passport Office Instructions of May 4, 1921; in 1937, Passport Office Instructions of July 30, 1937; in 1948, Foreign Service Regulations of July 9, 1948.

An even more serious error of the Court is its determination that the Secretary's wartime use of his discretion is wholly irrelevant in determining what discretionary practices were approved by Congress in enactment of § 215. In a wholly realistic sense there is no peace today, and there was no peace in 1952. At both times the state of national emergency declared by the President in 1950, wherein he stated that "world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world" and that "the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible," was in full effect. Proc. No. 2914, 64 Stat. A454. It is not a case, then, of judging what may be done in peace by what has been done in war. Professor Jaffe has aptly exposed the fallacy upon which the majority proceeds:

> "The criterion here is the defense of the country from external enemies. It is asserted that the precedents of 'war' have no relevance to 'peace.' But the

> critical consideration is defense against an external enemy; and communication abroad between our citizens and the enemy cannot by its nature be controlled by the usual criminal process. The facts in a particular case as to the citizen's intention are inevitably speculative: all is to be done after the bird has flown. Now our Congress and the Administration have concluded that the Communist International is a foreign and domestic enemy. We deal with its domestic aspect by criminal process; we would seem justified in dealing with its external aspect by exit control. If an avowed Communist is going abroad, it may be assumed that he will take counsel there with his fellows, will arrange for the steady and dependable flow of cash and information, and do his bit to promote the purposes of the 'conspiracy.' " Jaffe, The Right to Travel: The Passport Problem, 35 Foreign Affairs 17, 26.

Were this a time of peace, there might very well be no problem for us to decide, since petitioners then would not need a passport to leave the country. The very structure of § 215 is such that either war or national emergency is prerequisite to imposition of its restrictions.

Indeed, rather than being irrelevant, the wartime practice may be the only relevant one, for the discretion with which we are concerned is a discretionary control over international travel. Yet only in times of war and national emergency has a passport been required to leave or enter this country, and hence only in such times has passport power necessarily meant power to control travel.[4]

[4] Peacetime exercise of the passport power may still be relevant from another point of view, namely, if other countries hinge entry on possession of a passport, the right of international travel of a United States citizen who cannot secure a passport will thereby be curtailed. For though he can get out of this country, he cannot get into another.

Finally, while distinguishing away the Secretary's passport denials in wartime, the majority makes no attempt to distinguish the Secretary's practice during periods when there has been no official state of war but when nevertheless a presidential proclamation of national emergency has been in effect, the very situation which has prevailed since the end of World War II. Throughout that time, as I have pointed out, the Secretary refused passports to those "whose purpose in traveling abroad was believed to be to subvert the interest of the United States." Report of the Commission on Government Security, *supra*. Numerous specific instances of passport denials on security grounds during the years 1947–1951 were reported in a February 1952 law review article, nearly half a year prior to passage of § 215. Note, Passport Refusals for Political Reasons, 61 Yale L. J. 171.

On this multiple basis, then, I am constrained to disagree with the majority as to the authority of the Secretary to deny petitioners' applications for passports. The majority's resolution of the authority question prevents it from reaching the constitutional issues raised by petitioners, relating to claimed unlawful delegation of legislative power, violation of free speech and association under the First Amendment, and violation of international travel under the Fifth Amendment. In view of that, it would be inappropriate for me, as a dissenter, to consider those questions at this time. Cf. *Peters* v. *Hobby*, 349 U. S. 331, 353–357 (1955). Accordingly, I would affirm on the issue of the Secretary's authority to require the affidavits involved in this case, without reaching any constitutional questions.

DAYTON *v.* DULLES, SECRETARY OF STATE.

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

No. 621. Argued April 10, 1958.—Decided June 16, 1958.

At a time when an Act of Congress required a passport for foreign travel by citizens if a state of national emergency had been declared by the President and when the Proclamation necessary to make the Act effective had been made, the Secretary of State, after administrative hearings, concluded that the issuance of a passport to petitioner "would be contrary to the national interest" and denied him a passport. This action apparently was based on petitioner's alleged association with various Communists and with persons suspected of being part of the Rosenberg espionage ring, his alleged presence at an apartment allegedly used for microfilming material obtained for the use of a foreign government, and upon confidential information in the possession of the Government which was not revealed to petitioner. *Held:* The Secretary was not authorized to deny the passport for these reasons under the Act of July 3, 1926, 22 U. S. C. § 211a, or § 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1185. *Kent* v. *Dulles, ante*, p. 116. Pp. 145–150.

102 U. S. App. D. C. 372, 254 F. 2d 71, reversed.

Harry I. Rand argued the cause and filed a brief for petitioner.

Solicitor General Rankin argued the cause for respondent. With him on the brief were *Assistant Attorney General Doub, Samuel D. Slade* and *B. Jenkins Middleton.*

Nathan H. David for the Federation of American Scientists and *Sanford H. Bolz* for the American Jewish Congress filed a brief, as *amici curiae,* urging that the judgment below be set aside.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, a native-born citizen, is a physicist who has been connected with various federal projects and who has been associated as a teacher with several of our universities. In March 1954 he applied for a passport to enable him to travel to India in order to accept a position as research physicist at the Tata Institute of Fundamental Research, affiliated with the University of Bombay. In April 1954 the Director of the Passport Office advised him that his application was denied because the Department of State "feels that it would be contrary to the best interest of the United States to provide you passport facilities at this time."

Petitioner conferred with an officer of the Passport Office and as a result of that conversation executed an affidavit [1] which covered the wide range of matters inquired into and which stated in part:

> "I am not now and I have never been a member of the Communist Party.
>
> "With the possible exception of a casual and brief association with the work of the Joint Anti-Fascist Refugee Committee for a few months in 1941 and in 1942 (all as related below); I am not now and have never been a member of any of the organizations

[1] The Passport Regulations of the Secretary of State, as amended, 22 CFR § 51.142, provide:

"At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings."

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designated on the Attorney General's list (which I have carefully examined).

"I am not now engaged and I have never engaged in any activities which, so far as I know or at any time knew, support or supported the Communist movement.

"I wish to go abroad for the sole purpose of engaging in experimental research in physics at the Tata Institute of Fundamental Research in Bombay. I am not going abroad to engage in any activities which, so far as I know or can imagine, will in any way advance the Communist movement."

The Director of the Passport Office wrote petitioner's lawyer in reply that the Department had given careful consideration to the affidavit and added, "in view of certain factors of Mr. Dayton's case which I am not at liberty to discuss with him, the Department must adhere to its previous decision that it would be contrary to the best interests of the United States to provide Mr. Dayton with passport facilities at this time." Later the Director wrote again, saying:

"In arriving at its decision to refuse passport facilities to Mr. Dayton, the Department took into consideration his connection with the Science for Victory Committee and his association at that time with various communists. However, the determining factor in the case was Mr. Dayton's association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government."

Thereupon petitioner, pursuant to the Passport Regulations of the Secretary of State, as amended, 22 CFR § 51.1 *et seq.*, filed a petition of appeal, with the Board

of Passport Appeals.[2] He also requested, pursuant to the Regulations,[3] information from the Board of particulars concerning three items: (1) petitioner's alleged "association with various communists"; (2) his "association with persons suspected of being part of the Rosenberg espionage ring"; and (3) his "alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government." The Board's reply contained some, but very little, of the information requested; and it stated:

> "The file contains information indicating that the applicant was present at 65 Morton Street, New York City in the summer of 1949 (July or August) and at Apartment 61, 65 Morton Street, New York

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[2] § 51.138. "In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139."

§ 51.139. "There is hereby established within the Department of State a Board of Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138. The Board shall adopt and make public its own rules of procedure, to be approved by the Secretary, which shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony."

[3] § 51.162. "The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case."

City, during the month of January 1950. The applicant's relationship, if any (past or present), with the following-named persons is considered pertinent to the Board's review and consideration of the case: Marcel Scherer, Rose Segure, Sandra Collins, Frank Collins, Bernard Peters, Kurt Fritz, Karl Sitte, Louis S. Weiss, Alfred Sarant, and William Perl."

A hearing was held [4] at which witnesses for petitioner and for the State Department testified. Pursuant to the Regulations [5] the Board announced, over petitioner's protest, that it would consider "a confidential file composed of investigative reports from Government agencies" which petitioner would not be allowed to examine.[6]

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[4] Section 51.163 of the Regulations provides:

"The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths or affirmations for the purpose of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods."

[5] Note 4, *supra*.

[6] The Regulations in providing for that contingency state:

§ 51.170. "In determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such

Later petitioner was advised by the Acting Secretary of State that the Board had submitted its recommendation and that the Secretary, after "a review of the entire record and on the basis of all the evidence, including that contained in confidential reports of investigation," had denied the application. The denial was rested specifically upon § 51.135 of the Regulations.[7]

Petitioner then brought suit in the District Court for declaratory relief. The District Court entered summary judgment for the Secretary. The Court of Appeals reversed, 99 U. S. App. D. C. 47, 237 F. 2d 43, and remanded the case to the Secretary for reconsideration in

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confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the credibility of confidential informants."

[7] That section provides:

"In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

"(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

"(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

the light of its earlier decision in *Boudin* v. *Dulles,* 98 U. S. App. D. C. 305, 235 F. 2d 532.

On remand the Secretary without further hearing denied the application under § 51.135 (c),[8] saying that "the issuance of a passport would be contrary to the national interest." The Secretary at this time filed a document called "Decision and Findings" which is reproduced as an Appendix to this opinion.

The District Court again granted summary judgment for the Secretary, 146 F. Supp. 876; and the Court of Appeals affirmed by a divided vote, 102 U. S. App. D. C. 372, 254 F. 2d 71. The case is here on a petition for a writ of certiorari. 355 U. S. 911.

The question most discussed in the briefs and on oral argument is whether the hearing accorded petitioner satisfied the requirements of due process. A majority of the Court thinks we need not reach that constitutional question, since on their face these findings show only a denial of a passport for reasons which we have today held to be impermissible. *Kent* v. *Dulles, ante,* p. 116. Whether there are undisclosed grounds adequate to sustain the Secretary's action is not here for decision.

Reversed.

APPENDIX TO OPINION OF THE COURT.

Decision and Findings of the Secretary of State in the Case of Weldon Bruce Dayton

I have examined the files of the Department of State concerning the passport application of Weldon Bruce Dayton, including the proceedings in the Passport Office and before the Board of Passport Appeals, including confidential security information, and have found and concluded as follows:

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[8] Note 7, *supra.*

I.

a. I find that applicant was active in the Science for Victory Committee while at the University of California during 1943–44, serving as Chairman of the organization during much of that period. As Chairman he associated with Frank and Sandra Collins, and Rose Segure, who had been instrumental in organizing the said organization. This finding is based on information contained in the open record, including applicant's own statements.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, indicates that the above-named organization was conceived and organized by Communist Party officials as a front for propaganda and espionage activities; and that Frank and Sandra Collins and Rose Segure were members of the Communist Party at the time of their association with applicant and the Science for Victory Committee.

II.

a. I find that during the period 1946–1950, at Ithaca, New York, applicant maintained a close association and relationship with one Alfred Sarant. At applicant's invitation, Sarant and his wife lived in applicant's home for a period of eight months in 1947–1948, pending the completion of the Sarant home next door to applicant's home. Thereafter Dayton and Sarant were neighbors until July, 1950. On approximately July 18, 1950, Sarant became the subject of intensive interrogation by the Federal Bureau of Investigation. Approximately a week after the interrogation had begun Sarant departed from Ithaca and subsequently entered Mexico with applicant's wife. This finding is based on information contained in the open record, including applicant's own statements.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, establishes with respect to Alfred Sarant that he was an active member of the Communist Party; that he admitted said membership during the years 1943 and 1944; and that he was involved in the espionage apparatus of Julius Rosenberg.

III.

a. I find that the applicant was present during 1949 and 1950, on more than one occasion, in the apartment building at 65 Morton Street, New York City, in which Alfred Sarant was lessee of apartment 6–I. This finding is based on information contained in the open record.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, indicates that Sarant's apartment at 65 Morton Street, New York City, was used by Julius Rosenberg and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power.

IV.

a. I find that since 1938 the applicant, an experienced physicist, has maintained a close association and relationship with one Bernard Peters; that Peters was responsible for the applicant's offer of employment at the Tata Institute of Fundamental Research, Bombay, India; and that one of the primary stated purposes of the applicant's proposed travel abroad is to work in close collaboration with Peters at the Tata Institute. This finding is based on information contained in the open record, including applicant's own statements.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, indicates that Bernard Peters, who recently renounced his American citizenship, has held membership in the Communist Party outside of the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent.

V.

I have reason to believe, on the balance of all the evidence, that the applicant is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement. I have reached this conclusion on the basis of the foregoing findings together with the confidential information relating thereto, as well as other confidential information contained in the files of the Department of State, the disclosure of which might prejudice the conduct of United States foreign relations. I have also taken into consideration the serious doubts as to applicant's general credibility raised by the applicant's denial in the face of convincing contrary evidence, including the oral testimony of three apparently disinterested witnesses of ever having been present at 65 Morton Street. The passport application of Weldon Bruce Dayton is therefore denied under Section 51.135 (c) of the Passport Regulations (22 CFR § 51.135 (c)), and because the issuance of a passport would be contrary to the national interest.

VI.

The confidential information referred to in paragraphs I (b), II (b), III (b) and IV (b) above relates to the internal security of the United States. The substance

of this confidential information was disclosed to the applicant during the consideration of his passport application. To disclose publicly the sources and details of this information would, in my judgment, be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security. Moreover, it would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area; and might, with respect to information referred to in paragraph V, prejudice the interest of United States foreign relations.

Date: October 4, 1956.

MR. JUSTICE CLARK, with whom MR. JUSTICE BURTON, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER concur, dissenting.

On the grounds stated in my dissent to *Kent* v. *Dulles*, *ante*, p. 130, also decided this day, I think the Secretary of State is authorized to deny a passport to an applicant who is going abroad with the purpose of engaging in activities that would advance the Communist cause. Because the majority does not consider any of the constitutional issues raised by petitioner, it would be inappropriate for me, as a dissenter, to consider them at this time. Cf. *Peters* v. *Hobby*, 349 U. S. 331, 353–357 (1955). Accordingly, I would affirm on the question of authority without reaching any constitutional issue.

Syllabus.

UNITED STATES *v.* CENTRAL EUREKA MINING CO. ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 29. Argued January 7, 1958.—Decided June 16, 1958.

In 1942, the War Production Board issued an order requiring nonessential gold mines, including those of respondents, to cease operating; but the Government did not occupy, use or take physical possession of the gold mines or the equipment connected with them. The purpose of the order was to conserve equipment and manpower for essential war uses. Claiming that the order amounted to a taking of their right to mine gold during the life of the order, respondents sued the Government in the Court of Claims for compensation. *Held:*

1. The Special Jurisdictional Act of July 14, 1952, granting the Court of Claims jurisdiction to hear and determine actions brought within a year from that date on the claims of owners or operators of gold mines for losses allegedly resulting from the War Production Board's order, "notwithstanding any statute of limitations, laches, or lapse of time," was no more than a waiver of defenses based on the passage of time. It was not a congressional mandate to award compensation for losses resulting from the order. Pp. 162–165.

2. The Board's order did not constitute a taking of private property for public use within the meaning of the Fifth Amendment, and respondents are not entitled to compensation. Pp. 165–169.

134 Ct. Cl. 1, 130, 138 F. Supp. 281, 146 F. Supp. 476, reversed.

Assistant Attorney General Doub argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Melvin Richter, Paul A. Sweeney* and *John G. Laughlin, Jr.*

Edward W. Bourne argued the cause for respondents. On the brief were *Mr. Bourne, Eugene Z. Du Bose,*

Edward E. Rigney and *J. Kenneth Campbell* for the Homestake Mining Co., *Phillip Barnett, Ralph D. Pittman* and *Rodney H. Robertson* for the Central Eureka Mining Co., *O. R. McGuire, Jr.* and *V. A. Montgomery* for the Alaska-Pacific Consolidated Mining Co., *George Herrington* and *William H. Orrick, Jr.* for the Idaho Maryland Mines Corporation, and *John Ward Cutler* for the Bald Mountain Mining Co. et al., respondents.

MR. JUSTICE BURTON delivered the opinion of the Court.

In the interest of national defense, the War Production Board, in 1942, issued its Limitation Order L–208 [1] ordering nonessential gold mines to close down. This litigation was instituted in the Court of Claims to recover compensation from the United States for its alleged taking, under such order, of respondents' rights to operate their respective gold mines. Two issues are now presented. First, whether the Act of July 14, 1952,[2] granting jurisdiction to the Court of Claims to entertain the claims arising out of L–208, was a mandate to that court to award compensation for whatever losses were suffered as a result of L–208, or whether it amounted merely to a waiver by the United States of defenses based on the passage of time. For the reasons hereafter stated, we hold that it was the latter. We, therefore, reach the second question—whether L–208 constituted a taking of private property for public use within the meaning of the Fifth

[1] Issued October 8, 1942, 7 Fed. Reg. 7992–7993. Amended, November 19, 1942, 7 Fed. Reg. 9613–9614; November 25, 1942, 7 Fed. Reg. 9810–9811; and August 31, 1943, 8 Fed. Reg. 12007–12008. Revoked, June 30, 1945, 10 Fed. Reg. 8110. For text of the order as issued October 8, 1942, see note 4, *infra*.

[2] The Act is set forth in the text of this opinion at p. 163, *infra*.

Amendment.[3] For the reasons hereafter stated, we hold that it did not.

Early in 1941, it became apparent to those in charge of the Nation's defense mobilization that we faced a critical shortage of nonferrous metals, notably copper, and a comparable shortage of machinery and supplies to produce them. Responsive to this situation, the Office of Production Management (OPM) and its successor, the War Production Board (WPB), issued a series of Preference Orders. These gave the producers of mining machinery and supplies relatively high priorities for the acquisition of needed materials. They also gave to those mines, which were deemed important from the standpoint of defense or essential civilian needs, a high priority in the acquisition of such machinery. Gold mines were classified as nonessential and eventually were relegated to the lowest priority rating. These orders prevented the mines operated by respondents from acquiring new machinery or supplies so that, by March of 1942, respondents were reduced to using only the machinery and supplies which they had on hand.

Soon thereafter, a severe shortage of skilled labor developed in the nonferrous metal mines. This was due in part to the expanding need for nonferrous metals, and in part to a depletion of mining manpower as a result of the military draft and the attraction of higher wages paid by other industries. It became apparent that the only reservoir of skilled mining labor was that which remained in the gold mines. Pressure was brought to bear on the WPB to close down the gold mines with the expectation that many gold miners would thus be attracted to the nonferrous mines.

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[3] "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const., Amend. V.

As a part of this conservation program, WPB, on October 8, 1942, issued Limitation Order L–208 [4] now before us. That order was addressed exclusively to the gold mining industry which it classified as nonessential. It directed each operator of a gold mine to take steps immediately to close down its operations and, after seven

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[4] War Production Board Limitation Order L–208, 7 Fed. Reg. 7992–7993, provided as follows:

"The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

"§ 3093.1 *Limitation Order L–208*—(a) *Definitions.* For the purposes of this order, 'nonessential mine' means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P–56.

"(b) *Restrictions upon production.* (1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

"(2) In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

"(3) In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

"(4) The provisions of this order shall not apply to any lode mine

days, not to acquire, use or consume any material or equipment in development work. The order directed that, within 60 days, all operations should cease, excepting only the minimum activity necessary to maintain mine buildings, machinery and equipment, and to keep the workings safe and accessible. Applications to the

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which produced 1200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the issuance date of this order, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after the issuance date of this order, shall not exceed 100 cubic yards per month.

"(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

"(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

"(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in paragraph (b)(3) above.

"(e) *Records.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore.

"(f) *Reports.* All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

"(g) *Audit and inspection.* All records required to be kept by

WPB were permitted to meet special needs and several exceptions were made under that authority. Small mines were defined and exempted from the order. The WPB did not take physical possession of the gold mines. It did not require the mine owners to dispose of any of their machinery or equipment.

On November 19, 1942, Order L–208 was amended to prohibit the disposition of certain types of machinery or

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this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

"(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to: War Production Board, Mining Branch, Washington, D. C., Ref.: L–208.

"(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

"(j) *Appeal.* Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

"(k) *Applicability of priorities regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

"(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

"Issued this 8th day of October 1942.

"ERNEST KANZLER,
"Director General for Operations."

supplies without the permission of an officer of the WPB. Each mine operator was required to submit an itemized list of all such equipment held in inventory and to indicate which items he would be willing to sell or rent.[5] On August 31, 1943, L–208 was further amended to permit disposition of equipment, without approval of the WPB, to persons holding certain preference ratings.[6] The order, thus amended, remained in effect until revoked on June 30, 1945.[7]

The first legal action against the Government arising out of L–208 was brought in the Court of Claims in 1950. It was there alleged that the order had amounted to a taking of the complainant's right to mine gold during the life of the order. The Government demurred, taking its present position that the order was merely a lawful regulation of short supplies relevant to the war effort. The court sustained the demurrer, holding that the damages were not compensable. *Oro Fino Consolidated Mines, Inc.*, v. *United States,* 118 Ct. Cl. 18, 92 F. Supp. 1016. Accord, *Alaska-Pacific Consolidated Mining Co.* v. *United States,*

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[5] Section 6 (e), added to the original order on November 19, 1942, 7 Fed. Reg. 9613, provided:

"(e) *Restrictions on disposition of machinery and equipment.* No person shall sell or otherwise dispose of any machinery or equipment of the types listed in Schedule A to Preference Rating Order P–56, which has been used in a nonessential mine, and no person shall accept delivery thereof, except with specific permission of the Director General for Operations. On or before November 19, 1942, or within sixty days after the effective date, whichever is later, each operator of a nonessential mine shall file with the War Production Board, Washington, D. C., Reference: L–208, an itemized list of such machinery and equipment, signed by such operator or an authorized official, indicating each item available for sale or rental. Upon receipt of such itemized list, the War Production Board will furnish to the operator appropriate forms to be filled out for each item which the operator desires to dispose of."

[6] 8 Fed. Reg. 12007–12008.

[7] 10 Fed. Reg. 8110.

120 Ct. Cl. 307. Somewhat later, the instant action was brought in the Court of Claims by the Idaho Maryland Mines Corporation. Relying on the *Oro Fino* decision, the Government again demurred. This time, however, the court overruled the demurrer on the ground that this complaint contained detailed allegations which, if true, in its opinion demonstrated that L–208 was an arbitrary order without rational connection with the war effort. On that basis, the court authorized a commissioner to hear this case and several similar ones, solely to determine the Goverment's liability, leaving determination of the amount of recovery, if any, to further proceedings. 122 Ct. Cl. 670, 104 F. Supp. 576.[8] The commissioner heard the cases and filed his report. The Court of Claims, with two judges dissenting, held that the six respondents now before us were entitled to just compensation. 134 Ct. Cl. 1, 53, 56, 138 F. Supp. 281, 310, 312.[9] A new trial was denied. 134 Ct. Cl. 130, 146 F. Supp. 476. We granted the Government's petition for certiorari in order to consider the important constitutional issue presented. 352 U. S. 964.

Before reaching the merits, we face the suggestion of respondents that the Special Jurisdictional Act of July 14, 1952, 66 Stat. 605, did more than waive the statute

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[8] See also, *Homestake Mining Co.* v. *United States*, 122 Ct. Cl. 690, and *Central Eureka Mining Co.* v. *United States*, 122 Ct. Cl. 691.

[9] The Court of Claims concluded that respondents had shown not only that L–208 was arbitrary, but also that they had a sufficient inventory of machinery and supplies so that they would have been able to operate had it not been for the order. However, as to the following companies, it ordered their petitions dismissed on the ground that they had not shown that they would have been able to continue operations, thus failing to show that L–208 was the proximate cause of their loss: Alabama-California Gold Mines Co., Consolidated Chollar Gould & Savage Mining Co., and Oro Fino Consolidated Mines, Inc. 134 Ct. Cl., at 53, 138 F. Supp., at 310.

of limitations and the defense of laches. Respondents contend that this Act was a congressional mandate to the Court of Claims to award compensation to such of the respondents as established any loss which was, in fact, caused by L–208. We conclude that the language of the Act and its legislative history demonstrate that it was no more than a waiver of defenses based on the passage of time.

The entire Act reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the United States Court of Claims be, and hereby is, given jurisdiction to hear, determine, and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L–208 during the effective life thereof: *Provided,* That actions on such claims shall be brought within one year from the date this Act becomes effective."

The Act thus contains no language prejudging the validity of the claims on their merits. On the other hand, it expressly permits the filing of actions, based on L–208, within one year from the taking effect of the Act, "*notwithstanding any statute of limitations, laches, or lapse of time . . .*" (Emphasis supplied.) That this was the motivating purpose of Congress is further indicated by the fact that the statute of limitations had recently run against many of these claims by the time the Court of Claims, in the instant case, upheld the claim on the plead-

ings of the Idaho Maryland Mines Corporation. 122 Ct. Cl. 670, 104 F. Supp. 576. This was explained to Congress as follows in the House Report recommending passage of the bill:

> "At the present time many other claimants who may have as good a right for an adjudication of their claims as does the Idaho Maryland Mines Corp. may not prosecute such claims due to the running of the statute of limitations. Many of the claimants after the ruling in the Oro Fina case undoubtedly felt that to file in the Court of Claims would be useless and, therefore, allowed the statute to run against them." H. R. Rep. No. 2220, 82d Cong., 2d Sess. 2. See also, S. Rep. No. 1605, 82d Cong., 2d Sess. 2.

The legislative history also discloses repeated failures to induce Congress to act upon the merits of the claims.[10]

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[10] Bills were first introduced in the 78th Congress, 1st Session (1943), for the relief of the owners and operators of gold mines. Early efforts were directed at recision of L–208. H. R. 3009, 89 Cong. Rec. 6181, was referred to the House Committee on Banking and Currency and never reported out; H. R. 3682, 89 Cong. Rec. 9653, was referred to the House Committee on the Judiciary and never reported out.

At the same session of Congress, Senator McCarran introduced a bill, S. 27, 89 Cong. Rec. 34, which provided legislative relief to the mine owners *vis-à-vis* their creditors. This bill, referred to the Senate Committee on the Judiciary, was favorably reported, 89 Cong. Rec. 5187, S. Rep. No. 271, 78th Cong., 1st Sess., and, after amendment, it passed the Senate, 89 Cong. Rec. 6094–6095. In the House, S. 27 was referred to the House Committee on Mines and Mining, 89 Cong. Rec. 6180, and was never reported out. In the following session of Congress, a similar bill was introduced in the House by Representative Engle. H. R. 5093, 90 Cong. Rec. 6587. It too was referred to the House Committee on Banking and Currency and was never reported out.

In the 79th Congress, 1st Session (1945), Representative Engle introduced the first bill calling for compensation for losses arising out

In view of such history, it is hard to believe that the successful passage of this Act of July 14, 1952, would have taken place, as it did, without opposition [11] had it included a concession of liability. On the other hand, as explained in the above-quoted House Committee Report, its passage is readily understood if it merely granted an extension, for one year, of the time within which to file an action to recover a claim, the merits of which would be determined by the Court of Claims. For these reasons, we hold that this Jurisdictional Act is fairly interpreted as amounting only to a waiver of defenses based on the passage of time.

Turning to the merits, it is clear from the record that the Government did not occupy, use, or in any manner

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of L–208. H. R. 4393, 91 Cong. Rec. 9726. This bill was referred to the House Committee on War Claims which, in turn, referred the matter to a Subcommittee. The Subcommittee held hearings over several days and issued a report to the full Committee recommending approval. (This report was quoted at length in the Reports to both Houses favoring passage of the Jurisdictional Act.) The bill was never reported out of the full Committee.

In the 81st Congress, 1st Session (1949), Senator McCarran introduced S. 45, 95 Cong. Rec. 39, substantively similar to H. R. 4393 introduced by Representative Engle. The bill was referred to the Senate Committee on the Judiciary which reported it favorably. S. Rep. No. 79, 81st Cong., 1st Sess. It was objected to, however, by Senator Donnell, 95 Cong. Rec. 2764; Senator Hendrickson, by request, *id.*, at 13297; Senator Schoeppel, *id.*, at 14722; Senator Williams, 96 Cong. Rec. 1278; Senator Hendrickson, *id.*, at 14691; and Senators Hendrickson and Williams, *id.*, at 16592, and consequently never came to a vote. In the same Congress, Representative White introduced H. R. 7851, 96 Cong. Rec. 4066, a bill of the same type, which was referred to the House Committee on the Judiciary and never reported out.

[11] The Special Jurisdictional Act was passed on the Consent Calendar. 98 Cong. Rec. 6322–6323, 8931. The seriousness of a concession of liability is evidenced by the Government's recent estimate that its potential liability, if respondents prevail, can be measured in "terms of thirty to sixty million dollars."

take physical possession of the gold mines or of the equipment connected with them. Cf. *United States* v. *Pewee Coal Co.*, 341 U. S. 114. All that the Government sought was the cessation of the consumption of mining equipment and manpower in the gold mines and the conservation of such equipment and manpower for more essential war uses. The Government had no need for the gold or the gold mines. The mere fact that L–208 was in the form of an express prohibition of the *operation* of the mines, rather than a prohibition of the use of the scarce equipment in the mines, did not convert the order into a "taking" of a right to operate the mines. Obviously, if the use of equipment were prohibited, the mines would close and it did not make that order a "taking" merely because the order was, in form, a direction to close down the mines. The record shows that the WPB expected that L–208 would release substantial amounts of scarce mining equipment for use in essential industries, and also that experienced gold miners would transfer to other mines whose product was in gravely short supply. The purpose of L–208 was to encourage voluntary reallocation of scarce resources from the unessential to the essential.

Respondents contend that L–208 was arbitrary and without rational connection with the war effort.[12] They contend that, if it were arbitrary, there is no distinction in law between this case and one where the Government consciously exercises its power to take for public use. Respondents base their assertion of arbitrariness on several circumstances. For example, they urge that the preamble to L–208 recited as its sole purpose the conservation of scarce materials. If that alone were the purpose, they contend, it had already been achieved by priority

[12] Ordinarily the remedy for arbitrary governmental action is an injunction, rather than an action for just compensation. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579. Our view of the case makes it unnecessary to reach that question.

orders which prevented the gold mines from obtaining any scarce equipment. Order L–208 did more than merely prohibit the acquisition of scarce equipment—it also prohibited the use of equipment previously acquired. The fact that L–208 did not require the mine owners to sell their inventory of scarce equipment to essential users was a reasonable course of action. The WPB could properly rely on the profit motive to induce the mine owners to liquidate their inventories, and it was thought that the people who would be interested in purchasing used mining equipment probably would be the owners of essential mines. In any event, L–208 was soon amended to prohibit sales to nonessential users.[13]

Respondents also urge that the record shows that the shortage of experienced miners was the dominant, if not the sole, consideration for the issuance of L–208. They contend that the WPB had no authority to compel gold miners to transfer to other mines. The record shows that *a* dominating consideration in the issuance of L–208 was the expectation that it would release experienced miners for work in the nonferrous mines, but the record does not support a finding that such was the sole purpose of the order. It was lawful for the WPB to consider the impact of its material orders on the manpower situation. Order L–208 did not draft gold miners into government service as copper miners. It sought only to make the gold miners available for more essential work if they chose to move. Although the record indicates that the number of gold miners who transferred to nonferrous mines was disappointingly small, yet there were some who did, and others moved to other essential wartime services. The record shows a careful official consideration of the subject and a well-considered decision to accomplish a proper result. There is no suggestion that any of the officials

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[13] See pp. 160–161, *supra*.

who were responsible for the order were motivated by anything other than appropriate concern for the war effort.

Thus the WPB made a reasoned decision that, under existing circumstances, the Nation's need was such that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of wartime resources that it must be temporarily suspended. Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. See *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 416. In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking. *E. g., United States* v. *Kansas City Ins. Co.,* 339 U. S. 799; *United States* v. *Causby,* 328 U. S. 256. However, the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation. See *Mugler* v. *Kansas,* 123 U. S. 623, 664, 668, 669. In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. *E. g., Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264; *Bowles* v. *Willingham,* 321 U. S. 503; and see *United States* v. *Caltex, Inc.,* 344 U. S. 149. The reasons are plain. War, particularly in modern times, demands the strict regulation of nearly all resources. It makes demands which otherwise would be insufferable. But wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands.

We do not find in the temporary restrictions here placed on the operation of gold mines a taking of private prop-

erty that would justify a departure from the trend of the above decisions. The WPB here sought, by reasonable regulation, to conserve the limited supply of equipment used by the mines and it hoped that its order would divert available miners to more essential work. Both purposes were proper objectives; both matters were subject to regulation to the extent of the order. L–208 did not order any disposal of property or transfer of men. Accordingly, since the damage to the mine owners was incidental to the Government's lawful regulation of matters reasonably deemed essential to the war effort, the judgment is

Reversed.

MR. JUSTICE FRANKFURTER, dissenting.

For losses alleged to have resulted from a wartime order of the War Production Board, various of the respondents sought monetary relief in the Court of Claims. These suits had a checkered career in that court, and, as a consequence, Congress passed remedial legislation that has served as a ground for respondents' continued assertion of their right to recover. A consideration of the history of this controversy is necessary for due appreciation of this legislation, and an understanding of the legislation, its background and its meaning, is essential to a proper disposition of the suit before us.

From a time shortly before our entry into the Second World War, gold mines in this country were subjected by the United States Government to increasingly stringent limitations on their operations. Because they were regarded as a non-essential industry, they were first restricted in, and then virtually excluded from, the acquisition of required machinery, spare parts and supplies that were needed in mines producing critical materials. Finally, on October 8, 1942, apparently more in an attempt to divert gold miners into copper mines than

(as its preamble recited) to conserve critical materials, the War Production Board issued Limitation Order L–208, 7 Fed. Reg. 7992–7993, as amended, 7 *id.*, at 9613–9614, 8 *id.*, at 12007–12008, which ordered operators of gold mines that did not also produce substantial quantities of strategic materials to cease mining operations within sixty days. This order was revoked on June 30, 1945. 10 *id.*, at 8110.

Early in 1950, one of the mine operators allegedly affected by the shutdown order brought suit against the United States in the Court of Claims, asserting that Order L–208 was issued "arbitrarily and without authority of law" and was therefore a taking of property within the meaning of the Fifth Amendment for which the claimant sought just compensation. The court, while holding that the six-year statute of limitations (28 U. S. C. § 2501) did not begin to run against the claimant until the order was rescinded, dismissed the petition for failure to state a claim under the Fifth Amendment. *Oro Fino Consol. Mines, Inc.*, v. *United States*, 118 Ct. Cl. 18, 92 F. Supp. 1016 (1950). Approximately a month before the end of the statutory period, three other mine operators filed suits in the Court of Claims, also contending that, by virtue of the WPB order, their property had been taken without just compensation in violation of the Fifth Amendment. In their complaints (as amended after the statute had run) they laid a considerably more extensive factual basis for their contentions of arbitrary and unauthorized action. The Court of Claims, in *Idaho Maryland Mines Corp.* v. *United States*, 122 Ct. Cl. 670, 104 F. Supp. 576 (1952),[1] denied the Government's motion

[1] That decision also governed the companion cases of *Homestake Mining Co.* v. *United States*, 122 Ct. Cl. 690, and *Central Eureka Mining Co.* v. *United States*, 122 Ct. Cl. 691.

to dismiss the suits. It distinguished *Oro Fino* on the ground that the facts there alleged in support of the contentions of unconstitutionality, by contrast with those in *Idaho Maryland,* had not been sufficient to rebut the presumption of constitutionality attaching to governmental action. A motion by the Government for rehearing was overruled two months later. *Ibid.*

Within two weeks after the *Idaho Maryland* decision Senator McCarran of Nevada introduced a bill (S. 3195, 82d Cong., 2d Sess.) to grant the Court of Claims jurisdiction, notwithstanding the statute of limitations, to hear claims of gold mine operators for losses resulting from the issuance of Order L–208. 98 Cong. Rec. 5394. After consideration of the bill, the Committee on the Judiciary on May 28, 1952, recommended "favorable consideration of the measure by the Senate" in a report, S. Rep. No. 1605, 82d Cong., 2d Sess. The report, "[i]n order that the background of this situation can be fully understood and appreciated," *id.,* at p. 2, set forth large portions of an earlier report (on H. R. 4393 of the 79th Congress) setting forth in great detail a factual basis for the following contentions:

> "1. WPB Order L–208 was unique in that it was the only Government order closing a productive industry.
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> "2. Issuance of the order was an administrative error, based upon a statistical misconception, and may, furthermore, have been illegal.
>
> "3. The net results of the order in accomplishing its avowed primary purpose of channeling manpower to 'essential' mines were negligible.
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> "4. The economic loss to the gold-mining industry has been great and in some cases the damage may be irreparable." *Id.,* at p. 3.

In the conclusion of the report, it was stated (*id.*, at p. 7) that

> "The committee has carefully studied the facts relating to the situation that arose as a result of the proclamation of the War Production Board Limitation Order L–208 and is convinced that the gold mining industry was dealt with in a fashion which merits the consideration of the court in the adjudication of the losses which may have been occasioned by this order. The Idaho Maryland Mines Corp. decision is ample evidence of the fact that the least that can be done is to allow those persons affected by Order L–208 their day in court for such recompense as may seem justified."

The Senate passed the bill without debate on June 2. 98 Cong. Rec. 6322. In the House of Representatives, the bill was referred to and considered by the Committee on the Judiciary, which recommended its passage in a report (H. R. Rep. No. 2220, 82d Cong., 2d Sess.) substantially identical with the Senate report. The House passed the bill on July 2, 98 Cong. Rec. 8931, and it was signed by the President on July 14, 1952. It provides as follows:

> "That the United States Court of Claims be, and hereby is, given jurisdiction to hear, determine, and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L–208 during the effective life thereof: *Provided,* That actions on such claims shall be brought within one year from the date this Act becomes effective." 66 Stat. 605.

Thereupon a number of gold mine operators brought suit in the Court of Claims, and their claims were consolidated with those involved in *Idaho Maryland* for trial on the issue of liability. These plaintiffs proceeded under alternative claims against the United States: first, that the action of the Government in ordering them to close their gold mines constituted a taking of their property that entitled them to just compensation; and, second, that the Act of July 14, 1952, created liability on the part of the Government for their provable losses resulting from the closing. The Court of Claims (two judges dissenting) decided that the closing of the mines constituted a compensable "taking" of the plaintiffs' right to operate their mines within the meaning of the Fifth Amendment. The court dealt with the statutory claim in the following terms: "In view of our decision in these cases it is unnecessary to discuss the various contentions relative to the special jurisdictional act of July 14, 1952, 66 Stat. 605." 134 Ct. Cl. 1, 53, 138 F. Supp. 281, 310 (1956).

Since a court of the United States may properly decide a constitutional question only if the case cannot fairly be disposed of on a non-constitutional basis, any statutory question that is not frivolous should be met and disposed of before questions requiring construction of the Constitution are reached. The reason for the Court of Claims' failure to heed this fundamental rule can only be surmised. This litigation was initiated before the Act of July 14, 1952, had been passed by Congress and was framed exclusively in constitutional terms. The statutory claim was injected into the litigation at a time when the court, having already handed down several decisions on the question of whether or not a claim under the Fifth Amendment had been stated, had become preoccupied with, and, therefore, oriented toward, the constitutional aspects of the claims. Understandable though this approach may be, it should not be permitted to govern

the ultimate disposition of the cases before us. In the interest of responsible administration of our constitutional system, the scope and meaning of the Act of July 14, 1952, call for determination before any decision is made as to whether or not the Government's action amounted to a "taking" within the meaning of the Fifth Amendment.

The critical question is, of course, whether the Act merely eliminates the bar of the statute of limitations or substantively establishes a congressionally acknowledged basis for recovery. On its face, the Act is readily susceptible of either interpretation. The action authorized by the statute—*i. e.*, the filing of a certain type of suit in the Court of Claims within one year—is consistent with either of these alternative legislative ends. In order to waive the Government's then existing defense of the statute of limitations, it was necessary for Congress to authorize the assertion of claims notwithstanding the availability of that defense. And recognition by Congress of what it may regard as a just claim against the Government is not necessarily to be met by an outright appropriation to the claimants: there often remain questions (such as may be involved here, whether or not the alleged losses were caused by the Government's liability-creating action) that Congress quite properly wishes to have judicially determined before funds are to be withdrawn from the Treasury for the benefit of claimants.

Since the statutory language alone sheds little light on the congressional purpose, it is appropriate to canvass the legislative background of the Act. At the outset it should be noted that the legislative manner attending the passage of the Act has no relevance as to its interpretation. It is no more admissible that a statute's passage virtually without debate and from a bill on the consent calendar should reflect on its weight than that a decision of this Court should be given less weight because it was argued

on the summary docket. There is no reason to suppose that this legislation did not receive the careful study that the committees in their reports claim to have given it. Here one need not even draw on the indisputable fact that much legislation is passed solely on the basis of committee recommendations; the grievances of the gold mining industry had been continually pressed on Congress since shortly after the issuance of L–208,[2] so that the problem to which the Act was directed was one with which many members of Congress were undoubtedly thoroughly conversant.

Nothing is clearer from a reading of the committees' reports than that their members regarded the gold mine operators to have been unjustly treated by the Government. It is, of course, no concern of ours whether or not they were justified in thinking so. The reports quote extensively from an earlier report casting serious doubt on the propriety and even the legality of the government order and detailing the seriousness of the industry's resulting losses. To be sure, support may be drawn from this condemnation for either of the competing interpretations of the statute. It may imply a conviction that the Government should pay for whatever losses resulted from the issuance of the order; but it may also serve as nothing more than a justification for making an exception to the statute of limitations. Specific statements in the reports only compound this ambiguity. The committees make clear their concern that prospective claimants, discouraged by the *Oro Fino* decision, may have failed to assert their claims within the statutory period, discovering too late (through the *Idaho Maryland* decision) that they might have recovered. See S. Rep.

[2] *E. g.*, S. 27, 78th Cong.; S. 344, 78th Cong.; H. R. 3009, 78th Cong.; H. R. 3682, 78th Cong.; H. R. 5093, 78th Cong.; H. R. 4393, 79th Cong.; H. R. 950, 80th Cong.; S. 45, 81st Cong.; H. R. 7851, 81st Cong.

No. 1605, 82d Cong., 2d Sess. 2; H. R. Rep. No. 2220, 82d Cong., 2d Sess. 2. On the other hand, the committees' conclusions that "the gold mining industry was dealt with in a fashion which merits the consideration of the court in the adjudication of the losses which may have been occasioned by this order" and that "the least that can be done is to allow those persons affected by Order L–208 their day in court for such recompense as may seem justified," S. Rep. No. 1605, *supra,* at p. 7; H. R. Rep. No. 2220, *supra,* at p. 7, provide ground for inferring that Congress intended to establish a right of recovery if one did not already exist. The most, then, that can be said concerning the background of the Act is that it is inconclusive.

Although the language of the statute is equivocal and its legislative history ambiguous, another relevant line of inquiry must be pursued. The Act of July 14, 1952, is but one of many special jurisdictional statutes passed from time to time by Congress, and a number of these have been construed by the Court of Claims. An examination of these cases tends to corroborate the conclusion that the wording of the statute provides little clue to its judicially ascertainable meaning. The phrase "to hear, determine, and render judgment . . . on the claim," or an approximate equivalent, is common to most special jurisdictional statutes, including many that have been held to do no more than waive limited defenses. See, *e. g.,* Act of Sept. 25, 1950, 64 Stat. 1032, involved in *California* v. *United States,* 127 Ct. Cl. 624, 628, 119 F. Supp. 174, 177; Act of June 15, 1946, 60 Stat. 1227, involved in *Zephyr Aircraft Corp.* v. *United States,* 122 Ct. Cl. 523, 551, 104 F. Supp. 990, 997; cf. *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 500. Again, statutes similar in significant respects to the Act of July 14, 1952, have been construed in some cases to create a legal basis for recovery where none had existed before, see, *e. g.,* Act of June 14,

1935, 49 Stat. 2078, involved in *Stubbs* v. *United States,* 86 Ct. Cl. 152; Act of June 25, 1938, 52 Stat. 1399, involved in *Creech* v. *United States,* 102 Ct. Cl. 301, 60 F. Supp. 885, while in other cases to do no more than provide a forum for the adjudication of a claim on the basis of existing legal principles, see, *e. g.,* Act of May 11, 1948, 62 Stat. 1350, involved in *Hempstead Warehouse Corp.* v. *United States,* 120 Ct. Cl. 291, 98 F. Supp. 572.

In many of these special jurisdictional statutes, Congress has clarified its purpose by employing various qualifying phrases and clauses. The absence of such qualifications may be found to have some relevance in the interpretation of the statute before us. For example, where a specific defense is waived (as the statute of limitations is waived in the Act of July 14, 1952), Congress has on occasion been at pains to emphasize that the effect of the statute should extend no further than that limited waiver. See, *e. g.,* Act of Aug. 24, 1949, 63 Stat. 1169, involved in *Breinig Bros., Inc.* v. *United States,* 124 Ct. Cl. 645, 110 F. Supp. 269; Act of Oct. 18, 1951, 65 Stat. A124, involved in *Watson* v. *United States,* 135 Ct. Cl. 145, 146 F. Supp. 425. Moreover, it has not been uncommon for Congress in these statutes specifically to provide that the passage of the act should not be construed as "an inference of liability" on the part of the United States Government. See, *e. g.,* Act of July 16, 1952, 66 Stat. A206, A207, involved in *Griffith* v. *United States,* 135 Ct. Cl. 278; and Act of Aug. 25, 1950, 64 Stat. A191, involved in *Booth* v. *United States,* 140 Ct. Cl. 145, 155 F. Supp. 235.

Of course, if there is any significance to Congress' failure expressly to limit the application of the statute, it must also be recognized that Congress failed to employ techniques that would have made clear any intention to create a new right of action. Congress might, for example, have made a virtual confession of liability as

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it did in the Act of March 1, 1929, 45 Stat. 2345, involved in *Garrett* v. *United States,* 70 Ct. Cl. 304. Congress might have waived other defenses than the statute of limitations. See, *e. g.,* the Act of May 28, 1928, 45 Stat. 2001, involved in *Alcock* v. *United States,* 74 Ct. Cl. 308. Or Congress might, as it has often done, spell out in detail precisely what the task of the Court of Claims is to be under the statute, making clear what issues remain to be litigated. See, *e. g.,* Act of July 2, 1956, 70 Stat. A103, involved in *Kramer* v. *United States,* 137 Ct. Cl. 537, 149 F. Supp. 152; Act of July 16, 1952, 66 Stat. A206, involved in *Griffith* v. *United States,* 135 Ct. Cl. 278; Act of March 19, 1951, 65 Stat. 5, involved in *Board of County Comm'rs* v. *United States,* 123 Ct. Cl. 304, 105 F. Supp. 995.

The Court of Claims, in seeking to determine the meaning of these statutes, has had occasion to turn to their legislative backgrounds. The court has, for example, been more readily able to find an intention on the part of Congress to admit liability where the claim in question arose out of a national emergency that had necessitated hasty and experimental governmental action resulting in disproportionate hardships, see *Nolan Bros.* v. *United States,* 98 Ct. Cl. 41, 89 (Act of July 23, 1937, 50 Stat. 533); cf. *Mansfield* v. *United States,* 89 Ct. Cl. 12 (Act of Aug. 19, 1935, 49 Stat. 2148). Significance has also been attached to the fact that Congress regarded the governmental action to have been wrongful. See *Hawkins* v. *United States,* 96 Ct. Cl. 357, 369–370 (Act of Feb. 11, 1936, 49 Stat. 2217) (statement in committee report to effect that action was "unmoral, inequitable, and unjust"). Contrariwise, however, where Congress has not made its intention quite clear, the court has approached its task with caution, see *Hempstead Warehouse Corp.* v. *United States, supra,* 120 Ct. Cl., at 305, 98 F. Supp., at 573; and it has often asserted that special jurisdictional statutes

should be strictly construed. See, *e. g., California* v. *United States, supra,* 127 Ct. Cl., at 629–630, 119 F. Supp., at 178–179; cf. *United States* v. *Cumming,* 130 U. S. 452, 455.

Thus, even this limited examination of relevant materials leaves one very much in balance. But the fact that the answer to this question is not easy is no excuse for passing over it and deciding constitutional questions. It is startling doctrine to construe the Constitution in order to avoid difficult questions of statutory interpretation. It may well be that the Court of Claims, experienced as it obviously is in interpreting such statutes as these, may find the purpose of the Act of July 14, 1952, more readily susceptible of determination than could a court not possessed of that specialized competence. When the alternatives are initial and yet final decision by this Court and decision by an experienced court with the possibility of review in this Court, the choice seems clear. I would send the case back to the Court of Claims for an authoritative construction of the Special Jurisdictional Act.

MR. JUSTICE HARLAN, dissenting.

I dissent because I believe that the Fifth Amendment to the Constitution requires the Government to pay just compensation to the respondents for the temporary "taking" of their property accomplished by WPB Order L–208.

The Court views L–208 as a normal regulatory measure of the WPB, which had authority to allocate critical materials during the late war. It holds that this was the character of the administrative Order even though the Court of Claims found that L–208 was actually designed to cause a shift of gold miners to other nonferrous metal mines, rather than to control the allocation of mining equipment in short supply, as the Order on its face purported to do. In so holding, the Court emphasizes that

the "manpower" objective was simply *one* of the purposes of L–208. I am unable to reconcile the Court's conclusions with the findings of the Court of Claims. Finding 46 of the Court of Claims states that reallocation of gold miners by forced closure of the gold mines was "*The* dominant consideration . . . in the issuance of . . . L–208." (Italics supplied.) That this finding reflected the conclusion that the "manpower" purpose was the *sole* objective of the Order seems clear from the fact that the Court of Claims struck from this finding, as submitted to it by the hearing officer, the following two sentences:

> "Another consideration in the issuance of the order was as stated in the preamble that the fulfillment of requirements for the defense of the United States had created a shortage in the supply of critical materials which had been used in the maintenance and operation of gold mines.
>
> "Both objectives [the other being "manpower"] were in some measure accomplished with the closing of the plaintiffs' gold mines pursuant to the order."

On the basis of its findings, the Court of Claims concluded in its opinion:

> "From the language of the order itself [L–208] and from the circumstances surrounding its promulgation, it is apparent that its only purpose was to deprive the gold mine owners and operators of their right to make use of their mining properties."

These conclusions, which seem to me to be convincingly supported by the evidence in the record, require that L–208 be regarded as having no other purpose than to effect the closing of respondents' mines in order to free gold mine labor for essential war work. The Government acknowledges that during the war it lacked any legal authority to order the transfer of civilian manpower.

Viewing L–208 in this light, I cannot agree with the Court's conclusion that the Order was simply a "regulation" incident to which respondents happened to suffer financial loss. Instead, I believe that L–208 effected a temporary "taking" of the respondents' right to mine gold which is compensable under the Fifth Amendment.

L–208 was the only order promulgated during World War II which by its terms required a lawful and productive industry to shut down at a severe economic cost. See S. Rep. No. 1605, 82d Cong., 2d Sess. 3. As a result of the Order the respondents were totally deprived of the beneficial use of their property. Any suggestion that the mines could have been used in such a way (that is, other than to mine gold) so as to remove them from the scope of the Order would be chimerical. Not only were the respondents completely prevented from making profitable use of their property, but the Government acquired all that it wanted from the mines—their complete immobilization and the resulting discharge of the hardrock miners. It is plain that as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of these mines by the United States.

In these circumstances making the respondents' right to compensation turn on whether the Government took the ceremonial step of planting the American flag on the mining premises, cf. *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 116, is surely to permit technicalities of form to dictate consequences of substance. In my judgment the present case should be viewed precisely as if the United States, in order to accomplish its purpose of freeing gold miners for essential work, had taken possession of the gold mines and allowed them to lie fallow for the duration of the war. Had the Government adopted the latter course it is hardly debatable that respondents

would have been entitled to compensation. See *United States* v. *Pewee Coal Co., supra.*

As the Court recognizes, governmental action in the form of regulation which severely diminishes the value of property may constitute a "taking." See *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799; *United States* v. *Causby*, 328 U. S. 256; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415. In my opinion application of this principle calls here for the conclusion that there was a "taking," for it is difficult to conceive of a greater impairment of the use of property by a regulatory measure than that suffered by the respondents as a result of L–208.

None of the cases relied on by the Government precludes our acknowledging the confiscatory nature of L–208 and according respondents just compensation. Except in the extraordinary situation where private property is destroyed by American armed forces to meet the exigencies of the military situation in a theatre of war, see *United States* v. *Caltex, Inc.*, 344 U. S. 149, no case in this Court has held that the Government is excused from providing compensation when property has been "taken" from its owners during wartime in the interest of the common good. Cases such as *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503; *Lichter* v. *United States*, 334 U. S. 742, involving the wartime regulation of prices, rents, and profits, are wide of the mark. In all of them the Government was administering a nationwide regulatory system rather than a narrowly confined order directed to a small, singled-out category of individual concerns. Furthermore, none of the regulations involved in those cases prohibited the profitable exploitation of a legal business. And in none of them

did the Government, following issuance of its edict, stand virtually in the position of one in physical possession of the property.

Also beside the point are the wartime prohibition cases. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, dealt with the consequences of the Act of November 21, 1918, 40 Stat. 1045, 1046, which placed upon the property owners a burden not nearly so onerous as the one imposed on respondents by L–208. That Act permitted unrestricted sale of liquor for more than seven months from the date of its passage, and even after that time there was no restriction on sale for export or on local sale for other than beverage purposes. Moreover, the prohibition cases arose only after congressional action dealing specifically with the sale of liquor, and the Court in *Hamilton* particularly adverted to the fact that Congress might properly conclude that such sale should be halted "in order to guard and promote the efficiency" of the armed forces and defense workers. *Hamilton* v. *Kentucky Distilleries & Warehouse Co., supra,* at 155. This latter factor was also the premise of *Jacob Ruppert* v. *Caffey,* 251 U. S. 264. Not only has there been no comparable congressional finding that gold mining was injurious, but the Senate Committee on the Judiciary, which conducted a thorough analysis of the operation of L–208, recognized that "Issuance of the order was an administrative error . . . and may, furthermore, have been illegal." S. Rep. No. 1605, 82d Cong., 2d Sess. 3.

The question whether there has been a taking cannot of course be resolved by general formulae, but must turn on the circumstances of each particular case. As I have shown, the present case is plainly outside the run of past decisions. In those cases the Court was rightfully reluctant to sanction compensation for losses resulting from wartime regulatory measures which, under conditions of total mobilization, have ramifications touching everyone

in one degree or another. But where the Government proceeds by indirection, and accomplishes by regulation what is the equivalent of outright physical seizure of private property, courts should guard themselves against permitting formalities to obscure actualities. As Mr. Justice Holmes observed in *Pennsylvania Coal Co.* v. *Mahon, supra,* at 416: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

We should treat L–208 as being what in every realistic sense it was, a temporary confiscation of respondents' property. The Government is not absolved from providing just compensation here because the WPB may have lacked authority to "take" respondents' mines in order to free the miners for essential work in other mines. See *International Paper Co.* v. *United States,* 282 U. S. 399, 406; cf. *Hatahley* v. *United States,* 351 U. S. 173. I need hardly add that we should not be deterred from according respondents their due because their claims and those of others similarly situated may run into sizable amounts. The Court of Claims, certainly not given to the easy allowance of demands upon the public treasury, faced up to what the Constitution plainly requires in this instance. We should affirm its judgment.

LENG MAY MA *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 105. Argued May 20, 1958.—Decided June 16, 1958.

Petitioner, a native of China, came to the United States in 1951, claiming citizenship. Pending determination of her claim, she was at first held in custody but later was released on parole. When it was determined that she was not a citizen, she was ordered excluded. She surrendered, but applied for a stay of deportation under § 243 (h) of the Immigration and Nationality Act, on the ground that her deportation to China would subject her to physical persecution and probable death at the hands of the existing government. The stay was denied, and she sought a writ of habeas corpus. *Held:* Her release on parole did not alter her status as an excluded alien; she was not "within the United States," within the meaning of § 243 (h); and thus she was not eligible for the benefits of that section. Pp. 185–190.

241 F. 2d 85, affirmed.

Joseph S. Hertogs argued the cause and filed a brief for petitioner.

Leonard B. Sand argued the cause for respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a habeas corpus case involving § 243 (h) of the Immigration and Nationality Act, which authorizes the Attorney General "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecu-

tion. . . ." [1] Claiming to be an alien "within the United States" by reason of her parole in this country while her admissibility was being determined, petitioner contends that she is eligible to receive the benefactions of § 243 (h). The Attorney General contends that the section is applicable only to aliens who, in contemplation of law, have entered the United States. He argues that petitioner has never enjoyed that status because she eventually was found ineligible for entry and ordered excluded. The District Court denied a writ of habeas corpus, and the Court of Appeals affirmed. 241 F. 2d 85. We granted certiorari. 353 U. S. 981 (1957). We conclude that petitioner's parole did not alter her status as an excluded alien or otherwise bring her "within the United States" in the meaning of § 243 (h).

Petitioner is a native of China who arrived in this country in May 1951 claiming United States citizenship on the ground that her father was a United States citizen. Pending determination of her claim, she at first was held in custody, but later, in August 1952, was released on parole. Some three months thereafter, having failed to establish her claim of citizenship, she was ordered excluded, and the Board of Immigration Appeals affirmed. She surrendered for deportation in January 1954, and thereafter applied for a stay of deportation under § 243 (h) in which she alleged that her pending deportation to China would subject her to physical persecution and probable death at the hands of the existing government. Her petition for writ of habeas corpus followed administrative notification of her ineligibility for relief under that section. Petitioner does not challenge the

[1] Section 243 (h): "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." 66 Stat. 214, 8 U. S. C. § 1253 (h).

validity of her exclusion order or the proceedings culminating therein. She merely contends that by virtue of her physical presence as a parolee she is "within the United States," and hence covered by § 243 (h). The question, therefore, is wholly one of statutory construction.

It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry." *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206, 212 (1953). See *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 596 (1953). The distinction was carefully preserved in Title II of the Immigration and Nationality Act. Chapter 4 [2] subjects those seeking admission to "exclusion proceedings" to determine whether they "shall be allowed to enter or shall be excluded and deported." 66 Stat. 200, 8 U. S. C. § 1226 (a). On the other hand, Chapter 5 [3] concerns itself with aliens who have already entered the United States and are subject to "expulsion," as distinguished from "exclusion," if they fall within certain "general classes of deportable aliens." 66 Stat. 204, 8 U. S. C. § 1251. Proceedings for expulsion under Chapter 5 are commonly referred to as "deportation proceedings." Parenthetically, the word "deportation" appears also in Chapter 4 to refer to the return of excluded aliens from the country, but its use there reflects none of the technical gloss accompanying its use as a word of art in Chapter 5.

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[2] 66 Stat. 195–204, 8 U. S. C. §§ 1221–1230.

[3] 66 Stat. 204–219, 8 U. S. C. §§ 1251–1260.

For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206, 215 (1953); *United States* v. *Ju Toy,* 198 U. S. 253, 263 (1905); *Ekiu* v. *United States,* 142 U. S. 651, 661 (1892). It seems quite clear that an alien so confined would not be "within the United States" for purposes of § 243 (h). This, in fact, was conceded by respondents in the companion case, *Rogers* v. *Quan, post,* p. 193. Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. In § 212 (d)(5) of the Act, generally a codification of the administrative practice pursuant to which petitioner was paroled,[4] the Congress specifically provided that parole "shall not be regarded as an admission of the alien," and that after the return to custody the alien's case "shall *continue* to be dealt with in the same manner as that of any other applicant for admission to the United States." [5] (Emphasis added.) Petitioner's concept of the effect of parole certainly finds no support in this statutory language.

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[4] See Analysis of S. 716, 82d Cong., General Counsel, Immigration and Naturalization Service, pp. 39–42.

[5] Section 212 (d)(5): "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 66 Stat. 188, 8 U. S. C. § 1182 (d)(5).

This Court previously has had occasion to define the legal status of excluded aliens on parole. In *Kaplan* v. *Tod,* 267 U. S. 228 (1925), an excluded alien was paroled to a private Immigrant Aid Society pending deportation. The questions posed were whether the alien was "dwelling in the United States" within the meaning of a naturalization statute, and whether she had "entered or [was] found in the United States" for purpose of limitations. Mr. Justice Holmes disposed of the problem by explicitly equating parole with detention:

> "The appellant could not lawfully have landed in the United States . . . , and until she legally landed 'could not have dwelt within the United States.' *Zartarian* v. *Billings,* 204 U. S. 170, 175. Moreover while she was at Ellis Island she was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. *United States* v. *Ju Toy,* 198 U. S. 253, 263. When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still in theory of law at the boundary line and had gained no foothold in the United States." 267 U. S., at 230.

We find no evidence that the Congress, in enacting § 243 (h) in 1952, intended to depart from this interpretation.

The context in which § 243 (h) appears in the Act persuasively indicates the scope of its provisions. As we have observed, Title II of the Act preserves the distinction between exclusion proceedings and deportation (expulsion) proceedings, Chapter 4 dealing with the former and Chapter 5 with the latter. Within the two chapters are enumerated separate administrative procedures for

exclusion and expulsion, separate provisions for removal and transportation, and—most significantly—separate provisions for stays of deportation. Section 243 (h), under which petitioner claims relief, was inserted by the Congress *not* among Chapter 4's "Provisions Relating to Entry and Exclusion," but squarely within Chapter 5—a strikingly inappropriate place if, as petitioner claims, it was intended to apply to excluded aliens.

The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally "within the United States" is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court. Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. See Annual Reports, Immigration and Naturalization Service, 1955, pp. 5–6; 1956, pp. 5–6. Certainly this policy reflects the humane qualities of an enlightened civilization. The acceptance of petitioner's position in this case, however, with its inherent suggestion of an altered parole status, would be quite likely to prompt some curtailment of current parole policy—an intention we are reluctant to impute to the Congress.

Affirmed.

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

The statutory provision in controversy is contained in § 243 (h) of the Immigration and Nationality Act of 1952, 66 Stat. 212, 214, 8 U. S. C. § 1253 (h), which reads:

> "The Attorney General is authorized to withhold deportation of any alien within the United States

> to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The alien who is physically present in this country is about to be sent to Communist China—a country which the Immigration and Naturalization Service itself has told us is inhospitable to refugees.*

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*The Immigration and Naturalization Service announced on October 31, 1956, a policy of granting stays of deportation for those headed back to Red China. In that connection it stated:
"Official notice may be taken that the China mainland is under the control of a de facto Communist government. As in other Communist states, this government operates as a totalitarian dictatorship, suppressing personal liberties and imposing arbitrary restraints on the people when necessary to maintain its authority or secure its objectives. Its methods for imposing its will include persecution of individuals and groups by way of economic sanctions, corporal punishment, incarceration, and execution.
"While it can be accepted as a general proposition that the Peiping government at times engages in these forms of persecution to further its authoritarian ends, no reliable information has yet been made available to this Service to indicate whether such persecution is directed indiscriminately against the populace as a whole or whether it is employed on a selective basis against particular elements. It is not known to what extent or to what degree such factors as personal political beliefs or religious views, in themselves, are noticed or acted upon by the Communist authorities. Another unknown factor is whether prior presence in the United States has any bearing on the kind of treatment accorded by the Communist authorities to a Chinese national upon his return to the mainland, despite the fact that there is evidence indicating strong and continued efforts on the part of these same authorities to persuade their overseas nationals to reestablish themselves and their residence within Communist China. These and other specific considerations bearing on the question of physical persecution as practiced on the China mainland today are matters which await further inquiry and to which an answer may be provided through the collation of intelligence material being gathered by other agencies of the United States government." *In re Lee Sung,* No. A–7921505.

The question for us is not whether she should or should not be returned to China. It is whether the Attorney General has discretion to withhold her deportation if in his opinion she would be "subject to physical persecution" were she returned to that country.

This alien is not in custody at our border. She is here on parole. The authority to parole is contained in § 212 (d)(5) of the Act—the Attorney General may "in his discretion" parole an alien "into the United States." How an alien can be paroled "into the United States" and yet not be "within the United States" remains a mystery.

Of course if we had the problem of *Kaplan* v. *Tod*, 267 U. S. 228, different considerations would come into play. There an alien on parole sought to have her years here used to gain herself citizenship. Alternatively, she argued that the statute had run on her deportation since her parole was an "entry."

No such enlargement of the prerogatives of a parolee is sought here. This alien seeks not citizenship, not residence, but only the shelter of a provision of the law designed to protect such refugees from the fate of "physical persecution." She only requests that she be eligible to be considered by the Attorney General as a beneficiary of this humane provision of our law. Only a hostile reading can deny her that respite.

I would not read the law narrowly to make it the duty of our officials to send this alien and the others in the companion case to what may be persecution or death. Technicalities need not enmesh us. The spirit of the law provides the true guide. It makes plain, I think, that this case is one of those where the Attorney General is authorized to save a human being from persecution in a Communist land.

ROGERS, ATTORNEY GENERAL, *v.* QUAN ET AL.

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

No. 396. Argued May 20, 1958.—Decided June 16, 1958.

Respondents, natives of China, came to the United States between 1949 and 1954, seeking admission. All were paroled in the United States but have been ordered excluded. They applied for stays of deportation under § 243 (h) of the Immigration and Nationality Act, on the ground that their deportation to China would subject them to physical persecution at the hands of the existing government. The stays were denied, and they sued for judgments declaring their nondeportability to China, directing consideration of their claims under § 243 (h), and restraining the Attorney General from deporting them. *Held:*

1. Their release on parole did not alter their status as excluded aliens; they were not "within the United States," within the meaning of § 243 (h); and thus they were not eligible for the benefits of that section. *Leng May Ma* v. *Barber, ante*, p. 185. P. 194.

2. Deportation authority under the two exclusion sections, § 237 of the Immigration and Nationality Act and § 18 of the Immigration Act of 1917, is not confined to situations where deportation is immediate. Pp. 194–196.

3. Regardless of which of the two exclusion sections, § 237 (a) of the 1952 Act or § 18 of the 1917 Act, provides the basis for respondents' deportation, their applications for stays were all filed subsequent to the 1952 Act and must be determined by that Act. P. 196.

101 U. S. App. D. C. 229, 248 F. 2d 89, reversed.

Leonard B. Sand argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper.*

David Carliner argued the cause for respondents. With him on the brief were *Jack Wasserman* and *Andrew Reiner.*

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MR. JUSTICE CLARK delivered the opinion of the Court.

This is a companion case to *Leng May Ma* v. *Barber,* decided today, *ante,* p. 185. The five respondents are natives of China who came to the United States seeking admission between 1949 and 1954, four of them arriving before the effective date of the Immigration and Nationality Act. Like petitioner in *Leng May Ma,* all were paroled into the United States, and all have been ordered excluded. They applied for stays of deportation under § 243 (h) of the Immigration and Nationality Act,[1] and upon refusal, filed complaints in the District Court seeking judgments declaring their nondeportability to China, directing consideration of their claims under § 243 (h), and restraining the Attorney General from deporting them. The complaints were dismissed by the District Court, but the Court of Appeals held that excluded aliens on parole are "within the United States" for purposes of § 243 (h). 101 U. S. App. D. C. 229, 248 F. 2d 89. Because of the conflict with the Ninth Circuit's decision in *Leng May Ma,* we granted certiorari. 355 U. S. 861 (1957). We have concluded that respondents, like petitioner in *Leng May Ma,* are ineligible for stays of deportation under § 243 (h). However, because of the importance of this problem in the administration of the immigration laws, we deem it appropriate to deal specifically with a contention not directly asserted by petitioner in *Leng May Ma.*

The deportation of excluded aliens under the Immigration and Nationality Act is authorized in § 237 (a) of Chapter 4, wherein it is provided that an alien excluded

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[1] Section 243 (h): "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." 66 Stat. 214, 8 U. S. C. § 1253 (h).

under the Act "shall be immediately deported to the country whence he came . . . ." 66 Stat. 201, 8 U. S. C. § 1227 (a). A similar provision existed in the immediate predecessor to § 237 (a), which was § 18 of the Immigration Act of 1917.[2] Deportation in expulsion proceedings is separately provided for under the present Act in § 243 of Chapter 5, subsection (h) of which, of course, contains the authority which respondents seek to invoke in this case. 66 Stat. 212, 8 U. S. C. § 1253. Like authority existed in the immediate predecessor of § 243, which was § 20 of the Immigration Act of 1917, 39 Stat. 890, as amended by § 23 of the Internal Security Act of 1950, 64 Stat. 1010.

Respondents assert, however, that neither § 237 (a) nor its predecessor, § 18 of the 1917 Act, is the basis for their deportation since they were not "immediately" deported as required in the sections. Hence, they argue that deportation must rest upon § 243 of the present Act, as to the respondent who arrived after the Immigration and Nationality Act, and its predecessor, § 20 of the 1917 Act, as to the four who arrived prior to the present Act.

We will assume, for purpose of analysis, that four of the five respondents are, as they claim, deportable only under prior Acts by virtue of their early arrival. However, under neither of the exclusion sections, *i. e.*, § 237 (a) of the present Act or § 18 of the 1917 Act, is the deportation authority confined, as respondents contend, to those situations where deportation is immediate. Neither section, when read in its entirety and in context, fairly suggests any such limitation. Nor are there reasons of policy to compel such a result. As the desire to remain increases, those knocking on our doors quite naturally become more litigious, and contested departures

[2] Section 18: "[A]ll aliens brought to this country in violation of law shall be immediately sent back . . . ." 39 Stat. 887.

often involve long delays. We doubt that the Congress intended the mere fact of delay to improve an alien's status from that of one seeking admission to that of one legally considered within the United States. We conclude that there is ample basis under § 237 (a) and § 18 of the 1917 Act to deport respondents; we need not draw upon the provisions in § 243 of the present Act or § 20 of the 1917 Act.

Regardless of which of the two exclusion sections, § 237 (a) of the 1952 Act or § 18 of the 1917 Act, provides the basis for respondents' deportation, the applications for stays were all filed subsequent to the 1952 Act and hence must be determined by that Act. For reasons explained in *Leng May Ma,* § 243 (h) is unavailable to excluded aliens, and the fact of parole creates no variance from this principle.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN dissent for the reasons stated in the dissenting opinion in *Leng May Ma* v. *Barber, ante,* p. 190.

Syllabus.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., *v.* ROGERS, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.

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

No. 348. Argued May 1, 1958.—Decided June 16, 1958.

In a suit under § 9 (a) of the Trading with the Enemy Act brought by petitioner, a Swiss holding company, for the return of property seized by the Alien Property Custodian under § 5 (b), the District Court ordered petitioner to produce certain records of petitioner's Swiss bank. The Court found the records to be relevant and to be within petitioner's "control," within the meaning of Rule 34 of the Federal Rules of Civil Procedure. The records were not produced, on the grounds that their production would violate Swiss penal laws and that an order prohibiting their production had been made by the Swiss Federal Attorney. The District Court ruled that, unless full production were made, the complaint would be dismissed. During further lengthy proceedings, petitioner produced over 190,000 documents but was unable fully to satisfy the Court's order. The District Court found that petitioner had shown good faith in its efforts to comply with the production order; but it concluded that, apart from Swiss law, petitioner had control over its bank's records, that such records might prove to be crucial in the outcome of the litigation, and that Swiss law did not furnish an adequate excuse for failure to produce them. Accordingly, it dismissed the complaint with prejudice. The Court of Appeals affirmed. *Held:* On the record, dismissal of the complaint with prejudice was not justified; the judgment is reversed; and the cause is remanded for further proceedings. Pp. 198–213.

(1) In this instance, accommodation of Rule 34 of the Federal Rules of Civil Procedure to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing the production order, notwithstanding petitioner's claim that Swiss law, backed by criminal sanctions, prevented petitioner from having "control" of the records within the meaning of Rule 34. Pp. 204–206.

(2) Whether a federal district court has power to dismiss a complaint because of failure of the plaintiff to comply with a production order depends exclusively upon Rule 37 (b), which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ. The Rule makes no real distinction between "failure" to comply and "refusal" to obey. Pp. 206–208.

(3) On the record in this case, dismissal of the complaint with prejudice was not justified, in view of the findings below as to petitioner's good faith and efforts to comply with the production order, and in view of constitutional considerations which bear on this question. Pp. 208–213.

100 U. S. App. D. C. 148, 243 F. 2d 254, reversed and cause remanded.

John J. Wilson argued the cause for petitioner. With him on the brief were *Roger J. Whiteford* and *Hubert A. Schneider.*

Solicitor General Rankin argued the cause for respondents. With him on the brief were *Assistant Attorney General Townsend, David Schwartz, Sidney B. Jacoby, Paul E. McGraw* and *Ernest S. Carsten.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question before us is whether, in the circumstances of this case, the District Court erred in dismissing, with prejudice, a complaint in a civil action as to a plaintiff that had failed to comply fully with a pretrial production order.

This issue comes to us in the context of an intricate litigation. Section 5 (b) of the Trading with the Enemy Act, 40 Stat. 415, as amended, 50 U. S. C. App. § 5 (b), sets forth the conditions under which the United States during a period of war or national emergency may seize ". . . any property or interest of any foreign country or national . . . ." Acting under this section, the Alien Property Custodian during World War II assumed con-

trol of assets which were found by the Custodian to be "owned by or held for the benefit of" I. G. Farbenindustrie, a German firm and a then enemy national. These assets, valued at more than $100,000,000, consisted of cash in American banks and approximately 90% of the capital stock of General Aniline & Film Corporation, a Delaware corporation. In 1948 petitioner, a Swiss holding company also known as I. G. Chemie or Interhandel, brought suit under § 9 (a) of the Trading with the Enemy Act, 40 Stat. 419, as amended, 50 U. S. C. App. § 9 (a), against the Attorney General, as successor to the Alien Property Custodian, and the Treasurer of the United States, to recover these assets. This section authorizes recovery of seized assets by "[a]ny person not an enemy or ally of enemy" to the extent of such person's interest in the assets. Petitioner claimed that it had owned the General Aniline stock and cash at the time of vesting and hence, as the national of a neutral power, was entitled under § 9 (a) to recovery.

The Government both challenged petitioner's claim of ownership and asserted that in any event petitioner was an "enemy" within the meaning of the Act since it was intimately connected with I. G. Farben and hence was affected with "enemy taint" despite its "neutral" incorporation. See *Uebersee Finanz-Korp.* v. *McGrath,* 343 U. S. 205. More particularly, the Government alleged that from the time of its incorporation in 1928, petitioner had conspired with I. G. Farben, H. Sturzenegger & Cie, a Swiss banking firm, and others "[t]o conceal, camouflage and cloak the ownership, control and domination by I. G. Farben of properties and interests located in countries, including the United States, other than Germany, in order to avoid seizure and confiscation in the event of war between such countries and Germany."

At an early stage of the litigation the Government moved under Rule 34 of the Federal Rules of Civil Pro-

cedure for an order requiring petitioner to make available for inspection and copying a large number of the banking records of Sturzenegger & Cie. Rule 34, in conjunction with Rule 26 (b), provides that upon a motion "showing good cause therefor," a court may order a party to produce for inspection nonprivileged documents relevant to the subject matter of pending litigation ". . . which are in his possession, custody, or control . . . ." In support of its motion the Government alleged that the records sought were relevant to showing the true ownership of the General Aniline stock and that they were within petitioner's control because petitioner and Sturzenegger were substantially identical. Petitioner did not dispute the general relevancy of the Sturzenegger documents but denied that it controlled them. The District Court granted the Government's motion, holding, among other things, that petitioner's "control" over the records had been *prima facie* established.

Thereafter followed a number of motions by petitioner to be relieved of production on the ground that disclosure of the required bank records would violate Swiss penal laws and consequently might lead to imposition of criminal sanctions, including fine and imprisonment, on those responsible for disclosure. The Government in turn moved under Rule 37 (b)(2) of the Federal Rules of Civil Procedure to dismiss the complaint because of petitioner's noncompliance with the production order. During this period the Swiss Federal Attorney, deeming that disclosure of these records in accordance with the production order would constitute a violation of Article 273 of the Swiss Penal Code, prohibiting economic espionage, and Article 47 of the Swiss Bank Law, relating to secrecy of banking records, "confiscated" the Sturzenegger records. This "confiscation" left possession of the records in Sturzenegger and amounted to an interdiction on

Sturzenegger's transmission of the records to third persons. The upshot of all this was that the District Court, before finally ruling on petitioner's motion for relief from the production order and on the Government's motion to dismiss the complaint, referred the matter to a Special Master for findings as to the nature of the Swiss laws claimed by petitioner to block production and as to petitioner's good faith in seeking to achieve compliance with the court's order.

The Report of the Master bears importantly on our disposition of this case. It concluded that the Swiss Government had acted in accordance with its own established doctrines in exercising preventive police power by constructive seizure of the Sturzenegger records, and found that there was ". . . no proof, or any evidence at all of collusion between plaintiff and the Swiss Government in the seizure of the papers herein." Noting that the burden was on petitioner to show good faith in its efforts to comply with the production order, and taking as the test of good faith whether petitioner had attempted all which a reasonable man would have undertaken in the circumstances to comply with the order, the Master found that ". . . the plaintiff has sustained the burden of proof placed upon it and has shown good faith in its efforts [to comply with the production order] in accordance with the foregoing test."

These findings of the Master were confirmed by the District Court. Nevertheless the court, in February 1953, granted the Government's motion to dismiss the complaint and filed an opinion wherein it concluded that: (1) apart from considerations of Swiss law petitioner had control over the Sturzenegger records; (2) such records might prove to be crucial in the outcome of this litigation; (3) Swiss law did not furnish an adequate excuse for petitioner's failure to comply with the production order,

since petitioner could not invoke foreign laws to justify disobedience to orders entered under the laws of the forum; and (4) that the court in these circumstances had power under Rule 37 (b)(2), as well as inherent power, to dismiss the complaint. 111 F. Supp. 435. However, in view of statements by the Swiss Government, following petitioner's intercession, that certain records not deemed to violate the Swiss laws would be released, and in view of efforts by petitioner to secure waivers from those persons banking with the Sturzenegger firm who were protected by the Swiss secrecy laws, and hence whose waivers might lead the Swiss Government to permit production, the court suspended the effective date of its dismissal order for a limited period in order to permit petitioner to continue efforts to obtain waivers and Swiss consent for production.

By October 1953, some 63,000 documents had been released by this process and tendered the Government for inspection. None of the books of account of Sturzenegger were submitted, though petitioner was prepared to offer plans to the Swiss Government which here too might have permitted at least partial compliance. However, since full production appeared impossible, the District Court in November 1953 entered a final dismissal order. This order was affirmed by the Court of Appeals, which accepted the findings of the District Court as to the relevancy of the documents, control of them by petitioner, and petitioner's good-faith efforts to comply with the production order. The court found it unnecessary to decide whether Rule 37 authorized dismissal under these circumstances since it ruled that the District Court was empowered to dismiss both by Rule 41 (b) of the Federal Rules of Civil Procedure, and under its own "inherent power." It did, however, modify the dismissal order to allow petitioner an additional six months in which to

continue its efforts. 96 U. S. App. D. C. 232, 225 F. 2d 532. We denied certiorari. 350 U. S. 937.

During this further period of grace, additional documents, with the consent of the Swiss Government and through waivers, were released and tendered for inspection, so that by July of 1956, over 190,000 documents had been procured. Record books of Sturzenegger were offered for examination in Switzerland, subject to the expected approval of the Swiss Government, to the extent that material within them was covered by waivers. Finally, petitioner presented the District Court with a plan, already approved by the Swiss Government, which was designed to achieve maximum compliance with the production order: A "neutral" expert, who might be an American, would be appointed as investigator with the consent of the parties, District Court, and Swiss authorities. After inspection of the Sturzenegger files, this investigator would submit a report to the parties identifying documents, without violating secrecy regulations, which he deemed to be relevant to the litigation. Petitioner could then seek to obtain further waivers or secure such documents by letters rogatory or arbitration proceedings in Swiss courts.

The District Court, however, refused to entertain this plan or to inspect the documents tendered in order to determine whether there had been substantial compliance with the production order. It directed final dismissal of the action. The Court of Appeals affirmed, but at the same time observed: "That [petitioner] and its counsel patiently and diligently sought to achieve compliance . . . is not to be doubted." 100 U. S. App. D. C. 148, 149, 243 F. 2d 254, 255. Because this decision raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari. 355 U. S. 812.

I.

We consider first petitioner's contention that the District Court erred in issuing the production order because the requirement of Rule 34, that a party ordered to produce documents must be in "control" of them, was not here satisfied. Without intimating any view upon the merits of the litigation, we accept as amply supported by the evidence the findings of the two courts below that, apart from the effect of Swiss law, the Sturzenegger documents are within petitioner's control. The question then becomes: Do the interdictions of Swiss law bar a conclusion that petitioner had "control" of these documents within the meaning of Rule 34?

We approach this question in light of the findings below that the Swiss penal laws did in fact limit petitioner's ability to satisfy the production order because of the criminal sanctions to which those producing the records would have been exposed. Still we do not view this situation as fully analogous to one where documents required by a production order have ceased to exist or have been taken into the actual possession of a third person not controlled by the party ordered to produce, and without that party's complicity. The "confiscation" of these records by the Swiss authorities adds nothing to the dimensions of the problem under consideration, for possession of the records stayed where it was and the possibility of criminal prosecution for disclosure was of course present before the confiscation order was issued.

In its broader scope, the problem before us requires consideration of the policies underlying the Trading with the Enemy Act. If petitioner can prove its record title to General Aniline stock, it certainly is open to the Government to show that petitioner itself is the captive of interests whose direct ownership would bar recovery. This possibility of enemy taint of nationals of neutral

powers, particularly of holding companies with intricate financial structures, which asserted rights to American assets was of deep concern to the Congress when it broadened the Trading with the Enemy Act in 1941 ". . . to reach enemy interests which masqueraded under those innocent fronts." *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 485. See Administration of the Wartime Financial and Property Controls of the United States Government, Treasury Department (1942), pp. 29–30; H. R. Rep. No. 2398, 79th Cong., 2d Sess. 3.

In view of these considerations, to hold broadly that petitioner's failure to produce the Sturzenegger records because of fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had "control" over them, and thereby from ordering their production, would undermine congressional policies made explicit in the 1941 amendments, and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records. The District Court here concluded that the Sturzenegger records might have a vital influence upon this litigation insofar as they shed light upon petitioner's confused background. Petitioner is in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order, and indeed to that end it has already made significant progress. United States courts should be free to require claimants of seized assets who face legal obstacles under the laws of their own countries to make all such efforts to the maximum of their ability where the requested records promise to bear out or dispel any doubt the Government may introduce as to true ownership of the assets.

We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have

control. Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order.

II.

We consider next the source of the authority of a District Court to dismiss a complaint for failure of a plaintiff to comply with a production order. The District Court found power to dismiss under Rule 37 (b)(2)(iii) of the Federal Rules of Civil Procedure as well as in the general equity powers of a federal court. The Court of Appeals chose not to rely upon Rule 37, but rested such power on Rule 41 (b) and on the District Court's inherent power.

Rule 37 describes the consequences of a refusal to make discovery. Subsection (b), which is entitled "Failure to Comply With Order," provides in pertinent part:

> "(2) . . . If any party . . . refuses to obey . . . an order made under Rule 34 to produce any document or other thing for inspection . . . , the court may make such orders in regard to the refusal as are just, and among others the following:
>
> . . . . . .
>
> "(iii) An order striking out pleadings or parts thereof . . . , or dismissing the action or proceeding or any part thereof . . . ."

Rule 41 (b) is concerned with involuntary dismissals and reads in part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

In our opinion, whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is "just." There is no need to resort to Rule 41 (b), which appears in that part of the Rules concerned with *trials* and which lacks such specific references to discovery. Further, that Rule is on its face appropriate only as a defendant's remedy, while Rule 37 provides more expansive coverage by comprehending disobedience of production orders by any party. Reliance upon Rule 41, which cannot easily be interpreted to afford a court more expansive powers than does Rule 37, or upon "inherent power," can only obscure analysis of the problem before us. See generally Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col. L. Rev. 480.

It may be that the Court of Appeals invoked Rule 41 (b), which uses the word "failure," and hesitated to draw upon Rule 37 (b) because of doubt that Rule 37 would cover this situation since it applies only where a party "*refuses* to obey." (Italics added.) Petitioner has urged that the word "refuses" implies willfulness and that it simply *failed* and did not *refuse* to obey since it was not in willful disobedience. But this argument turns on too fine a literalism and unduly accents certain distinctions found in the language of the various subsections of Rule 37.[1] Indeed subsection (b), as noted above, is itself

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[1] Rule 37 is entitled: "*Refusal* to Make Discovery: Consequences." Different subsections refer to "*Refusal* to Answer" (a), "Expenses on *Refusal* to Admit" (c), "*Failure* of Party to Attend or Serve Answers" (d), and "*Failure* to Respond to Letters Rogatory" (e). We find no design in the Rules evidenced by this pattern of words to establish the clear distinction petitioner detects between mere failure and willful refusal insofar as Rule 37 (b) is concerned. The word

entitled "*Failure* to Comply With Order." (Italics added.) For purposes of subdivision (b)(2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.

III.

We turn to the remaining question, whether the District Court properly exercised its powers under Rule 37 (b) by dismissing this complaint despite the findings that petitioner had not been in collusion with the Swiss authorities to block inspection of the Sturzenegger records, and had in good faith made diligent efforts to execute the production order.

We must discard at the outset the strongly urged contention of the Government that dismissal of this action was justified because petitioner conspired with I. G. Farben, Sturzenegger & Cie, and others to transfer ownership of General Aniline to it prior to 1941 so that seizure would be avoided and advantage taken of Swiss secrecy laws. In other words, the Government suggests that petitioner stands in the position of one who delib-

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"refusal," by way of example, clearly refers in several instances in subsection (a) of the Rule to noncompliance for any reason. And Rule 41 (b) in turn, discussed above in text, refers simply to "*failure* . . . to comply" but might as applied to a particular situation require a showing of willfulness to justify dismissal. (Italics added throughout.) The words "refusal" and "failure" cannot be deemed to bear a fixed meaning common to their use in all sections but must be read in the context of a particular subsection.

erately courted legal impediments to production of the Sturzenegger records, and who thus cannot now be heard to assert its good faith after this expectation was realized. Certainly these contentions, if supported by the facts, would have a vital bearing on justification for dismissal of the action, but they are not open to the Government here. The findings below reach no such conclusions; indeed, it is not even apparent from them whether this particular charge was ever passed upon below. Although we do not mean to preclude the Government from seeking to establish such facts before the District Court upon remand, or any other facts relevant to justification for dismissal of the complaint, we must dispose of this case on the basis of the findings of good faith made by the Special Master, adopted by the District Court, and approved by the Court of Appeals.

The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey* v. *Elliott,* 167 U. S. 409, and *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U. S. C. (1952 ed.), p. 4325.

In *Hovey* v. *Elliott, supra,* it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree *pro confesso* without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. This holding was substantially modified by *Hammond Packing Co.* v. *Arkansas, supra,* where the

Court ruled that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. The *Hovey* case was distinguished on grounds that the defendant there was denied his right to defend "as a mere punishment"; due process was found preserved in *Hammond* on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence ". . . was but an admission of the want of merit in the asserted defense." 212 U. S., at 350–351. But the Court took care to emphasize that the defendant had not been penalized ". . . for a failure to do that which it may not have been in its power to do." All the State had required "was a *bona fide* effort to comply with an order . . . , and therefore any reasonable showing of an inability to comply would have satisfied the requirements . . ." of the order. 212 U. S., at 347.

These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. Cf. *Tot* v. *United States,* 319 U. S. 463. Certainly substantial constitutional questions are provoked by such action. Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff,* cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a *defendant,* for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian

without the opportunity for protest by any party claiming that seizure was unjustified under the Trading with the Enemy Act. Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure. See *Stoehr* v. *Wallace,* 255 U. S. 239, 245–246; *Guessefeldt* v. *McGrath,* 342 U. S. 308, 318; cf. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489.

The findings below, and what has been shown as to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign. Of course this situation should be distinguished from one where a party claims that compliance with a court's order will reveal facts which may provide the basis for criminal prosecution of that party under the penal laws of a foreign sovereign thereby shown to have been violated. Cf. *United States* v. *Murdock,* 284 U. S. 141, 149. Here the findings below establish that the very fact of compliance by disclosure of banking records will itself constitute the initial violation of Swiss laws. In our view, petitioner stands in the position of an American plaintiff subject to criminal sanctions in Switzerland because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws. Petitioner has sought no privileges because of its foreign citizenship which are

not accorded domestic litigants in United States courts. Cf. *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 133–135. It does not claim that Swiss laws protecting banking records should here be enforced. It explicitly recognizes that it is subject to procedural rules of United States courts in this litigation and has made full efforts to follow these rules. It asserts no immunity from them. It asserts only its *inability* to comply because of foreign law.

In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.[2]

This is not to say that petitioner will profit through its inability to tender the records called for. In seeking recovery of the General Aniline stock and other assets, petitioner recognizes that it carries the ultimate burden of proof of showing itself not to be an "enemy" within the meaning of the Trading with the Enemy Act. The Government already has disputed its right to recovery by relying on information obtained through seized records of I. G. Farben, documents obtained through petitioner, and depositions taken of persons affiliated with petitioner. It may be that in a trial on the merits, petitioner's

[2] The Government relies in part upon a number of British prize cases in support of its position that dismissal without adjudication on the merits is justified where a party is prevented by foreign laws from satisfying a court order. However these cases are to be interpreted, they are not persuasive authority on the issue before us. We are here concerned with the interpretation to be accorded rules governing procedure in the federal courts and with constitutional doctrine underlying these rules.

inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events. So much indeed petitioner concedes. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits.

On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective. It may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to commence at once trial on the merits. We decide only that on this record dismissal of the complaint with prejudice was not justified.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

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

ESKRIDGE *v.* WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 96. Argued May 19, 1958.—Decided June 16, 1958.

The Constitution of the State of Washington gives the accused in a criminal prosecution a right to appeal in all cases, and a state law authorizes the furnishing of a stenographic transcript of trial proceedings to an indigent defendant at public expense, if, in the opinion of the trial judge, "justice will thereby be promoted." Alleging substantial errors in his trial for murder, petitioner moved in 1935 for a free transcript; but it was denied. The State Supreme Court denied petitioner a writ of mandate directing the trial judge to furnish the transcript and dismissed petitioner's appeal for failure to file a transcript. In 1956, petitioner applied to the State Supreme Court for habeas corpus, charging that failure to furnish the free transcript had violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment; but the writ was denied. *Held:* Petitioner was denied his constitutional rights under the Fourteenth Amendment; the judgment is reversed; and the cause is remanded for further proceedings. *Griffin* v. *Illinois,* 351 U. S. 12. Pp. 214–216.

Reversed and remanded.

Robert W. Graham, acting under appointment by the Court, 354 U. S. 936, argued the cause and filed a brief for petitioner.

John J. O'Connell, Attorney General of Washington, argued the cause for respondent. With him on the brief was *Haydn H. Hilling,* Assistant Attorney General.

PER CURIAM.

The Constitution of the State of Washington provides: "In criminal prosecutions, the accused shall have . . . the right to appeal in all cases . . . ." Wash. Const., Amend. 10. In 1935, after petitioner was convicted of murder in a Washington state court and sentenced to life

imprisonment, he gave timely notice of appeal to the Supreme Court of the State. Washington law authorizes a trial judge to have a stenographic transcript of trial proceedings furnished an indigent defendant at public expense "if in his opinion justice will thereby be promoted." Remington's Wash. Rev. Stat., 1932, § 42–5. Alleging substantial errors in his trial petitioner moved for a free transcript. The trial judge denied this motion, finding that "justice would not be promoted . . . in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein." Petitioner then moved in the State Supreme Court for writ of mandate ordering the trial judge to have a transcript furnished for the prosecution of his appeal. The Supreme Court denied this petition and simultaneously granted the State's motion to dismiss petitioner's appeal for failure to file a certified "statement of facts" and "transcript of record." In 1956 petitioner applied for habeas corpus in the Washington Supreme Court charging that failure to furnish a free transcript of the proceedings had violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. His petition was denied without opinion and we granted certiorari. 353 U. S. 922.

In this Court the State does not deny petitioner's allegations of poverty, the substantiality of the trial errors he alleges, or the necessity for him to have some record of the proceedings in order to prosecute his appeal properly. It does argue that petitioner might have utilized notes compiled by someone other than the official court reporter. Assuming that under some circumstances such notes could be an adequate substitute for a court reporter's transcript there is nothing in this record to show that any were available to petitioner, and the Washington courts appear to have proceeded on the

assumption that he could not effectively prosecute his appeal unless the motion for a free transcript was granted. The State concedes that the reporter's transcript from the 1935 trial is still available. In *Griffin* v. *Illinois,* 351 U. S. 12, we held that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. We hold that Washington has denied this constitutional right here. The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript. We do not hold that a State must furnish a transcript in every case involving an indigent defendant. But here, as in the *Griffin* case, we do hold that, "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Griffin* v. *Illinois,* 351 U. S. 12, 19.

The judgment of the Washington Supreme Court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER, believing that on this record the *Griffin* case, decided in 1956, should not be applied to this conviction occurring in 1935, would affirm the judgment.

MR. JUSTICE FRANKFURTER, not having heard the argument, took no part in the consideration or disposition of the case.

TRIPLETT *v.* IOWA.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 547. Argued May 21, 1958.—Decided June 16, 1958.

Certiorari, 355 U. S. 811, dismissed as improvidently granted.
Reported below: 248 Iowa 339, 79 N. W. 2d 391.

Thomas O. Tacy argued the cause for petitioner. With him on the brief was *Herbert S. French.*

Freeman H. Forrest, Assistant Attorney General of Iowa, argued the cause for respondent. With him on the brief was *Norman A. Erbe,* Attorney General.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

DeFEBIO ET AL. *v.* COUNTY SCHOOL BOARD OF FAIRFAX COUNTY ET AL.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 677, Misc. Decided June 16, 1958.

Appeal dismissed and certiorari denied.
Reported below: 199 Va. 511, 100 S. E. 2d 760.

C. Douglas Adams, Jr. and *Albert I. Kassabian* for appellants.

A. S. Harrison, Jr., Attorney General of Virginia, *Kenneth C. Patty* and *R. D. McIlwaine, III*, Assistant Attorneys General, and *John C. Wood* for appellees.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

CASH *v.* UNITED STATES.

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

No. 723, Misc. Decided June 16, 1958.

Certiorari granted; judgment vacated; and cause remanded for consideration in light of cases cited.

Reported below: —— U. S. App. D. C. ——, 261 F. 2d 731.

Eugene Gressman for petitioner.

Solicitor General Rankin, Assistant Attorney General Anderson and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded to that court for consideration in light of *Ellis* v. *United States,* 356 U. S. 674, decided May 26, 1958, and in light of *Hill* v. *United States,* 356 U. S. 704, decided June 2, 1958.

ROGERS *v.* RICHMOND, WARDEN.

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

No. 755, Misc. Decided June 16, 1958.

Certiorari denied with statement as to effect of opinion of Court of Appeals in 252 F. 2d 807.

Louis H. Pollak for petitioner.

Abraham S. Ullman for respondent.

PER CURIAM.

The petition for writ of certiorari is denied. We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* v. *Allen*, 344 U. S. 443, 506, *et seq.*

McALLISTER *v.* MAGNOLIA PETROLEUM CO.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT.

No. 83. Argued April 1, 1958.—Decided June 23, 1958.

1. Where an action for unseaworthiness is combined with an action under the Jones Act, a court cannot apply to the former a shorter period of limitations than Congress has prescribed for the latter. Pp. 221–226.

2. In this case, the trial judge's instructions to the jury on the issue of unseaworthiness were erroneous, since they carried the incorrect implication that petitioner could recover for unseaworthiness only if the defect was of such quality that it rendered the whole vessel unfit for the purpose for which it was intended. Pp. 226–227.

290 S. W. 2d 313, judgment vacated and cause remanded.

Arthur J. Mandell argued the cause and filed a brief for petitioner.

Frank C. Bolton, Jr. argued the cause for respondent. With him on the brief were *Charles B. Wallace* and *Jack E. Earnest.*

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

The question in this case is whether a state court may apply its two-year statute of limitations to bar an unseaworthiness action that is joined with an action for negligence under the Jones Act.

Petitioner was a member of the crew of a vessel owned and operated by respondent. His back was injured Oct. 19, 1950, when he slipped and fell down a stairway leading from the lounge to the galley. He reported the injury, and the ship's log book supports his allegation that the steps were wet. At the termination of the voyage petitioner consulted a doctor about the pain and

stiffness in his back. Intermittent medical attention failed to arrest a deteriorating condition. In March 1953, a specialist in orthopedics diagnosed the difficulty as ruptured discs between the vertebrae. By July 6, 1953, petitioner could no longer perform his duties aboard respondent's vessel, and on that date he entered a United States Public Health Marine Hospital as an injured seaman. After his discharge he consulted an attorney and this state-court action was filed Aug. 27, 1953, in the District Court of Dallas County, Texas.

Petitioner claimed damages under the Jones Act for negligence [1] and under the general maritime law for unseaworthiness. He also asked for maintenance and cure under the general maritime law. He alleged that the portholes and deck at the head of the stairs were not watertight, that they allowed water to accumulate on the stairs, and that this condition was the proximate cause of his fall. Respondent's answer denied the allegations of negligence and unseaworthiness, and averred that petitioner's claims were barred by the pertinent statutes of limitations and by laches. The trial court ruled that the actions were not barred, and after hearing evidence submitted all three claims to the jury.[2] The jury returned special verdicts importing the following findings: Petitioner was injured while attempting to walk down the stairs in question; the portholes and deck above and near

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[1] 46 U. S. C. § 688.

[2] Recent authorities have effectively disposed of suggestions in earlier cases that an injured seaman can be required to exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness. *McCarthy* v. *American Eastern Corp.*, 175 F. 2d 724 (C. A. 3d Cir.); *Balado* v. *Lykes Bros. S. S. Co.*, 179 F. 2d 943 (C. A. 2d Cir.); *Williams* v. *Tide Water Asso. Oil Co.*, 227 F. 2d 791 (C. A. 9th Cir.). Cf. *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406. See Gilmore and Black, The Law of Admiralty, §§ 6–23 through 6–25.

the stairs were not watertight; these defects were not due to the negligence of respondents; and the condition did not make the vessel unseaworthy.[3] Pursuant to these findings, the trial court entered judgment for respondent on the Jones Act and unseaworthiness counts, and awarded petitioner $6,258 for maintenance and cure.

Both parties appealed to the Texas Court of Civil Appeals. Respondent sought to overturn the award for maintenance and cure, but the trial court's decision in that respect was affirmed and that portion of the case is not before us. Petitioner took no appeal from the judgment so far as it concerned his claim under the Jones Act, so that portion of the case is also outside the scope of our review. Limiting his appeal to the unseaworthiness aspect of his case, petitioner assigned errors in admitting evidence and in instructing the jury. The Court of Civil Appeals found it unnecessary to rule upon these questions, for in its opinion the unseaworthiness action was barred by the two-year Texas statute of limitations pertaining to actions for personal injuries.[4] 290 S. W. 2d 313. The Texas Supreme Court refused petitioner's application for writ of error. In view of the importance of this ruling for maritime personal injury litigation in the state courts, we granted petitioner's motion for leave

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[3] Because of its negative findings on unseaworthiness and negligence, the jury made no finding on whether the condition of the portholes and deck was the proximate cause of petitioner's fall. The jury did find that petitioner was not contributorily negligent, and that it would require $32,500 to compensate him for loss of earnings, diminished earning capacity, past and future medical expenses, and pain and suffering.

[4] "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

. . . . . .

"6. Action for injury to the person of another." Vernon's Ann. Rev. Civ. Stat., Art. 5526.

to proceed *in forma pauperis,* and granted certiorari. 352 U. S. 1000.

In the view we take of this case it is unnecessary for us to decide the broad question of whether a state court is free to apply its own statutes of limitation to an admiralty right of action for which no special limitation is prescribed, or whether it is bound to determine the timeliness of such actions by the admiralty doctrine of laches.[5] For the reasons stated hereafter, we simply hold that where an action for unseaworthiness is combined with an action under the Jones Act a court cannot apply to the former a shorter period of limitations than Congress has prescribed for the latter. We think this is so whether the action is at law or in admiralty, in the state or the federal courts.

The appropriate period of limitations for this action must be determined with an eye to the practicalities of admiralty personal injury litigation. When a seaman is injured he has three means of recovery against his employer: (1) maintenance and cure, (2) negligence under the Jones Act, and (3) unseaworthiness. Without elaborating on the nature of these three actions, it is sufficient to say that they are so varied in their elements of proof, type of defenses, and extent of recovery that a seaman will rarely forego his right to sue for all three. But if the seaman is to sue for both unseaworthiness and Jones Act negligence, he must do so in a single proceed-

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[5] The question of which limitation a state court must apply was reserved in *Engel* v. *Davenport,* 271 U. S. 33, 36. Lower courts are divided on the related question of which principles govern the limitation of admiralty actions on the law side of the federal court. Compare *Henderson* v. *Cargill, Inc.,* 128 F. Supp. 119; *Apika* v. *Pennsylvania Whsg. & Safe Deposit Co.,* 74 F. Supp. 819, 101 F. Supp. 575; *Untersinger* v. *Keystone Tankship Corp.,* 1948 A. M. C. 1899; with *Bonam* v. *Southern Menhaden Corp.,* 284 F. 360; *Oroz* v. *American President Lines,* 154 F. Supp. 241.

ing. That is a consequence of this Court's decision in *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, which held that these claims were but alternative "grounds" of recovery for a single cause of action. A judgment in the seaman's libel for unseaworthiness was held to be a complete "bar" to his subsequent action for the same injuries under the Jones Act.

Since the seaman must sue for both unseaworthiness and Jones Act negligence in order to make full utilization of his remedies for personal injury, and since that can be accomplished only in a single proceeding, a time limitation on the unseaworthiness claim effects in substance a similar limitation on the right of action under the Jones Act. Congress has provided that a seaman shall have three years to bring his action under the Jones Act.[6] A state court cannot reduce that time by applying its own statute of limitations to such an action. *Engel* v. *Davenport,* 271 U. S. 33; cf. *Cox* v. *Roth,* 348 U. S. 207. As an essential corollary of that proposition, it may not qualify the seaman's Jones Act right by affixing a shorter limitation to his concurrent right of action for unseaworthiness.[7]

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[6] See 46 U. S. C. § 688, which incorporates the statute of limitations under the Federal Employers' Liability Act, 45 U. S. C. § 56. When the Jones Act was adopted in 1920 the period of limitations for the FELA was two years. Some authorities have suggested that the Act of Aug. 11, 1939, 53 Stat. 1404, which extended the FELA period to three years, did not effect a similar extension for the Jones Act. *E. g.,* 3 Benedict, Admiralty (6th ed., Knauth, 1940), § 469. The contrary must now be taken to have been established. See *Cox* v. *Roth,* 348 U. S. 207, 210; *Pope* v. *McCrady Rodgers Co.,* 164 F. 2d 591, 592; *Streeter* v. *Great Lakes Transit Corp.,* 49 F. Supp. 466; *Gahling* v. *Colabee S. S. Co.,* 37 F. Supp. 759; *Royle* v. *Standard Fruit & Steamship Co.,* 269 App. Div. 762, 54 N. Y. S. 2d 778.

[7] Cf. *Le Gate* v. *The Panamolga,* 221 F. 2d 689 (C. A. 2d Cir.). In that case, a longshoreman brought a libel claiming damages for personal injuries caused by negligence or unseaworthiness. The District Court held both claims barred by laches. He was reversed as to un-

To be sure, the seaman's right of action under the Jones Act is not extinguished when a State imposes a two-year limitation on the right to sue for unseaworthiness for the same injury. But in view of the practical necessity of combining both claims in a single action, *Baltimore S. S. Co.* v. *Phillips, supra,* the unseaworthiness limitation effectively diminishes the time within which the seaman must commence his action under the Jones Act. The result falls short of affording seamen "the full benefit of federal law," *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 243, to which they are entitled when state courts undertake to adjudicate claims under the federal maritime law.

Because the state court thought petitioner's action was barred by the statute of limitations, it had no occasion to consider the assignment of error in connection with the trial judge's instructions on unseaworthiness. The parties have argued the matter, and in furtherance of what we deem to be sound judicial administration, *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.,* 355 U. S. 563, 569, we rule on the question at this time. We think that the charges set out in the margin [8] were erroneous.

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seaworthiness. The Court of Appeals held that if the negligence count were the only basis of liability the District Court would have been correct in holding it barred by laches. However, since libellant was going to have a trial on his unseaworthiness claim, the court thought it a "harsh result" to limit the scope of his suit. The cause was remanded for the District Court to reconsider the question of laches on the negligence count and respondent was given the burden of showing prejudice from inexcusable delay. And see *Cross* v. *Allen,* 141 U. S. 528 (laches will not bar suit in equity to foreclose mortgage so long as statute of limitations has not run on underlying debt); *United States* v. *Mack,* 295 U. S. 480, 489 ("Laches within the term of the statute of limitations is no defense at law.").

[8] "Special Issue No. 3 [and 14]. Do you find from a preponderance of the evidence that the portholes or windows in question [or the "deck above the galley"] not being in a watertight condition, if you

They carried the incorrect implication that petitioner could recover for unseaworthiness only if the defect was of such quality that it rendered the whole vessel unfit for the purpose for which it was intended.[9] It is well settled that "the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment . . . ." *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 99.

The judgment of the Court of Civil Appeals of Texas is vacated, and the cause is remanded to it for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BRENNAN, concurring.

While I join in the opinion of the Court, I believe it proper to add a few words because of the suggestion in the dissent that the Court intimates that the state statute would be applied were it longer. I find no such indication in the Court's opinion. Indeed, the theory of the Court precludes consideration of that problem. The single question for decision is whether the Texas two-year statute of limitations was correctly applied to bar petitioner's

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have so found in answer to special issue No. 2 [or No. 13], made the crew ship in question 'unseaworthy,' as defined herein?

"You are instructed that the term 'unseaworthy,' as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used."

[9] The jurors were puzzled over the meaning of this charge. A short time after retiring to the juryroom they made the following inquiry of the trial judge: "In special issue 3 is the term unseaworthy referring to the vessel as a whole, or the three windows on the port side?" Plaintiff thereupon requested the trial judge to instruct the jury that the term meant that "the portholes and their fittings are not fit for the purpose for which such portholes are used." The court declined to instruct the jury further and answered their request by referring them to the definition in his charge, presumably the one quoted in note 8, *supra*.

claim for damages based on the unseaworthiness of his employer's vessel. More generally, the question is whether, in an action in a state court to enforce the seaman's federally created right to recover for unseaworthiness, the period of limitations for that action is governed by state or federal law.

In resolving this question the Court must touch upon the delicate problems of federalism inevitable in the working out of a viable scheme for enforcing federally created rights in state courts. Cf. *Testa* v. *Katt,* 330 U. S. 386. Where federal statutes, which create federal rights of action, do not include a period of limitations, it has been the practice of state and federal courts to apply state statutes of limitations. See *Campbell* v. *Haverhill,* 155 U. S. 610, 616; *Cope* v. *Anderson,* 331 U. S. 461. On the other hand, where a federal statute establishes a limitation period for the enforcement of federal rights, which period is an integral part of the right created, that limitation must be applied in actions brought in state courts, whether the state statute be longer, *Atlantic Coast Line R. Co.* v. *Burnette,* 239 U. S. 199, or shorter, *Engel* v. *Davenport,* 271 U. S. 33. This case has two factors which must be aligned with the pattern of those decisions. First, we deal with judicially created maritime rights, *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406; second, we do not have an Act of Congress establishing a fixed period of limitations for enforcement of the right.

As to the first factor, that the remedy for unseaworthiness is judicially rather than legislatively created, it cannot fairly be considered pertinent to the problem of what period of limitations applies in state courts. As to the second, I do not believe that the absence of specific directions from Congress leads necessarily to the result that state statutes of limitations should apply in cases of this sort. The reason is that the considerations which in *Campbell* v. *Haverhill, supra,* and *Cope* v. *Anderson,*

supra, prompted resort to the state statutes do not apply at all here. Those cases represented intensely practical solutions to a practical problem in the administration of justice. In the absence of any comparable federal statute of limitations which might be applied, the Court had four choices: (1) No period of limitations at all; (2) an arbitrary period applicable in all like cases; (3) the flexible but uncertain doctrine of laches; and (4) state statutes of limitations. The state statutes were chosen by default.

No such default is necessary in this case since the Court can look elsewhere for the measure of the seaman's federal right to recover for unseaworthiness. Just as equity follows the law in applying, as a rough measure of limitations, the period which would bar a similar action at law, see *Russell* v. *Todd,* 309 U. S. 280, 287, I think that the maritime cause of action for unseaworthiness could be measured by the analogous action at law for negligence under the Jones Act, 46 U. S. C. § 688. This reference seems especially appropriate since the seaman's remedy for unseaworthiness under the general maritime law and his remedy for negligence under the Jones Act are but two aspects of a single cause of action. *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316.

It thus seems to me that the three-year limitation on the Jones Act remedy, 45 U. S. C. § 56, is the ready and logical source to draw upon for determining the period within which this federal right may be enforced. This period should be applied in an action for unseaworthiness brought in a state court, just as it would be applied by the state courts in actions brought under the Jones Act, *Engel* v. *Davenport, supra.* Such a result would be in harmony with the practice in federal admiralty courts of applying state statutes of limitations in enforcing state-created rights. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233. The alternative of subjecting the parties' rights to the variant state statutes of limitations and the consequent uncer-

tainty of legal obligation would inject an unnecessarily sporting element into the affairs of men. Cf. *Guaranty Trust Co.* v. *York,* 326 U. S. 99. The mischief to be avoided is the possibility of shopping for the forum with the most favorable period of limitations. In actions arising at sea, frequently beyond the territorial bounds of any State, normal choice-of-law doctrines are likely to prove inadequate to the task of supplying certainty and predictability.

Since we are not advised that the Texas statute of limitations is anything more than a statute of repose, and since application of the state statute of limitations would be disruptive of the desired uniformity of enforcement of maritime rights, *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, the state statute of limitations cannot be applied to bar petitioner's claim for unseaworthiness.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN join, dissenting.

With all respect, I feel compelled to express my disagreement with the Court's holding "that where an action for unseaworthiness is combined with an action under the Jones Act a court cannot apply to the former a shorter period of limitations than Congress has prescribed for the latter."

Although both are federal laws, each creates a separate and independent cause of action for conduct not covered or made redressable by the other, though both are designed for the one purpose of authorizing, within their respective terms, recovery of damages by a seaman for a bodily injury suffered in the course of his employment. Under the maritime law of unseaworthiness the owner warrants the vessel, its appliances and gear to be free of defects, and is liable to pay damages to a seaman for an injury occasioned by a breach of the warranty. This

is so even though "negligence of the officers of the vessel *contributed to its unseaworthiness* [for their negligence] is not sufficient to insulate the owner from liability for . . . *failure to furnish seaworthy appliances* . . . ." *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 100–101. (Emphasis supplied.) But "before the Jones Act the owner was, in other respects, not responsible for injuries to a seaman caused by the negligence of officers or members of the crew." *Id.*, at 101.

To fill the gap in the owner's liability, by making him liable for the operating negligence of officers and members of the crew, Congress passed the Jones Act in 1920, which, in pertinent part, provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . ." 46 U. S. C. § 688.

That Act, thus, incorporated the provisions of the Federal Employers' Liability Act,[1] § 1 of which [2] creates a liability upon the carrier for "injury or death resulting in whole or in part from *the negligence of any of the officers, agents, or employees of such carrier,* or by reason of any defect or insufficiency, *due to its negligence,* in its . . . boats, wharves, or other equipment" (emphasis supplied), and § 6 [3] provides, in pertinent part, that "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

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[1] 45 U. S. C. § 51 *et seq.*

[2] 45 U. S. C. § 51.

[3] 45 U. S. C. § 56.

This makes clear that the maritime law of unseaworthiness imposes an unqualified liability upon the owner to pay damages to a seaman for injuries sustained through the owner's failure to keep the vessel, its appliances and gear in that safe and sound condition colloquially called "ship-shape," and that the Jones Act, on the other hand, supplements the maritime law of unseaworthiness by imposing a liability in tort upon the owner to pay damages to a seaman injured *by negligence* of the officers or members of the crew *in the operation* of the vessel, its appliances and gear.

By the Jones Act, then, Congress created a new cause of action, not then known to maritime law, for damages for a bodily injury to a seaman caused by "the negligence of any of the officers, agents, or employees of such carrier," and required any suit thereunder to be brought within three years. But Congress has fixed no limitation upon the time within which an action for damages for unseaworthiness must be commenced.

Numerous decisions of this Court have established that, in a suit to enforce a federally created right which is silent on the matter of limitations, the applicable period of limitations is that prescribed by the law of the State in which the action is brought. *Cope* v. *Anderson,* 331 U. S. 461, 463; *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395; *Rawlings* v. *Ray,* 312 U. S. 96, 97; *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 397; *McClaine* v. *Rankin,* 197 U. S. 154, 158, and *Brady* v. *Daly,* 175 U. S. 148, 158. The Court's opinion, holding that, where an action for unseaworthiness is combined with an action under the Jones Act, a court cannot apply to the former "a shorter period of limitations" than Congress has prescribed for the latter, recognizes this rule but permits it to be applied *only* to an unseaworthiness action which is *not* conjoined with a count for negligence under the Jones Act, *or* to an unseaworthiness action which *is* conjoined

with a count for negligence under the Jones Act *if* brought in a State whose laws provide an equal or longer period than Congress has provided for the commencement of a negligence action under the Jones Act. This seems quite inconsistent. We know that many States provide a longer period, and others a shorter period, for the commencement of a suit for unseaworthiness than is provided by Congress for the commencement of an action for damages for negligence under the Jones Act. I cannot escape the conviction that the long-established rule, expressive of the meaning of the silence of Congress in fixing a statute of limitations, should be enforced in all unseaworthiness cases or in none. I am therefore unable to see why, as the Court argues, "a time limitation on the unseaworthiness claim effects in substance a similar limitation on the right of action under the Jones Act" or, transposing—as I think more proper—the names of the laws as used in the Court's argument, why "a time limitation on the [Jones Act] claim effects in substance a similar limitation on the right of action [for unseaworthiness]," *i. e.*, extends it to three years when, as here, the applicable state statute prescribes a limitation of two years.

It is quite true, as the Court points out, that *Baltimore Steamship Co.* v. *Phillips,* 274 U. S. 316, holds that an action for damages for unseaworthiness and an action for damages for negligence under the Jones Act must be conjoined in the same suit inasmuch as they both look to redress of the same bodily injury, and that otherwise a final judgment on the one would bar an action on the other under principles of *res judicata.* But I think this is not to say, as the Court argues, that a time limitation upon the one "effects in substance a similar limitation" upon the other. Surely a seaman may not, in such a suit, maintain a count for unseaworthiness which is barred by the applicable limitations of the State, any more

than he may maintain a count for damages for negligence under the Jones Act which is barred by the applicable three-year federal statute. It would seem just as clear that he may maintain both counts in the same suit only if neither is barred by limitations as it is that he could not maintain an action on either count if both were so barred.

I, therefore, believe that the Court is in error in holding that "where an action for unseaworthiness is combined with an action under the Jones Act a court cannot apply to the former *a shorter period of limitations* than Congress has prescribed for the latter" (emphasis supplied), for, as observed, a state court, in an unseaworthiness action, is bound to apply the period of limitations prescribed by the law of the State in which it sits, not only in instances where that period is equal to or longer, but also where it is shorter, than the three-year period prescribed by Congress for commencing a negligence action under the Jones Act—which Act, I think, is quite immaterial to the question. However desirable coterminous and uniformly applicable periods of limitations may be in these two coordinate federal laws, accomplishment of that change in the law is not properly for us, but for Congress.

Here petitioner joined in his suit, brought in a Texas court, a count for unseaworthiness with a count for negligence under the Jones Act, but he did not bring the suit within the two-year period of limitations applicable to unseaworthiness actions as prescribed by the law of that State. Therefore, I think the Texas Court of Civil Appeals was correct in holding his unseaworthiness count to be barred for that reason, and I would affirm its judgment.

HANSON, EXECUTRIX, ET AL. *v.* DENCKLA ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 107. Argued March 10–11, 1958.—Decided June 23, 1958.*

While domiciled in Pennsylvania, a woman executed in Delaware a revocable deed of trust making a Delaware trust company trustee of certain securities, reserving the income for life and providing that the remainder should be paid to such parties as she should appoint by *inter vivos* or testamentary instrument. Later, after becoming domiciled in Florida, where she remained until her death, she executed (1) an *inter vivos* instrument appointing certain beneficiaries to receive $400,000 of the trust property, and (2) a will containing a residuary clause covering, *inter alia,* "all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised." In a proceeding in which the Delaware trust company did not appear and was given notice only by mail and publication, a Florida State Court held that the trust and power of appointment were ineffective under Florida law and that the $400,000 passed under the residuary clause of the will. This ruling was sustained by the Supreme Court of Florida, which also held that the Florida court had jurisdiction over the nonresident trust company, and an appeal was taken to this Court. A Delaware court with personal jurisdiction over the trust company sustained the trust and *inter vivos* appointment and held that the parties designated therein were entitled to the $400,000. This decision was sustained by the Supreme Court of Delaware, and its judgment was brought here on certiorari. Both Delaware courts denied motions to give full faith and credit to the Florida decree. *Held:*

1. This Court need not determine whether Florida was bound to give full faith and credit to the Delaware decree, because that question was not seasonably presented to the Florida court. Pp. 243–244.

2. This Court is without jurisdiction of the Florida appeal, and it is dismissed; but, treating the papers whereon appeal was taken

*Together with No. 117, *Lewis et al.* v. *Hanson, Executrix and Trustee, et al.,* on certiorari to the Supreme Court of Delaware.

as a petition for certiorari, 28 U. S. C. § 2103, certiorari is granted. P. 244.

3. Appellants in the Florida case have standing to challenge the jurisdiction of the Florida court over the nonresident trust company which made no appearance, because they have a "direct and substantial personal interest in the outcome" of the litigation, *Chicago* v. *Atchison, T. & S. F. R. Co., ante,* p. 77, and the trustee was an indispensable party without whom a Florida court had no power to adjudicate the controversy. Pp. 244–245.

4. The Florida court did not have *in rem* jurisdiction over the corpus of the trust or personal jurisdiction over the trust company. Without such jurisdiction it had no power under Florida law to pass on the validity of the trust. Therefore, its decree is void under the Due Process Clause of the Fourteenth Amendment, and it is reversed, not only as to the trust company but also as to the individuals over whom it did have jurisdiction. Pp. 245–254.

(a) Though the property involved was intangible personal property, the settlor was domiciled in Florida at the time of her death, and Florida had jurisdiction over the probate and construction of her will, it had no *in rem* jurisdiction over the trust assets, and its judgment is invalid insofar as it rests on the basis of *in rem* jurisdiction. Pp. 246–250.

(b) The trust company did not have sufficient affiliation with Florida to empower the Florida courts to exercise personal jurisdiction over it. *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, distinguished. Pp. 250–253.

(c) Since it is the validity of the trust agreement, not the exercise of the power of appointment, that is at issue here, the execution in Florida of the power of appointment does not give Florida a substantial connection with the contract on which the suit is based nor justify the exercise of personal jurisdiction over the nonresident trustee. Pp. 253–254.

(d) That the settlor and most of the appointees and beneficiaries were domiciled in Florida does not give Florida personal jurisdiction over this nonresident trustee. P. 254.

(e) Because the Florida Supreme Court has repeatedly held that a trustee is an indispensable party without whom a Florida court has no power to adjudicate controversies affecting the validity of a trust (though it did not rule on that point in this case), the

Florida judgment must be reversed, not only as to the nonresident trustees but also as to the appellants over whom the Florida court admittedly had jurisdiction. Pp. 254–255.

5. Delaware was under no obligation to give full faith and credit to the invalid Florida judgment, and the Delaware judgment is affirmed. Pp. 255–256.

(a) Since Delaware was entitled to conclude that Florida law made the trust company an indispensable party, it was under no obligation to give the Florida judgment any faith and credit—even against parties over whom Florida's jurisdiction was unquestioned. P. 255.

(b) The Delaware case should not be held while the Florida case is remanded to give the Florida court an opportunity to determine whether the trustee is an indispensable party in the circumstances of this case, since there is ample Florida authority from which the answer to that question may be determined. Pp. 255–256.

100 So. 2d 378, reversed and cause remanded.

— Del. —, 128 A. 2d 819, affirmed.

William H. Foulk argued the cause for appellants in No. 107. With him on the brief were *Manley P. Caldwell* and *Edward McCarthy.*

Arthur G. Logan argued the cause for petitioners in No. 117. With him on the brief was *Aubrey B. Lank.*

Sol A. Rosenblatt argued the cause for appellees in No. 107. With him on the brief were *D. H. Redfearn, C. Robert Burns, R. H. Ferrell* and *Charles Roden.*

Edwin D. Steel, Jr. argued the cause for respondents in No. 117. With him on a brief were *William S. Megonigal, Jr.* and *Andrew B. Kirkpatrick, Jr.* for Steel, respondent.

On a brief were *Caleb S. Layton* for the Wilmington Trust Co., and *David F. Anderson* for the Delaware Trust Co., respondents.

Robert B. Walls, Jr. filed a brief for Walls, respondent.

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

This controversy concerns the right to $400,000, part of the corpus of a trust established in Delaware by a settlor who later became domiciled in Florida. One group of claimants, "legatees," urge that this property passed under the residuary clause of the settlor's will, which was admitted to probate in Florida. The Florida courts have sustained this position. 100 So. 2d 378. Other claimants, "appointees" and "beneficiaries," contend that the property passed pursuant to the settlor's exercise of the *inter vivos* power of appointment created in the deed of trust. The Delaware courts adopted this position and refused to accord full faith and credit to the Florida determination because the Florida court had not acquired jurisdiction over an indispensable party, the Delaware trustee. — Del. —, 128 A. 2d 819. We postponed the question of jurisdiction in the Florida appeal, No. 107, 354 U. S. 919, and granted certiorari to the Delaware Supreme Court, No. 117, 354 U. S. 920.

The trust whose validity is contested here was created in 1935. Dora Browning Donner, then a domiciliary of Pennsylvania, executed a trust instrument in Delaware naming the Wilmington Trust Co., of Wilmington, Delaware, as trustee. The corpus was composed of securities. Mrs. Donner reserved the income for life, and stated that the remainder should be paid to such persons or upon such trusts as she should appoint by *inter vivos* or testamentary instrument. The trust agreement provided that Mrs. Donner could change the trustee, and that she could amend, alter or revoke the agreement at any time. A measure of control over trust administration was assured by the provision that only with the consent of a trust "advisor" appointed by the settlor could the trustee (1) sell trust assets, (2) make investments, and (3) participate in any plan, proceeding, reorganization or merger

involving securities held in the trust. A few days after the trust was established Mrs. Donner exercised her power of appointment. That appointment was replaced by another in 1939. Thereafter she left Pennsylvania, and in 1944 became domiciled in Florida, where she remained until her death in 1952. Mrs. Donner's will was executed Dec. 3, 1949. On that same day she executed the *inter vivos* power of appointment whose terms are at issue here.[1] After making modest appointments in favor of a hospital and certain family retainers (the "appointees"),[2] she appointed the sum of $200,000 to each of two trusts previously established with another Delaware trustee, the Delaware Trust Co. The balance of the trust corpus, over $1,000,000 at the date of her death, was appointed to her executrix. That amount passed under the residuary clause of her will and is not at issue here.

The two trusts with the Delaware Trust Co. were created in 1948 by Mrs. Donner's daughter, Elizabeth Donner Hanson, for the benefit of Elizabeth's children, Donner Hanson and Joseph Donner Winsor. In identical terms they provide that the income not required for the beneficiary's support should be accumulated to age 25, when the beneficiary should be paid ¼ of the corpus and receive the income from the balance for life. Upon the death of the beneficiary the remainder was to go to such of the beneficiary's issue or Elizabeth Donner Hanson's issue as the beneficiary should appoint by *inter vivos* or testamentary instrument; in default of appointment to the beneficiary's issue alive at the time of his death, and if none to the issue of Elizabeth Donner Hanson.

Mrs. Donner died Nov. 20, 1952. Her will, which was admitted to probate in Florida, named Elizabeth Donner

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[1] The appointment was partially revoked July 7, 1950 in a respect not material to the instant controversy.

[2] The hospital received $10,000. Six servants qualified for appointments totalling $7,000.

Hanson as executrix. She was instructed to pay all debts and taxes, including any which might be payable by reason of the property appointed under the power of appointment in the trust agreement with the Wilmington Trust Co. After disposing of personal and household effects, Mrs. Donner's will directed that the balance of her property (the $1,000,000 appointed from the Delaware trust) be paid in equal parts to two trusts for the benefit of her daughters Katherine N. R. Denckla and Dorothy B. R. Stewart.

This controversy grows out of the residuary clause that created the last-mentioned trusts. It begins:

> "All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever the same may be at the time of my death, including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows . . . ."

Residuary legatees Denckla and Stewart, already the recipients of over $500,000 each, urge that the power of appointment over the $400,000 appointed to sister Elizabeth's children was not "effectively exercised" and that the property should accordingly pass to them. Fourteen months after Mrs. Donner's death these parties petitioned a Florida chancery court for a declaratory judgment "concerning what property passes under the residuary clause" of the will. Personal service was had upon the following defendants: (1) executrix Elizabeth Donner Hanson, (2) beneficiaries Donner Hanson and Joseph Donner Winsor, and (3) potential beneficiary William Donner Roosevelt, also one of Elizabeth's children. Curtin Winsor, Jr., another of Elizabeth's children and

also a potential beneficiary of the Delaware trusts, was not named as a party and was not served. About a dozen other defendants were nonresidents and could not be personally served. These included the Wilmington Trust Co. ("trustee"), the Delaware Trust Co. (to whom the $400,000 had been paid shortly after Mrs. Donner's death), certain individuals who were potential successors in interest to complainants Denckla and Stewart, and most of the named appointees in Mrs. Donner's 1949 appointment. A copy of the pleadings and a "Notice to Appear and Defend" were sent to each of these defendants by ordinary mail, and notice was published locally as required by the Florida statutes dealing with constructive service.[3] With the exception of two individuals whose interests coincided with complainants Denckla and Stewart, none of the nonresident defendants made any appearance.

The appearing defendants (Elizabeth Donner Hanson and her children) moved to dismiss the suit because the exercise of jurisdiction over indispensable parties, the Delaware trustees, would offend Section 1 of the

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[3] Fla. Stat., 1957, c. 48, § 48.01: "Service of process by publication may be had, in any of the several courts of this state, and upon any of the parties mentioned in § 48.02 in any suit or proceeding:

"(1) To enforce any legal or equitable lien upon or claim to any title or interest in real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.

. . . . . .

"(5) For the construction of any will, deed, contract or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder."

§ 48.02: "Where personal service of process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including: (1) Any known or unknown natural person . . . (2) Any corporation or other legal entity, whether its domicile be foreign, domestic or unknown . . . ."

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Fourteenth Amendment. The Chancellor ruled that he lacked jurisdiction over these nonresident defendants because no personal service was had and because the trust corpus was outside the territorial jurisdiction of the court. The cause was dismissed as to them. As far as parties before the court were concerned, however, he ruled that the power of appointment was testamentary and void under the applicable Florida law. In a decree dated Jan. 14, 1955, he ruled that the $400,000 passed under the residuary clause of the will.

After the Florida litigation began, but before entry of the decree, the executrix instituted a declaratory judgment action in Delaware to determine who was entitled to participate in the trust assets held in that State. Except for the addition of beneficiary Winsor and several appointees, the parties were substantially the same as in the Florida litigation. Nonresident defendants were notified by registered mail. All of the trust companies, beneficiaries, and legatees except Katherine N. R. Denckla, appeared and participated in the litigation. After the Florida court enjoined executrix Hanson from further participation, her children pursued their own interests. When the Florida decree was entered the legatees unsuccessfully urged it as *res judicata* of the Delaware dispute. In a decree dated Jan. 13, 1956, the Delaware Chancellor ruled that the trust and power of appointment were valid under the applicable Delaware law, and that the trust corpus had properly been paid to the Delaware Trust Co. and the other appointees. —— Del. Ch. ——, 119 A. 2d 901.

Alleging that she would be bound by the Delaware decree, the executrix moved the Florida Supreme Court to remand with instructions to dismiss the Florida suit then pending on appeal. No full faith and credit question was raised. The motion was denied. The Florida Supreme Court affirmed its Chancellor's conclusion that Florida law applied to determine the validity of the trust

and power of appointment. Under that law the trust was invalid because the settlor had reserved too much power over the trustee and trust corpus, and the power of appointment was not independently effective to pass the property because it was a testamentary act not accompanied by the requisite formalities. The Chancellor's conclusion that there was no jurisdiction over the trust companies and other absent defendants was reversed. The court ruled that jurisdiction to construe the will carried with it "substantive" jurisdiction "over the persons of the absent defendants" even though the trust assets were not "physically in this state." Whether this meant jurisdiction over the person of the defendants or jurisdiction over the trust assets is open to doubt. In a motion for rehearing the beneficiaries and appointees urged for the first time that Florida should have given full faith and credit to the decision of the Delaware Chancellor. The motion was denied without opinion, Nov. 28, 1956.

The full faith and credit question was first raised in the Delaware litigation by an unsuccessful motion for new trial filed with the Chancellor Jan. 20, 1956. After the Florida Supreme Court decision the matter was renewed by a motion to remand filed with the Delaware Supreme Court. In a decision of Jan. 14, 1957, that court denied the motion and affirmed its Chancellor in all respects. The Florida decree was held not binding for purposes of full faith and credit because the Florida court had no personal jurisdiction over the trust companies and no jurisdiction over the trust *res*.

The issues for our decision are, *first,* whether Florida erred in holding that it had jurisdiction over the nonresident defendants, and *second,* whether Delaware erred in refusing full faith and credit to the Florida decree. We need not determine whether Florida was bound to give full faith and credit to the decree of the Delaware Chan-

cellor since the question was not seasonably presented to the Florida court. *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 128.

No. 107, The Florida Appeal. The question of our jurisdiction was postponed until the hearing of the merits. The appeal is predicated upon the contention that as applied to the facts of this case the Florida statute providing for constructive service is contrary to the Federal Constitution. 28 U. S. C. § 1257 (2). But in the state court appellants (the "beneficiaries") did not object that the statute was invalid as applied, but rather that the effect of the state court's exercise of jurisdiction in the circumstances of this case deprived them of a right under the Federal Constitution.[4] Accordingly, we are without jurisdiction of the appeal and it must be dismissed. *Wilson* v. *Cook,* 327 U. S. 474, 482; *Charleston Fed. Sav. & L. Assn.* v. *Alderson,* 324 U. S. 182. Treating the papers whereon appeal was taken as a petition for certiorari, 28 U. S. C. § 2103, certiorari is granted.

Relying upon the principle that a person cannot invoke the jurisdiction of this Court to vindicate the right of a third party,[5] appellees urge that appellants lack standing to complain of a defect in jurisdiction over the nonresi-

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[4] The record discloses no mention of the state statute until the petition for rehearing in the Florida Supreme Court. In the trial court, appellant's motion to dismiss raised the federal question in this manner: "The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section 1 of the Fourteenth Amendment to the United States Constitution." No. 107, R. 41.

[5] See *Liberty Warehouse Co.* v. *Burley T. G. Co-op. M. Assn.,* 276 U. S. 71, 88; *Smith* v. *Indiana,* 191 U. S. 138, 148; *Tyler* v. *Judges of the Court of Registration,* 179 U. S. 405; Robertson and Kirkham, Jurisdiction of the Supreme Court (Wolfson and Kurland ed.), § 298.

dent trust companies, who have made no appearance in this action. Florida adheres to the general rule that a trustee is an indispensable party to litigation involving the validity of the trust.[6] In the absence of such a party a Florida court may not proceed to adjudicate the controversy.[7] Since state law required the acquisition of jurisdiction over the nonresident trust company [8] before the court was empowered to proceed with the action, any defendant affected by the court's judgment has that "direct and substantial personal interest in the outcome" that is necessary to challenge whether that jurisdiction was in fact acquired. *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77.

Appellants charge that this judgment is offensive to the Due Process Clause of the Fourteenth Amendment because the Florida court was without jurisdiction. There is no suggestion that the court failed to employ a means of notice reasonably calculated to inform nonresident defendants of the pending proceedings,[9] or denied them an opportunity to be heard in defense of their interests.[10] The alleged defect is the absence of those

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[6] *Trueman Fertilizer Co.* v. *Allison*, 81 So. 2d 734, 738; *Winn* v. *Strickland*, 34 Fla. 610, 633, 16 So. 606, 613; *Wilson* v. *Russ*, 17 Fla. 691, 697; *McArthur* v. *Scott*, 113 U. S. 340, 396; *Sadler* v. *Industrial Trust Co.*, 327 Mass. 10, 97 N. E. 2d 169.

[7] *Martinez* v. *Balbin*, 76 So. 2d 488, 490; *Florida Land Rock Phosphate Co.* v. *Anderson*, 50 Fla. 501, 512–513, 39 So. 392, 396.

[8] Hereafter the terms "trust," "trust company" and "trustee" have reference to the trust established in 1935 with the Wilmington Trust Co., the validity of which is at issue here. It is unnecessary to determine whether the Delaware Trust Co., to which the $400,000 remainder interest was appointed and was paid after Mrs. Donner's death, is also an indispensable party to this proceeding.

[9] *Walker* v. *City of Hutchinson*, 352 U. S. 112; *Mullane* v. *Central Hanover B. & T. Co.*, 339 U. S. 306; *McDonald* v. *Mabee*, 243 U. S. 90.

[10] *Roller* v. *Holly*, 176 U. S. 398.

"affiliating circumstances" [11] without which the courts of a State may not enter a judgment imposing obligations on persons (jurisdiction *in personam*) or affecting interests in property (jurisdiction *in rem* or *quasi in rem*).[12] While the *in rem* and *in personam* classifications do not exhaust all the situations that give rise to jurisdiction,[13] they are adequate to describe the affiliating circumstances suggested here, and accordingly serve as a useful means of approach to this case.

In rem jurisdiction. Founded on physical power, *McDonald* v. *Mabee,* 243 U. S. 90, 91, the *in rem* jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States.[14] The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State. *Rose* v. *Himely,* 4 Cranch 241, 277; *Overby* v. *Gordon,* 177 U. S. 214, 221–222. Tangible property poses no problem for the application of this rule, but the situs of

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[11] Sunderland, The Problem of Jurisdiction, Selected Essays on Constitutional Law, 1270, 1272.

[12] A judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. Restatement, Judgments, 5–9. For convenience of terminology this opinion will use "*in rem*" in lieu of "*in rem* and *quasi in rem.*"

[13] *E. g., Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 312; *Williams* v. *North Carolina,* 317 U. S. 287, 297. Fraser, Jurisdiction by Necessity, 100 U. of Pa. L. Rev. 305.

[14] *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 400; *Riley* v. *New York Trust Co.,* 315 U. S. 343, 349; *Overby* v. *Gordon,* 177 U. S. 214, 221–222; *Pennoyer* v. *Neff,* 95 U. S. 714; *Rose* v. *Himely,* 4 Cranch 241, 277.

intangibles is often a matter of controversy.[15] In considering restrictions on the power to tax, this Court has concluded that "jurisdiction" over intangible property is not limited to a single State. *Tax Commission* v. *Aldrich,* 316 U. S. 174; *Curry* v. *McCanless,* 307 U. S. 357. Whether the type of "jurisdiction" with which this opinion deals may be exercised by more than one State we need not decide. The parties seem to assume that the trust assets that form the subject matter of this action [16] were located in Delaware and not in Florida. We can see nothing in the record contrary to that assumption, or sufficient to establish a situs in Florida.[17]

The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was thought sufficient

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[15] See Andrews, Situs of Intangibles in Suits against Non-Resident Claimants, 49 Yale L. J. 241.

[16] This case does not concern the situs of a beneficial interest in trust property. These appellees were contesting the validity of the trust. Their concern was with the legal interest of the trustee or, if the trust was invalid, the settlor. Therefore, the relevant factor here is the situs of the stocks, bonds, and notes that make up the corpus of the trust. Properly speaking such assets are intangibles that have no "physical" location. But their embodiment in documents treated for most purposes as the assets themselves makes them partake of the nature of tangibles. Cf. *Wheeler* v. *Sohmer,* 233 U. S. 434, 439.

[17] The documents evidencing ownership of the trust property were held in Delaware, cf. *Bank of Jasper* v. *First Nat. Bank,* 258 U. S. 112, 119, by a Delaware trustee who was the obligee of the credit instruments and the record owner of the stock. The location of the obligors and the domicile of the corporations do not appear. The trust instrument was executed in Delaware by a settlor then domiciled in Pennsylvania. Without expressing any opinion on the significance of these or other factors unnamed, we note that none relates to Florida.

to confer the requisite jurisdiction.[18] But jurisdiction cannot be predicated upon the contingent role of this Florida will. Whatever the efficacy of a so-called *"in rem"* jurisdiction over assets admittedly passing under a local will, a State acquires no *in rem* jurisdiction to adjudicate the validity of *inter vivos* dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which

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[18] The Florida Supreme Court's opinion states: "We held [in *Henderson* v. *Usher,* 118 Fla. 688, 160 So. 9] that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely consistent with the Henderson case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants." 100 So. 2d, at 385.

The foregoing leaves unclear whether the court was invoking *in personam* jurisdiction over the trustee, or *in rem* jurisdiction over the trust assets. *Henderson* v. *Usher, supra,* which was an action by testamentary trustees for a construction of the will establishing a trust whose assets were held in New York, found it unnecessary to decide the basis of the jurisdiction exercised. In response to the jurisdictional objections of a specially appearing nonresident defendant, the Florida Supreme Court ruled: "Since the interpretation of the will is the primary question with which we are confronted we are impelled to hold that the res is at least constructively in this state and that the Florida courts are empowered to advise the trustees how to proceed under it and what rights those affected have in it. For the immediate purpose of this suit the will is the res and when that is voluntarily brought into the courts of Florida to be construed the trust created by it is to all intents and purposes brought with it." 118 Fla., at 692, 160 So., at 10.

neither the State nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction *in rem* the maxim that personalty has its situs at the domicile of its owner [19] is a fiction of limited utility. *Green* v. *Van Buskirk,* 7 Wall. 139, 150. The maxim is no less suspect when the domicile is that of a decedent. In analogous cases, this Court has rejected the suggestion that the probate decree of the State where decedent was domiciled has an *in rem* effect on personalty outside the forum State that could render it conclusive on the interests of nonresidents over whom there was no personal jurisdiction. *Riley* v. *New York Trust Co.,* 315 U. S. 343, 353; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 401; *Overby* v. *Gordon,* 177 U. S. 214.[20] The fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction *in rem.* Having concluded that Florida had no *in rem* jurisdiction, we proceed to consider whether a judgment purporting to rest on that basis is invalid in Florida and must therefore be reversed.

Prior to the Fourteenth Amendment an exercise of jurisdiction over persons or property outside the forum State was thought to be an absolute nullity,[21] but the mat-

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[19] We assume *arguendo* for the purpose of this discussion that the trust was invalid so that Mrs. Donner was the "owner" of the subject property.

[20] Though analogous, these cases are not squarely in point. They concerned the efficacy of such judgments in the courts of another sovereign, while the issue here is the validity of such an exercise of jurisdiction within the forum State.

[21] See *Pennoyer* v. *Neff,* 95 U. S. 714, 720–728, 732; Story, Commentaries on the Conflict of Laws (6th ed. 1865), §§ 539, 550–551; Cooley, Constitutional Limitations (1st ed. 1868), 404–405; Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. of Chi. L. Rev. 775, 792–793.

ter remained a question of state law over which this Court exercised no authority.[22] With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the court had not acquired *in personam* jurisdiction was void within the State as well as without. *Pennoyer* v. *Neff*, 95 U. S. 714. Nearly a century has passed without this Court being called upon to apply that principle to an *in rem* judgment dealing with property outside the forum State. The invalidity of such a judgment within the forum State seems to have been assumed—and with good reason. Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction.[23] Therefore, so far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained. *Sadler* v. *Industrial Trust Co.*, 327 Mass. 10, 97 N. E. 2d 169.

In personam jurisdiction. Appellees' stronger argument is for *in personam* jurisdiction over the Delaware trustee. They urge that the circumstances of this case amount to sufficient affiliation with the State of Florida to empower its courts to exercise personal jurisdiction over this nonresident defendant. Principal reliance is placed upon *McGee* v. *International Life Ins. Co.*, 355 U. S. 220. In *McGee* the Court noted the trend of expanding personal jurisdiction over nonresidents. As technological

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[22] See *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 403.

[23] This holding was forecast in *Pennoyer* v. *Neff*, *supra*. When considering the effect of the Fourteenth Amendment, this Court declared that in actions against nonresidents substituted service was permissible only where "*property in the State* is brought under the control of the court, and subjected to its disposition by process adapted to that purpose . . . ." (Emphasis supplied.) 95 U. S., at 733.

progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* v. *Neff*, 95 U. S. 714, to the flexible standard of *International Shoe Co.* v. *Washington*, 326 U. S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319.

We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail. Cf. *International Shoe Co.* v. *Washington*, 326 U. S. 310; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220; *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643.

The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, and the cases there cited. In *McGee*, the nonresident defendant solicited a reinsurance agreement with a resident of California.

The offer was accepted in that State, and the insurance premiums were mailed from there until the insured's death. Noting the interest California has in providing effective redress for its residents when nonresident insurers refuse to pay claims on insurance they have solicited in that State, the Court upheld jurisdiction because the suit "was based on a contract which had substantial connection with that State." In contrast, this action involves the validity of an agreement that was entered without any connection with the forum State. The agreement was executed in Delaware by a trust company incorporated in that State and a settlor domiciled in Pennsylvania. The first relationship Florida had to the agreement was years later when the settlor became domiciled there, and the trustee remitted the trust income to her in that State. From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in *McGee*.[24] But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*. Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida. Cf. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 319. This case is also different from *McGee* in that there the State had enacted special legislation (Unauthorized Insurers Process Act) to exercise what *McGee* called its "manifest interest" in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation. Cf. *Trav-*

[24] By a letter dated Feb. 5, 1946, Mrs. Donner changed the compensation to be paid the trust advisor. April 2, 1947, she revoked the trust as to $75,000, returning that amount to the trustee December 22, 1947. To these acts may be added the execution of the two powers of appointment mentioned earlier.

elers Health Assn. v. *Virginia,* 339 U. S. 643, 647–649; *Doherty & Co.* v. *Goodman,* 294 U. S. 623, 627; *Hess* v. *Pawloski,* 274 U. S. 352.

The execution in Florida of the powers of appointment under which the beneficiaries and appointees claim does not give Florida a substantial connection with the contract on which this suit is based. It is the validity of the trust agreement, not the appointment, that is at issue here.[25] For the purpose of applying its rule that the validity of a trust is determined by the law of the State of its creation, Florida ruled that the appointment amounted to a "republication" of the original trust instrument in Florida. For choice-of-law purposes such a ruling may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant. The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 319.

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[25] The Florida Supreme Court's opinion makes repeated references to the "invalidity" of the trust, and uses other language of like import. See 100 So. 2d, at 381, 382, 383, 384, 385. Its ruling that the 1949 and 1950 "appointments" were ineffective to pass title to the property (because lacking the requisite testamentary formalities) proceeded from this initial ruling that the trust agreement was "invalid," 100 So. 2d, at 383, or "illusory," 100 So. 2d, at 384, and therefore created no power of appointment. There was no suggestion that the appointment was ineffective as an exercise of whatever power was created by the trust agreement.

The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case.

It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a non sequitur. With personal jurisdiction over the executor, legatees, and appointees, there is nothing in federal law to prevent Florida from adjudicating concerning the respective rights and liabilities of those parties. But Florida has not chosen to do so. As we understand its law, the trustee is an indispensable party over whom the court must acquire jurisdiction before it is empowered to enter judgment in a proceeding affecting the validity of a trust.[26] It does not acquire that jurisdiction by being the "center of gravity" of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction.[27]

Because it sustained jurisdiction over the nonresident trustees, the Florida Supreme Court found it unnecessary to determine whether Florida law made those defendants indispensable parties in the circumstances of this case. Our conclusion that Florida was without jurisdiction over the Delaware trustee, or over the trust corpus held in that State, requires that we make that determination in the first instance. As we have noted earlier, the Florida Supreme Court has repeatedly held that a trustee is an

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[26] See note 6, *supra*.

[27] This conclusion makes unnecessary any consideration of appellants' contention that the contacts the trust agreement had with Florida were so slight that it was a denial of due process of law to determine its validity by Florida law. See *Home Insurance Co.* v. *Dick*, 281 U. S. 397.

indispensable party without whom a Florida court has no power to adjudicate controversies affecting the validity of a trust.[28] For that reason the Florida judgment must be reversed not only as to the nonresident trustees but also as to appellants, over whom the Florida court admittedly had jurisdiction.

No. 117, The Delaware Certiorari. The same reasons that compel reversal of the Florida judgment require affirmance of the Delaware one. Delaware is under no obligation to give full faith and credit to a Florida judgment invalid in Florida because offensive to the Due Process Clause of the Fourteenth Amendment. 28 U. S. C. § 1738. Even before passage of the Fourteenth Amendment this Court sustained state courts in refusing full faith and credit to judgments entered by courts that were without jurisdiction over nonresident defendants. *D'Arcy* v. *Ketchum,* 11 How. 165; *Hall* v. *Lanning,* 91 U. S. 160. See *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394; *Riley* v. *New York Trust Co.,* 315 U. S. 343. Since Delaware was entitled to conclude that Florida law made the trust company an indispensable party, it was under no obligation to give the Florida judgment any faith and credit—even against parties over whom Florida's jurisdiction was unquestioned.

It is suggested that this disposition is improper—that the Delaware case should be held while the Florida cause is remanded to give that court an opportunity to determine whether the trustee is an indispensable party in the circumstances of this case. But this is not a case like *Herb* v. *Pitcairn,* 324 U. S. 117, where it is appropriate to remand for the state court to clarify an ambiguity in its opinion that may reveal an adequate state ground that would deprive us of power to affect the result of the controversy. Nor is this a circumstance where the state

[28] See notes 6 and 7, *supra.*

court has never ruled on the question of state law that we are deciding. Although the question was left open in this case, there is ample Florida authority from which we may determine the appropriate answer.

The rule of primacy to the first final judgment is a necessary incident to the requirement of full faith and credit. Our only function is to determine whether judgments are consistent with the Federal Constitution. In determining the correctness of Delaware's judgment we look to what Delaware was entitled to conclude from the Florida authorities at the time the Delaware court's judgment was entered. To withhold affirmance of a correct Delaware judgment until Florida has had time to rule on another question would be participating in the litigation instead of adjudicating its outcome.

The judgment of the Delaware Supreme Court is affirmed, and the judgment of the Florida Supreme Court is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, whom MR. JUSTICE BURTON and MR. JUSTICE BRENNAN join, dissenting.

I believe the courts of Florida had power to adjudicate the effectiveness of the appointment made in Florida by Mrs. Donner with respect to all those who were notified of the proceedings and given an opportunity to be heard without violating the Due Process Clause of the Fourteenth Amendment.[1] If this is correct, it follows that

[1] In my judgment it is a mistake to decide this case on the assumption that the Florida courts invalidated the trust established in 1935 by Mrs. Donner while she was living in Pennsylvania. It seems quite clear to me that those courts had no such purpose. As I understand it, all they held was that an appointment made in Florida providing for the disposition of part of the trust property after Mrs. Donner's

the Delaware courts erred in refusing to give the prior Florida judgment full faith and credit. U. S. Const., Art. IV, § 1; 28 U. S. C. § 1738.

Mrs. Donner was domiciled in Florida from 1944 until her death in 1952. The controversial appointment was made there in 1949. It provided that certain persons were to receive a share of the property held by the Delaware "trustee" under the so-called trust agreement upon her death. Until she died Mrs. Donner received the entire income from this property, and at all times possessed absolute power to revoke or alter the appointment and to dispose of the property as she pleased. As a practical matter she also retained control over the management of the property, the "trustee" in Delaware being little more than a custodian.[2] A number of the beneficiaries of the appointment, including those who were to receive more than 95% of the assets involved, were residents of Florida at the time the appointment was made as well as when the present suit was filed. The appointed property consisted of intangibles which had no real situs in any particular State although Mrs. Donner paid taxes on the property in Florida.

The same day the 1949 appointment was made Mrs. Donner executed a will, which after her death was duly probated in a Florida court. The will contained a residuary clause providing for the distribution of all of

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death was (1) testamentary since she retained complete control over the appointed property until she died, and (2) ineffective because not executed in accordance with the Florida statute of wills.

[2] Among other things Mrs. Donner reserved the right to appoint "advisers" serving at her sufferance who controlled all purchases, sales and investments by the "trustee." Evidence before the Delaware courts indicated that these advisers, not the Delaware "trustee," actually made all decisions with respect to transactions affecting the "trust" property and that the "trustee" mechanically acted as they directed.

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her property not previously bequeathed, including "any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me . . . ." Thus if the 1949 appointment was ineffective the property involved came back into Mrs. Donner's estate to be distributed under the residuary clause of her will. As might be anticipated the present litigation arose when legatees brought an action in the Florida courts seeking a determination whether the appointment was valid. The beneficiaries of the appointment, some of whom live outside Florida, and the Delaware trustee were defendants. They had timely notice of the suit and an adequate opportunity to obtain counsel and appear.

In light of the foregoing circumstances it seems quite clear to me that there is nothing in the Due Process Clause which denies Florida the right to determine whether Mrs. Donner's appointment was valid as against its statute of wills. This disposition, which was designed to take effect after her death, had very close and substantial connections with that State. Not only was the appointment made in Florida by a domiciliary of Florida, but the primary beneficiaries also lived in that State. In my view it could hardly be denied that Florida had sufficient interest so that a court with jurisdiction might properly apply Florida law, if it chose, to determine whether the appointment was effectual. *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66; *Osborn* v. *Ozlin*, 310 U. S. 53. True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations. It seems to me that where a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have

power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer,* 311 U. S. 457, 463; *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316. So far as the nonresident defendants here are concerned I can see nothing which approaches that degree of unfairness. Florida, the home of the principal contenders for Mrs. Donner's largess, was a reasonably convenient forum for all.[3] Certainly there is nothing fundamentally unfair in subjecting the corporate trustee to the jurisdiction of the Florida courts. It chose to maintain business relations with Mrs. Donner in that State for eight years, regularly communicating with her with respect to the business of the trust including the very appointment in question.

Florida's interest in the validity of Mrs. Donner's appointment is made more emphatic by the fact that her will is being administered in that State. It has traditionally been the rule that the State where a person is domiciled at the time of his death is the proper place to determine the validity of his will, to construe its provisions and to marshal and distribute his personal property. Here Florida was seriously concerned with winding up Mrs. Donner's estate and with finally determining what property was to be distributed under her will. In fact this suit was brought for that very purpose.

The Court's decision that Florida did not have jurisdiction over the trustee (and inferentially the nonresident beneficiaries) stems from principles stated the better part

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[3] The suggestion is made that Delaware was a more suitable forum, but the plain fact is that none of the beneficiaries or legatees has ever resided in that State.

of a century ago in *Pennoyer* v. *Neff*, 95 U. S. 714. That landmark case was decided in 1878, at a time when business affairs were predominantly local in nature and travel between States was difficult, costly and sometimes even dangerous. There the Court laid down the broad principle that a State could not subject nonresidents to the jurisdiction of its courts unless they were served with process within its boundaries or voluntarily appeared, except to the extent they had property in the State. But as the years have passed the constantly increasing ease and rapidity of communication and the tremendous growth of interstate business activity have led to a steady and inevitable relaxation of the strict limits on state jurisdiction announced in that case. In the course of this evolution the old jurisdictional landmarks have been left far behind so that in many instances States may now properly exercise jurisdiction over nonresidents not amenable to service within their borders.[4] Yet further relaxation seems certain. Of course we have not reached the point where state boundaries are without significance, and I do not mean to suggest such a view here. There is no need to do so. For we are dealing with litigation arising from a transaction that had an abundance of close and substantial connections with the State of Florida.

Perhaps the decision most nearly in point is *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306. In that case the Court held that a State could enter a personal judgment in favor of a trustee against nonresident beneficiaries of a trust even though they were not served with process in that State. So far as appeared, their only connection with the State was the fact that the trust was

[4] See, *e. g.*, *McGee* v. *International Life Ins. Co.*, 355 U. S. 220; *Travelers Health Assn.* v. *Virginia ex rel. State Corporation Comm'n*, 339 U. S. 643; *International Shoe Co.* v. *Washington*, 326 U. S. 310; *Milliken* v. *Meyer*, 311 U. S. 457; *Henry L. Doherty & Co.* v. *Goodman*, 294 U. S. 623; *Hess* v. *Pawloski*, 274 U. S. 352.

being administered there.[5] In upholding the State's jurisdiction the Court emphasized its great interest in trusts administered within its boundaries and governed by its laws. *Id.*, at 313. Also implicit in the result was a desire to avoid the necessity for multiple litigation with its accompanying waste and possibility of inconsistent results. It seems to me that the same kind of considerations are present here supporting Florida's jurisdiction over the nonresident defendants.

Even if it be assumed that the Court is right in its jurisdictional holding, I think its disposition of the two cases is unjustified. It reverses the judgment of the Florida Supreme Court on the ground that the trustee may be, but need not be, an indispensable party to the Florida litigation under Florida law. At the same time it affirms the subsequent Delaware judgment. Although in form the Florida case is remanded for further proceedings not inconsistent with the Court's opinion, the effect is that the Florida courts will be obliged to give full faith and credit to the Delaware judgment. This means the Florida courts will never have an opportunity to determine whether the trustee is an indispensable party. The Florida judgment is thus completely wiped out even as to those parties who make their homes in that State, and even though the Court acknowledges there is nothing in the Constitution which precludes Florida from entering a binding judgment for or against them. It may be argued that the Delaware judgment is the first to become final and therefore is entitled to prevail. But it only comes first because the Court makes it so. In my judgment the proper thing to do would be to hold the Delaware case until the Florida courts had an opportunity to

[5] There was no basis for *in rem* jurisdiction since the litigation concerned the personal liability of the trustee and did not involve the trust property.

decide whether the trustee is an indispensable party. Under the circumstances of this case I think it is quite probable that they would say he is not. See *Trueman Fertilizer Co.* v. *Allison,* 81 So. 2d 734. I can see no reason why this Court should deprive Florida plaintiffs of their judgment against Florida defendants on the basis of speculation about Florida law which might well turn out to be unwarranted.

MR. JUSTICE DOUGLAS, dissenting.

The testatrix died domiciled in Florida. Her will, made after she had acquired a domicile in Florida, was probated there. Prior to the time she established a domicile in Florida she executed a trust instrument in Delaware. By its terms she was to receive the income during her life. On her death the principal and undistributed income were to go as provided in any power of appointment or, failing that, in her last will and testament.

After she had become domiciled in Florida she executed a power of appointment; and she also provided in her will that if the power of appointment had not been effectively exercised, the property under the trust, consisting of intangibles, should pass to certain designated trusts.

The Florida court held that the power of appointment was testamentary in character and not being a valid testamentary disposition for lack of the requisite witnesses, failed as a will under Florida law. Therefore the property passed under the will. 100 So. 2d 378.

Distribution of the assets of the estate could not be made without determining the validity of the power of appointment. The power of appointment, being integrated with the will, was as much subject to construction and interpretation by the Florida court as the will itself. Of course one not a party or privy to the Florida proceedings is not bound by it and can separately liti-

gate the right to assets in other States. See *Riley* v. *New York Trust Co.,* 315 U. S. 343; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394. But we have no such situation here. The trustee of the trust was in privity with the deceased. She was the settlor; and under the trust, the trustee was to do her bidding. That is to say, the trustee, though managing the *res* during the life of the settlor, was on her death to transfer the property to such persons as the settlor designated by her power of appointment or by her last will and testament, or, failing that, to designated classes of persons. So far as the present controversy is concerned the trustee was purely and simply a stakeholder or an agent holding assets of the settlor to dispose of as she designated. It had a community of interest with the deceased. I see no reason therefore why Florida could not say that the deceased and her executrix may stand in judgment for the trustee so far as the disposition of the property under the power of appointment and the will is concerned. The question in cases of this kind is whether the procedure is fair and just, considering the interests of the parties. Cf. *Hansberry* v. *Lee,* 311 U. S. 32; *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 312–317. Florida has such a plain and compelling relation to these out-of-state intangibles (cf. *Curry* v. *McCanless,* 307 U. S. 357), and the nexus between the settlor and trustee is so close, as to give Florida the right to make the controlling determination even without personal service over the trustee and those who claim under it. We must remember this is not a suit to impose liability on the Delaware trustee or on any other absent person. It is merely a suit to determine interests in those intangibles. Cf. *Mullane* v. *Central Hanover Trust Co., supra,* at 313. Under closely analogous facts the California Supreme Court held in *Atkinson* v. *Superior Court,* 49 Cal. 2d 338, 316 P. 2d 960, that California had

jurisdiction over an absent trustee. I would hold the same here. The decedent was domiciled in Florida; most of the legatees are there; and the absent trustee through whom the others claim was an agency so close to the decedent as to be held to be privy with her—in other words so identified in interest with her as to represent the same legal right.

McKINNEY *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL.

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

No. 93. Argued January 27, 1958.—Decided June 23, 1958.

Under § 9 of the Universal Military Training and Service Act, petitioner, who had been promoted by respondent railroad to an advanced position upon his return from military service, though under the collective bargaining agreement between his union and the railroad such promotion depended on fitness and ability, was not entitled to seniority in his new position from the date he would have had the opportunity to qualify for it had he remained in the continuous employment of the railroad. Pp. 266–274.

(a) Before bringing suit under § 9 (d) of the Act petitioner was not obliged to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement or before the National Railroad Adjustment Board. Pp. 268–270.

(b) Since promotion to the higher position in this case was not automatic but was dependent on fitness and ability, petitioner received a promotion which was not required under the Act, and respondent was not obliged to give him a seniority date earlier than that to which any employee similarly promoted would have been entitled. Pp. 270–273.

(c) Because his complaint was dismissed and he had no opportunity to prove that, by custom and practice under the collective bargaining agreement, he would necessarily have been promoted to the new position had he remained continuously in respondent's employ, petitioner is granted leave to amend his complaint to allege, if such be the fact, that, in actual practice under the collective bargaining agreement, his promotion was automatic. Pp. 273–274.

240 F. 2d 8, affirmed.

John G. Laughlin, Jr. argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade.*

M. E. Clinton argued the cause and filed a brief for the Missouri-Kansas-Texas Railroad Co., respondent.

Carroll J. Donohue argued the cause for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, respondent. With him on the brief was *Sam Elson.*

Clarence M. Mulholland, Edward J. Hickey, Jr. and *Richard R. Lyman* filed a brief for the Railway Employes' Department, AFL–CIO, as *amicus curiae.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case arises out of proceedings to enforce the claim of a veteran to re-employment rights under § 9 of the Universal Military Training and Service Act. 62 Stat. 604, 614–618, as amended, 50 U. S. C. App. § 459, as amended, 50 U. S. C. App. (Supp. V) § 459. More specifically, petitioner claims that he has been deprived of seniority rights to which he is entitled under the statute and the collective bargaining agreement in force between his employer, respondent railroad, and the union representing its employees.

Made part of the complaint filed in the District Court are provisions of the collective bargaining agreement regulating the relations between respondent and its employees, especially provisions relating to seniority and promotions. Employees are divided into three groups according to the functions they perform, with seniority defined within each group. Rule 10 provides that when new positions are available or vacancies occur in existing positions, such positions will be "bulletined" by the employer and employees may bid therefor. Rule 1 (3)(A) provides that, "Promotion will be confined to the group . . . with the exception that employes on positions enumerated in group two (2) will be given prefer-

ence over nonemployes in the assignment to positions in group one (1), based upon fitness and ability . . . ." Rule 15 states that, "An employe returning after leave of absence may return to former position or may, upon return . . . exercise seniority rights to any position bulletined during such absence."

The complaint alleges that petitioner was employed by respondent as a relief clerk-chief caller, a position classified under the collective bargaining agreement in group 2. On September 26, 1950, he left his employment for induction into the Armed Forces of the United States. Petitioner was still in the Armed Forces when respondent, pursuant to the procedure set forth in Rule 10 of the collective bargaining agreement, bulletined two group 1 positions to be filled. On September 8, 1952, the group 1 position of bill clerk was bulletined and a nonemployee assigned to it on September 15. On September 10, 1952, the group 1 position of assistant cashier was bulletined and a nonemployee assigned to it on September 22. Petitioner was separated from the military service on September 25, 1952, and on October 1 applied for re-employment with respondent. He was placed in the group 1 position of assistant cashier with a group 1 seniority date of October 7, 1952. Subsequently this position was abolished and petitioner reduced to a group 2 position. Respondent refused to allow petitioner to exercise claimed seniority rights to place himself in the group 1 position of bill clerk in place of the nonemployee who had been assigned to that position on September 15, 1952.

In the District Court petitioner contended that the group 1 seniority date assigned him on re-employment, October 7, 1952, was erroneous, and that under § 9 of the Universal Military Training and Service Act, *supra,* he was entitled to a seniority date of September 8 or September 10, 1952, the dates on which, if he had then been employed by respondent, he could have applied for the

bulletined group 1 positions. Such a seniority date, according to petitioner, would have entitled him to replace the nonemployee as bill clerk when the position of assistant cashier was abolished, and thus avoided reduction to group 2.

Petitioner prayed the District Court to order respondent to assign him the requested earlier seniority date and to permit him to place himself in the position of bill clerk, and in addition he sought compensation for wages lost as a result of being deprived of the group 1 position. The District Court dismissed the complaint for failure to state a cause of action under the Universal Military Training and Service Act, and the Court of Appeals for the Tenth Circuit affirmed. 240 F. 2d 8. Because of the importance of the question presented in the administration of the statute and the protection of veterans' rights thereunder, we granted certiorari. 353 U. S. 948.

The Court of Appeals correctly held that petitioner was not obliged, before bringing suit in the District Court under § 9 (d) of the Act, 62 Stat. 616, as amended, 50 U. S. C. App. (Supp. V) § 459 (d), to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement or before the National Railroad Adjustment Board. See 48 Stat. 1189–1193, 45 U. S. C. § 153. The rights petitioner asserts are rights created by federal statute even though their determination may necessarily involve interpretation of a collective bargaining agreement. Although the statute does not itself create a seniority system, but accepts that set forth in the collective bargaining agreement, it requires the application of the principles of that system in a manner that will not deprive the veteran of the benefits, in terms of restoration to position and advancement in status, for which Congress has provided. Petitioner sues not simply as an employee under a col-

lective bargaining agreement, but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces.

For the effective protection of these distinctively federal rights, Congress provided in § 9 (d) [1] of the Act that if any employer fails to comply with the provisions of the statute, the District Court, upon the filing of a petition by a person entitled to the benefits of the Act, has jurisdiction to compel compliance and to compensate for loss of wages. The court is enjoined to order speedy hearing

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[1] "In case any private employer fails or refuses to comply with the provisions of subsection (b), (c)(1) or subsection (g) of this section, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided,* That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further,* That only the employer shall be deemed a necessary party respondent to any such action." 62 Stat. 616, as amended, 50 U. S. C. App. (Supp. V) § 459 (d).

in any such case and to advance it on the calendar, and the United States Attorney must appear and act for the veteran in the prosecution of his claim if reasonably satisfied that he is entitled to the benefits of the Act. Nowhere is it suggested that before a veteran can obtain the benefit of this expeditious procedure and the remedies available to him in the District Court he must exhaust other avenues of relief possibly open under a collective bargaining agreement or before a tribunal such as the National Railway Adjustment Board. On the contrary, the statutory scheme contemplates the speedy vindication of the veteran's rights by a suit brought immediately in the District Court, advanced on the calendar before other litigation, and prosecuted with the assistance of the United States Attorney. Only thus, it evidently was thought, would adequate protection be assured the veteran, since delay in the vindication of re-employment rights might often result in hardship to the veteran and the defeat, for all practical purposes, of the rights Congress sought to give him. To insist that the veteran first exhaust other possibly lengthy and doubtful procedures on the ground that his claim is not different from any other employee grievance or claim under a collective bargaining agreement would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights.

Section 9 of the Universal Military Training and Service Act, on which petitioner relies, requires that a returning veteran who has been separated from the service under the conditions set forth in the statute be restored by his employer to his former position or to a position of like seniority, status, and pay. He is not to be disadvantaged by serving his country. Section 9 (c)(1) states that he shall be restored "without loss of sen-

iority." [2] In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284–285, and *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, 283, the same provision in an earlier Act was interpreted to mean that a returning veteran does not step back at the exact point he left his employment, but rather is entitled to "a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment." 338 U. S., at 283. This interpretation is now embodied in § 9 (c)(2) of the present Act.[3]

However, § 9 (c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9 (c) does not assure him that

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[2] "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." 62 Stat. 604, 615, as amended, 50 U. S. C. App. § 459 (c)(1).

[3] "It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." 62 Stat. 604, 615–616, as amended, 50 U. S. C. App. § 459 (c)(2).

the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer. On his return from service, petitioner in the present case could not have demanded under the statute that respondent place him in any group 1 position. Promotion to a group 1 position from group 2, in which petitioner had formerly been employed, is not dependent simply on seniority. Under Rule 1 (3)(A) of the collective bargaining agreement it is dependent on fitness and ability and the exercise of a discriminating managerial choice. Collective bargaining agreements that include such familiar provisions are presupposed by the statute, and it is in their context that it must be placed. See *Aeronautical Lodge* v. *Campbell,* 337 U. S. 521, 527. Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability. The statute does not envisage overriding an employer's discretionary choice by any such mandatory promotion.

Nor does it sanction interfering with and disrupting the usual, carefully adjusted relations among the employees themselves regarding opportunities for advancement.

The precise question in the present case is not essentially different. Petitioner was not, by virtue of the fact that the group 1 position of assistant cashier had been bulletined in his absence, entitled to that position on re-employment. Rule 15 of the collective bargaining agreement states that an employee who returns from leave of absence may "exercise seniority rights to any position bulletined during such absence." But seniority alone does not, under Rule 1 (3)(A), entitle an employee to move from group 2 to group 1; fitness and ability are also relevant. Respondent asserts that petitioner was in fact assigned to the group 1 position of assistant cashier through a mistake of law. Whatever the reason, the fact of employment in the higher position did not enlarge petitioner's rights under either the collective bargaining agreement or the statute. Since respondent was not obligated to give petitioner the higher position at all, when it did so it was not bound to give him a seniority date earlier than that to which any employee similarly promoted would have been entitled. In this case that was the date on which petitioner's pay in the group 1 position commenced, and not a month earlier when the position had first been bulletined.

Petitioner argues that because the complaint was summarily dismissed on motion he did not have the opportunity to prove that by custom and practice under the collective bargaining agreement he would necessarily have been assigned to the group 1 position of bill clerk or assistant cashier had he remained continuously in respondent's employ. He states that interpretation and practice by the parties to an agreement are frequently the most reliable bases for determining rights claimed to

arise under it. Accordingly, we affirm the judgment, but with leave to petitioner to amend his complaint to allege, if such be the fact, that in actual practice under the collective bargaining agreement advancement from group 2 to group 1 is automatic.

The judgment is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent on the merits.

Syllabus.

IVANHOE IRRIGATION DISTRICT ET AL. *v.* McCRACKEN ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 122. Argued April 29, 1958.—Decided June 23, 1958.*

In these cases involving two federal reclamation projects in California, the Supreme Court of California refused to confirm certain contracts entered into between the United States on the one hand and two state irrigation districts and a state water agency on the other hand, because it found them invalid on several grounds. Taking the position that § 8 of the Reclamation Act of 1902 required the application of state law, it held that § 5, providing generally that no right to the use of water shall be sold for lands in excess of 160 acres in single ownership, was inapplicable because in conflict with state law and that, therefore, the excess lands provisions of the contracts were invalid. It also held that the provisions pursuant to § 9 of the Reclamation Project Act of 1939 for repayment to the United States of part of the funds expended on the construction and operation of reclamation works were invalid, on the grounds that no provision was made for repayment of a stated amount within 40 years or for transfer of title to the distribution systems to the respective districts after payment thereof and that no permanent right to receive water was vested in the respective districts and their members. On review by this Court, *held:* The judgments are reversed. Pp. 277–300.

1. This Court does not have jurisdiction on appeal, because the decisions were based on the construction of a federal statute, not on a holding that federal statutes were unconstitutional. However, treating the papers as petitions for certiorari, 28 U. S. C. § 2103, certiorari is granted. Pp. 279, 289–290.

2. The judgments did not rest upon an adequate state ground, because state law was invoked only by the interpretation the Court gave to § 8 of the Reclamation Act of 1902. P. 290.

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*Together with No. 123, *Madera Irrigation District et al.* v. *Steiner et al.*, No. 124, *Madera Irrigation District* v. *Albonico et ux.*, and No. 125, *Santa Barbara County Water Agency* v. *Balaam et al.*, also on appeals from the same Court.

3. Congress did not intend that § 8 of the Reclamation Act of 1902 would, under the application of state law, make the excess lands provision of § 5 inapplicable to the Central Valley Project. Pp. 290–294.

4. Section 5 of the Reclamation Act of 1902 and § 46 of the Omnibus Adjustment Act of 1926, providing generally that no right to the use of water shall be sold for lands in excess of 160 acres in single ownership, are not invalid under the Fifth and Fourteenth Amendments, because they do not amount to a taking of vested property rights in land or irrigation district water without just compensation and they do not deny equal protection of the laws by discriminating unjustly between small and large landowners. Pp. 294–297.

5. In view of the declarations and provisions incorporated in the amendments contained in the Act of July 2, 1956, there is no room for objection to the contracts on the ground that they infer that the water users are not entitled to water rights beyond the 40-year terms of the contracts or that the contracts do not make clear that the districts and landowners become free of indebtedness upon repayment of their shares of the cost of the project. Pp. 297–298.

6. The contracts were not invalid because of failure to recite a definite sum as being the total amount due for the water supply facilities. P. 298.

7. The contracts were not invalid because of the absence of any provision to the effect that the districts would obtain title to the distribution systems when their obligations therefor had been totally discharged. Pp. 298–300.

47 Cal. 2d 597, 681, 695, 699, 306 P. 2d 824, 886, 894, 875, reversed.

B. Abbott Goldberg, Deputy Attorney General of California, argued the causes for appellants. On the brief were *Edmund G. Brown,* Attorney General, *Mr. Goldberg* and *Adolphus Moskovitz,* Deputy Attorney General, for the State of California and the Ivanhoe Irrigation District, *Denver C. Peckinpah* for the Madera Irrigation District, and *Francis Price* for the Santa Barbara County Water Agency, appellants.

By special leave of Court, 356 U. S. 917, *John F. Davis* argued the causes for the United States, as *amicus curiae,*

urging reversal. On the brief were *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis, S. Billingsley Hill, Fred W. Smith* and *David R. Warner.*

Harry W. Horton, Alvin J. Rockwell and *Denslow B. Green* argued the causes for appellees. With them on the brief were *Reginald L. Knox, Jr., W. R. Bailey, Sherman Anderson* and *Herman Phleger.*

Briefs of *amici curiae* urging affirmance were filed by the Irrigation Districts Association of California, and *Edson Abel* and *Allen Lauterbach* for the American Farm Bureau Federation and the California Farm Bureau Federation.

MR. JUSTICE CLARK delivered the opinion of the Court.

These four cases present issues of basic importance to the federal reclamation laws. The Supreme Court of California has refused to confirm certain contracts entered into between two state irrigation districts and a water agency on the one hand and the United States on the other,[1] finding the contracts invalid on several grounds. 47 Cal. 2d 597, 681, 695, 699, 306 P. 2d 824, 886, 894, 875. Specifically involved are parts of two statutory enactments: Section 5 of the Reclamation Act of 1902,[2] pro-

[1] Section 46 of the Omnibus Adjustment Act of 1926 requires that the contracts be confirmed by decree of a court of competent jurisdiction. 44 Stat. 649, as amended, 70 Stat. 524, 43 U. S. C. § 423e. For the applicable California statutes authorizing such procedure, see Cal. Water Code, 1956, § 23225 (irrigation districts), and Cal. Stat. 1945, pp. 2780, 2798, as amended, Cal. Stat. 1949, p. 18 (water agency).

[2] Section 5: ". . . No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no

viding generally that no right to the use of water shall be sold for lands in excess of 160 acres in single ownership, and § 9 of the Reclamation Project Act of 1939,[3] providing, *inter alia*, for the repayment to the United States of funds expended on the construction of reclamation works, and authorizing the Secretary of the Interior to make contracts to furnish reclamation water at appropriate rates for irrigation. The opinion of the Supreme Court of California turned on an interpretation of a third provision, § 8 of the Reclamation Act of 1902.[4]

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such right shall permanently attach until all payments therefor are made." 32 Stat. 389, 43 U. S. C. § 431. This provision was substantially re-enacted in § 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 70 Stat. 524, 43 U. S. C. § 423e.

[3] 53 Stat. 1193, as amended, 59 Stat. 75, 43 U. S. C. § 485h. Section 9 (c), the pertinent section in No. 125, authorizes the Secretary of the Interior to enter into contracts to furnish water for municipal water supply. Section 9 (d) involves contracts with irrigation districts, and requires repayment within a 40-year period of construction costs allocated to irrigation. Section 9 (e) authorizes the use of an alternative method of repayment, whereby the Secretary may agree to furnish water for irrigation for a period of 40 years at rates sufficient "to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation . . . . [T]he costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to said subsection (d)."

[4] Section 8: "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user

That section provides that the Act is not to be construed as interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation." It further provides that in administering the Act the Secretary of the Interior "shall proceed in conformity with such laws . . . ." The California court held that this provision required the application of California law, and finding the provisions of the contracts contrary thereto, it refused confirmation. The water districts and agency involved, joined by the State of California, appealed, and we postponed the question of jurisdiction to the merits. 355 U. S. 803 (1957). We have concluded, for reasons hereinafter set forth, that we have no jurisdiction over the appeals. Treating the papers as petitions for certiorari, 28 U. S. C. § 2103, we grant certiorari. On the merits, we deem the contracts controlled by federal law and valid as against the objections made.

I. The Background of the Litigation.

This litigation involves a dispute between landowners on the one hand and the combined State and Federal Governments on the other. As the Attorney General of California points out, there is no clash here between the United States and the State of California. Quite to the contrary, the United States and the various state agencies, with commendable faith and steadfastness to one another, have embarked upon and nearly completed a most complicated joint venture known as the Central Valley Project. There have at times been differences, but these are inevitable in the everyday implementation of

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of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390, 43 U. S. C. §§ 372, 383.

such a giant undertaking. On the whole the parties have kept the ultimate goal firmly centered in their joint vision.

Central Valley is the largest single undertaking yet embarked upon under the federal reclamation program. It was born in the minds of far-seeing Californians in their endeavor to bring to that State's parched acres a water supply sufficiently permanent to transform them into veritable gardens for the benefit of mankind. Failing in its efforts to finance such a giant undertaking, California almost a quarter of a century ago petitioned the United States to join in the enterprise. The Congress approved and adopted the project, pursuant to repeated requests of the State, and thus far has expended nearly half a billion dollars. The total cost is estimated to be as high as a billion dollars.

The saga of this project is fascinating. California has two somewhat parallel ranges of mountains running south from its northern border for two-thirds the length of the State. Known as the Sierra Nevada on the east and the Coast Range on the west, they converge on the north at Mount Shasta and are joined by the Tehachapi Mountains on the south, thereby forming the Central Valley Basin. The basin extends almost 500 miles between these ranges, from Shasta to Bakersfield, and has an average width of 120 miles, including more than a third of the area of California. The main valley floor, comprising about a third of the basin area, is an alluvial plain some 400 miles long and averaging 45 miles in width. The Sacramento River, with headwaters near Mount Shasta, flows south into San Francisco Bay, draining the northern portion of the basin. The San Joaquin River, which rises above Friant in the south, runs first west then north to join the Sacramento River in the Sacramento-San Joaquin Delta, both finding a common outlet to the ocean

through San Francisco Bay. See *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725 (1950).

Rainfall on the valley floor comes during the winter months—85% from November to April—and summers are quite dry. At Red Bluff, just south of Mount Shasta, the average is 23 inches, while south at Bakersfield a scant 6 inches fall. The climate is ideal with a frost-free period of over seven months and a mild winter permitting production of some citrus as well as deciduous fruits and other specialized crops. The absence of rain, however, makes irrigation essential, particularly in the southern region.

In the mountain ranges precipitation is greater, and the winters more severe. The Northern Sierras average 80 inches of rainfall and the Southern 35 inches. The Coast Range experiences much less. In the higher recesses of the mountains precipitation is largely snow which, when it melts, joins the other runoff of the mountain areas to make up an annual average of 33,000,000 acre-feet of water coming from the mountain regions. Nature has not regulated the timing of the runoff water, however, and it is estimated that half of the Sierra runoff occurs during the three months of April, May, and June. Resulting floods cause great damage, and waste this phenomenal accumulation of water so vital to the valley's rich alluvial soil. The object of the plan is to arrest this flow and regulate its seasonal and year-to-year variations, thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply of water for municipal and irrigation purposes, facilitating navigation, and generating power. The plan is now nearing completion and is actually in partial operation in some areas.

The completed project is built around these two great rivers, and includes a series of dams, three of which—

Shasta, Folsom, and Trinity River—will furnish electric power. The state water plan contemplates that eventually 38 major reservoirs scattered at various points in this part of the State will store an estimated 30,000,000 acre-feet of water. The Shasta Dam and Reservoir sits at the head of the table on the north. With a capacity of 4,500,000 acre-feet of water, it, along with tributary dams and reservoirs, will control the floods from that area. The Trinity River, with headwaters west of Shasta on the western slope of the Coast Range, drains into the Pacific Ocean. A dam now under construction near Lewiston will impound some three-quarters of a million acre-feet of water which, by means of a tunnel, will be partially diverted into and supplement the waters of the Sacramento River lying to the east and across the mountains. The water supply facilities along the Sacramento River will regulate its flow, store surplus winter runoff for use in the Sacramento Valley, maintain navigation in the channel, protect the Sacramento-San Joaquin Delta from salt intrusion from the Pacific, provide a water supply for the Contra Costa and Delta-Mendota Canals, and generate a great deal of hydroelectric energy. The Contra Costa Canal services the south shore of Suisun Bay from Antioch to Martinez with water from the Delta for domestic, industrial, and irrigation use. The Delta-Mendota Canal transports surplus Sacramento River water to Mendota Pool on the San Joaquin River, 120 miles south of the Delta. The water is pumped from the Delta to the canal along the foothills of the Coast Range and by gravity it runs to the pool at Mendota. This exchange of water replaces that diverted from the San Joaquin by the dam at Friant. This latter dam forces the entire flow of the San Joaquin into Millerton Lake which has a capacity of 520,000 acre-feet of water. It is diverted from the lake by the Madera Canal to

the north and the Friant-Kern Canal to the south. The former extends about 37 miles in length and services the Madera District, while the latter supplies water to the Ivanhoe District and others to the south. It will extend south about 160 miles to a point near Bakersfield, which sits at the foot of the Central Valley's enormous table.

The power facilities of the project will, when finally completed, have a capacity of near a million kilowatts. Transmission lines, steam plants, and other essential facilities will be constructed so as to obtain the maximum utilization. It is estimated that through the sale of this power the United States will receive reimbursement for over half of its total reimbursable expenditures.

The over-all allocation of these enormous costs has not been definitely determined. That portion of the costs ultimately allocated to power facilities will be reimbursed at 4% interest, but that allocated to irrigation facilities will be reimbursed at *no* interest. Moreover, the Federal Government will receive no reimbursement for that portion of the cost allocated to numerous aspects of the project, such as navigation, flood control, salinity prevention, fish and wildlife preservation, and recreation. The irrigators will, therefore, be chargeable with but a small fraction of the total cost of the project.

We hasten to correct any impression that lands in the Central Valley had not been reclaimed and irrigated at the inception of the project. On the contrary, since California entered the Union it has worked diligently to bring water to its arid lands. Working largely through state irrigation districts, private interests have been ingenious in constructing smaller reservoirs, tapping underground sources, and attempting to prevent saline encroachment which would destroy the soil for agricultural purposes. Water has been called "the life blood of the State." Competition for this vital natural resource has provoked such

controversy that it has required amendments to the Constitution and continual legislative activity. It is not at all surprising, therefore, that in putting together the mosaic of Central Valley some litigation would ensue. See *United States* v. *Gerlach Live Stock Co., supra.*

II. Scope of the Appeals and Nature of the Contracts.

These four appeals contest the right of the United States and California to complete the venture and reap the rewards therefrom as provided by their respective laws.

It should be noted that the appeal involving the Santa Barbara County Water Agency, No. 125, does not involve the Central Valley Project, as it does not lie within that area. It concerns a project to supply water for irrigation and municipal uses along the south coastal area of Santa Barbara County. It includes a dam on the Santa Ynez River impounding water in Cachuma Reservoir. This river rises on the western slopes of the Coast Range and runs into the Pacific. The Tecolote Tunnel will deliver water across the coastal range of mountains to the Santa Barbara County Agency through the lateral distribution systems of the Goleta and Carpenteria County Water Districts. The adoption of the project by the Congress in 1948 was based on the recommendation of the State Division of Water Resources Report stating that there was "an urgent and immediate need for substantial supplemental municipal and irrigation water supplies . . . . The city of Santa Barbara has a critical water situation at this time. . . . The underground water supplies in the county water districts are being seriously overdrawn. In some localities . . . wells are being damaged by salt water intrusion." H. R. Doc. No. 587, 80th Cong., 2d Sess. 10. While the contract is authorized

under § 9 (c) of the 1939 Act,[5] for our purposes it is identical to the others and will be discussed with them.

The remaining appeals involve areas in the southern portion of the Central Valley Basin. The Madera District includes the Friant Dam and Millerton Lake, the sites for which the United States has purchased outright. Water rights surrounding these areas were involved in *United States* v. *Gerlach Live Stock Co., supra,* and have been acquired by the United States. These installations are, of course, vital to the operation of the project in the south of the valley. The Madera District will be furnished water from Millerton Lake by the Madera Canal. The Ivanhoe District is south of Friant and will be supplied water through the Friant-Kern Canal. It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right.

The contracts to which the Supreme Court of California took exception provide, in outline, that the United States will, after construction of the water supply facilities and the lateral distribution system for the irrigation districts, furnish water to the districts and the Santa Barbara County Agency for a period of 40 years. Incorporating the requirements of § 5 of the Reclamation Act of 1902,[6] the contract provides that project water shall not be furnished to lands in excess of 160 acres in single ownership. This limitation applies only to "project water" and previously existing water supplies are unaffected thereby. "Large landowners," *i. e.,* those who own excess land, who wish that excess to have the benefit of project water must agree to sell their excess to other than large landowners within 10 years at a price, fixed by three

[5] See note 3, *supra.*

[6] See note 2, *supra.*

appraisers, which will exclude potential enhancement of the price by reason of project water being available. Large landowners electing not to sell their excess may use existing water supplies in underground sources. Moreover, if they designate which of their holdings shall be considered nonexcess, the district would furnish water to that land under the terms provided in the contracts.

The repayment provisions as to the "distribution systems" require liquidation of the maximum stated expenditure of the United States by installments spread over 40 years, without interest, in accordance with § 9 (d) of the Reclamation Project Act of 1939. As to the "water supply facilities," such as the dams and reservoirs, the contracts employ the more liberal provisions of § 9 (e) of that Act.[7] Repayment, without interest, is to be included in the charge for water sold to the districts and the agency by the United States. The contract term runs for 40 years and, using the language of § 9 (e), the water rate is calculated so as to return to the United States "revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation." The Congress has now supplemented these terms of the contracts by the Act of July 2, 1956, 70 Stat. 483. It provides that the districts and the agency shall be given "credit each year" for "so much of the amount paid . . . as is in excess of the share of the operation and maintenance costs of the project which the Secretary finds is properly chargeable . . . ." The provision is retroactive and runs with the contract, and when this amount is equal to the amount

[7] See note 3, *supra*.

owing on the total water supply expenditures allocated to irrigation, "no construction component shall be included in any charges made for the furnishing of water . . . ." The Act also permits renewal of the contract on terms that will reflect any "increases or decreases in construction, operation, and maintenance costs and improvement or deterioration in the [district's] repayment capacity." In addition, the Act provides that the districts and the agency "shall . . . have a first right (to which right the rights of the holders of any other type of irrigation water contract shall be subordinate) to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands [within the district] and a permanent right to such share or quantity upon completion of payment of the amount" that is due on expenditures for water supply allocated to irrigation.

III. Action of the California Courts.

In the confirmation suits involving the Ivanhoe District, No. 122, and of the Madera District, No. 123, the trial court found the contracts and the proceedings leading to their execution invalid. The court reasoned that § 8 of the 1902 Act required that "whenever there is a conflict between the Federal Reclamation laws and the laws of the State, the law of California must prevail." The court also found that in the light of the origin of the Central Valley Project, the United States was trustee of an express trust of which the Ivanhoe District and others were among the beneficiaries. It concluded that all applications to appropriate water are included in such trust and the beneficiaries have "an incomplete, incipient and conditional right in the water applied for" which is vested and runs with the land. The excess land provision was declared invalid and unenforceable as conflicting

with both state law and the Reclamation Act. Application of the excess land provision to an irrigator would, the court found, be unconstitutional.

The *Albonico* litigation, No. 124, was an application for a mandatory order excluding lands in excess of 320 acres owned by the Albonicos from the Madera District. The court held that the excess land provisions were unconstitutional and that if applied to the Albonicos the mandatory order should issue.

The trial court in the *Santa Barbara* confirmation case, No. 125, contrary to the action in the other cases, upheld the contract and granted confirmation. The court found that the Master Contract was ratified and confirmed by the Interior Department's Appropriation Act for 1951. 64 Stat. 595, 679.

The Supreme Court of California, by a 4–3 vote, reversed the trial court judgment validating the contract in No. 125, the *Santa Barbara* case, and affirmed each of the other judgments. The principal opinion was in the *Ivanhoe* case to which we confine our discussion. The majority agreed with the trial court that § 8 of the 1902 Act required the application of state law. It found that the excess lands provision was inapplicable and improper under state law, and that the contract was therefore invalid. This conclusion was posited on a trust theory of California water law which placed a trust on the State and the irrigation districts for the benefit of water users. In administering this trust the United States, the majority held, stood in the shoes of the State. The § 9 (e) provisions of the contract were found invalid on the grounds that no provision was made for repayment of a stated amount within 40 years or for transfer of title to the distribution systems to the respective districts after payment thereof, and that no permanent right to receive water was vested in the respective districts and their

members. The court appears to have reached this conclusion by finding that the contract created a "debtor-creditor" relationship and that the United States was acting as a public utility without conforming to state law.

IV. The Jurisdictional Question.

We first face the dual aspects of the jurisdictional question: has California's Supreme Court held a federal statute unconstitutional, and does its decision rest on an adequate state ground? *Flournoy* v. *Wiener,* 321 U. S. 253, 262 (1944).

As we read the reasons, heretofore mentioned, upon which the Supreme Court of California invalidated the contracts, we conclude that they rest upon neither ground. As to the rights and duties of the United States under the contracts, these are matters of federal law on which this Court has final word. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943). Our construction of the contract might dispel any features thereof found offensive. The other ground, namely, the 160-acre limitation, alone requires further consideration.

Appellants claim that California's Supreme Court has held unconstitutional the federal statutes, § 5 of the Reclamation Act of 1902, as re-enacted in § 46 of the Omnibus Adjustment Act of 1926, relating to the 160-acre limitation. It appears to us, however, that the opinion actually turned on the court's interpretation of § 8 of the 1902 Act. In effect, the court held that this section overrides all other sections of the Act, requiring that it be construed as not affecting state laws "relating to the control, appropriation, use, or distribution of water used in irrigation." Turning to state law, the court by applying a "trust theory" held that the Federal Government could acquire no title to appropriative water rights free of a trust in the State of California for the benefit

of the people of the State. This "limited measure of control" of the appropriative water, the court said, 47 Cal. 2d, at 620, 306 P. 2d, at 837, prevented the imposition of the 160-acre limitation because the beneficiaries of the trust, namely, the people of the State and particularly those in the districts involved, would be deprived by the acreage limitation of a right to the use of the water in the district. We think it plain that this was a construction of federal law and not a holding of unconstitutionality. This, of course, provides no basis for an appeal, but the importance of the case, as we earlier noted, requires that certiorari be granted.

We deem it equally clear that the judgments do not rest on an adequate state ground. The construction the opinion gave to § 8 of the 1902 Act nullified the specific mandate of § 5, as well as its re-enactment in the 1926 Act, and even though in the doing a state law may have been called into play, this would not immunize it from this Court's review. Basically it is the interpretation of the Federal Act that opens the door to the application of the state law and leads to the striking down of the contracts made by the Secretary.

Nor would the suggestion that state law prevented the water districts and agencies of the State from entering into the contracts change this conclusion. We need not determine whether a State could in that manner frustrate the consummation of a federal project constructed at its own behest. The fact remains that the state law was, in fact, invoked only by the interpretation the court gave § 8.

V. Application of the Reclamation Laws to the Contracts.

At the outset we set aside as not necessary to decision here the question of title to or vested rights in unappropriated water. Cf. *Nebraska* v. *Wyoming*, 325 U. S. 589,

611–616 (1945). If the rights held by the United States are insufficient, then it must acquire those necessary to carry on the project, *United States* v. *Gerlach Live Stock Co., supra,* at 739, paying just compensation therefor, either through condemnation or, if already taken, through action of the owners in the courts. As we see it, the authority to impose the conditions of the contracts here comes from the power of the Congress to condition the use of federal funds, works, and projects on compliance with reasonable requirements. And, again, if the enforcement of those conditions impairs any compensable property rights, then recourse for just compensation is open in the courts.

As we have noted, the Supreme Court of California first concluded that the provisions of § 8 of the 1902 Act as to the application of state law were absolute, and controlled all provisions of the Act and other reclamation statutes having to do with "the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . . ." We believe this erroneous insofar as the substantive provisions of § 5 of the 1902 Act are concerned. As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming, supra,* at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." Section 5 is a specific and mandatory prerequisite laid down by the Congress as binding in the operation of reclamation projects, providing that "[n]o right to the use of water . . . shall be sold for a tract exceeding one hundred and sixty acres to any one landowner . . . ."

We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State. To read § 8 to the contrary would require the Secretary to violate § 5, the provisions of which, as we shall see, have been national policy for over half a century. Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5.

From the beginning of the federal reclamation program in 1902, the policy as declared by the Congress has been one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. It has been applied to public land opened up for entry under the reclamation law as well as privately owned lands, which might receive project water. See Taylor, The Excess Land Law: Execution of a Public Policy, 64 Yale L. J. 477.

Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such exemption by express enactment. See Act of September 3, 1954, 68 Stat. 1190, exempting the Santa Maria Project from the applicability of "excess land laws." [8] With respect to the Central Valley Project the Congress has again and again reaffirmed the specific requirements of § 5 and the action taken by

[8] The Act recites: "That in view of the special circumstances of the Santa Maria project" the excess land laws should not be applicable thereto "so long as the water utilized on project lands is acquired by pumping from the underground reservoir." See H. R. Rep. No. 1098, 83d Cong., 2d Sess. 2–3.

the Secretary thereunder. As late as 1944 on consideration of the Omnibus Rivers and Harbors Bill the Senate refused, after vigorous debate, to concur in a conference report that would have exempted this project from the excess land requirements of § 5. 90 Cong Rec. 9493–9499. At the next Session of the Congress the disputed exemption was deleted from the bill and it was promptly passed. Likewise, the Secretary reported to the Congress from time to time the execution of contracts, similar to those involved here, wherein "the excess land limitations and other requirements of law are fully incorporated in the Central Valley contract form." His annual report for 1950 and 1951 related the execution of the Madera, Ivanhoe, and Santa Barbara contracts involved here. In the latter report he mentions individual contracts with water users under the excess land laws, advising that these laws were "given active attention. Five recordable contracts providing for delivery of Central Valley Project water to 3,570 acres of excess land are the first to be executed on the project." During this period the Congress reauthorized the project, additional units were added, see Act of October 14, 1949, 63 Stat. 852; H. R. Doc. No. 416, 84th Cong., 2d Sess., pp. 620–622; Act of September 26, 1950, 64 Stat. 1036, and the Act of August 12, 1955, 69 Stat. 719; H. R. Doc. No. 416, pp. 937–940, and large appropriations of funds thereto were granted annually.

In light of these congressional actions, it cannot be said that Congress intended that § 8 would, under the application of state law, make inapplicable the excess lands provisions of § 5 of the Reclamation Act of 1902 to the Central Valley Project. That possibility is foreclosed by subsequent and continuing action by the Congress ever since the inception of the project. Such a record constitutes ratification of administrative construction, and confirmation and approval of the contracts.

Fleming v. *Mohawk Co.*, 331 U. S. 111, 119 (1947); *Brooks* v. *Dewar*, 313 U. S. 354, 361 (1941); *Swayne & Hoyt, Ltd.*, v. *United States*, 300 U. S. 297, 302 (1937).

VI. The Constitutional Issues.

Appellees urge, however, that the federal statutes requiring insertion of these provisions in the contracts are unconstitutional as a denial of due process and equal protection of the law under the Fifth and Fourteenth Amendments. They assert that the excess acreage provisions amount to a taking of vested property rights both in land and irrigation district water, and discriminate between the nonexcess and the excess landowner. We cannot agree.

There can be no doubt of the Federal Government's general authority to establish and execute the Central Valley and Santa Barbara County projects. As we said in *United States* v. *Gerlach Live Stock Co.*, *supra*, at 739, the Congress "elected to treat it [the Central Valley Project] as a reclamation project." We upheld its power to pursue the project as "clear" and "ample," an exercise of the general power "to promote the general welfare through large-scale projects for reclamation, irrigation, or other internal improvement." *Id.*, at 738. The Santa Barbara Project is supportable on the same grounds. Cf. *United States* v. *Butler*, 297 U. S. 1, 65–67 (1936). In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution, but also from Art. IV, § 3, relating to the management and disposal of federal property. As this Court said in *United States* v. *San Francisco*, 310 U. S. 16, 29–30 (1940), this "power over the public land thus entrusted

to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' " See also *United States* v. *California,* 332 U. S. 19, 27 (1947), and *Alabama* v. *Texas,* 347 U. S. 272, 273–274 (1954).

Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges. See *Berman* v. *Parker,* 348 U. S. 26 (1954), and *Federal Power Comm'n* v. *Idaho Power Co.,* 344 U. S. 17 (1952). The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof. Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress. *Public Utilities Comm'n of California* v. *United States,* 355 U. S. 534 (1958). Article VI of the Constitution, of course, forbids state encroachment on the supremacy of federal legislative action.

In considering appellees' specific constitutional contentions, it is well to recapitulate. The Central Valley Project is multi-purpose in nature. That portion of the project expense attributable to navigation, flood control, salinity prevention, recreation and fish and wildlife preservation is nonreimbursable. The remainder of the total expense, and the only part that is reimbursable, is divided between two main sources. The first is hydroelectric power which estimates indicate will be chargeable with over 50 percent of the reimbursable expense, plus interest on the part representing electric plants in service. The other is irrigation, which pays the rest without interest charge. In short, the project is a subsidy, the cost of which will never be recovered in full. Appellees argue that the same reasoning applies to power facilities, but

there the Government is operating the generating facilities itself and the base rate upon which the power is sold includes an item for interest on the amount of expenditures allocated to that purpose. Hence the true relationship of debtor-creditor is maintained. In the light of these facts we believe that the language of the Court in *Wickard* v. *Filburn,* 317 U. S. 111, 131 (1942), is apposite: "It is hardly lack of due process for the Government to regulate that which it subsidizes."

In any event, the provisions under attack are entirely reasonable and do not deprive appellees of any rights to property or water. It is beyond dispute that excess land will be benefited by delivery of water to neighboring and nearby nonexcess land. This fact was recognized by the California Supreme Court in the *Santa Barbara* case. 47 Cal. 2d 699, 712, 306 P. 2d 875, 883. Furthermore the Chief Engineer of the Madera District so testified before the Senate Committee on Public Lands in 1944.[9] The contracts themselves indirectly refer to the benefits that may accrue, through underground water improvement, to excess owners, by provisions which declare that such water shall not be considered as furnished by the project. In other words, any benefits to the underground water level under excess acreage will not be chargeable to the owner of such acreage, but still will be available to his excess land. We therefore find no substance in the contention that "possible severance" of the excess acreage will result in damage constituting a taking of property

[9] "There appears to be no doubt, therefore, that with the introduction of surface irrigation and the consequent cessation of pumping by those using surface water, excess lands will receive direct benefits in the way of a higher water table, with consequent improvement in quality, plus lower pumping costs, and above all, reasonable assurance that the water table will not fall to the danger point." Hearings before Senate Committee on Public Lands on S. 912, 80th Cong., 1st Sess. 1221.

without just compensation. We deem it unnecessary to discuss other claims in this area, but repeat in connection therewith that if the United States takes any compensable water or property right the courts are open for redress.

As to the claim of discrimination in the 160-acre limitation, we believe that it overlooks the purpose for which the project was designed. The project was designed to benefit people, not land. It is a reasonable classification to limit the amount of project water available to each individual in order that benefits may be distributed in accordance with the greatest good to the greatest number of individuals. The limitation insures that this enormous expenditure will not go in disproportionate share to a few individuals with large land holdings. Moreover, it prevents the use of the federal reclamation service for speculative purposes. In short, the excess acreage provision acts as a ceiling, imposed equally upon all participants, on the federal subsidy that is being bestowed.

We also find the other contract provisions reasonable and necessary. As we have pointed out heretofore the Act of July 2, 1956, *supra,* answered most of the objections lodged against these requirements. That Act requires the Secretary, in all § 9 (d) and § 9 (e) contracts executed after its passage, (1) to include a renewal provision, (2) to provide that during the term of the contract or any renewal thereof the contracting parties shall have "first right . . . to a stated share or quantity of the project's available water supply," and (3) to determine as soon as feasible the total repayment obligation of the contracting parties, crediting against that obligation so much of the amount paid for water supply as is unnecessary for operation and maintenance costs until, and only until, that obligation has been liquidated. The Secretary is authorized to negotiate amendments to existing contracts to incorporate the foregoing amendments.

In view of the declarations and privileges incorporated in these amendments we see no room for objection to the contracts on the ground that they infer that the water users are not entitled to water rights beyond the 40-year terms of the contracts, or that they do not make clear that the districts and landowners become free of indebtedness upon repayment.

That leaves two other objections, the first being the failure of the contracts to recite a definite sum as being the total amount due for the water supply facilities. It was not possible at the time of executing the contracts, nor is it today, to determine the exact amount of expenditures necessary for dams and reservoirs. The record shows that original estimates often bore little resemblance to ultimate cost. The project is only two-thirds completed, and estimates of the remaining third cannot be accurately made. Moreover, the Government was not bound to determine in advance of the project's completion just what proportion of this total cost should be attributed to irrigation. In view of these uncertainties it would have been highly impractical, if not impossible, to recite any stated amount in the contract. Since no interest is charged on the amount due, it is difficult to see how harm or inconvenience is occasioned by the delay. The law now requires that all amounts paid the Government in excess of its maintenance and operation costs be credited on the obligations of the respective districts. That is an entirely adequate protection of the district's interest in not paying more than its share of the principal facilities.

Second, objection was made to the absence of any provision to the effect that the districts would obtain title to the distribution systems when their obligations therefor had been totally discharged. We do not understand appellees to contend that the districts and landowners should ultimately obtain title to the principal dams and

reservoirs. The fact that irrigation interests are bearing but a small fraction of the cost of the water supply facilities renders such a suggestion untenable. For related reasons we see no defect in the failure to guarantee passage of title to the local distributing systems at the end of 40 years when it is contemplated that the obligation therefor shall have been discharged. As we have pointed out, even the terms regarding the distribution systems involve a substantial federal subsidy because no interest is charged over the 40-year period during which the principal amount is repaid. In reality, the districts will *never* repay the total cost of these systems. Moreover, it is likely that for some time beyond the 40-year period of these contracts the districts will remain indebted to the Federal Government for their share of the cost of the water supply facilities. Under such circumstances the retention of title to the distribution systems, at least until the stated obligations of the districts are discharged, seems entirely consistent with what the state court thought was a "debtor-creditor" relationship. In view of these considerations, we think it altogether reasonable for the Federal Government and the districts and agency involved to defer the question of title passage to another day.

Any suggestion that the Congress might be arbitrary in the final accounting, or trample upon any of the rights of appellees, is highly improbable. It does not seem untoward for the recipients of a huge federal bounty to have to depend in small measure on the continued beneficence of their donor. It would be a physical impossibility to withdraw the facilities. As for the possibility of discrimination in the administration of those facilities, it seems farfetched to foresee the Federal Government "turning its back upon a people who had been benefited by it" and allowing their lands to revert to

desert.[10] The prospect is too improbable to figure in our decision.

For the reasons set forth above, the judgments of the Supreme Court of California are

Reversed.

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

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[10] Senator Gore (then Representative) gave this compelling answer to these trepidations in 1947:

"I cannot conceive of a Government that would spend $384,000,000 building one of the great reclamation-irrigation projects of the world and suddenly because some evil agent of Government had gotten into a bureau, turning its back upon a people who had been benefited by it and who in turn had greatly benefited the Nation by production of foodstuffs and wealth. I just do not conceive of the United States as being that kind. . . ." Hearings before the Subcommittee of the House Committee on Appropriations on the Interior Department Appropriation Bill for 1948, 80th Cong., 1st Sess. 737.

MILLER *v.* UNITED STATES.

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

No. 126. Argued January 28, 1958.—Decided June 23, 1958.

In the District of Columbia, officers without a warrant knocked on the door of petitioner's apartment and upon his inquiry, "Who's there?" replied in a low voice, "Police." Petitioner opened the door but quickly tried to close it, whereupon the officers broke the door, entered, arrested petitioner and seized marked bills which were later admitted as evidence over petitioner's objection at a trial in which he was convicted of violations of the narcotics laws. *Held:* Petitioner could not lawfully be arrested in his home by officers breaking in without first giving him notice of their authority and purpose, the arrest was unlawful, the evidence seized was inadmissible, and the conviction is reversed. Pp. 302–314.

(a) The validity of an arrest without a warrant for violation of federal law by local peace officers is to be determined by reference to local law. Pp. 305–306.

(b) Under District of Columbia law, peace officers, otherwise authorized to break the door of a home to make an arrest, may do so only if denied admittance after notice of their authority and purpose. Pp. 306–310.

(c) Since no express announcement was made and since the evidence in this case was not sufficient to prove that petitioner knew the purpose of the arresting officers, the arrest was unlawful. Pp. 310–313.

100 U. S. App. D. C. 302, 244 F. 2d 750, reversed.

De Long Harris argued the cause and filed a brief for petitioner.

Leonard B. Sand argued the cause for the United States. On the brief were *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner, William Miller, together with Bessie Byrd and her brother, Arthur R. Shepherd, was tried and convicted in the District Court for the District of Columbia for conspiracy to commit violations, and violations, of the federal narcotics laws. 26 U. S. C. (Supp. V) § 4704 (a), 21 U. S. C. § 174, 18 U. S. C. § 371. The Court of Appeals for the District of Columbia Circuit affirmed, one judge dissenting, 100 U. S. App. D. C. 302, 244 F. 2d 750. We granted certiorari, 353 U. S. 957, to determine whether evidence seized at the time of petitioner's arrest was properly admitted against the petitioner. The evidence was $100 of marked currency which was seized by the federal officers who arrested the petitioner and Bessie Byrd at their apartment.

On March 25, 1955, at 1:35 a. m., Clifford Reed was arrested, under an arrest warrant, on a Washington, D. C., street on suspicion of narcotics offenses. Reed revealed to Wilson, a federal narcotics agent, that he purchased heroin in 100-capsule quantities from the petitioner through Shepherd. Agent Wilson knew of the petitioner as one who had trafficked in narcotics and had been convicted for a narcotics offense in 1953. Reed said that he was to meet Shepherd later that morning to make a purchase. Agent Wilson enlisted his aid to apprehend Shepherd and the petitioner. About 3 a. m. another federal narcotics agent, Lewis, carrying $100 of marked currency, went with Reed in a taxicab to Shepherd's home. Reed introduced Lewis to Shepherd as a buyer. Shepherd accepted the $100 and agreed to secure 100 capsules of heroin from the petitioner and deliver them to Lewis at Reed's apartment. Shepherd proceeded alone in the taxicab to the petitioner's apartment.

The taxicab was followed by agent Wilson, officer Wurms of the Metropolitan Police Department, and other officers in police cars.[1] Shepherd was seen to leave the taxicab in front of the apartment house where the petitioner and Bessie Byrd occupied a two-room-and-bath basement apartment. The taxicab waited. Shepherd entered the basement but agent Wilson, who looked into the basement hall, could not see where he went. Shepherd came out of the basement within a few minutes and re-entered the taxicab. The taxicab was proceeding toward Reed's apartment when the officers following in the police cars intercepted it. Shepherd was arrested and searched. He did not have the marked bills on his person but admitted to agent Wilson and officer Wurms that a package of 100 capsules of narcotics found under the taxicab's front seat was put there by him when the police cars stopped the taxicab. He said that he had taken the package from behind a fire extinguisher in the basement hall where he had been sent by a "fellow" with Reed who had promised him $10 for getting it.

The federal officers returned immediately to the apartment building. About 3:45 a. m. agent Wilson and officer Wurms went to the door of the petitioner's apartment. Officer Wurms knocked and, upon the inquiry from within—"Who's there?"—replied in a low voice, "Police." The petitioner opened the door on an attached door chain and asked what the officers were doing there. Before either responded, he attempted to close the door. Thereupon, according to officer Wurms, "we put our hands inside the door and pulled and ripped the chain off,

[1] The group included two Federal Bureau of Narcotics agents, Wilson and Pappas, officer Wurms of the District of Columbia Metropolitan Police Department, and officers Bowman and Thompson of the Virginia State Police, who were trainees in the narcotics program of the State of Virginia.

and entered." [2] The officers had no arrest or search warrant. They did not expressly demand admission or state their purpose for their presence,[3] nor did they place the petitioner under arrest until after they entered the apartment.

Bessie Byrd was also arrested in the apartment and turned over the cash she had in her housecoat. The cash included $34 of the marked currency. After an extended search the remaining $66 of marked currency was found, some in a hatbox in a closet, and the rest within the covers of a bed in the bedroom.

The Government contends that there was probable cause for arresting the petitioner and that the marked cur-

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[2] Officer Wurms testified:

"The Witness: Agent Wilson and I were at the front door of the apartment No. 1, 1337 Columbia Road. I knocked on the front door. I said—somebody asked, 'Who's there?' I said, 'Blue' [the petitioner's nickname]—in a low voice, I said 'Police.'

"I repeated it two or three times, in that manner.

"The door opened. There was a chain on the door. Blue Miller saw me, Agent Wilson, and I don't know who else he saw but he tried to close the door and at that time we put our hands inside the door and pulled and ripped the chain off, and entered."

[3] At the trial, but not at the hearing on the motion to suppress, agent Wilson testified, "He said, 'What do you-all want?' And we says, 'Police, you are under arrest, we want in.' He says he was not going to let us in, or something like that, and so officer Wurms took ahold of the door and pulled it open." But apparently the Government is satisfied that agent Wilson was mistaken in saying that there was mention of the purpose to arrest. His testimony on the motion to suppress as well as the testimony of officer Wurms, both on the motion and at the trial, is contrary. The Government in its brief refers to this testimony merely in footnotes. Its brief accepts the petitioner's premise that the case should be decided upon the basis that the evidence shows that the officers did not formally announce their purpose. The Court of Appeals decided the case on the basis that Wilson did not make the statement. 100 U. S. App. D. C. 302, 306, 244 F. 2d 750, 754.

rency was properly admitted in evidence because it was seized as an incident to a lawful arrest. *Harris* v. *United States,* 331 U. S. 145. The petitioner's argument breaks down into three contentions: (1) that the officers had no probable cause to arrest the petitioner without a warrant; (2) that the search was not justified as being an incident of a lawful arrest; (3) that the arrest, and therefore the search, was in any event unlawful because the officers broke the door of petitioner's home without first giving notice of their authority and purpose in demanding admission. If any one of these contentions prevails, it is agreed that the marked money was inadmissible in evidence. In the view we take, we need consider only petitioner's third contention.

The lawfulness of the arrest of petitioner depends upon the power of the arresting officers to "break" the doors of a home in order to arrest without warrant persons suspected of having committed narcotics offenses. Agent Wilson did not have statutory authority to arrest without a warrant although officer Wurms, as a member of the Metropolitan Police Department, did have such authority.[4] This Court has said, in the similar circumstance of an arrest for violation of federal law by state peace officers, that the lawfulness of the arrest without warrant is to be determined by reference to state law. *United States* v. *Di Re,* 332 U. S. 581, 589; *Johnson* v. *United States,* 333 U. S. 10, 15. By like reasoning the validity of the arrest

[4] Narcotics agents were subsequently given authority by 26 U. S. C. § 7607, added July 18, 1956, to make an arrest where the agents have "reasonable grounds to believe that the person to be arrested has committed" a narcotics offense. In the District of Columbia peace officers having probable cause to believe that a felony is being, or has been, committed are empowered to arrest without a warrant. *Wrightson* v. *United States,* 98 U. S. App. D. C. 377, 378, 236 F. 2d 672, 673 (C. A. D. C. Cir.).

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of petitioner is to be determined by reference to the law of the District of Columbia.

In making reference to that law we are mindful of our policy of not interfering with local rules of law fashioned by the courts of the District of Columbia. *Fisher* v. *United States,* 328 U. S. 463, 476; *Griffin* v. *United States,* 336 U. S. 704, 715. But the Government agrees with petitioner that the validity of the entry to execute the arrest without warrant must be tested by criteria identical with those embodied in 18 U. S. C. § 3109, which deals with entry to execute a search warrant.[5] That section provides that an officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose," he is denied admittance. The Government states in its brief that, "where an arrest is made on probable cause rather than a warrant, these statutory requirements must be met before an officer can force entry into an apartment." These statutory requirements are substantially identical to those judicially developed by the Court of Appeals for the District of Columbia Circuit in *Accarino* v. *United States,* 85 U. S. App. D. C. 394, 403, 179 F. 2d 456, 465. Since the rule of *Accarino* bears such a close relationship to a statute which is not confined in operation to the District of Columbia, we believe that review is warranted here. Cf. *Del Vecchio* v. *Bowers,* 296 U. S. 280; *Carroll* v. *United States,* 354 U. S. 394, 414.

From earliest days, the common law drastically limited the authority of law officers to break the door of a house

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[5] 18 U. S. C. § 3109:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

The petitioner does not raise a question of the application of D. C. Code, 1951, § 4–141. See also § 4–145.

to effect an arrest.[6] Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle. As early as the 13th Year-book of Edward IV (1461–1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party. Remarks attributed[7] to William Pitt, Earl of Chatham, on the occasion of debate in Parliament on the searches incident to the enforcement of an excise on cider, eloquently expressed the principle:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

But the common law recognized some authority in law officers to break the door of a dwelling to arrest for felony. The common-law authorities differ, however, as to the circumstances in which this was the case. Hawkins says: "where one lies under a probable Suspicion only, and is not indicted, it seems the better Opinion at this Day, That no one can justify the Breaking open Doors in Order to

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[6] Judge Prettyman's opinion for the Court of Appeals in *Accarino* v. *United States*, 85 U. S. App. D. C. 394, 179 F. 2d 456, discusses comprehensively the development of the law. See also the exhaustive article, Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 673, 798 (1924).

[7] The Oxford Dictionary of Quotations (2d ed. 1953), 379. In Hansard, Parliamentary History of England (1813), vol. 15, column 1307, under the proceedings in the Commons on the cider tax in March, 1763, we find: "Mr. Pitt spoke against this measure, particularly against the dangerous precedent of admitting the officers of excise into private houses. Every man's house was his castle, he said."

apprehend him." 2 Hawkins, Pleas of the Crown (1762), c. 14, § 7; see also Foster, Crown Law (1762), 320–321. Coke appears to have been of the same view, and to have thought that the breaking of a house was limited to cases in which a writ, now our warrant, had issued. Co. 4th Inst. 177. On the other hand, Hale says that "A man, that arrests upon suspicion of felony, may break open doors, if the party refuse upon demand to open them . . . ." 1 Hale, Pleas of the Crown (1736), 583.

Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. The requirement was pronounced in 1603 in *Semayne's Case,* 5 Co. Rep. 91a, 11 E. R. C. 629, 77 Eng. Repr. 194, at 195: "In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . .*" (Emphasis supplied.)

The requirement stated in *Semayne's Case* still obtains. It is reflected in 18 U. S. C. § 3109, in the statutes of a large number of States,[8] and in the American Law

[8] Ala. Code, 1940, Tit. 15, § 155; Ariz. Rev. Stat. Ann., 1955, § 13–1411; Deering's Cal. Penal Code, § 844; Fla. Stat., 1957, 901.17; Idaho Code, 1947, § 19–611; Burns' Ann. Ind. Stat., 1956, Replacement Vol., § 9–1009; Iowa Code Ann., 1949, § 755.9; Kan. Gen. Stat., 1949, 62–1819; Ky. Rev. Stat., 1953, § 70.078; Dart's La. Crim. Code, 1943, Art. 72; Mich. Stat. Ann., 1954, § 28.880; Minn. Stat., 1945, § 629.34; Miss. Code, 1942, § 2471; Mo. Rev. Stat., 1949, § 544.200; Mont. Rev. Codes, 1947, 94–6011; Neb. Rev. Stat., 1943, § 29–411; Nev. Rev. Stat., 1957, 171.275; Clevenger-Gilbert's N. Y. Crim. Code, 1956, § 178; N. C. Gen. Stat., 1953, § 15–44; Page's Ohio Rev. Code Ann., 1953, § 2935.15; Okla. Stat. Ann., Tit. 22, § 194; Ore. Comp. Laws Ann., 1940, § 26–1530; S. C. Code, 1952,

Institute's proposed Code of Criminal Procedure, § 28.[9] It applies, as the Government here concedes, whether the arrest is to be made by virtue of a warrant, or when officers are authorized to make an arrest for a felony without a warrant. There are some state decisions holding that justification for noncompliance exists in exigent circumstances, as, for example, when the officers may in good faith believe that they or someone within are in peril of bodily harm, *Read* v. *Case,* 4 Conn. 166, or that the person to be arrested is fleeing or attempting to destroy evidence. *People* v. *Maddox,* 46 Cal. 2d 301, 294 P. 2d 6.

But whether the unqualified requirements of the rule admit of an exception justifying noncompliance in exigent circumstances is not a question we are called upon to decide in this case. The Government makes no claim here of the existence of circumstances excusing compliance. The Government concedes that compliance was required but argues that "compliance is evident from the events immediately preceding the officers' forced entry."

The rule seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by

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§ 53–198; S. D. Code, 1939, § 34.1606; Tenn. Code Ann., 1955, § 40–807; Utah Code Ann., 1953, 77–13–12; Remington's Wash. Rev. Stat., 1932, § 2082; Wyo. Comp. Stat., 1945, § 10–309.

[9] Code of Crim. Proc., American Law Institute, Official Draft (1930), § 28:

"*Right of officer to break into building.* An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in section 21, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose."

the officers would have satisfied the requirement in this case. It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture. Cf. *People* v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855; Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 798, 802 (1924).[10] But even by that test the evidence upon which the Government relies was not sufficient to justify the officers' failure expressly to notify the petitioner that they demanded admission to his apartment for the purpose of arresting him.

The single fact known to the officers upon which the Government relies is the "split-second" occurrence in which the petitioner evinced "instantaneous resistance to their entry," an "almost instinctive attempt to bar their entry after they [the officers] had identified themselves as police . . . ." It is argued that this occurrence "certainly points up that he knew their purpose immediately . . . [and], at once, realized that he had been detected and that the officers were there to arrest him";

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[10] Professor Wilgus sums up his discussion of the breaking of doors thus: "Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased." 22 Mich. L. Rev. 798, 802. (Footnotes omitted.) The dissenting opinion herein, in footnote 1, mistakenly refers to this passage as if it were a holding "enunciated" by the Court of Appeals. In fact, this passage was merely quoted without approval. The holding was: "Upon one topic there appears to be no dispute in the authorities. Before an officer can break open a door to a home, he must make known the cause of his demand for entry. There is no claim in the case at bar that the officers advised the suspect of the cause of their demand before they broke down the door." *Accarino* v. *United States*, 85 U. S. App. D. C. 394, 403, 179 F. 2d 456, 465.

that "[i]t would be wholly unrealistic to say that the officers had not made their purpose known because they did not more formally announce that they were there to arrest him."

But, first, the fact that petitioner attempted to close the door did not of itself prove that he knew their purpose to arrest him. It was an ambiguous act. It could have been merely the expected reaction of any citizen having this experience at that hour of the morning, particularly since it does not appear that the officers were in uniform, cf. *Accarino* v. *United States, supra,* 85 U. S. App. D. C., at 403, 179 F. 2d, at 465, and the answer "Police" was spoken "in a low voice" and might not have been heard by the petitioner so far as the officers could tell.

Second, petitioner's reaction upon opening the door could only have created doubt in the officers' minds that he knew they were police intent on arresting him. On the motion to suppress, agent Wilson testified that "he wanted to know what we were doing there." This query, which went unanswered, is on its face inconsistent with knowledge. The majority of the Court of Appeals denied the import of the query by inferring that Miller knew Wilson and Wurms personally and recognized them as soon as he opened the door. That inference has no support in the record.[11] But even if this inference were

[11] Judge Holtzoff heard the motion to suppress over two months before the trial. Our examination of the record made at that time brings us into complete agreement with Judge Edgerton, who, dissenting in the Court of Appeals, said, "I find no evidence, and the court cites no evidence, that supports an inference that Miller even recognized the officers as the narcotics squad." 100 U. S. App. D. C. 302, 311, 244 F. 2d 750, 759. Even if petitioner could have seen the officers sufficiently to make out their faces, there is no evidence that he knew them personally. The record at best supports an inference, not that either officer personally knew Miller, or that Miller had met, or even heard of, either officer, but only that

supportable, Miller's recognition of Wilson and Wurms as police officers would not have justified them, in light of other facts known to them, in being virtually certain that Miller actually knew the reason for their presence. The officers knew that petitioner was unaware of Shepherd's arrest; they knew that he was unaware that the currency was marked; they knew that he was unaware that their presence was pursuant to a plan, initiated by Reed's disclosures, to catch the petitioner in a criminal act. Moreover, they did not actually know that petitioner had made a sale to Shepherd and received the marked money, for Shepherd had not talked and had not been seen to enter petitioner's apartment. The fact that the marked money was found in the apartment has no bearing upon the petitioner's knowledge of the officers' purpose since he did not know that the money was marked. This Court said in *United States* v. *Di Re, supra,* at 595: "We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." The most that can be said is that the petitioner's act in attempting to close the door might be the basis for the officers being virtually certain that the petitioner knew there were police at his door conducting an investigation. This, however, falls short of a

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the officers knew *of him* as a reputed narcotics violator. Judge Youngdahl presided at the trial and refused to hear a renewed motion to suppress because he considered the matter settled by Judge Holtzoff's ruling. Agent Wilson's testimony at the trial was again at variance with his testimony before Judge Holtzoff as it had been on the question whether the officers had communicated their purpose to arrest. At the trial he testified that Miller had met him on one occasion before the night of the arrest. Apparently unwilling to rely on this testimony, in the face of its inconsistency, the majority of the Court of Appeals did not allude to it as the basis for its conclusion that Miller recognized the officers.

virtual certainty that the petitioner knew of their purpose to arrest him. The requirement is not met except by notice of that purpose, for the Government admits that the officers had no authority to break the petitioner's door except to arrest him. We must, therefore, conclude that the petitioner did not receive the required notice of authority and purpose.

We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in § 3109 the reverence of the law for the individual's right of privacy in his house.[12] Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that

[12] Compliance is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder. See concurring opinion in *McDonald* v. *United States*, 335 U. S. 451, 460–461.

notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.

Reversed.

MR. JUSTICE HARLAN concurs in the result.

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

I agree that a requirement of prior notice of authority and purpose should not be given a "grudging" application. But by the same token it should not be reduced to an absurdity. A majority of the Court of Appeals has concluded that petitioner, at the time the police entered his apartment, "already fully understood who the officers were and that they sought to arrest him." 100 U. S. App. D. C. 302, 310, 244 F. 2d 750, 758. The entry, therefore, was held valid under District of Columbia law.[1]

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[1] The rule in the District with which the Court of Appeals found compliance was enunciated in *Accarino* v. *United States,* 85 U. S. App. D. C. 394, 179 F. 2d 456 (opinion by Judge Prettyman). Rehearing *en banc* in the instant case was denied without dissent, with the author of *Accarino* participating.

In discussing the local rule, Judge Prettyman in *Accarino* quoted with approval from Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 802: "Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, *unless this is already understood, or the peril would be increased.*" (Emphasis added.) 85 U. S. App. D. C., at 401, 179 F. 2d, at 463. The Court of Appeals in the instant case recognized this language as the embodiment of the local rule, 100 U. S. App. D. C., at 309, 244 F. 2d, at 757, and in finding that petitioner "already fully understood who the officers were and that they sought to arrest him," 100 U. S. App. D. C., at 310, 244 F. 2d, at 758, applied that rule in affirming the conviction.

This Court now concludes that the rule "judicially developed" in the District is "substantially identical" to 18 U. S. C. § 3109, which

This Court now superimposes upon the local rule of the District an artificial and unrealistic requirement that, even under the circumstances found here, police must make "an express announcement" in unmistakable words that they are the police and have come to make an arrest.

The Court attempts to justify interference in local law by what it terms a "concession" of the Government that validity of the entry must be tested by a federal statute relating to forcible entry to execute a search warrant.[2] But the fact that the Government seeks clarification of a general federal statute, possibly to serve its purposes in prosecutions elsewhere, is no reason for us to oblige, especially when the result is to subvert existing local law. In the process, the Court reverses the conviction of a wholesale narcotics violator with a previous record in the traffic who carries on his abominable trade by using a juvenile as his dope peddler and co-conspirator.

The facts on which the Court of Appeals found the entry valid were these: Officers trailed Shepherd as he proceeded by taxicab to purchase heroin for Lewis, a narcotics agent. Shepherd went to the apartment occupied by his sister, Mrs. Byrd, and by petitioner. The officers saw him enter the apartment building. Agent Wilson followed him to the basement entrance and saw him disappear down a lighted hall about "as long as the jury box." Other than the entrance, there were only two

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concerns entry to execute a search warrant. It is important to note, however, that certain language, set out in italics above, is peculiar to the local "judicially developed" rule. The latter is not respected in the interpretation of § 3109 by the Court today.

[2] While the Government in its brief agrees "that the validity of the entry should be tested under the standard of 18 U. S. C. 3109," it joins that position with the contention that "[u]nder these circumstances, [the police] entry complied with the teaching accepted in *Accarino* v. *United States* [85 U. S. App. D. C. 394, 401], 179 F. 2d 456, 463." See note 1, *supra*.

doors into the hall, one leading into petitioner's apartment, the other into a furnace room. No one lived in the basement except petitioner and Mrs. Byrd. Wilson then withdrew to a location across the street. He saw a light go on in the furnace room, remain on shortly, and then go out. Shepherd soon emerged, re-entered the taxicab and drove away. The officers followed, arrested Shepherd, and seized 100 capsules of heroin found in the taxicab.

The opinion of the Court of Appeals graphically described the subsequent events:

> "After the arrest of Shepherd, the officers, having found the 100 capsules of heroin, immediately went back to the apartment occupied by Mrs. Byrd and Miller, and, a few minutes later, knocked on the door and announced their identity. Thereupon Miller, known to the officers as a narcotics violator, having opened his door part way, recognized the officers of the narcotics squad and attempted to close the door. As he pulled the door to, the officers resisted his effort to close it, a chain bolt broke, and the officers arrested Miller and Mrs. Byrd." 100 U. S. App. D. C., at 304, 244 F. 2d, at 752.

This summary is amply supported by the evidence. Wilson testified that petitioner previously met him when he was an agent with the Federal Bureau of Narcotics. He also knew petitioner in connection with a narcotics case. Officer Wurms testified that he too knew petitioner officially.[3] As to their entry into the apartment, Wurms testified: "I knocked on the front door . . . somebody

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[3] Q. "How did you know [Miller]?" A. "Previous knowledge, and I have seen him before." Furthermore, petitioner in his affidavit supporting his motion to suppress swore "that officers Wilson, Pappas and four others did break the chain off the door," and further that Wilson physically assaulted him in his apartment.

asked, 'Who's there?' I said, 'Blue'—in a low voice, I said 'Police.' I repeated it two or three times, in that manner. The door opened. There was a chain on the door. Blue Miller saw me, Agent Wilson, and I don't know who else he saw but he tried to close the door . . . ." Wilson described the entry this way: "There was a short struggle there between Wurms and Miller to open the door and finally the door was forced open and we got ourselves into the apartment." The officers found the marked currency and a carton of one thousand unfilled gelatin capsules. Three hundred and eighty-one such capsules filled with heroin were found in the furnace room across the hall.

At a pretrial hearing petitioner moved to suppress the marked currency, alleging that the officers had neither warrant nor probable cause for arrest. This motion was denied. At trial before a jury and a different judge the motion was renewed. In denying the motion, the judge said, "I will give you the right to make another motion. You certainly have a right at the end of the testimony." Petitioner never availed himself of this opportunity.

On appeal petitioner shifted his ground, emphasizing that even if the officers had probable cause to arrest him, such authority was improperly exercised because they did not formally announce their purpose before entry. The Court of Appeals held:

> "Against the background of the facts as noted and the law as summarized, we find the officers at Miller's door, knowing that a felony had been committed and having probable cause to believe it was continuing. The statute spelled out their clear duty to arrest." 100 U. S. App. D. C. 302, 309, 244 F. 2d 750, 757.

The court agreed with the trial judge "that the attempt of the officers to arrest Miller at his doorway under the circumstances of this case was not unreasonable," and found

that the breaking of the door chain "in the course of his resistance [was] immaterial and his arrest, immediately made, was justified." 100 U. S. App. D. C., at 310, 244 F. 2d, at 758. Concluding that Miller without doubt was aware both of the officers' identity and purpose, the court upheld the refusal of the trial court to suppress the evidence, and found the proof of guilt "overwhelming and unanswerable."

The majority, however, brushes aside these conclusions, explaining petitioner's action in slamming the door as "the expected reaction of any citizen." This is something entirely foreign to my concept of the respect a law-abiding citizenry pays to its law-enforcement officers. Nor can I accept the conclusion of the Court that the circumstances found by the Court of Appeals fall "short of a virtual certainty that the petitioner knew of [the officers'] purpose to arrest him." His knowledge—in the absence of an express admission by him—can never be a "virtual certainty." Rather than attempting to psychoanalyze petitioner, we should measure his understanding by his outward acts. The Court of Appeals found that they indisputably established petitioner's awareness of the police purpose. We should not disturb that finding.

The majority does not deal with the "exigent circumstances" of the case because the Government makes no claim for thus "excusing compliance" with the statute. It is to be noted, however, that the Court of Appeals expressly based its opinion on the fact that the officers "were confronted by the need for a decision arising from the necessitous circumstances of the situation." The position of the Government does not excuse us from evaluating the circumstances of the whole case. I believe that the Court of Appeals was eminently correct in its conclusion that "necessitous circumstances" here warranted the officers in entering the apartment. As that court pointed out, petitioner might have fled or hidden

himself or destroyed the fruits of his crime, particularly in view of his background and the visit of his brother-in-law Shepherd only a few moments before. Certainly he soon would have learned of Shepherd's arrest. Moreover, his attempt to forcibly prevent the entry of the officers into his apartment required their immediate action. Any delay might well have precluded the arrest. Destruction of the marked money might have prevented the establishment of petitioner's guilt. As the Government points out, "split-second action [was] necessary."

I would affirm the judgment on the basis of the District of Columbia rule in *Accarino, supra,* which I believe this Court should honor.[4]

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[4] See *Fisher* v. *United States,* 328 U. S. 463, 476 (1946), where the Court said, "Our policy is not to interfere with the local rules of law which [District of Columbia courts] fashion, save in exceptional situations where egregious error has been committed."

In *Griffin* v. *United States,* 336 U. S. 704 (1949), the Court determined that there was no "federal rule" on the issue in the case. But it added that even if there were such a rule, it would not necessarily control in the District of Columbia: "This Court, in its decisions, and Congress, in its enactment of statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law." *Id.,* at 712. The Court noted that it was the "special function" of the Court of Appeals to decide questions of local law. "Only in exceptional cases will this Court review a determination of such a question by the Court of Appeals for the District." *Id.,* at 718.

CITY OF TACOMA *v.* TAXPAYERS OF TACOMA ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 509. Argued April 30, 1958.—Decided June 23, 1958.

Under the Federal Power Act, the City of Tacoma, a municipality of the State of Washington authorized to construct and operate electric power plants, applied for a license to construct and operate a hydro-electric project on navigable waters. Its application was opposed by the State on the ground, *inter alia,* that one of the reservoirs which would be created by the proposed dams would inundate a fish hatchery owned by the State; but the Commission issued the license. Under § 313 of the Act, the State petitioned the Court of Appeals for review and challenged the Commission's authority to issue the license, on the ground, *inter alia,* that the City could not act in opposition to the policy of the State. Holding that state laws cannot prevent the Commission from issuing a license or bar the licensee from acting thereunder, the Court of Appeals affirmed the Commission's order. This Court denied certiorari. In a proceeding by the City for a judgment declaring valid a bond issue to finance the project, a state court enjoined the City from proceeding with the project. The Supreme Court of Washington affirmed, on the ground that the City was not authorized by state law to condemn state-owned property. This Court granted certiorari. *Held:* The judgment is reversed. Pp. 322–341.

1. The fact that the project cannot be completed before expiration of the license does not require dismissal of the writ on the ground that the case is moot, because § 13 of the Act expressly authorizes the Commission to extend the time for completing the project, and an application for extension is pending. P. 333.

2. Under § 313 (b) of the Act, the judgment of the Court of Appeals became final upon this Court's denial of certiorari; it is binding upon the State, its officers and its citizens, including the taxpayers of Tacoma; and the objections and claims to the contrary asserted by the State, its officers and the taxpayers of Tacoma in the bond-validation suit were impermissible collateral attacks upon, and *de novo* litigation between the same parties of issues

determined by, the final judgment of the Court of Appeals. Pp. 334–341.

(a) Under the Commerce Clause, the Federal Government has dominion, to the exclusion of the States, over navigable waters of the United States. P. 334.

(b) Under § 313 (b) of the Federal Power Act, the Court of Appeals had "exclusive jurisdiction" to review the Commission's order; all objections to the order, to the licenses to be issued thereunder, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all; and the judgment of the Court of Appeals is "final," subject to review by this Court. Pp. 335–337.

(c) Upon review of the Commission's order, the Court of Appeals overruled the State's contention that the City, as a creature of the State, had no right to take or destroy property of the State. Pp. 337–339.

(d) Even if it be thought that this issue was not raised in the Court of Appeals, that was the only place where it could be raised, because the Court of Appeals had "exclusive jurisdiction" and Congress has declared that its judgment "shall be final," subject to review by this Court. P. 339.

(e) The decision of the Court of Appeals left open possible questions with reference to "indebtedness limitations" in the City's charter and other "questions of this nature"; but it did not leave open the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license. Pp. 339–340.

(f) The final judgment of the Court of Appeals was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens, were represented by the State in those proceedings and, like it, were bound by the judgment. Pp. 340–341.

49 Wash. 2d 781, 307 P. 2d 567, reversed and remanded.

Northcutt Ely argued the cause for petitioner. With him on the brief were *Marshall McCormick, Paul J. Nolan, Robert L. McCarty, C. Emerson Duncan, II,* and *Charles F. Wheatley, Jr.*

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By special leave of Court, 356 U. S. 916, *Oscar H. Davis* argued the cause for the United States and the Federal Power Commission, as *amici curiae,* urging reversal. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Lionel Kestenbaum, Willard D. Gatchell* and *Howard E. Wahrenbrock* filed a brief for the Federal Power Commission, as *amicus curiae,* urging reversal.

John S. Lynch, Jr. and *E. P. Donnelly,* Assistant Attorney General of Washington, argued the cause for respondents. *Mr. Lynch* filed a brief for the Taxpayers of Tacoma, Washington, respondents. With *Mr. Donnelly* on a brief were *John J. O'Connell,* Attorney General, and *Philip R. Meade,* Assistant Attorney General, for the State of Washington et al., respondents; and joining them in this brief were the States of Iowa, by *Norman A. Erbe,* Attorney General; Michigan, by *Paul L. Adams,* Attorney General; Montana, by *Forrest H. Anderson,* Attorney General; Nevada, by *Harvey Dickerson,* Attorney General; New Mexico, by *Fred M. Standley,* Attorney General; Vermont, by *Frederick M. Reed,* Attorney General; Virginia, by *A. S. Harrison, Jr.,* Attorney General; and Wisconsin, by *Stewart G. Honeck,* Attorney General, and *Roy G. Tulane* and *James H. McDermott,* Assistant Attorneys General.

Mr. Justice Whittaker delivered the opinion of the Court.

This is the latest episode in litigation beginning in 1948 which has been waged in five tribunals and has produced more than 125 printed pages of administrative and judicial opinions. It concerns the plan of the City of Tacoma, a municipal corporation in the State of Washington, to construct a power project on the Cowlitz River, a navigable water of the United States, in accordance with a

license issued by the Federal Power Commission under the Federal Power Act.[1] The question presented for decision here is whether under the facts of this case the City of Tacoma has acquired federal eminent domain power and capacity to take, upon the payment of just compensation, a fish hatchery owned and operated by the State of Washington, by virtue of the license issued to the City under the Federal Power Act and more particularly § 21 thereof.[2] The project cannot be built without taking the hatchery because it necessarily must be inundated by a reservoir that will be created by one of the project's dams.

The question has arisen under the following circumstances and proceedings. Having earlier filed its declaration of intention to construct the project,[3] the City of Tacoma, a "municipality" [4] in the State of Washington, on December 28, 1948, filed with the Commission, under

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[1] 41 Stat. 1063 *et seq.*, 16 U. S. C. § 791a *et seq.*

[2] 41 Stat. 1074, 16 U. S. C. § 814.

[3] On August 6, 1948, the City filed with the Commission its declaration of intention to build this power project. On March 18, 1949, the Commission ruled that the Cowlitz River was navigable below the proposed project and that its construction would affect navigation and interstate commerce and, hence, could not be built without a license from the Commission, because of the provisions of § 23 of the Federal Power Act. 41 Stat. 1075, 16 U. S. C. § 816.

[4] "'Municipality' [as used in the Federal Power Act] means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." § 3 (7), 41 Stat. 1063, 16 U. S. C. § 796 (7).

By a Washington statute all cities and towns of that State are made legally competent to "construct, condemn and purchase, purchase, acquire, add to, maintain, and operate works, plants, and facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes . . . ." Wash. Rev. Code 80.40.050. Tacoma has exercised such powers since 1893.

§ 4 (e) of the Federal Power Act,[5] an application [6] for a federal license to construct a power project, including two dams (known as Mossyrock and Mayfield) and appurtenant facilities, on the Cowlitz River.[7]

The Mossyrock development was proposed to be located at Mile 65 and to consist of a concrete dam across the Cowlitz rising 510 feet above bedrock (creating a reservoir covering about 10,000 acres extending 21 miles upstream) and an integral powerhouse containing, initially, three generators each of 75,000-kilowatt capacity and provisions for a fourth generator of like capacity.

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[5] 41 Stat. 1065, 16 U. S. C. § 797 (e). That subsection, so far as presently pertinent, provides:

"The commission is authorized and empowered—

. . . . . .

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, powerhouses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States . . . ."

[6] The application was accompanied by the maps, plans, specifications and estimates of cost covering the proposed project, as required by § 9 (a) of the Act. 41 Stat. 1068, 16 U. S. C. § 802 (a). Those maps, plans and specifications made clear that the State's hatchery would be inundated by the proposed Mayfield Reservoir.

[7] The Cowlitz River is a tributary of the Columbia in southwestern Washington. It drains an area of 2,490 square miles of the western slope of the Cascade Range, and flows westerly for about 100 miles and thence southerly for 30 miles to its confluence with the Columbia at Longview which is about 65 miles above the mouth of the Columbia. It is conceded to be navigable at all points below the projected Mayfield Dam and, at the point of confluence with the Columbia, is a tidal river with an average flow of about 10,000 cubic feet per second.

The Mayfield development was proposed to be located at Mile 52 and to consist of a concrete dam across the Cowlitz rising 240 feet above bedrock (creating a reservoir covering about 2,200 acres extending 13.5 miles upstream to the tailwaters of the Mossyrock Dam, which would inundate the State's fish hatchery) and an integral powerhouse containing, initially, three generators each of 40,000-kilowatt capacity and provisions for a fourth generator of like capacity. The project—estimated to cost $146,000,000, including $9,465,000 for devices to enable anadromous fish to pass to spawning grounds upstream and their young to pass to the sea, and for new fish hatcheries—would thus have initial capacity to produce 345,000 kilowatts or 474,000 horsepower, and eventually 460,000 kilowatts or 632,000 horsepower, of electrical energy.

The Commission ordered a public hearing to determine whether the license should issue, and gave notice of the hearing to the Governor of the State of Washington. In response, the Attorney General of the State filed an intervening petition, in the names of the State's Directors of Fisheries and of Game, alleging in substance that the State's Departments of Fisheries and of Game are subdivisions of the sovereign State, and that the respective Directors are charged with the duty of enforcing its laws concerning the conservation of fish and game; that the dams and fish-handling facilities proposed by the City would destroy fishery resources of the State; that construction of proposed dams would violate Wash. Rev. Code 90.28.060, requiring the State's permission to construct any dam for the storage of 10 acre-feet or more of water, and Wash. Rev. Code 75.20.010, prohibiting the construction of any dam higher than 25 feet across any river tributary to the Columbia, downstream from the McNary Dam, within the migratory range of anadromous fish; and "[t]hat the reservoirs which would be created by the pro-

posed dams would inundate a valuable and irreplaceable fish hatchery owned by the State of Washington, as well as . . . productive spawning areas." The City's answer admitted that the State's fish hatchery would be inundated by the Mayfield Reservoir. The State's Attorney General also appointed a Special Assistant Attorney General to represent all persons of the State whose views were in conflict with the State's official position.

Upon the issues thus framed a hearing, consuming 24 days, was conducted by a Commission examiner, throughout which the Attorney General of the State, by his designated assistant, actively participated in opposition to the application, and the Special Assistant Attorney General, appointed for the purpose stated, also participated in the proceedings before the Commission. Thereafter the Commission, on November 28, 1951, rendered its opinion,[8] findings,[9] and order granting the license.[10] *Re City of*

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[8] The Commission's opinion discussed at length the State's basic contention that the river should be left in its natural state for the unobstructed use and propagation of anadromous fish and, upon that contention, concluded:

"The question posed does not appear to us to be between all power and no fish but rather between large power benefits (needed particularly for defense purposes), important flood control benefits and navigation benefits, with incidental recreation and intangible benefits, balanced against some fish losses, or a retention of the stream in its present natural condition until such time in the fairly near future when economic pressures will force its full utilization. With proper testing and experimentation by the city of Tacoma, in co-operation with interested state and Federal agencies, a fishery protective program can be evolved which will prevent undue loss of fishery values in relation to the other values. For these reasons we are issuing the license with certain conditions which are set forth in our accompanying order." 92 P. U. R. (N. S.) 79, 85.

[9] In its order granting the license the Commission made 66 findings in which, among other things, it found that the Cowlitz is a navigable water of the United States below the site of the proposed project

[*Footnote 10 begins on p. 327.*]

Tacoma, 92 P. U. R. (N. S.) 79. The State petitioned for a rehearing which was denied.

Pursuant to § 313 of the Act, 16 U. S. C. § 825*l*, the State, in its proper name and also on behalf of its Direc-

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and that the dams and reservoirs will affect the interests of interstate or foreign commerce (see §§ 4 (e) and 23 of the Act, 41 Stat. 1065, 1075, 16 U. S. C. §§ 797 (e), 816); that a critical shortage of electric power exists on the west side of the Cascade Range; that the project "will be an exceptionally valuable addition to the Northwest Region power supply"; that "none of the hydroelectric projects suggested for construction in lieu of the Cowlitz Project can be constructed as quickly or as economically as the Cowlitz Project"; that the project has been approved by the Chief of Engineers and the Secretary of the Army (see § 4 (e), 41 Stat. 1065, 16 U. S. C. § 797 (e)); that the project is financially and economically feasible; that "*the Applicant . . . has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project* [see § 9 (b), 41 Stat. 1068, 16 U. S. C. § 802 (b)] and it is a municipality within the meaning of Section 3 (7) of the Act"; and that "[u]nder present circumstances and conditions and upon the terms and conditions hereinafter included in the license, *the project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the conservation and preservation of fish and wildlife resources, and for other beneficial public uses including recreational purposes.*" See § 10 (a), 41 Stat. 1068, 16 U. S. C. § 803 (a). (Emphasis added.)

[10] The license was issued on November 28, 1951, for a period of 50 years from January 1, 1952—the first day of the month in which the City filed with the Commission its ordinance, No. 14386, enacted on January 9, 1952, formally accepting the license and all its requirements and conditions. See § 6, 41 Stat. 1067, 16 U. S. C. § 799. The license, among other things, incorporated the City's maps, plans, specifications, and estimates of cost for the construction of the project (see § 9 (a), 41 Stat. 1068, 16 U. S. C. § 802 (a)); incorporated by reference all provisions of the Federal Power Act (see § 6, 41 Stat. 1067, 16 U. S. C. § 799); required construction of the project to be commenced within two years from the effective date of the license and to be completed within 36 months (see § 13, 41 Stat. 1071, 16 U. S. C. § 806); required the City to construct, maintain and operate

tors of Fisheries and of Game, petitioned for review of the Commission's order by the Court of Appeals for the Ninth Circuit. The City intervened. The State there challenged the Commission's authority to issue the license principally upon the grounds that the City had not complied with applicable state laws nor obtained state permits and approvals required by state statutes; [11] that "Tacoma, as a creature of the State of Washington, *cannot act* in opposition to the policy of the State or in derogation of its laws" (emphasis added); and that the evidence was not sufficient to sustain the Commission's findings and order. The Court of Appeals, holding that "state laws cannot prevent the Federal Power Commission from issuing a license *or bar the licensee from acting under the license* to build a dam on a navigable stream since the stream is under the dominion of the United States" and that there was ample evidence to sustain the Commission's findings and its order, affirmed. *Washington Department of Game* v. *Federal Power Comm'n,* 207 F. 2d 391, 396. (Emphasis added.) The State then petitioned this Court for a writ of certiorari which was denied. 347 U. S. 936.

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such fish-handling facilities and fish hatcheries as may be prescribed by the Commission, but, before doing so, to make further studies, tests and experiments in cooperation with the United States Fish and Wildlife Service and the Departments of Fisheries and of Game of the State of Washington to determine the effectiveness of such facilities, and to submit the plans therefor to the Commission and obtain its approval.

[11] The Washington statutes relied upon were Wash. Rev. Code 75.20.050, proscribing the diversion or use of water without a state permit; Wash. Rev. Code 75.20.100, requiring the State's approval of plans for the protection of fish in connection with the construction of dams; and Wash. Rev. Code 75.20.010, proscribing the construction of any dam higher than 25 feet across any stream tributary to the Columbia, downstream from the McNary Dam, within the migration range of anadromous fish.

While the petition for review was pending in the Ninth Circuit, the City, on February 3, 1952, commenced an action in the Superior Court of Pierce County, Washington, against the taxpayers of Tacoma and the State's Directors of Fisheries and of Game, seeking a judgment declaring valid a large issue of revenue bonds, authorized by the City's Ordinance (No. 14386) of January 9, 1952, to be issued and sold by Tacoma to finance the construction of the Cowlitz project—a proceeding specifically authorized by Wash. Rev. Code 7.25.010 through 7.25.040. As required by those statutes the court named representative taxpayers of Tacoma as class defendants and also appointed their counsel who demurred to the City's complaint. The State's Directors of Fisheries and of Game, acting through an Assistant Attorney General of the State, filed an answer and also a cross-complaint (reasserting substantially the same objections that they and the State had made before the Commission, and that had been made in, and rejected by, the Court of Appeals on their petition for review) to which the City demurred. The judge of the Superior Court sustained the Taxpayers' demurrer and dismissed the suit.[12] Tacoma appealed to the Supreme Court of Washington. That court, three justices dissenting, reversed the judgment and remanded the cause with instructions to overrule the Taxpayers' demurrer and to proceed further consistently with the court's opinion. *City of Tacoma* v. *Taxpayers of Tacoma,* 43 Wash. 2d 468, 262 P. 2d 214.[13]

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[12] This order was entered by the Superior Court of Thurston County to which the cause had been transferred.

[13] The court, in answering the contentions of the Taxpayers and the State's Directors of Fisheries and of Game that the State's statutes proscribing the diversion of water and the construction of dams (see note 11) "are a valid exercise of the [State's] police power" (43 Wash. 2d, at 483, 262 P. 2d, at 222) and "must be complied with before [the City] can proceed with the construction of its project"

Following that opinion the City, on June 21, 1955, accepted bids for a block of its revenue bonds totaling $15,000,000, and on the next day it awarded contracts for construction of the Mayfield Dam aggregating $16,120,870. Two days later, June 24, 1955, the Directors "acting for and on behalf of the State" moved in the Superior Court for, and obtained, *ex parte,* an order enjoining the City, pending determination of the suit, from proceeding to construct the Cowlitz project or to sell any of its revenue bonds. That order was modified on June 30, 1955, to permit such construction work as would not in any manner interfere with the bed or waters of the Cowlitz River. Promptly thereafter the City began construction of the project, within the limits of the injunction, and had expended about $7,000,000 thereon to the time the work was completely enjoined as later stated.

On July 27, 1955, Tacoma amended its complaint merely to assert the intervening facts that the Commis-

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(43 Wash. 2d, at 477, 262 P. 2d, at 219), said: "[T]hese state laws are in direct conflict with the Federal power act, they are invalid under the terms of the supremacy clause contained in article VI of the United States Constitution, [and] [w]here, as here, the state and Federal acts cannot be reconciled or consistently stand together, the action of a state even under its police power must give way." 43 Wash. 2d, at 483, 262 P. 2d, at 222. And in answering the further contention that the City, "being a municipal corporation created by the state, may not defy the laws of its creator" (43 Wash. 2d, at 491, 262 P. 2d, at 227), the court said: "The Federal power act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. *Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act.*" 43 Wash. 2d, at 492, 262 P. 2d, at 227. (Emphasis added.)

sion, upon application of the City which was opposed by the State, had, on the basis of delays entailed by this litigation, entered an order on February 24, 1954, amending Articles 28 and 33 of the City's license by extending the time for commencing and for completing the project to December 31, 1955, and December 31, 1958, respectively, and that the City had amended its pertinent ordinance (No. 14386) accordingly and in other minor respects. On August 8, 1955, on motion made by the State's Attorney General (in the names of the Directors of Fisheries and of Game), the State, "in its sovereign capacity," was formally made a defendant in the action. The State and those Directors answered, and also filed a cross-complaint again reviving the objections previously made by the Directors in their earlier cross-complaint and alleging further that the project would interfere with navigation of the Cowlitz River in violation of Wash. Rev. Code 80.40.010. Upon pretrial conference the Superior Court found that the navigation issue was the only one open and ordered that the evidence at the trial be limited to that issue. On January 11, 1956, the case was tried and the testimony taken was limited solely to the navigation issue. On March 6, 1956, the court, holding that the State's statutes proscribing the construction of dams (note 11) are "inapplicable," but that the City "is acting illegally and in excess of its authority in the construction of the . . . project as presently proposed for the reason that said project would necessarily impede, obstruct or interfere with public navigation contrary to the proviso of R. C. W. 80.40.010 et seq.," entered judgment in favor of the Taxpayers and the State, and enjoined the City from proceeding to construct the project.

Tacoma appealed, and the Taxpayers, the State and its Directors cross-appealed, to the Supreme Court of Wash-

ington. On February 7, 1957, that court,[14] three justices dissenting, affirmed. *City of Tacoma* v. *Taxpayers of Tacoma,* 49 Wash. 2d 781, 307 P. 2d 567. It agreed that the Washington statutes proscribing the construction of dams (note 11) were "inapplicable . . . insofar as the same conflict with the provisions of the Federal Power Act or the terms and conditions of [the City's] License for said project, or insofar as they would enable State officials to exercise a veto over said project" (49 Wash. 2d, at 801, 307 P. 2d, at 577), but it disapproved the action of the trial court in sustaining the State's objection that the project would interfere with navigation in violation of Wash. Rev. Code 80.40.010. However, upon the declared premise that though the trial court's judgment was based upon an erroneous ground it would sustain it if correct on any ground within the pleadings and established by proof, it held that, though the State Legislature has given the City the right to construct and operate facilities for the production and distribution of electric power and a general power of condemnation for those purposes, "the legislature has [not] expressly authorized a municipal corporation to condemn state-owned land previously dedicated to a public use [and] that the city of Tacoma has not been endowed with [State] statutory capacity to condemn [the State's fish hatchery]"; that "the city of Tacoma [may not] receive the power and capacity to condemn [the State's fish hatchery] previously dedicated to a public use, from the license issued to it by the Federal power commission in the absence of such power and capacity *under state statutes*" (emphasis

[14] The Supreme Court of Washington was then somewhat differently constituted than when it rendered its decision on October 14, 1953, reversing the Superior Court's judgment sustaining the Taxpayers' demurrer to the City's complaint. *City of Tacoma* v. *Taxpayers of Tacoma,* 43 Wash. 2d 468, 262 P. 2d 214.

added); and that the City's *"inability so to act can be remedied only by state legislation that expands its capacity."* (Emphasis in original.) 49 Wash. 2d, at 798, 799, 307 P. 2d, at 576, 577. This, it said, "is not a question of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal power act, to delegate that right. It only questions the capacity of a municipal corporation of this state *to act under such license* when its exercise requires the condemnation of state-owned property dedicated to a public use." 49 Wash. 2d, at 798, 307 P. 2d, at 576. (Emphasis added.) We granted certiorari. 355 U. S. 888.

At the outset respondents ask dismissal of our writ on the ground that the case is moot. They argue that it is evident the Cowlitz project cannot be completed by December 31, 1958, which is the date now stated in the license for its completion. There is no merit in this contention because § 13 of the Federal Power Act, 41 Stat. 1071, 16 U. S. C. § 806, expressly provides that "the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the Commission when not incompatible with the public interests," and an application by the City is now pending before the Commission for an extension of completion time based upon delays entailed by these proceedings.

We come now to the core of the controversy between the parties, namely, whether the license issued by the Commission under the Federal Power Act to the City of Tacoma gave it capacity to act under that federal license in constructing the project and delegated to it federal eminent domain power to take, upon the payment of just compensation, the State's fish hatchery—essential to the construction of the project—in the absence of state legislation specifically conferring such authority.

At the threshold of this controversy petitioner, the City, asserts that, under the express terms of § 313 (b) of the Act, 16 U. S. C. § 825*l* (b), this question has been finally determined by the decision of the Court of Appeals (207 F. 2d 391) and this Court's denial of certiorari (347 U. S. 936); and that respondents' cross-complaints, and proceedings thereon, in the subsequent bond validation suit in the Washington courts have been only impermissible collateral attacks upon the final judgment of the Court of Appeals. If this assertion is correct, the judgment of the Supreme Court of Washington now before us would necessarily have to be reversed, for obviously that court, like this one, may not, in such a case, re-examine and decide a question which has been finally determined by a court of competent jurisdiction in earlier litigation between the parties. We must turn then to an examination of petitioner's contention.

It is no longer open to question that the Federal Government under the Commerce Clause of the Constitution (Art. I, § 8, cl. 3) has dominion, to the exclusion of the States, over navigable waters of the United States. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *New Jersey* v. *Sargent*, 269 U. S. 328, 337; *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 424; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm'n*, 328 U. S. 152, 173; *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224–225. Congress has elected to exercise this power under the detailed and comprehensive plan [15] for development of the Nation's water resources, which it prescribed in the Federal Power Act, to be administered by the Federal Power Commission. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm'n, supra; United States* v. *Appalachian Electric Power Co., supra.*

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[15] For a summary of the detailed and comprehensive plan of the Act see *First Iowa* case, *supra*, at 181, note 25.

Section 313 (b) of that Act, upon which petitioner's claim of finality depends, provides, in pertinent part:

> "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located . . . by filing in such court, within 60 days after the order of [the] Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court *shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part.* No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. . . . *The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.*" 16 U. S. C. § 825*l* (b). (Emphasis added.)

This statute is written in simple words of plain meaning and leaves no room to doubt the congressional purpose

and intent. It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. Cf. *Labor Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388. So acting, Congress in § 313 (b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders. *Safe Harbor Water Power Corp.* v. *Federal Power Comm'n,* 124 F. 2d 800, 804, cert. denied, 316 U. S. 663. It there provided that any party aggrieved by the Commission's order may have judicial review, upon all issues raised before the Commission in the motion for rehearing, by the Court of Appeals which "shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part," and that "[t]he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final,* subject to review by the Supreme Court of the United States upon certiorari or certification . . . ." (Emphasis added.) It thereby necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review.[16] Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have "exclusive jurisdiction" to review such orders, and that its judgment "shall be final," subject to review by this Court upon certiorari or certification. Such statutory finality need not be labeled *res*

[16] Cf., *e. g., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 48–50; *United States* v. *Corrick*, 298 U. S. 435; *Washington Terminal Co.* v. *Boswell,* 75 U. S. App. D. C. 1, 124 F. 2d 235.

judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts.

The State participated in the hearing before the Commission. It there vigorously objected to the issuance of the license upon the grounds, among others, "[t]hat the reservoirs which would be created by the proposed dams would inundate a valuable and irreplaceable fish hatchery owned by the State" and, hence, necessarily require the taking of it by the City under the license sought; that the City had not complied with the applicable laws of the State respecting construction of the project and performance of the acts necessarily incident thereto (note 11); and that the City was not authorized by the laws of the State to engage in such business. The Commission rejected these contentions of the State and made all the findings required by the Act to support its order granting the license (note 9) including the finding that:

> "The Applicant . . . has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project; [17] and it is a municipality within the meaning of Section 3 (7) of the Act." [18]

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[17] See § 9 (b) of the Act, 41 Stat. 1068, 16 U. S. C. § 802 (b).

[18] Under § 3 (7) of the Act "municipality" means, among other things, a city "competent under the laws [of the State] to carry on the business of developing, transmitting, utilizing, or distributing power." 41 Stat. 1063, 16 U. S. C. § 796 (7). It is no longer disputed that Tacoma is expressly authorized by Wash. Rev. Code 80.40.050 to carry on such business, and that it has done so for many years. In fact the State's brief in this Court goes much further, saying that "[i]mplicit in the state court's ruling is that petitioner, if licensed, could build a dam on a plan which would not necessitate the destruction of the state fish hatchery," and that "Tacoma . . . has the right to build the dam in such a way that the fish hatchery will not be damaged."

The State then petitioned the Commission for a rehearing, reviving the foregoing contentions and raising others. The petition was denied.

Thereafter, the State, following the procedures prescribed by § 313 (b), petitioned the proper Court of Appeals for review of the Commission's findings and order. After full hearing, that court rejected all contentions there raised by the State, did not disturb any of the Commission's findings, and affirmed its order without modification. *Washington Department of Game* v. *Federal Power Comm'n,* 207 F. 2d 391. It made particular mention of, and approved, the Commission's finding, as rephrased by the court, that the City had submitted "such evidence of compliance with state law as, in the Commission's judgment, would be 'appropriate to effect the purposes of a Federal license on the navigable waters of the United States.' " *Id.,* at 396.

Moreover, in its briefs in the Court of Appeals, the State urged reversal of the Commission's order on the grounds that the City "has not shown, nor could it show, that [it] has availed itself of . . . *any right to take or destroy the property of the State* of Washington [and that] Tacoma, as a creature of the State of Washington, *cannot act* [under the license] in opposition to the policy of the State or in derogation of its laws." (Emphasis added.) In rejecting these contentions—that the City does not have "any right to take or destroy property of the State" and "cannot act" in accordance with the terms of its federal license—the Court of Appeals said:

> "Again, we turn to the First Iowa case, supra. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with

> the declared policy of its creator, and to prevail in obtaining a license.
>
> "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license *or bar the licensee from acting under the license* to build a dam on a navigable stream since the stream is under the dominion of the United States." *Id.*, at 396. (Emphasis added.)

We think these recitals show that the very issue upon which respondents stand here was raised and litigated in the Court of Appeals and decided by its judgment. But even if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that was the court to which Congress had given "exclusive jurisdiction to affirm, modify, or set aside" the Commission's order. And the State may not reserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court—which had "exclusive jurisdiction" of the proceeding and whose judgment therein as declared by Congress "shall be final," subject to review by this Court upon certiorari or certification. After the Court of Appeals' judgment was rendered, the State petitioned this Court for a writ of certiorari which was denied. 347 U. S. 936.

These were precisely the proceedings prescribed by Congress in § 313 (b) of the Act for judicial review of the Commission's findings and order. They resulted in affirmance. That result, Congress has declared, "shall be final."

But respondents say that the Court of Appeals did not decide the question of legal capacity of the City to act

under the license and, therefore, its decision is not final on that question, but left it open to further litigation. They rely upon the following language of the opinion:

> "However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." *Id.*, at 396–397.

We believe that respondents' construction of this language is in error. The questioned language expressly refers to possible "indebtedness limitations" in the City's Charter and "questions of this nature," not to the right of the City to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license. That this was the meaning of the court, if its meaning might otherwise be doubtful, is made certain by the facts that the court did not disturb a single one of the Commission's findings; affirmed its order without modification; and said, in the sentence immediately preceding the questioned language: "Consistent with the First Iowa case, supra, we conclude that the state laws cannot prevent the Federal Power Commission from issuing a license *or bar the licensee from acting under the license* to build a dam on a navigable stream since the stream is under the dominion of the United States." *Id.*, at 396. (Emphasis added.)

The final judgment of the Court of Appeals was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their

common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment. *Wyoming* v. *Colorado,* 286 U. S. 494, 506–509; cf. *Missouri* v. *Illinois,* 180 U. S. 208, 241; *Kansas* v. *Colorado,* 185 U. S. 125, 142; s. c. 206 U. S. 46, 49; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237; *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 591, 595; *North Dakota* v. *Minnesota,* 263 U. S. 365, 373.

We conclude that the judgment of the Court of Appeals, upon this Court's denial of the State's petition for certiorari, became final under § 313 (b) of the Act, and is binding upon the State of Washington, its Directors of Fisheries and of Game, and its citizens, including the taxpayers of Tacoma; and that the objections and claims to the contrary asserted in the cross-complaints of the State, its Directors of Fisheries and of Game, and the Taxpayers of Tacoma, in this bond validation suit, were impermissible collateral attacks upon, and *de novo* litigation between the same parties of issues determined by, the final judgment of the Court of Appeals. Therefore, the judgment of the Supreme Court of Washington is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion, but deem it appropriate to state my understanding of what the Court has held. The Court of Appeals in the earlier proceeding had jurisdiction to determine whether state or federal law governed Tacoma's power to condemn the State's hatchery, and that issue itself was a federal question. Section 313 (b) of the Federal Power Act therefore foreclosed relitigation

of this issue in the present case. I do not understand the Court to suggest that the Federal Power Act endowed the Commission and the Court of Appeals with authority to decide any issues of state law if such law were deemed controlling, or that had the Court of Appeals undertaken to do so, such a determination would have foreclosed re-examination of such a decision in other proceedings.

MORAND ET UX. *v.* CITY OF RALEIGH.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 949. Decided June 23, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 247 N. C. 363, 100 S. E. 2d 870.

Herman L. Taylor and *Samuel S. Mitchell* for appellants.

William Joslin for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

DUNN ET AL. *v.* COUNTY OF LOS ANGELES ET AL.

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

No. 952. Decided June 23, 1958.

Appeal dismissed and certiorari denied.
Reported below: 155 Cal. App. 2d 789, 318 P. 2d 795.

Henry W. Robinson for appellants.

Harold W. Kennedy for the County of Los Angeles, appellee.

Roger J. Whiteford, John J. Wilson, Oscar John Dorwin and *Ray A. Pittman, Jr.*, for the Texas Company, appellee.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

NATIONAL LABOR RELATIONS BOARD *v.* MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNIONS NOS. 338 AND 680, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO.

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

No. 412. Decided June 23, 1958.

Certiorari granted and judgment reversed on authority of cases cited. Reported below: 245 F. 2d 817.

Solicitor General Rankin, Jerome D. Fenton, Stephen Leonard, Dominick L. Manoli and *Norton J. Come* for petitioner.

Samuel J. Cohen for Local 338, respondent.

Thomas L. Parsonnet for Local 680, respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed on the authority of *Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, et al.* v. *National Labor Relations Board; National Labor Relations Board* v. *General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL–CIO;* and *Local 850, International Association of Machinists, AFL–CIO,* v. *National Labor Relations Board,* all decided together June 16, 1958, and reported *ante,* p. 93.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS dissent for the reasons stated in the dissenting opinion of MR. JUSTICE DOUGLAS in these cases.

KLAW *v.* SCHAFFER, POSTMASTER, NEW YORK CITY.

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

No. 921. Decided June 23, 1958.

Motion to substitute new party respondent denied as untimely. Certiorari granted; judgment vacated; and case remanded to District Court with instructions to dismiss complaint as abated.

Reported below: 251 F. 2d 615.

Joseph E. Brill and *Coleman Gangel* for petitioner.

Solicitor General Rankin, Assistant Attorney General Doub, Roger Fisher and *Samuel D. Slade* for respondent.

PER CURIAM.

The motion to substitute Howard Coonen, individually and Regional Operations Director in charge of the United States Post Office at New York, New York, as the party respondent in the place and stead of Robert H. Schaffer, resigned, is denied as untimely. *Snyder* v. *Buck*, 340 U. S. 15. The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded to the District Court with instructions to dismiss the complaint as abated.

GLANZMAN, DOING BUSINESS AS GLANZMAN STUDIOS AND BOWERY ENTERPRISES, *v.* SCHAFFER, POSTMASTER, NEW YORK CITY.

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

No. 986. Decided June 23, 1958.

Motion to substitute new party respondent denied as untimely. Certiorari granted; judgment vacated; and case remanded to District Court with instructions to dismiss complaint as abated.

Reported below: 252 F. 2d 333.

David T. Berman for petitioner.

Solicitor General Rankin, Assistant Attorney General Doub, Roger Fisher and *Samuel D. Slade* for respondent.

PER CURIAM.

The motion to dispense with the printing of the petition is granted. The motion to substitute Robert K. Christenberry, Acting Postmaster, New York, New York, as the party respondent in the place and stead of Robert H. Schaffer, resigned, is denied as untimely. *Snyder* v. *Buck,* 340 U. S. 15. The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded to the District Court with instructions to dismiss the complaint as abated.

WASHINGTON *v.* UNITED STATES.

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

No. 1012. Decided June 23, 1958.

Certiorari granted; judgment reversed because of insufficiency of the evidence; and case remanded.

Reported below: 253 F. 2d 913.

Daniel D. Glasser for petitioner.

Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg and *Robert G. Maysack* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed because of the insufficiency of the evidence and the case is remanded to that Court.

MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE WHITTAKER dissent.

WIENER *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 52. Argued November 18, 1957.—Decided June 30, 1958.

Petitioner was a member of the War Claims Commission created by Congress "to receive and adjudicate according to law" claims for compensating internees, prisoners of war and religious organizations who suffered personal injury or property damage at the hands of the enemy in connection with World War II. The Commission's determinations were to be "final" and "not subject to review by any other official of the United States or by any court." The Commissioners' terms were to expire with the life of the Commission, and there was no provision for removal of a Commissioner. Appointed by President Truman and confirmed by the Senate, petitioner was removed by President Eisenhower before the expiration of the life of the Commission, on the ground that the Act should be administered "with personnel of my own selection." Petitioner sued in the Court of Claims to recover his salary as a Commissioner from the date of his removal to the last day of the Commission's existence. *Held:* The President had no power under the Constitution or the Act to remove a member of this adjudicatory Commission, and the Court of Claims erred in dismissing petitioner's suit. Pp. 349–356.

135 Ct. Cl. 827, 142 F. Supp. 910, reversed.

I. H. Wachtel argued the cause and filed a brief for petitioner.

Solicitor General Rankin argued the cause for the United States. With him on the brief were *Assistant Attorney General Doub, Paul A. Sweeney* and *Herman Marcuse.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit for back pay, based on petitioner's alleged illegal removal as a member of the War Claims Commission. The facts are not in dispute. By the War Claims

Act of 1948, 62 Stat. 1240, Congress established that Commission with "jurisdiction to receive and adjudicate according to law," § 3, claims for compensating internees, prisoners of war, and religious organizations, §§ 5, 6 and 7, who suffered personal injury or property damage at the hands of the enemy in connection with World War II. The Commission was to be composed of three persons, at least two of whom were to be members of the bar, to be appointed by the President, by and with the advice and consent of the Senate. The Commission was to wind up its affairs not later than three years after the expiration of the time for filing claims, originally limited to two years but extended by successive legislation first to March 1, 1951, 63 Stat. 112, and later to March 31, 1952, 65 Stat. 28. This limit on the Commission's life was the mode by which the tenure of the Commissioners was defined, and Congress made no provision for removal of a Commissioner.

Having been duly nominated by President Truman, the petitioner was confirmed on June 2, 1950, and took office on June 8, following. On his refusal to heed a request for his resignation, he was, on December 10, 1953, removed by President Eisenhower in the following terms: "I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection." The following day, the President made recess appointments to the Commission, including petitioner's post. After Congress assembled, the President, on February 15, 1954, sent the names of the new appointees to the Senate. The Senate had not confirmed these nominations when the Commission was abolished, July 1, 1954, by Reorganization Plan No. 1 of 1954, 68 Stat. 1279, issued pursuant to the Reorganization Act of 1949, 63 Stat. 203. Thereupon, petitioner brought this proceeding in the Court of Claims for recovery of his salary as a War Claims Commissioner

from December 10, 1953, the day of his removal by the President, to June 30, 1954, the last day of the Commission's existence. A divided Court of Claims dismissed the petition, 135 Ct. Cl. 827, 142 F. Supp. 910. We brought the case here, 352 U. S. 980, because it presents a variant of the constitutional issue decided in *Humphrey's Executor* v. *United States,* 295 U. S. 602.*

Controversy pertaining to the scope and limits of the President's power of removal fills a thick chapter of our political and judicial history. The long stretches of its history, beginning with the very first Congress, with early echoes in the Reports of this Court, were laboriously traversed in *Myers* v. *United States,* 272 U. S. 52, and need not be retraced. President Roosevelt's reliance upon the pronouncements of the Court in that case in removing a member of the Federal Trade Commission on the ground that "the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection" reflected contemporaneous professional opinion regarding the significance of the *Myers* decision. Speaking through a Chief Justice who himself had been President, the Court did not restrict itself to the immediate issue before it, the President's inherent power to remove a postmaster, obviously an executive official. As of set purpose and not by way of parenthetic casualness, the

*An earlier *quo warranto* proceeding initiated by petitioner was dismissed; an appeal from this judgment was dismissed as moot by stipulation of the parties. The Government's contention that that judgment estops petitioner from relitigating certain issues in the present proceeding does not, in the special circumstances presented on this record, call for consideration on the merits. It was not urged, as in the particular situation it should have been, as a "ground why the cause should not be reviewed by this court." Rule 24 (1) of the Revised Rules of the Supreme Court of the United States. In thus disposing of the matter, we do not mean to imply any support on the merits of the Government's claim.

Court announced that the President had inherent constitutional power of removal also of officials who have "duties of a quasi-judicial character . . . whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control." *Myers* v. *United States, supra,* at 135. This view of presidential power was deemed to flow from his "constitutional duty of seeing that the laws be faithfully executed." *Ibid.*

The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure. The versatility of circumstances often mocks a natural desire for definitiveness. Within less than ten years a unanimous Court, in *Humphrey's Executor* v. *United States,* 295 U. S. 602, narrowly confined the scope of the *Myers* decision to include only "all purely executive officers." 295 U. S., at 628. The Court explicitly "disapproved" the expressions in *Myers* supporting the President's inherent constitutional power to remove members of quasi-judicial bodies. 295 U. S., at 626–627. Congress had given members of the Federal Trade Commission a seven-year term and also provided for the removal of a Commissioner by the President for inefficiency, neglect of duty or malfeasance in office. In the present case, Congress provided for a tenure defined by the relatively short period of time during which the War Claims Commission was to operate—that is, it was to wind up not later than three years after the expiration of the time for filing of claims. But nothing was said in the Act about removal.

This is another instance in which the most appropriate legal significance must be drawn from congressional failure of explicitness. Necessarily this is a problem in prob-

abilities. We start with one certainty. The problem of the President's power to remove members of agencies entrusted with duties of the kind with which the War Claims Commission was charged was within the lively knowledge of Congress. Few contests between Congress and the President have so recurringly had the attention of Congress as that pertaining to the power of removal. Not the least significant aspect of the *Myers* case is that on the Court's special invitation Senator George Wharton Pepper, of Pennsylvania, presented the position of Congress at the bar of this Court.

Humphrey's case was a *cause célèbre*—and not least in the halls of Congress. And what is the essence of the decision in Humphrey's case? It drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government," 295 U. S., at 625–626, as to whom a power of removal exists only if Congress may fairly be said to have conferred it. This sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference. "For it is quite evident," again to quote *Humphrey's Executor*, "that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U. S., at 629.

Thus, the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission. What were the duties that Congress confided to this Commission? And can the inference fairly be drawn from the failure of Congress to

provide for removal that these Commissioners were to remain in office at the will of the President? For such is the assertion of power on which petitioner's removal must rest. The ground of President Eisenhower's removal of petitioner was precisely the same as President Roosevelt's removal of Humphrey. Both Presidents desired to have Commissioners, one on the Federal Trade Commission, the other on the War Claims Commission, "of my own selection." They wanted these Commissioners to be their men. The terms of removal in the two cases are identic and express the assumption that the agencies of which the two Commissioners were members were subject in the discharge of their duties to the control of the Executive. An analysis of the Federal Trade Commission Act left this Court in no doubt that such was not the conception of Congress in creating the Federal Trade Commission. The terms of the War Claims Act of 1948 leave no doubt that such was not the conception of Congress regarding the War Claims Commission.

The history of this legislation emphatically underlines this fact. The short of it is that the origin of the Act was a bill, H. R. 4044, 80th Cong., 1st Sess., passed by the House that placed the administration of a very limited class of claims by Americans against Japan in the hands of the Federal Security Administrator and provided for a Commission to inquire into and report upon other types of claims. See H. R. Rep. No. 976, 80th Cong., 1st Sess. The Federal Security Administrator was indubitably an arm of the President. When the House bill reached the Senate, it struck out all but the enacting clause, rewrote the bill, and established a Commission with "jurisdiction to receive and adjudicate according to law" three classes of claims, as defined by §§ 5, 6 and 7. The Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination "not subject to

review by any other official of the United States or by any court by mandamus or otherwise," § 11. Awards were to be paid out of a War Claims Fund in the hands of the Secretary of the Treasury, whereby such claims were given even more assured collectability than adheres to judgments rendered in the Court of Claims. See S. Rep. No. 1742, 80th Cong., 2d Sess. With minor amendment, see H. R. Conf. Rep. No. 2439, 80th Cong., 2d Sess. 10–11, this Senate bill became law.

When Congress has for distribution among American claimants funds derived from foreign sources, it may proceed in different ways. Congress may appropriate directly; it may utilize the Executive; it may resort to the adjudicatory process. See *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423. For Congress itself to have made appropriations for the claims with which it dealt under the War Claims Act was not practical in view of the large number of claimants and the diversity in the specific circumstances giving rise to the claims. The House bill in effect put the distribution of the narrow class of claims that it acknowledged into Executive hands, by vesting the procedure in the Federal Security Administrator. The final form of the legislation, as we have seen, left the widened range of claims to be determined by adjudication. Congress could, of course, have given jurisdiction over these claims to the District Courts or to the Court of Claims. The fact that it chose to establish a Commission to "adjudicate according to law" the classes of claims defined in the statute did not alter the intrinsic judicial character of the task with which the Commission was charged. The claims were to be "adjudicated according to law," that is, on the merits of each claim, supported by evidence and governing legal considerations, by a body that was "entirely free from the control or coercive influence, direct or indirect," *Humphrey's Executor* v. *United States, supra,* 295 U. S., at 629, of

either the Executive or the Congress. If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

For such is this case. We have not a removal for cause involving the rectitude of a member of an adjudicatory body, nor even a suspensory removal until the Senate could act upon it by confirming the appointment of a new Commissioner or otherwise dealing with the matter. Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it. The philosophy of *Humphrey's Executor,* in its explicit language as well as its implications, precludes such a claim.

The judgment is

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* UNITED STEELWORKERS OF AMERICA, CIO, ET AL.

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

No. 81. Argued January 29, 1958.—Decided June 30, 1958.*

These two cases involve the question whether, in the circumstances, it was an unfair labor practice within the meaning of § 8 (a) (1) of the National Labor Relations Act, as amended, for an employer to enforce an otherwise valid rule forbidding employees to engage in pro-union solicitation during working hours or to distribute literature in the employer's plant, when the employer was engaging in anti-union solicitation and was committing other acts which constituted unfair labor practices. In one case the employer's anti-union campaign was so conducted as to constitute an unfair labor practice. In neither case was it shown that the employees or the union had requested the employer to make an exception to permit pro-union solicitation or that the no-solicitation rule actually diminished the ability of the labor organization involved to carry its messages to the employees. *Held:* The records in these cases furnish no basis for findings that enforcement of the no-solicitation rules constituted unfair labor practices. Pp. 358–365.

100 U. S. App. D. C. 170, 243 F. 2d 593, reversed in part, affirmed in part and cause remanded.

242 F. 2d 669, affirmed.

Dominick L. Manoli argued the causes for petitioner. With him on the briefs were *Jerome D. Fenton* and *Stephen Leonard*. *Solicitor General Rankin* and *Frederick U. Reel* were also with them on the brief in No. 289.

David E. Feller argued the cause for the United Steelworkers of America, CIO, respondent in No. 81. With him on the brief was *Arthur J. Goldberg*.

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*Together with No. 289, *National Labor Relations Board* v. *Avondale Mills*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

Frank A. Constangy argued the cause for respondent in No. 289. With him on the brief were *M. A. Prowell* and *Fred W. Elarbee, Jr.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These two cases, argued in succession, are controlled by the same considerations and will be disposed of in a single opinion. In one case the National Labor Relations Board ruled that it was not an unfair labor practice for an employer to enforce against his employees a no-solicitation rule, in itself concededly valid, while the employer was himself engaged in anti-union solicitation in a context of separate unfair labor practices. This ruling was reversed by a Court of Appeals.[1] In the second case the Board on the basis of similar facts, except that the employer's anti-union solicitation by itself constituted a separate unfair labor practice, found the enforcement of the rule to have been an unfair labor practice, but another Court of Appeals denied enforcement of the

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[1] The statutory basis for the decision that this conduct constituted an unfair labor practice was § 8 (a)(1) of the National Labor Relations Act, 49 Stat. 449, 452, as amended by 61 Stat. 136, 140, 29 U. S. C. § 158 (a)(1), which provides:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . ."

Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)."

Board's order. We brought both cases here because of the importance of the question they present in the administration of the Taft-Hartley Act, and because of the apparent conflict in the decisions in the Courts of Appeals. 353 U. S. 921; 355 U. S. 811.

No. 81.—In April of 1953 the respondent Steelworkers instituted a campaign to organize the employees of respondent NuTone, Inc., a manufacturer of electrical devices. In the early stages of the campaign, supervisory personnel of the company interrogated employees and solicited reports concerning the organizational activities of other employees. Several employees were discharged; the Board later found that the discharges had been the result of their organizational activities. In June the company began to distribute, through its supervisory personnel, literature that, although not coercive, was clearly anti-union in tenor. In August, while continuing to distribute such material, the company announced its intention of enforcing its rule against employees' posting signs or distributing literature on company property or soliciting or campaigning on company time. The rule, according to these posted announcements, applied to "all employees—whether they are for or against the union." Later the same month a representation election was held, which the Steelworkers lost.

In a proceeding before the Board commenced at the instance of the Steelworkers, the company was charged with a number of violations of the Act alleged to have taken place both before and after the election, including the discriminatory application of the no-solicitation rule. The Board found that the pre-election interrogation and solicitation by supervisory personnel and the discharge of employees were unfair labor practices; it also found that the company had, in violation of the Act, assisted and supported an employee organization formed after the

election. However, the Board dismissed the allegation that the company had discriminatorily enforced its no-solicitation rule. 112 N. L. R. B. 1153. The Steelworkers sought review of this dismissal in the United States Court of Appeals for the District of Columbia Circuit, and the Board petitioned for enforcement of its order in the same court. The Court of Appeals concluded that it was an unfair labor practice for the company to prohibit the distribution of organizational literature on company property during non-working hours while the company was itself distributing anti-union literature; and it directed that the Board's order be modified accordingly and enforced as modified. 100 U. S. App. D. C. 170, 243 F. 2d 593.

No. 289.—In the fall of 1954 the Textile Workers conducted an organizational campaign at several of the plants of respondent Avondale Mills. A number of individual employees were called before supervisory personnel of the company, on the ground that they had been soliciting union membership, and informed that such solicitation was in violation of plant rules and would not be tolerated in the future. The rule had not been promulgated in written form, but there was evidence that it had been previously invoked in a non-organizational context. During this same period, both in these interviews concerning the rule and at the employees' places of work, supervisory personnel interrogated employees concerning their organizational views and activities and solicited employees to withdraw their membership cards from the union. This conduct was in many cases accompanied by threats that the mill would close down or that various employee benefits would be lost if the mill should become organized. Subsequently three employees, each of whom had been informed of the no-solicitation rule, were laid off and eventually discharged for violating the rule.

As a result of charges filed with the Board by the Textile Workers, a complaint was brought against the company alleging that it had committed a number of unfair labor practices, including the discriminatory invocation of the no-solicitation rule and the discharge of employees for its violation. The Board found that the interrogation, solicitation and threatening of employees by the company's supervisory personnel were unfair labor practices. Moreover, it found that resort to the no-solicitation rule and discharge of the three employees for its violation were discriminatory and therefore in violation of the Act; it further held that, even if the rule had not been invoked discriminatorily, the discharge of one of the employees had resulted solely from his organizational activities apart from any violation of the rule and was therefore an unfair labor practice. The Board ordered the cessation of these practices and the reinstatement of the discharged employees. 115 N. L. R. B. 840. Upon the Board's petitioning for enforcement in the Court of Appeals for the Fifth Circuit, the company contested only the portions of the Board's findings and order relating to the rule and the discharges. The court enforced the uncontested portions of the order but, finding insufficient evidence of discrimination in the application of the no-solicitation rule, denied enforcement to the portion of the order relating to the rule and to two of the discharges. As to the third discharge, the court agreed with the Board that it was the result of discrimination unrelated to a violation of the rule, and the court enforced the portion of the Board's order directing the employee's reinstatement. 242 F. 2d 669.

Employer rules prohibiting organizational solicitation are not in and of themselves violative of the Act, for they may duly serve production, order and discipline. See *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793;

Labor Board v. *Babcock & Wilcox Co.*, 351 U. S. 105. In neither of the cases before us did the party attacking the enforcement of the no-solicitation rule contest its validity. Nor is the claim made that an employer may not, under proper circumstances, engage in non-coercive anti-union solicitation; indeed, his right to do so is protected by the so-called "employer free speech" provision of § 8 (c) of the Act.[2] Contrariwise, as both cases before us show, coercive anti-union solicitation and other similar conduct run afoul of the Act and constitute unfair labor practices irrespective of the bearing of such practices on enforcement of a no-solicitation rule. The very narrow and almost abstract question here derives from the claim that, when the employer himself engages in anti-union solicitation that if engaged in by employees would constitute a violation of the rule—particularly when his solicitation is coercive or accompanied by other unfair labor practices—his enforcement of an otherwise valid no-solicitation rule against the employees is itself an unfair labor practice. We are asked to rule that the coincidence of these circumstances necessarily violates the Act, regardless of the way in which the particular controversy arose or whether the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication. For us to lay down such a rule of law would show indifference to the responsibilities imposed by the Act primarily on the Board to appraise carefully the interests of both sides of any labor-management con-

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[2] 49 Stat. 449, 452, as amended by 61 Stat. 136, 142, 29 U. S. C. § 158 (c):

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

troversy in the diverse circumstances of particular cases and in light of the Board's special understanding of these industrial situations.

There is no indication in the record in either of these cases that the employees, or the union on their behalf, requested the employer, himself engaging in anti-union solicitation, to make an exception to the rule for pro-union solicitation. There is evidence in both cases that the employers had in the past made exceptions to their rules for charitable solicitation. Notwithstanding the clear anti-union bias of both employers, it is not for us to conclude as a matter of law—although it might well have been open to the Board to conclude as a matter of industrial experience—that a request for a similar qualification upon the rule for organizational solicitation would have been rejected. Certainly the employer is not obliged voluntarily and without any request to offer the use of his facilities and the time of his employees for pro-union solicitation. He may very well be wary of a charge that he is interfering with, or contributing support to, a labor organization in violation of § 8 (a)(2) of the Act.[3]

No attempt was made in either of these cases to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their messages to the employees. Just as that is a vital consideration in determining the validity of a no-solicitation rule, see *Republic Aviation Corp.* v. *Labor Board, supra,* at 797–798; *Labor Board* v. *Babcock & Wilcox Co., supra,* at 112, it is highly relevant in determining whether a valid rule has been fairly applied. Of course the rules had the effect of closing off one channel of communica-

[3] 49 Stat. 449, 452, as amended by 61 Stat. 136, 140, 29 U. S. C. § 158 (a)(2).

tion; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. Cf. *Bonwit Teller, Inc.*, v. *Labor Board,* 197 F. 2d 640, 646; *Labor Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78, 84 (concurring opinion). No such mechanical answers will avail for the solution of this non-mechanical, complex problem in labor-management relations. If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these "otherwise valid" rules. The Board, in determining whether or not the enforcement of such a rule in the circumstances of an individual case is an unfair labor practice, may find relevant alternative channels available for communications on the right to organize. When this important issue is not even raised before the Board and no evidence bearing on it adduced, the concrete basis for appraising the significance of the employer's conduct is wanting.

We do not at all imply that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation may not constitute an unfair labor practice. All we hold is that there must be some basis, in the actualities of industrial relations, for such a finding. The records in both cases—the issues raised in the proceedings—are barren of the ingredients for such a finding. Accordingly the judgment in No. 81 is reversed, insofar as it sets aside and requires the Board to modify its order, and the cause is remanded to

the Court of Appeals for proceedings not inconsistent with this opinion; in all other respects, it is affirmed. The judgment in No. 289 is affirmed.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would affirm the judgment in No. 81 for the reasons set forth in the opinion of the Court of Appeals, 100 U. S. App. D. C. 170, 243 F. 2d 593.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join in the dissent in No. 289, *Labor Board* v. *Avondale Mills.*

MR. CHIEF JUSTICE WARREN dissenting in part and concurring in part.

These two cases concern the issue of whether the enforcement of company rules preventing union solicitation or distribution is an unfair labor practice when concurrent with this enforcement the employer embarks on a program of advocacy against the union. Contrary to what is stated in the opinion of the Court, I do not believe that both these cases are controlled by the same considerations. The pivotal distinction is that in *Labor Board* v. *Avondale Mills* the employer's antiunion activities were coercive in nature, while in *Labor Board* v. *United Steelworkers* they were not. I dissent from the judgment in No. 289, *Avondale Mills,* and concur in the result in No. 81, *United Steelworkers.*

In *Avondale Mills* this Court affirms the judgment of the Court of Appeals, which refused to enforce that portion of an order of the National Labor Relations Board which held that enforcement of the company's rule against solicitation on the premises during working hours was an unfair labor practice contrary to Section 8 (a)(1) of the National Labor Relations Act. I cannot agree with the conclusion of the majority that the record is

insufficient to sustain the action of the Board. Their conclusion depends on two circumstances. The first is the failure of the union or the employees to request the employer not to enforce his antisolicitation rule during the union organizing campaign. This is a slender reed. Union membership cards were first distributed to employees on November 10, 1954. On the very next day certain employees were summoned to the office of a management representative, who read the following statement:

> "It has come to our attention that you are attempting to solicit union membership in this plant during working hours, while the employees that you are attempting to solicit are at work. This is a violation of plant rules and any future instances of this sort will result in prompt dismissal."

Immediately thereafter the company's supervisory personnel engaged in a series of personal confrontations with union members and other employees, threatening loss of jobs and other benefits in case the organizing campaign continued or the plant became unionized. Furthermore, there was substantial evidence from which the Board was able to conclude that prior to November 11, 1954, there was in fact no rule against solicitation on the premises during working hours and that the rule was invoked solely as an antiunion measure. None of these conclusions was disturbed by the court below, which merely held that the invocation of the rule under these facts was part of the employer's right to oppose the union. The majority thus attaches significance, where the Board did not, to the fact that the union failed to request the company to grant for the union's benefit an exception to a rule that was promulgated to keep the union out.

The second circumstance on which the majority relies is the failure of the Board to make findings that reason-

able alternatives were not open to the union in the face of the no-solicitation rule. Admittedly, evidence and findings of this nature were elements in cases where the validity of employer no-solicitation and no-distribution rules was in issue. See *Labor Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105; *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793. However, there has heretofore been no indication that such evidence and findings were indispensable elements to every case in which these employer rules were being examined.[1] In contrast to *Babcock* and *Republic Aviation* we are not concerned here with the validity of these rules *per se*. The no-solicitation rule under examination here may well be valid if fairly applied. But the Board held that it was not fairly applied on account of its link to the company's campaign of coercion, and the evidence and findings on that issue are far more relevant to this case than a discussion of the site of the plant, the nature of the surrounding area, and the places of residence of the workers.

While praising "the Board's special understanding of these industrial situations," the majority opinion reverses the Board on the very sort of issues that are within its special competence. An examination of the record shows that the Board has already carefully apprized itself of the interests of both sides in this controversy. An employer

[1] In the opinion in *Republic Aviation* all that appears is that the company was a large nonurban manufacturer, many of whose employees lived at distances greater than walking distance from the plant in the Long Island area. 324 U. S., at 800. The opinion goes on to note that in both the *Republic Aviation* case and its companion *Le Tourneau Co.* case, "No evidence was offered that any unusual conditions existed in labor relations, the plant location or otherwise to support any contention that conditions at this plant differed from those occurring normally at any other large establishment." *Supra,* at 801. Evidence and findings now required by this Court were similarly absent in *Matter of Peyton Packing Co.*, 49 N. L. R. B. 828, quoted with approval in *Republic Aviation, supra,* at 803, n. 10.

has forbidden his employees to engage in union solicitation within the plant during working hours. He contemporaneously engages in a campaign of coercive antiunion solicitation during those same working hours. The validity of both practices—the enforcement of the no-solicitation rule and the coercive antiunion solicitation—comes into question, for they are not separable. Under one set of circumstances the no-solicitation rule may be valid. However, the determination as to whether an employer's antiunion activities are an unfair labor practice depends on the context in which those activities occur,[2] and no-solicitation rules are to be subjected to the same kind of scrutiny. Employees during working hours are the classic captive audience. At the very moment the employees in this case were under the greatest degree of control by their employer, they were forced to listen to denunciations of the union coupled with clear references to the personal disasters that would ensue if the union succeeded or if the particular employee continued to solicit for the union. These threats were themselves held to be unfair labor practices by the Board, and that holding was enforced by the Court of Appeals and is not in issue here. During this same working time the unionized employees, who under Section 7 of the National Labor Relations Act have a right to engage in concerted activity, were unable, due to their employer's own rule, to try to overcome the effect of his activities even though those activities were in violation of Section 8 (a)(1) of the Act. It is not necessary to suggest that in all circumstances a union must have the same facilities and opportunity to solicit employees as the employer has in opposing the union. However, the plant premises and working time are such decisive factors during

[2] Cf. *Labor Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469; *International Assn. of Machinists* v. *Labor Board*, 311 U. S. 72.

a labor dispute that when an employer denies them to the union and at the same time pursues his own program of coercion on the premises and during working hours, this denial is by itself an interference with the rights guaranteed in Section 7 of the Act and hence contrary to Section 8 (a)(1).

There is no issue in this case of balancing the employee's rights under Section 7 with the employer's right to promote "the legally authorized expression of his anti-union views." The only expression of views carried on by Avondale Mills was a series of threats against the union. Far from being "legally authorized," this expression of views constituted an unfair labor practice by itself. Thus we are not concerned in this case with the possibility of curtailing legitimate employer expression in violation of either the First Amendment or Section 8 (c) of the National Labor Relations Act. Moreover, it is no aid to the company that all the activities here involved occurred on plant property and during working hours. When a choice has been required between an employer's rights in his premises and the rights that Congress has protected under Section 7, this Court has not hesitated to give effect to the congressional will. *Republic Aviation Corp.* v. *Labor Board, supra; Labor Board* v. *Stowe Spinning Co.*, 336 U. S. 226; cf. *Labor Board* v. *Babcock & Wilcox Co., supra.*

In *United Steelworkers,* I concur in the result. The National Labor Relations Board declined to hold that the enforcement of an employer's no-distribution rule against a union was an unfair labor practice even though it was coupled with an antiunion campaign. The Court of Appeals reversed the Board on this point, modifying the Board's order accordingly. This Court sustains the Board. It is conceded that the enforcement of this no-distribution rule against the union is not by itself an

unfair labor practice. The Board determined that the employer's expressions of his antiunion views were noncoercive in nature. This fact creates a vital distinction between this case and *Avondale Mills*. Being noncoercive in nature, the employer's expressions were protected by Section 8 (c) of the National Labor Relations Act [3] and so cannot be used to show that the contemporaneous enforcement of the no-distribution rule was an unfair labor practice.[4]

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[3] "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[4] See H. R. Rep. No. 245, 80th Cong., 1st Sess. 8, 33; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 45. See also the remarks of Senator Taft during the Senate debate on the Act. 93 Cong. Rec. 6443–6444, 6446–6447, 6859–6860.

Syllabus.

KNAPP *v.* SCHWEITZER, JUDGE OF THE COURT OF GENERAL SESSIONS, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 189. Argued March 6, 10, 1958.—Decided June 30, 1958.

Subpoenaed before a state grand jury which was conducting an inquiry regarding violations of state laws, petitioner refused to answer certain questions on the ground of possible self-incrimination. After being granted under a state statute immunity from state prosecution and being ordered by a state court to answer, petitioner persisted in his refusal, on the ground that to answer the questions might expose him to federal prosecution for violation of a federal statute. For such refusal, he was convicted in the state court of contempt and sentenced to fine and imprisonment. *Held:* His conviction did not violate his rights under the Fifth Amendment, which limits only the powers of the Federal Government and not those of the States. Pp. 372–381.

(a) To sustain petitioner's contention that, because Congress has made certain conduct a federal crime, the Fifth Amendment enables him to assert against a State Government the privilege against giving testimony that might tend to implicate him in a violation of the federal statute, would disregard the historic distribution of power in our federal system between the Federal Government and the States. Pp. 374–377.

(b) Though the Fourteenth Amendment did impose some restrictions upon the States in the making and enforcement of criminal laws, it did not fundamentally change the great division of powers between the Federal Government and the States in the enforcement of the criminal law. P. 378.

(c) The right of the States, as a means of investigating and discovering corruption and misconduct which violate state laws, to require full disclosure in exchange for immunity of a witness from state prosecution cannot be denied on the ground that it may expose the witness to prosecution under federal law. Pp. 378–379.

(d) The sole purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling the Federal Government to convict him out of his own mouth. Pp. 379–380.

2 N. Y. 2d 913, 975, 141 N. E. 2d 825, 142 N. E. 2d 649, affirmed.

Bernard H. Fitzpatrick argued the cause for petitioner. With him on the brief was *William J. Keating.*

Richard G. Denzer argued the cause for respondents. With him on the brief were *Frank S. Hogan, Charles W. Manning, H. Richard Uviller* and *Harold Birns.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner is a partner in a New York manufacturing firm engaged in interstate commerce, some of whose employees have been organized by a local union of the International Brotherhood of Teamsters. Petitioner was subpoenaed to appear before a New York grand jury conducting an inquiry regarding bribery of labor representatives, conspiracy and extortion, constituting crimes under state law. Petitioner, duly sworn, was asked a question concerning the union's representation in certain wage negotiations with petitioner's firm; he refused to answer on the ground that his answer might tend to incriminate him. The grand jury then granted petitioner immunity from prosecution, applying N. Y. Penal Law, §§ 381, 2447, which provides that one duly granted immunity

> "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding." § 2447 (2).

Having been thus granted immunity, petitioner was directed to answer the question. He again refused to do so on the ground of possible self-incrimination.

In a subsequent appearance before the grand jury, petitioner was asked, and was directed to answer by the foreman, fourteen other questions concerning relations

and transactions between petitioner and union officials. Petitioner again invoked the privilege against self-incrimination. On application of the foreman of the grand jury, respondent Schweitzer, as judge of a New York Court of General Sessions, ordered petitioner to return to the grand jury and make answer to the questions put to him.

After further refusal to answer, petitioner was once more ordered to appear before respondent Schweitzer; when he did so, the respondent district attorney moved that petitioner be punished for contempt of court. In opposition to this application petitioner stood on his refusal to answer inasmuch as the immunity granted by the grand jury did not protect him against federal prosecution. Respondent Schweitzer adjudged petitioner in contempt of court and sentenced him to serve thirty days in jail and to pay a fine of $250. 4 Misc. 2d 449, 157 N. Y. S. 2d 820.

Petitioner applied to the Supreme Court of New York for reversal of the contempt conviction and for an order prohibiting respondents from proceeding further in the matter. He alleged that his danger of self-incrimination was attributable to the prosecutorial potentialities of § 302 of the Labor Management Relations Act of 1947, 61 Stat. 136, 157, 29 U. S. C. § 186, making it unlawful

> "for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce" (§ 302 (a)),

and to the fact that the United States Attorney for the Southern District of New York had "made public announcement of his intention to cooperate with the [respondent] District Attorney . . . in the prosecution of criminal cases in the field of the subject matter out of which petitioner's commitment arose." The petition for

reversal of the contempt conviction was denied by the Supreme Court; this judgment was unanimously affirmed in the Appellate Division, 2 App. Div. 2d 579, 157 N. Y. S. 2d 158, and, without opinion, by the Court of Appeals of New York, 2 N. Y. 2d 913, 141 N. E. 2d 825, which duly amended its remittitur to show that it had passed on and rejected petitioner's claim of a privilege against self-incrimination under the Fifth Amendment, 2 N. Y. 2d 975, 142 N. E. 2d 649. We granted certiorari, 355 U. S. 804, to consider this constitutional question.

Petitioner does not claim that his conviction of contempt for refusal to answer questions put to him in a state proceeding deprived him of liberty or property without due process of law in violation of the Fourteenth Amendment; that such a claim is without merit was settled in *Twining* v. *New Jersey,* 211 U. S. 78. His contention is, rather, that, because the Congress of the United States has in the exercise of its constitutional powers made certain conduct unlawful, the Fifth Amendment gives him the privilege, which he can assert against either a State or the National Government, against giving testimony that might tend to implicate him in a violation of the federal Act.[1] Because of the momentum of adjudication whereby doctrine expands from case to case, such a claim carries dangerous implications. It may well lead to the contention that when Congress enacts a statute carrying criminal sanctions it has as a practical matter withdrawn from the States their traditional power to investigate in aid of prosecuting conventional state

[1] No force or validity is added to petitioner's argument by the invocation of the Supremacy Clause, Art. VI, cl. 2, and the Privileges and Immunities Clause of the Fourteenth Amendment. Whatever the applicability of the Fifth Amendment, it is in no way expanded by those two provisions. Cf. *Twining* v. *New Jersey, supra,* at 99: "[T]he exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship . . . ."

crimes, some facts of which may be entangled in a federal offense. To recognize such a claim would disregard the historic distribution of power as between Nation and States in our federal system.

The essence of a constitutionally formulated federalism is the division of political and legal powers between two systems of government constituting a single Nation. The crucial difference between federalisms is in a wide sweep of powers conferred upon the central government with a reservation of specific powers to the constituent units as against a particularization of powers granted to the federal government with the vast range of governmental powers left to the constituent units. The difference is strikingly illustrated by the British North America Act, 1867, 30 Vict., c. 3, and the Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., c. 12. It is relevant to remind that our Constitution is one of particular powers given to the National Government with the powers not so delegated reserved to the States or, in the case of limitations upon both governments, to the people. Except insofar as penal remedies may be provided by Congress under the explicit authority to "make all Laws which shall be necessary and proper for carrying into Execution" the other powers granted by Art. I, § 8, the bulk of authority to legislate on what may be compendiously described as criminal justice, which in other nations belongs to the central government, is under our system the responsibility of the individual States.

The choice of this form of federal arrangement was the product of a jealous concern lest federal power encroach upon the proper domain of the States and upon the rights of the people. It was the same jealous concern that led to the restrictions on the National Government expressed by the first ten amendments, colloquially known as the Bill of Rights. These provisions are deeply concerned with procedural safeguards pertaining to crim-

inal justice within the restricted area of federal jurisdiction. They are not restrictions upon the vast domain of the criminal law that belongs exclusively to the States.[2] Needless to say, no statesman of his day cared more for safeguarding the liberties that were enshrined in the Bill of Rights than did James Madison. But it was his view that these liberties were already protected against federal action by the Constitution itself. "My own opinion," he wrote to Thomas Jefferson, "has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly

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[2] In 1833 Mr. Chief Justice Marshall had this to say:

"Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

"But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments." *Barron* v. *Baltimore,* 7 Pet. 243, 250.

executed could not be of disservice. I have not viewed it in an important light 1. Because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. . . ." [3] Plainly enough the limitations arising from the manner in which the federal powers were granted were limitations on the Federal Government, not on the States. The Bill of Rights that Madison sponsored because others anxiously desired that these limitations be made explicit patently was likewise limited to the Federal Government. If conclusive proof of this were needed, it is afforded by the fact that when Madison came to sponsor the Bill of Rights in the House of Representatives as safeguards against the Federal Government he proposed that like safeguards against the States be placed in the United States Constitution.[4] Congress, however, rejected such limitations upon state power.

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[3] Letter to Thomas Jefferson, Oct. 17, 1788, 14 Papers of Thomas Jefferson (Boyd ed. 1958) 16, 18. Madison went on to give the following additional reasons for his view: "2. Because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. . . . 3. Because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. Because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed." 14 *id.*, at 18–19. The entire, rather long, letter merits reading. For an account of Madison's management of the resolution that became the Bill of Rights, see Brant, James Madison: Father of the Constitution, 1787–1800, c. 21.

[4] "Mr. MADISON conceived this to be the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured

While the adoption of the Fourteenth Amendment in 1868 did not change the distribution of powers between the States and the Federal Government so as to withdraw the basic interests of criminal justice from the exclusive control of the States, it did impose restrictions upon the States in the making and in the enforcement of the criminal laws. It did this insofar as the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Palko* v. *Connecticut,* 302 U. S. 319; *Malinski* v. *New York,* 324 U. S. 401, 412–416, with 438, are implied in the comprehensive concept of due process of law. But this concept does not blur the great division of powers between the Federal Government and the individual States in the enforcement of the criminal law.

Generalities though these observations be, they bear decisively on the issue that has been tendered in this case. To yield to the contention of the petitioner would not only disregard the uniform course of decision by this Court for over a hundred years in recognizing the legal autonomy of state and federal governments.[5] In these

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against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people." 1 Annals of Cong. 755 (1789).

[5] By 1900 the applicability of the Bill of Rights to the States had been rejected in cases involving claims based on virtually every provision in the first eight Articles of Amendment. See, *e. g., Article I: Permoli* v. *Municipality No. 1,* 3 How. 589, 609 (free exercise of religion); *United States* v. *Cruikshank,* 92 U. S. 542, 552 (right to assemble and petition the Government); *Article II: United States* v. *Cruikshank, supra,* at 553 (right to keep and bear arms); *Article IV: Smith* v. *Maryland,* 18 How. 71, 76 (no warrant except on probable cause); *Spies* v. *Illinois,* 123 U. S. 131, 166 (security against unreasonable searches and seizures); *Article V: Barron* v. *Baltimore,* note 2, *supra,* at 247 (taking without just compensation); *Fox* v. *Ohio,* 5 How. 410, 434 (former jeopardy); *Twitchell* v. *Pennsylvania,* 7 Wall. 321, 325–327 (deprivation of life without due process of law);

days of the extensive sweep of such federal statutes as the income tax law and the criminal sanctions for their evasions, investigation under state law to discover corruption and misconduct, generally, in violation of state law could easily be thwarted if a State were deprived of its power to expose such wrongdoing with a view to remedial legislation or prosecution. While corruption and generally low standards in local government may not today be as endemic as Lord Bryce reported them to be in The American Commonwealth (1888), not even the most cheerful view of the improvements that have since taken place can afford justification for blunting the power of States to ferret out, and thereby guard against, such corruption by restrictions that would reverse our whole constitutional history. To achieve these essential ends of state government the States may find it necessary, as did New York, to require full disclosure in exchange for immunity from prosecution. This cannot be denied on the claim that such state law of immunity may expose the potential witness to prosecution under federal law. See *Jack* v. *Kansas,* 199 U. S. 372. Every witness before a state grand jury investigation would feel free to block those vitally important proceedings.

In construing the Fifth Amendment and its privilege against self-incrimination, one must keep in mind its

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Spies v. *Illinois, supra,* at 166 (compulsory self-incrimination); *Eilenbecker* v. *Plymouth County,* 134 U. S. 31, 34–35 (presentment or indictment by grand jury); *Article VI: Twitchell* v. *Pennsylvania, supra,* at 325–327 (right to be informed of nature and cause of accusation); *Spies* v. *Illinois, supra,* at 166 (speedy and public trial by impartial jury); *In re Sawyer,* 124 U. S. 200, 219 (compulsory process); *Eilenbecker* v. *Plymouth County, supra,* at 34–35 (confrontation of witnesses); *Article VII: Livingston's Lessee* v. *Moore,* 7 Pet. 469, 551–552 (right of jury trial in civil cases); *Justices* v. *Murray,* 9 Wall. 274, 278 (re-examination of facts tried by jury); *Article VIII: Pervear* v. *Massachusetts,* 5 Wall. 475, 479–480 (excessive fines, cruel and unusual punishments).

essential quality as a restraint upon compulsion of testimony by the newly organized Federal Government at which the Bill of Rights was directed, and not as a general declaration of policy against compelling testimony. It is plain that the amendment can no more be thought of as restricting action by the States than as restricting the conduct of private citizens. The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth.

Of course the Federal Government may not take advantage of this recognition of the States' autonomy in order to evade the Bill of Rights. If a federal officer should be a party to the compulsion of testimony by state agencies, the protection of the Fifth Amendment would come into play. Such testimony is barred in a federal prosecution, see *Byars* v. *United States,* 273 U. S. 28. Whether, in a case of such collaboration between state and federal officers, the defendant could successfully assert his privilege in the state proceeding, we need not now decide, for the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation. Petitioner's assertion that a federal prosecuting attorney announced his intention of cooperating with state officials in the prosecution of cases in a general field of criminal law presents a situation devoid of legal significance as a joint state and federal endeavor.

This Court with all its shifting membership has repeatedly found occasion to say that whatever inconveniences and embarrassments may be involved, they are the price we pay for our federalism, for having our people amenable to—as well as served and protected by—two governments. If a person may, through immunized self-

disclosure before a law-enforcing agency of the State, facilitate to some extent his amenability to federal process, or *vice versa,* this too is a price to be paid for our federalism. Against it must be put what would be a greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere.

Judgment affirmed.

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion upon my understanding that the only question we decide is that a witness who is granted immunity by a State against state prosecution may be compelled to testify in a state proceeding and cannot successfully assert the privilege against self-incrimination under the Fifth Amendment.

I therefore do not believe that reconsideration of the holding in *Feldman* v. *United States,* 322 U. S. 487, is necessary or appropriate in this case. In view of the contrary suggestion in the dissent of MR. JUSTICE BLACK, I think it proper however to note that in joining the Court's opinion, I should not be understood as believing that our decision today forecloses reconsideration of the *Feldman* holding in a case requiring our decision of that question.

MR. CHIEF JUSTICE WARREN, dissenting.

There can be no doubt that the problem in this case is a problem of federalism. Competing considerations of the greatest significance are involved. But in resolving questions that touch upon the intricate and delicate mechanism of our federal system it is especially important to remember, as Mr. Justice Holmes observed, that "General propositions do not decide concrete cases." *Lochner* v. *New York,* 198 U. S. 45, 76. In this case the New York courts sustained petitioner's conviction on the under-

standing that in the circumstances of this case the testimony petitioner was compelled to give before the New York State grand jury could not, as a matter of federal law, be employed in a subsequent federal prosecution. On the other hand, it is implicit in the majority opinion in this Court that the petitioner does run the risk of a federal prosecution based on his own testimony under *Feldman* v. *United States,* 322 U. S. 487. If we are to have any profitable discussion of federalism based on the facts of this case, we should begin with agreement on the facts and the controlling principles. In any event, we should not affirm a New York conviction if in fact the state courts construed state law under a misconception of federal law. To do so does violence to the vital principle of federalism that a state court is the final arbiter of state law. See *May* v. *Anderson,* 345 U. S. 528, 534, 535. I therefore agree with MR. JUSTICE BLACK that this case should be remanded so that the New York Court of Appeals can reconsider state law in light of the majority's conclusion that the role of the federal prosecutor was not such as to prevent use of the state-compelled testimony against petitioner in a federal prosecution. At all events, the unsettling influence that *Feldman* has had upon the course of this litigation indicates that a satisfactory solution cannot be reached without a reconsideration of that decision.

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

Petitioner refused to answer questions directed to him by a New York grand jury on the ground that his answers might tend to incriminate him under both state and federal law. He was then granted immunity from prosecution under state law and ordered to answer. When he

persisted in his refusal he was found guilty of contempt and sentenced to jail. In reviewing his conviction the Appellate Division of the New York Supreme Court rejected the contention that it violated both State and Federal Constitutions to punish him for declining to give testimony which might have incriminated him under federal law. 2 App. Div. 2d 579, 157 N. Y. S. 2d 158.

Article I, § 6 of the New York Constitution, like the Fifth Amendment, provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." The Appellate Division ruled that this state provision had not been infringed, pointing out (1) that petitioner had been granted immunity from state prosecution and (2) his answers could not be used to convict him of a federal crime since the record showed that the federal district attorney had "cooperated" with state officers in the grand jury investigation. The New York Court of Appeals affirmed without opinion. 2 N. Y. 2d 913, 141 N. E. 2d 825.

In affirming, this Court evidently takes the position, contrary to the Appellate Division, that whatever cooperation between federal and state officials is disclosed by this record it is not enough to bar use of petitioner's testimony in a federal prosecution. In the light of this, it seems to me that the proper course would be to vacate the judgment of the New York Court of Appeals and remand so that the courts of that State might consider petitioner's claim of privilege under the New York Constitution free from the erroneous assumption that his testimony could not be used to convict him of a federal crime. See *Standard Oil Co. of California* v. *Johnson,* 316 U. S. 481. Cf. *Patterson* v. *Alabama,* 294 U. S. 600, 607; 28 U. S. C. § 2106. Otherwise petitioner will go to jail when there is at least a chance that the New York courts would not have upheld his conviction had they

known, as they now do, that his state-compelled testimony could be used against him in the federal courts.[1]

I think it is also appropriate to say a few words here about *Feldman* v. *United States,* 322 U. S. 487, which was referred to by the Appellate Division. In that case a minority of this Court held, 4–3, that information extracted from a person by state authorities under threat of punishment could be used to convict him of a federal crime.[2] The passage of time has only strengthened my conviction that this result is thoroughly contrary to the guarantee of the Fifth Amendment that no person shall be compelled to be a witness against himself, at least in a federal prosecution. The untenability of the premises upon which the Court relied in *Feldman* has been clearly revealed in a series of penetrating law review articles by Professor J. A. C. Grant. Immunity from Compulsory Self-Incrimination in a Federal System of Government, 9 Temple L. Q. 57, 194; Federalism and Self-Incrimination, 4 U. C. L. A. Law Rev. 549, 5 *id.,* 1. *Feldman* places a witness who is called before a state agency and ordered to testify in a desperate position; he must either remain silent and risk state imprisonment for contempt or con-

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[1] In Michigan, at least, the state constitution has been interpreted as preventing state officers from compelling disclosure of facts which might tend to incriminate the witness under federal law, even though he has been granted full immunity from state prosecution. *People* v. *DenUyl,* 318 Mich. 645, 29 N. W. 2d 284. Cf. *State ex rel. Doran* v. *Doran,* 215 La. 151, 39 So. 2d 894.

[2] Contrast *Bram* v. *United States,* 168 U. S. 532, where this Court ruled that an involuntary confession could not be used in a federal prosecution even though it was procured by officers of a foreign nation outside the United States. And see *Ashcraft* v. *Tennessee,* 322 U. S. 143, at 155, where we declared that "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession." It seems to me that there was at least as much coercion in *Feldman* as in either of these cases.

fess himself into a federal penitentiary. See *Marcello* v. *United States,* 196 F. 2d 437. Indeed things have now reached the point, as the result of *United States* v. *Murdock,* 284 U. S. 141, *Feldman,* and the present case, where a person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each. Cf. *Irvine* v. *California,* 347 U. S. 128; *United States* v. *Kahriger,* 345 U. S. 22. I cannot agree that we must accept this intolerable state of affairs as a necessary part of our federal system of government.

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GORE *v.* UNITED STATES.

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

No. 668. Argued May 19, 1958.—Decided June 30, 1958.

Convicted in a federal court on six counts for violating three different sections of federal law by a single sale of narcotics on each of two different days, petitioner was sentenced to three consecutive terms for each day's sale, the terms for each day's sale to run concurrently with those for the other day's sale. He moved under 28 U. S. C. § 2255 to vacate the sentences as unlawful. *Held:* The sentences were not unlawful. Pp. 387–393.

(a) The Court adheres to the decision in *Blockburger* v. *United States,* 284 U. S. 299. Pp. 388–393.

(b) Though the three sections here involved grew out of a single purpose to outlaw non-medicinal sales of narcotics, they grew out of three different laws enacted at different times, for each of which Congress has provided a separate punishment, and Congress did not intend that violations of all three should be treated as a single offense when committed through a single sale. Pp. 390–391.

(c) *Bell* v. *United States,* 349 U. S. 81, distinguished. Pp. 391–392.

(d) The result here reached does not offend the constitutional prohibition of double jeopardy. Pp. 392–393.

(e) The question of policy involved is for Congress to decide, and this Court has no power to increase or reduce sentences for such offenses. P. 393.

100 U. S. App. D. C. 315, 244 F. 2d 763, affirmed.

Joseph L. Rauh, Jr. and *James H. Heller,* acting under appointment by the Court, 355 U. S. 909, argued the cause for petitioner. With them on the brief was *John Silard.*

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Rankin, Assistant Attorney General Anderson* and *J. F. Bishop.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a prosecution under an indictment containing six counts for narcotics offenses. Four counts were based on provisions of the Internal Revenue Code of 1954 and two counts on the Narcotic Drugs Import and Export Act, as amended. The first three counts derive from a sale on February 26, 1955, of twenty capsules of heroin and three capsules of cocaine; the last three counts derive from a sale of thirty-five capsules of heroin on February 28, 1955. Counts One and Four charged the sale of the drugs, on the respective dates, not "in pursuance of a written order" of the person to whom the drugs were sold on the requisite Treasury form, in violation of § 4705 (a) of the Internal Revenue Code of 1954. Counts Two and Five charged the sale and distribution of the drugs on the respective dates not "in the original stamped package or from the original stamped package," in violation of § 4704 (a) of the Internal Revenue Code of 1954. Counts Three and Six charged facilitating concealment and sale of the drugs on the respective dates, with knowledge that the drugs had been unlawfully imported, in violation of § 2 (c) of the Narcotic Drugs Import and Export Act,[1] as amended by the Act of November 2, 1951, 65 Stat. 767. In short, Congress had made three distinct offenses in connection with the vending of illicit drugs, and the petitioner, having violated these three independent provisions, was prosecuted for all three as separate wrongdoings, despite the fact that these violations of what Congress had proscribed were compendiously committed in single transactions of vending. Duly tried before a jury, petitioner was convicted, and no question touch-

[1] 35 Stat. 614, as amended. This provision was subsequently amended, 70 Stat. 570, 21 U. S. C. (Supp. V) § 174.

ing the conviction is before us. In controversy is the legality of the sentences imposed by the trial court. These were imprisonment for a term of one to five years, imposed on each count, the sentences on the first three counts to run consecutively, the sentences on the remaining three counts to run concurrently with those on the first three counts. Thus the total sentence was three to fifteen years. Petitioner moved, under 28 U. S. C. § 2255, to vacate the sentence, claiming that for all three counts a sentence as for only one count could be imposed. The motion was denied and the Court of Appeals affirmed, 100 U. S. App. D. C. 315, 244 F. 2d 763, with expressions of doubt by two of the judges, who felt themselves bound by *Blockburger* v. *United States,* 284 U. S. 299. We brought the case here, 355 U. S. 903, in order to consider whether some of our more recent decisions, while not questioning *Blockburger* but moving in related areas, may not have impaired its authority.

We adhere to the decision in *Blockburger* v. *United States, supra.* The considerations advanced in support of the vigorous attack against it have left its justification undisturbed, nor have our later decisions generated counter currents.

That the *Blockburger* opinion did not lay out with particularity the course of anti-narcotics legislation is scant basis for suggesting that the Court was unaware of it or did not duly heed the relevant criteria for statutory construction in dealing with the specific legislation before it. The Court was not an innocent in the history of narcotics legislation. *Blockburger* was not the first case that brought prosecutions under successive enactments dealing with the control of narcotics before the Court. At the time of *Blockburger,* it was not customary to make the whole legislative history connected with particular statutes in adjudication part of the conventional apparatus of an opinion. What is more to the point about the

Blockburger decision is that the unanimous Court that rendered it then included three Justices conspicuous for their alertness in safeguarding the interests of defendants in criminal cases and in their insistence on the compassionate regard for such interests. Invidiousness is not implied in saying that Mr. Justice Brandeis, Mr. Justice Butler and Mr. Justice Roberts [2] would not have joined in finding that Congress established independent curbs as tactical details in the strategy against illicit narcotics trade, if it could be reasonably maintained that what in fact Congress was doing was merely giving different labels to the same thing. The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic. In *Blockburger,* the offender was indicted, convicted, and cumulatively sentenced for two separate offenses: selling forbidden drugs not "in the original stamped package" (now § 4704 (a) of the Internal Revenue Code), and of selling such drugs not "in pursuance of a written order of the person to whom such article is sold" (now § 4705 (a) of the Internal Revenue Code). The petitioner here was likewise indicted, tried, convicted and cumulatively sentenced for the two foregoing offenses and, in addition, for violating the amended § 2 (c) of the Narcotic Drugs Import and Export Act. And so while

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[2] For typical expressions of the attitudes of these members of the Court, see, *e. g., Horning* v. *District of Columbia,* 254 U. S. 135, 139 (dissenting opinion of Brandeis, J.); *Burdeau* v. *McDowell,* 256 U. S. 465, 476 (same); *Olmstead* v. *United States,* 277 U. S. 438, 471, 485 (dissenting opinions of Brandeis and Butler, JJ.); *Sorrells* v. *United States,* 287 U. S. 435, 453 (separate opinion of Roberts, J., joined by Brandeis, J.); *Snyder* v. *Massachusetts,* 291 U. S. 97, 123 (dissenting opinion of Roberts, J., joined by Brandeis and Butler, JJ.); *Palko* v. *Connecticut,* 302 U. S. 319, 329 (dissent of Butler, J.).

Blockburger was sentenced to ten years for the two offenses, petitioner was sentenced to a maximum of fifteen years. The Court of Appeals inevitably found the *Blockburger* case controlling.

We are strongly urged to reconsider *Blockburger* by reading the various specific enactments of Congress as reflecting a unitary congressional purpose to outlaw non-medicinal sales of narcotics. From this the conclusion is sought to be drawn that since Congress had only a single purpose, no matter how numerous the violations by an offender, of the specific means for dealing with this unitary purpose, the desire should be attributed to Congress to punish only as for a single offense when these multiple infractions are committed through a single sale. We agree with the starting point, but it leads us to the opposite conclusion. Of course the various enactments by Congress extending over nearly half a century constitute a network of provisions, steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy. If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter. The three penal laws for which petitioner was convicted have different origins both in time and in design. The present § 2 (c) of the Narcotic Drugs Import and Export Act derives from an enactment of February 9, 1909, § 2, 35 Stat. 614. The present § 4705 (a) of the Internal Revenue Code of 1954 derives from the Act of December 17, 1914, § 2, 38 Stat. 785, 786. The present § 4704 (a) of the Internal Revenue Code of 1954 derives from the Revenue Act of 1918, § 1006, 40 Stat. 1057, 1130 (1919).[3] It seems more daring than con-

[3] This statute, amendatory of the 1914 Act, *supra,* introduced the "original stamped package" concept.

vincing to suggest that three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods, for each of which a separate punishment was declared by Congress, somehow or other ought to have carried with them an implied indication by Congress that if all these three different restrictions were disregarded but, forsooth, in the course of one transaction, the defendant should be treated as though he committed only one of these offenses.

This situation is *toto coelo* different from the one that led to our decision in *Bell* v. *United States,* 349 U. S. 81. That case involved application of the Mann Act—a single provision making it a crime to transport a woman in interstate commerce for purposes of prostitution. We held that the transportation of more than one woman as a single transaction is to be dealt with as a single offense, for the reason that when Congress has not explicitly stated what the unit of offense is, the doubt will be judicially resolved in favor of lenity. It is one thing for a single transaction to include several units relating to proscribed conduct under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics. Both in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws. Nor need we be detained by two other cases relied on, *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218, and *Prince* v. *United States,* 352 U. S. 322. In the former we construed the record-keeping provisions of the Fair Labor Standards Act as punishing "a course of conduct." Of

the *Prince* case, it suffices to say that the Court was dealing there "with a unique statute of limited purpose." 352 U. S., at 325.

Finally, we have had pressed upon us that the *Blockburger* doctrine offends the constitutional prohibition against double jeopardy. If there is anything to this claim it surely has long been disregarded in decisions of this Court, participated in by judges especially sensitive to the application of the historic safeguard of double jeopardy. In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept like that of due process, a long course of adjudication in this Court carries impressive authority. Certainly if punishment for each of separate offenses as those for which the petitioner here has been sentenced, and not merely different descriptions of the same offense, is constitutionally beyond the power of Congress to impose, not only *Blockburger* but at least the following cases would also have to be overruled: *Carter* v. *McClaughry,* 183 U. S. 365; *Morgan* v. *Devine,* 237 U. S. 632; *Albrecht* v. *United States,* 273 U. S. 1; *Pinkerton* v. *United States,* 328 U. S. 640; *American Tobacco Co.* v. *United States,* 328 U. S. 781; *United States* v. *Michener,* 331 U. S. 789; *Pereira* v. *United States,* 347 U. S. 1.

Suppose Congress, instead of enacting the three provisions before us, had passed an enactment substantially in this form: "Anyone who sells drugs except from the original stamped package and who sells such drugs not in pursuance of a written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlawfully imported, shall be sentenced to not less than fifteen years' imprisonment: *Provided, however,* That if he makes such sale in pursuance of a written order of the person to whom the drug is sold he shall be sentenced to only ten years' imprisonment: *Provided*

further, That if he sells such drugs in the original stamped package he shall also be sentenced to only ten years' imprisonment: *And provided further,* That if he sells such drugs in pursuance of a written order and from a stamped package, he shall be sentenced to only five years' imprisonment." Is it conceivable that such a statute would not be within the power of Congress? And is it rational to find such a statute constitutional but to strike down the *Blockburger* doctrine as violative of the double jeopardy clause?

In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see Radzinowicz, A History of English Criminal Law: The Movement for Reform, 1750–1833, *passim,* these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. See 7 Edw. VII, c. 23, § 4 (3); 16 & 17 Geo. V, c. 15, § 2 (4). This Court has no such power.

Affirmed.

MR. CHIEF JUSTICE WARREN, dissenting.

The problem of multiple punishment is a vexing and recurring one. It arises in one of two broad contexts: (a) a statute or a portion thereof proscribes designated conduct, and the question is whether the defendant's conduct constitutes more than one violation of this proscription. Thus, murdering two people simultaneously might well warrant two punishments but stealing two one-dollar bills might not. (b) Two statutes or two portions of a

single statute proscribe certain conduct, and the question is whether the defendant can be punished twice because his conduct violates both proscriptions. Thus, selling liquor on a Sunday might warrant two punishments for violating a prohibition law and a blue law, but feloniously entering a bank and robbing a bank, though violative of two statutes, might warrant but a single punishment.

In every instance the problem is to ascertain what the legislature intended. Often the inquiry produces few if any enlightening results. Normally these are not problems that receive explicit legislative consideration. But this fact should not lead the judiciary, charged with the obligation of construing these statutes, to settle such questions by the easy application of stereotyped formulae. It is at the same time too easy and too arbitrary to apply a presumption for or against multiple punishment in all cases or even to do so one way in one class of cases and the other way in another. Placing a case in the category of unit-of-offense problems or the category of overlapping-statute problems may point up the issue, but it does not resolve it.

Where the legislature has failed to make its intention manifest, courts should proceed cautiously, remaining sensitive to the interests of defendant and society alike. All relevant criteria must be considered and the most useful aid will often be common sense. In this case I am persuaded, on the basis of the origins of the three statutes involved, the text and background of recent amendments to these statutes, the scale of punishments prescribed for second and third offenders, and the evident legislative purpose to achieve uniformity in sentences, that the present purpose of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale.

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

The first three counts of this indictment cover one sale of narcotics made on February 26, 1955. The one sale was broken down for purposes of the three counts into three crimes:

(1) petitioner made the sale "not in pursuance of a written order" which is contrary to the requirement of 68A Stat. 551, 26 U. S. C. (Supp. V) § 4705 (a);

(2) the narcotics were sold "not in the original stamped package" which is contrary to the requirements of 68A Stat. 550, 26 U. S. C. (Supp. V) § 4704 (a);

(3) petitioner "facilitated the concealment and sale" which is in violation of 65 Stat. 767, 21 U. S. C. § 174.

Another single sale, one made on February 28, 1955, was likewise broken down into three separate and distinct crimes.

Consecutive sentences were imposed for the three crimes resulting from the first sale. Sentences imposed for the three crimes resulting from the second sale were made to run concurrently with each other and with the sentences imposed for the three offenses resulting from the first sale.

Plainly, Congress defined three distinct crimes, giving the prosecutor on these facts a choice. But I do not think the courts were warranted in punishing petitioner three times for the same transaction. I realize that *Blockburger* v. *United States,* 284 U. S. 299, holds to the contrary. But I would overrule that case.

I find that course necessary because of my views on double jeopardy, recently expressed in *Hoag* v. *New Jersey,* 356 U. S. 464. And see *Ciucci* v. *Illinois,* 356

U. S. 571. Once a crucial issue is litigated in a criminal case that issue may not be the basis of another prosecution. Here the same sale is made to do service for three prosecutions. The different evidence test, which was adopted without much analysis by the Court in *Carter* v. *McClaughry,* 183 U. S. 365, 394–395 (cf. *Ex parte Nielsen,* 131 U. S. 176), would permit the practice. Yet I agree with Bishop: ". . . in principle, and by the better judicial view, while the legislature may pronounce as many combinations of things as it pleases criminal, resulting not unfrequently in a plurality of crimes in one transaction or even in one act, for any one of which there may be a conviction without regard to the others, it is, in the language of Cockburn, C. J., 'a fundamental rule of law that out of the same facts a series of charges shall not be preferred.' "* 1 Criminal Law (9th ed. 1923) § 1060. I think it is time that the Double Jeopardy Clause was liberally construed in light of its great historic purpose to protect the citizen from more than one trial for the same act.

That analysis was adopted by the Court in *Ballerini* v. *Aderholt,* 44 F. 2d 352, 353, a case close on its facts to the present one. There two counts were charged from one sale: (1) a sale without registration and payment of the tax and (2) a sale without requiring a written order. The court said:

> "The offense charged in each count was the unlawful sale of the same ounce of heroin. As there was but one sale, it would seem to follow that there was but one criminal act committed against the laws of the United States. The failure of appellant to register and pay the special tax, as charged in the first count, or to obtain a written order, as charged in the second count, could not have been the basis of a criminal

**Regina* v. *Elrington,* 9 Cox C. C. 86, 90, 1 B. & S. 688.

> prosecution. It was only in the event of a sale that such failure could become material. At last it was the sale, and not the failure to register, pay the tax, or secure the written order, that constituted the offense."

Cf. Mr. Justice Rutledge concurring in *District of Columbia* v. *Buckley,* 75 U. S. App. D. C. 301, 305, 128 F. 2d 17, 21.

I would read the three present statutes from that approach. I would hold that the prosecutor was given the choice of one of three prosecutions for this single sale. I would resist a reading which inferred that Congress intended multiple offenses from the same sale, for that would not make the statutes square with the Constitution.

MR. JUSTICE BRENNAN, dissenting.

Even assuming the vitality of *Blockburger* v. *United States,* 284 U. S. 299, I must dissent from the disposition of this case. In *Blockburger* the Court held that multiple punishment might be imposed as the consequence of a single sale of narcotics, provided that separate statutory offenses were involved in the same transaction. In determining whether there were separate statutory offenses the Court said:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, *is whether each provision requires proof of a fact which the other does not.*" 284 U. S., at 304. (Emphasis added.)

The Court's decision today is inconsistent with the principles of *Blockburger* because it allows separate offenses to be proved and separate punishments to be imposed upon the proof of a single fact. The petitioner

has been convicted of a sale of narcotics "not from the original stamped package" in violation of 26 U. S. C. (Supp. V) § 4704 (a), and for having "facilitated the concealment and sale" of narcotics in violation of 21 U. S. C. § 174. But § 4704 (a) provides that "the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found" and § 174 provides that "whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Therefore under the statutes proof of the single fact of possession of unstamped narcotics suffices to convict the defendant of offenses under either § 4704 (a) or § 174. Since under *Blockburger* punishment under separate sections can be sustained only if "each provision requires proof of a fact which the other does not," 284 U. S., at 304, the decision of the court below should be reversed.

Syllabus.

BEILAN *v.* BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 63. Argued March 4, 1958.—Decided June 30, 1958.

Petitioner, a teacher in the public schools of Philadelphia, refused to answer questions relating to Communistic affiliations and activities asked by his Superintendent, after being warned that the inquiry related to his fitness to be a teacher and that refusal to answer might lead to his dismissal. After administrative proceedings in which his loyalty and his political beliefs and associations were not in issue, the Board of Education found that his refusal to answer his Superintendent's questions constituted "incompetency," a ground for discharge under the state tenure statute, and discharged him. The State Supreme Court sustained this action. *Held:* His discharge did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 400–409.

(a) By engaging in teaching in public schools petitioner did not give up his right to freedom of belief, speech or association; but he did undertake obligations of frankness, candor and cooperation in answering inquiries made by his superior examining into his fitness to serve as a public school teacher. P. 405.

(b) A municipal employer is not disabled because it is an agency of the State from inquiry of its employees as to matters that may prove relevant to their fitness and suitability for the public service. *Garner* v. *Board of Public Works*, 341 U. S. 716. P. 405.

(c) The questions petitioner refused to answer were relevant to his fitness and suitability as a teacher, and his discharge was based upon his insubordination and lack of frankness and candor in refusing to answer such questions—not upon disloyalty or any of the activities inquired about. Pp. 405–406.

(d) The Federal Constitution does not require that a teacher's classroom conduct be the sole basis for determining his fitness. P. 406.

(e) The State Supreme Court held that "incompetency," within the meaning of the relevant state statute, includes petitioner's

"deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness," and this interpretation is not inconsistent with the Federal Constitution. Pp. 406–408.

(f) Petitioner's claim that he was denied due process because he was not sufficiently warned of the consequences of his refusal to answer his Superintendent's questions is not supported by the record. P. 408.

(g) *Slochower* v. *Board of Education*, 350 U. S. 551, and *Konigsberg* v. *State Bar of California*, 353 U. S. 252, distinguished. Pp. 408–409.

386 Pa. 82, 125 A. 2d 327, affirmed.

John Rogers Carroll argued the cause for petitioner. With him on the brief was *A. Harry Levitan.*

C. Brewster Rhoads argued the cause for respondent. With him on the brief was *Edward B. Soken.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The question before us is whether the Board of Public Education for the School District of Philadelphia, Pennsylvania, violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when the Board, purporting to act under the Pennsylvania Public School Code, discharged a public school teacher on the ground of "incompetency," evidenced by the teacher's refusal of his Superintendent's request to confirm or refute information as to the teacher's loyalty and his activities in certain allegedly subversive organizations. For the reasons hereafter stated, we hold that it did not.

On June 25, 1952, Herman A. Beilan, the petitioner, who had been a teacher for about 22 years in the Philadelphia Public School System, presented himself at his Superintendent's office in response to the latter's request. The Superintendent said he had information which

reflected adversely on petitioner's loyalty and he wanted to determine its truth or falsity. In response to petitioner's suggestion that the Superintendent do the questioning, the latter said he would ask one question and petitioner could then determine whether he would answer it and others of that type. The Superintendent, accordingly, asked petitioner whether or not he had been the Press Director of the Professional Section of the Communist Political Association in 1944.[1] Petitioner asked permission to consult counsel before answering and the Superintendent granted his request.

On October 14, 1952, in response to a similar request, petitioner again presented himself at the Superintendent's office. Petitioner stated that he had consulted counsel and that he declined to answer the question as to his activities in 1944. He announced he would also decline to answer any other "questions similar to it," "questions of this type," or "questions about political and religious beliefs . . . ." The Superintendent warned petitioner that this "was a very serious and a very important matter and that failure to answer the questions might lead to his dismissal." The Superintendent made it clear that he was investigating "a real question of fitness for [petitioner] to be a teacher or to continue in the teaching work." These interviews were given no publicity and were attended only by petitioner, his Superintendent and the Assistant Solicitor of the Board.

On November 25, 1953, the Board instituted dismissal proceedings against petitioner under § 1127 of the Pennsylvania Public School Code of 1949.[2] The only specifi-

[1] The Communist Political Association was the predecessor organization of the Communist Party of the United States. See *Yates* v. *United States*, 354 U. S. 298, 304, n. 5.

[2] Pa. Laws 1949, No. 14, Purdon's Pa. Stat. Ann., 1950, Tit. 24, § 11–1127.

cation which we need consider [3] charged that petitioner's refusal to answer his Superintendent's questions constituted "incompetency" under § 1122 of that Code.[4] The Board conducted a formal hearing on the charge. Petitioner was present with counsel but did not testify.

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[3] Petitioner's refusal to answer his Superintendent was also charged as persistent and willful violation of the school laws, another statutory ground for dismissal. See note 4, *infra*.

On November 18, 1953, petitioner had been called to testify as a witness in a Philadelphia hearing of a Subcommittee of the United States House Committee on Un-American Activities. There he was asked to confirm or refute several reports as to his alleged subversive activities in 1949 and earlier years. He declined to answer, relying upon the Fifth Amendment to the Federal Constitution. That invocation of the Fifth Amendment was specified by the Board as a further ground of "incompetency." All charges were sustained on the administrative level.

The Pennsylvania Supreme Court found that petitioner's refusal to answer his Superintendent evidenced a statutory "incompetency" sufficient to support his dismissal and, therefore, found it unnecessary to pass on the other grounds for dismissal. 386 Pa. 82, 94, 125 A. 2d 327, 333. It is suggested that petitioner has a right to the initial judgment of the administrative authorities on whether refusal to answer the Superintendent, independent of the other charges, would support the dismissal. Under the Pennsylvania Public School Code, Common Pleas Courts exercise *de novo* review of dismissals. Purdon's Pa. Stat. Ann., 1950 (Cum. Ann. Pocket Pt., 1957), Tit. 24, § 11–1132 (b). A dismissal can be sustained if the court finds support for any one of the multiple grounds relied upon by the dismissing school board. Cf. *Brown Case*, 347 Pa. 418, affirming 151 Pa. Super. 522, 30 A. 2d 726, reported *sub nom. Appeal of School District of City of Bethlehem*, 32 A. 2d 565. This allocation of functions between the Pennsylvania courts and administrative agencies does not violate due process. Accordingly, it is necessary for us to consider only the one ground relied upon by the Pennsylvania Supreme Court. As a matter of jurisdiction, our only jurisdiction is over the Pennsylvania Supreme Court, as the highest court of the State.

[4] Section 1122 of that Code, in 1952 and 1953, provided that "The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality,

Counsel for each side agreed that petitioner's loyalty was not in issue, and that evidence as to his disloyalty would be irrelevant.[5] On January 7, 1954, the Board found that the charge of incompetency had been sustained and, by a vote of fourteen to one, discharged petitioner from his employment as a teacher.

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incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe." (Emphasis supplied.) Pa. Laws 1949, No. 14, as amended, Pa. Laws 1951, No. 463, § 16; Purdon's Pa. Stat. Ann., 1950 (Cum. Ann. Pocket Pt., 1957), Tit. 24, § 11–1122.

As enacted in 1949, § 1122 had contained, after the words "mental derangement," the clause, "advocation of or participating in un-American or subversive doctrines." Pa. Laws 1949, No. 14. That clause, however, was deleted by § 16 of the Pennsylvania Loyalty Act, approved December 22, 1951, effective March 1, 1952. Pa. Laws 1951, No. 463.

[5] Counsel for the Board, at the outset of the hearing, stated: "It is my contention, and it has been the thought of your counsel since these proceedings were initiated, that these are not proceedings brought against these respondents charging them with disloyalty. If that were the situation we would have a completely different record, a completely different set of facts, a completely different section under which the charges would be made, if made at all.

. . . . . .

"Now, so far as I am concerned, sir, and so far as my presentation of testimony is concerned, I don't think whether this man is loyal or disloyal has anything to do with this case. And if your counsel's advice were being asked in the matter, I should say that any testimony directed toward present loyalty or disloyalty is completely out of this case.

. . . . . .

"So far as this case is concerned, we are not delving into present or past loyalty."

Counsel for petitioner stated: "Mr. President, if you please, I have no intention of seeing this proceeding become a loyalty hearing. Mr. Rhoads [counsel for the Board] has stated that it is not. I agree with him completely."

On an administrative appeal, the Superintendent of Public Instruction of Pennsylvania sustained the local Board. However, on petitioner's appeal to the County Court of Common Pleas, that court set aside petitioner's discharge and held that the Board should have followed the procedure specified by the Pennsylvania Loyalty Act, rather than the Public School Code. Finally, on the Board's appeal, the Supreme Court of Pennsylvania, with two justices dissenting, reversed the Court of Common Pleas and reinstated petitioner's discharge. 386 Pa. 82, 98, 110, 125 A. 2d 327, 334, 340. We granted certiorari. 353 U. S. 964.

In addition to the Public School Code, Pennsylvania has a comprehensive Loyalty Act which provides for the discharge of public employees on grounds of disloyalty or subversive conduct. Purdon's Pa. Stat. Ann., 1941 (Cum. Ann. Pocket Pt., 1957), Tit. 65, §§ 211–225. Petitioner stresses the fact that the question asked of him by his Superintendent related to his loyalty. He contends that he was discharged for suspected disloyalty and that his discharge is invalid because of failure to follow the Loyalty Act procedure. However, the Pennsylvania Supreme Court held that the Board was not limited to proceeding under the Loyalty Act, even though the questions asked of petitioner related to his loyalty. We are bound by the interpretation thus given to the Pennsylvania statutes by the Supreme Court of Pennsylvania. *Barsky* v. *Board of Regents,* 347 U. S. 442, 448; *Chicago, M., St. P. & P. R. Co.* v. *Risty,* 276 U. S. 567, 570. The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory "incompetency" based on his refusal to answer the Superintendent's questions.[6]

[6] There is no showing that the statute was discriminatorily applied. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Lane* v. *Wilson,* 307 U. S. 268.

By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." *Adler* v. *Board of Education,* 342 U. S. 485, 493.

As this Court stated in *Garner* v. *Board of Public Works,* 341 U. S. 716, 720, "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service."

The question asked of petitioner by his Superintendent was relevant to the issue of petitioner's fitness and suitability to serve as a teacher. Petitioner is not in a position to challenge his dismissal merely because of the remoteness in time of the 1944 activities. It was apparent from the circumstances of the two interviews that the Superintendent had other questions to ask. Petitioner's refusal to answer was not based on the remoteness of his 1944 activities. He made it clear that he would not answer any question of the same type as the one asked. Petitioner blocked from the beginning any inquiry into his Communist activities, however relevant to his present loyalty. The Board based its dismissal upon petitioner's

refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty.

We find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors. The Pennsylvania tenure provision [7] specifies several disqualifying grounds, including immorality, intemperance, cruelty, mental derangement and persistent and willful violation of the school laws, as well as "incompetency." However, the Pennsylvania statute, unlike those of many other States, contains no catch-all phrase, such as "conduct unbecoming a teacher," [8] to cover disqualifying conduct not included within the more specific provisions. Consequently, the Pennsylvania courts have given "incompetency" a broad interpretation. This was made clear in *Horosko* v. *Mt. Pleasant School District*, 335 Pa. 369, 371, 374–375, 6 A. 2d 866, 868, 869–870:

> "If the fact be that she 'now commands neither the respect nor the good will of the community' and if the record shows that effect to be the result of her

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[7] See note 4, *supra*.

[8] *E. g.*, Baldwin's Ky. Rev. Stat. Ann., 1955, § 161.790 (1), "conduct unbecoming a teacher," "during good behavior."

Mass. Ann. Laws, 1953 (Cum. Supp., 1957), c. 71, § 42, "conduct unbecoming a teacher," "or other good cause."

West's Ann. Cal. Code, Education, § 13521 (a), (e), "unprofessional conduct," "Evident unfitness for service."

Smith-Hurd's Ill. Ann. Stat., 1946 (Cum. Ann. Pocket Pt., 1957), c. 122, § 6–36, "other sufficient cause."

Burns' Ann. Ind. Stat., 1948 Replacement Vol., § 28–4308, "other good and just cause."

conduct within the clause quoted, it will be conclusive evidence of incompetency. It has always been the recognized duty of the teacher to conduct himself in such way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations. Educators have always regarded the example set by the teacher as of great importance . . . .

. . . . . .

"The term 'incompetency' has a 'common and approved usage'. The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage give a much wider meaning. For example, in 31 C. J., with reference to a number of supporting decisions, it is defined: 'A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; lack of ability, legal qualifications, or fitness to discharge the required duty.' In Black's Law Dictionary (3rd edition) page 945, and in Bouvier's Law Dictionary, (3rd revision) p. 1528, it is defined as 'Lack of ability or fitness to discharge the required duty.' Cases construing the word to the same effect are found in Words and Phrases, 1st series, page 3510, and 2nd series, page 1013. Webster's New International Dictionary defines it as 'want of physical, intellectual, or moral ability; insufficiency; inadequacy; specif., want of legal qualifications or fitness.' Funk & Wagnalls Standard Dictionary defines it as 'General lack of capacity of fitness, or lack of the special qualities required for a particular purpose.' "

In the *Horosko* case, a teacher was discharged for "incompetency" because of her afterhours activity in her husband's beer garden, serving as a bartender and waitress, occasionally drinking beer, shaking dice with the customers for drinks and playing the pinball machine. Cf. *Schwer's Appeal,* 36 Pa. D. & C. 531, 536.

In the instant case, the Pennsylvania Supreme Court has held that "incompetency" includes petitioner's "deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness." 386 Pa., at 91, 125 A. 2d, at 331. This interpretation is not inconsistent with the Federal Constitution.

Petitioner complains that he was denied due process because he was not sufficiently warned of the consequences of his refusal to answer his Superintendent. The record, however, shows that the Superintendent, in his second interview, specifically warned petitioner that his refusal to answer "was a very serious and a very important matter and that failure to answer the questions might lead to his dismissal." That was sufficient warning to petitioner that his refusal to answer might jeopardize his employment. Furthermore, at petitioner's request, his Superintendent gave him ample opportunity to consult counsel. There was no element of surprise.

Our recent decisions in *Slochower* v. *Board of Education,* 350 U. S. 551, and *Konigsberg* v. *State Bar of California,* 353 U. S. 252, are distinguishable. In each we envisioned and distinguished the situation now before us. In the *Slochower* case, at 558, the Court said:

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs,

> or government of the city, or . . . official conduct of city employees.' In this respect the present case differs materially from *Garner* [341 U. S. 716], where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

In the *Konigsberg* case, *supra,* at 259–261, this Court stressed the fact that the action of the State was not based on the mere refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal. In the instant case, no inferences at all were drawn from petitioner's refusal to answer. The Pennsylvania Supreme Court merely equated refusal to answer the employing Board's relevant questions with statutory "incompetency."

Inasmuch as petitioner's dismissal did not violate the Federal Constitution, the judgment of the Supreme Court of Pennsylvania is

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.*

Although I join the opinion of the Court in both these cases, a word of emphasis is appropriate against finding that New York and Pennsylvania—for the highest courts of those States are for our purposes the States—have violated the United States Constitution by attributing to them determinations that they have not made and have

*[NOTE: This opinion applies also to No. 165, *Lerner* v. *Casey, post,* p. 468.]

carefully avoided making. Such a finding would rest, as I understand it, on the theory that although the States, with a due sense of responsibility, have not made these determinations, they may be attributed to them because persons who do not make distinctions that are important in law and the conduct of government may loosely infer them.

The services of two public employees have been terminated because of their refusals to answer questions relevant, or not obviously irrelevant, to an inquiry by their supervisors into their dependability. When these two employees were discharged, they were not labeled "disloyal." They were discharged because governmental authorities, like other employers, sought to satisfy themselves of the dependability of employees in relation to their duties. Accordingly, they made inquiries that, it is not contradicted, could in and of themselves be made. These inquiries were balked. The services of the employees were therefore terminated.

Because the specific questions put to these employees were part of a general inquiry relating to what is compendiously called subversion and to conduct that on due proof may amount to disloyalty, every part of the process of inquiry is given the attribute of an inquiry into disloyalty and every resulting severance from service is deemed a finding of disloyalty. The argument runs, in essence, that because such an inquiry may in certain instances lead to a determination of disloyalty, the refusal to answer any questions in this process and dismissal therefor themselves establish disloyalty. To make such an attribution to a State, to draw such an inference from a carefully limited exercise of state power, to disallow state action because there are those who may draw inferences that the State itself has not drawn and has avoided drawing, is a curbing of the States through the Fourteenth Amendment that makes of that Amendment an instru-

ment of general censorship by this Court of state action. In refusing to put the Fourteenth Amendment to such a use, I am of course wholly unconcerned with what I may think of the wisdom or folly of the state authorities. I am not charged with administering the transportation system of New York or the school system of Pennsylvania. The Fourteenth Amendment does not check foolishness or unwisdom in such administration. The good sense and right standards of public administration in those States must be relied upon for that, and ultimately the electorate.

MR. CHIEF JUSTICE WARREN, dissenting.*

I believe the facts of record in No. 63 compel the conclusion that Beilan's plea of the Fifth Amendment before a subcommittee of the House Committee on Un-American Activities was so inextricably involved in the Board's decision to discharge him that the validity of the Board's action cannot be sustained without consideration of this ground. The clearest indication of this is the fact that for 13 months following petitioner's refusal to answer the Superintendent's questions, he was retained as a school teacher and continually rated "satisfactory," yet five days after his appearance before the House subcommittee petitioner was suspended. Since a plea of the Fifth Amendment before a congressional committee is an invalid basis for discharge from public employment, *Slochower* v. *Board of Higher Education,* 350 U. S. 551, I would reverse the judgment approving petitioner's dismissal.

I cannot agree that the invalidity of the Board's action is cured by the Pennsylvania Supreme Court's conclusion that the dismissal was "justified" if any charge against petitioner was sustained. Whether the first refusal alone

*[NOTE: This opinion applies also to No. 165, *Lerner* v. *Casey*, *post*, p. 468.]

would "justify" the discharge we need not decide. This Court has previously held that where a conclusion of guilt may rest on a constitutionally impermissible basis, the adjudication must be set aside, notwithstanding a state court's conclusion that permissible bases existed on which the decision might have rested. *Stromberg* v. *California,* 283 U. S. 359, 368; see also *Williams* v. *North Carolina,* 317 U. S. 287, 292. There may be exceptions to the application of this principle to the full range of state administrative action. Nevertheless, on the particular facts of this case, the invalid basis of the State's action is too critical to be ignored.

For these reasons MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and I dissent in No. 63. I also dissent in No. 165 for the reasons stated in the dissenting opinion of MR. JUSTICE BRENNAN.

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

The holding of the Court that the teacher in the *Beilan* case and the subway conductor in the *Lerner* case could be discharged from their respective jobs because they stood silent when asked about their Communist affiliations cannot, with due deference, be squared with our constitutional principles.

Among the liberties of the citizens that are guaranteed by the Fourteenth Amendment are those contained in the First Amendment. *Stromberg* v. *California,* 283 U. S. 359; *De Jonge* v. *Oregon,* 299 U. S. 353; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Everson* v. *Board of Education,* 330 U. S. 1; *Staub* v. *City of Baxley,* 355 U. S. 313, 321. These include the right to believe what one chooses, the right to differ from his neighbor, the right to pick and

*[NOTE: This opinion applies also to No. 165, *Lerner* v. *Casey, post,* p. 468.]

choose the political philosophy that he likes best, the right to associate with whomever he chooses, the right to join the groups he prefers, the privilege of selecting his own path to salvation. The Court put the matter succinctly in *Board of Education* v. *Barnette,* 319 U. S. 624, 641–642:

> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

We deal here only with a matter of belief. We have no evidence in either case that the employee in question ever committed a crime, ever moved in treasonable opposition against this country. The only mark against them—if it can be called such—is a refusal to answer questions concerning Communist Party membership. This is said to give rise to doubts concerning the competence of the teacher in the *Beilan* case and doubts as to the trustworthiness and reliability of the subway conductor in the *Lerner* case.

Our legal system is premised on the theory that every person is innocent until he is proved guilty. In this country we have, however, been moving away from that concept. We have been generating the belief that

anyone who remains silent when interrogated about his unpopular beliefs or affiliations is guilty. I would allow no inference of wrongdoing to flow from the invocation of any constitutional right. I would not let that principle bow to popular passions. For all we know we are dealing here with citizens who are wholly innocent of any wrongful action. That must indeed be our premise. When we make the contrary assumption, we part radically with our tradition.

If it be said that we deal not with guilt or innocence but with frankness, the answer is the same. There are areas where government may not probe. Private citizens, private clubs, private groups may make such deductions and reach such conclusions as they choose from the failure of a citizen to disclose his beliefs, his philosophy, his associates. But government has no business penalizing a citizen merely for his beliefs or associations. It is government action that we have here. It is government action that the Fourteenth and First Amendments protect against. We emphasized in *N. A. A. C. P.* v. *Alabama,* decided this day, *post,* p. 449, that freedom to associate is one of those liberties protected against governmental action and that freedom from "compelled disclosure of affiliation with groups engaged in advocacy" is vital to that constitutional right. We gave protection in the *N. A. A. C. P.* case against governmental probing into political activities and associations of one dissident group of people. We should do the same here.

If we break with tradition and let the government penalize these citizens for their beliefs and associations, the most we can assume from their failure to answer is that they were Communists. Yet, as we said in *Wieman* v. *Updegraff,* 344 U. S. 183, 190, membership in the Communist Party "may be innocent." The member may have thought that the Communist movement would develop in the parliamentary tradition here, or he may not have

been aware of any unlawful aim, or knowing it, may have embraced only the socialist philosophy of the group, not any political tactics of violence and terror. Many join associations, societies, and fraternities with less than full endorsement of all their aims.

We compound error in these decisions. We not only impute wrongdoing to those who invoke their constitutional rights. We go further and impute the worst possible motives to them.

As Judge Fuld said in dissent in the *Lerner* case, "It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties. The fears and doubts of the moment may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees." 2 N. Y. 2d 355, 378, 141 N. E. 2d 533, 546.

Our initial error in all this business (see *Dennis* v. *United States,* 341 U. S. 494) was our disregard of the basic principle that government can concern itself only with the actions of men, not with their opinions or beliefs. As Thomas Jefferson said in 1779:

> ". . . the opinions of men are not the object of civil government, nor under its jurisdiction; . . . 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." [1]

The fitness of a subway conductor for his job depends on his health, his promptness, his record for reliability, not on his politics or philosophy of life. The fitness of a teacher for her job turns on her devotion to that priesthood, her education, and her performance in the library, in the laboratory, and the classroom, not on her political beliefs. Anyone who plots against the government and

[1] 2 Papers of Thomas Jefferson (Boyd ed. 1950) 546.

moves in treasonable opposition to it can be punished. Government rightly can concern itself with the actions of people. But it's time we called a halt to government's penalizing people for their beliefs. To repeat, individuals and private groups can make any judgments they want. But the realm of belief—as opposed to action—is one which the First Amendment places beyond the long arm of government.

A teacher who is organizing a Communist cell in a schoolhouse or a subway conductor who is preparing the transportation system for sabotage would plainly be unfit for his job. But we have no such evidence in the records before us. As my Brother BRENNAN points out, to jump to those conclusions on these records is to short-cut procedural due process.

In sum, we have here only a bare refusal to testify; and the Court holds that sufficient to show that these employees are unfit to hold their public posts. That makes qualification for public office turn solely on a matter of belief—a notion very much at war with the Bill of Rights.

When we make the belief of the citizen the basis of government action, we move toward the concept of *total security*. Yet *total security* is possible only in a totalitarian regime [2]—the kind of system we profess to combat.

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[2] In an analogous situation, Judge Pope stated the problem for the Court of Appeals in *Parker* v. *Lester*, 227 F. 2d 708, 721:

"It cannot be said that in view of the large problem of protecting the national security against sabotage and other acts of subversion we can sacrifice and disregard the individual interest of these merchant seamen because they are comparatively few in number. It is not a simple case of sacrificing the interests of a few to the welfare of the many. In weighing the considerations of which we are mindful here, we must recognize that if these regulations may be sustained, similar regulations may be made effective in respect to other groups as to whom Congress may next choose to express its legislative fears. No doubt merchant seamen are in a sensitive position in that the opportunities for serious sabotage are numerous. If it can be said

MR. JUSTICE BRENNAN, dissenting.*

It is instructive on occasion to ask why particular cases are brought before this Court for review. The Court has said again and again that the incorrectness of a decision of a court below—and especially of a state court—is not sufficient reason for us to exercise our discretionary power to bring the case here. There must be "special and important reasons therefor." Rule 19 (1) of this Court. We must, therefore, ask ourselves the question: What special character and importance of the right asserted justified our taking these cases for review?

The Court treats the cases as though the only right involved were the right of an unreliable subway conductor

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that a merchant seaman notwithstanding his being on board might sink the ship loaded with munitions for Korea, it is plain that many persons other than seamen would be just as susceptible to security doubts. The enginemen and trainmen hauling the cargo to the docks, railroad track and bridge inspectors, switchmen and dispatchers, have a multitude of opportunities for destruction. Dangerous persons might infiltrate the shipping rooms of factories where the munitions are being packed for shipment to Korea with opportunities for inserting bombs appropriately timed for explosion on board ship. All persons who are in factories making munitions and material for the armed forces have opportunities for sabotage, and the same may be said of all operators of transportation facilities, not to mention workers upon the docks.

. . . . . .

"It may be possible that we have reached an age when our system of constitutional freedom and individual rights cannot hold its own against those who, under totalitarian discipline are prepared to infiltrate not only our public services, but our civilian employments as well. In the event of war we may have to anticipate Black Tom explosions on every waterfront, poison in our water systems, and sand in all important industrial machines. But the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists. Such a system was not that ordained by the framers of our Constitution. It is the latter we are sworn to uphold."

*[NOTE: This dissenting opinion of MR. JUSTICE BRENNAN applies also to No. 165, *Lerner* v. *Casey*, *post*, p. 468.]

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and an incompetent schoolteacher to hold their jobs. But if that were really all that was involved in these cases, I fail to see why it should take some nine pages in each case to justify the State's action. I can scarcely believe that such concern would be displayed if the question were whether there was evidence to show that Lerner was unreliable about getting the subway doors opened promptly at each station, or that Beilan was incompetent as an algebra teacher. It is obvious that more is at stake here than the loss of positions of public employment for unreliability or incompetence. Rather, it is the simultaneous public labeling of the employees as disloyal that gives rise to our concern.

New York and Pennsylvania have publicly announced that the subway conductor and teacher are disloyal Americans. This consequence of the States' actions is devastating beside the loss of employment. In each case a man's honor and reputation are indelibly stained. "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy." *Wieman* v. *Updegraff*, 344 U. S. 183, 190–191. The petitioners thus not only lose their present jobs, but their standing in the community is so undermined as doubtless to cost them most opportunities for future jobs.

Moreover, the States' actions touch upon important political rights which have ever warranted the special attention of the courts. It may be stated as a generality that government is never at liberty to be arbitrary in its relations with its citizens, and close judicial scrutiny is essential when state action infringes on the right of a man to be accepted in his community, to express his ideas in an atmosphere of calm decency, and to be free of the dark stain of suspicion and distrust of his loyalty on account of his political beliefs and associations.

N. A. A. C. P. v. *Alabama, post,* p. 449, decided this day. It is these rights which stand before the bar today, and it is in the awareness of their implications that these cases must be decided.

The people of New York and Pennsylvania have voiced through their legislatures their determination that the stain of disloyalty shall not be impressed upon a state employee without fair procedures in which the State carries the burden of proving specific charges by a fair preponderance of evidence. Cf. *Adler* v. *Board of Education,* 342 U. S. 485. In the New York Security Risk Law and the Pennsylvania Loyalty Act the States have endeavored to provide the traditional Anglo-American standards of procedural due process for the ascertainment of guilt. Yet this Court today finds no denial of due process in the palpable evasion of these standards of fair play by administrative officials. This Court refuses to pierce the transparent denials that each of these employees was publicly branded disloyal. The Court holds that we are bound by the definition of state law pronounced by the States' high courts that the dismissals were for unreliability and incompetency. Of course, we accept state law as the high court of a State pronounces it, but certainly our duty to secure to the individual the safeguards, embodied in due process, against a State's arbitrary exercise of power is no less when the state courts refuse to recognize what has in fact occurred. Cf. *Payne* v. *Arkansas,* 356 U. S. 560; *Moore* v. *Michigan,* 355 U. S. 155. See also *Broad River Power Co.* v. *South Carolina ex rel. Daniel,* 281 U. S. 537, 540. In my view the judgments in both cases must be reversed because each petitioner has been branded a disloyal American without the due process of law required of the States by the Fourteenth Amendment. "Strict adherence to required legal procedures, especially where one's loyalty is being impugned, affords the greatest and, in last analysis,

the ultimate assurance of the inviolability of our freedoms as we have heretofore known them in this Country. Least of all, should they be impaired or trenched upon by procedural shortcuts." *Board of Public Education* v. *Beilan,* 386 Pa. 82, 99, 125 A. 2d 327, 335 (Jones, J., dissenting).

LERNER *v.* CASEY.

In response to the outbreak of hostilities in Korea in 1950 the New York Legislature, early in its next session, enacted its Security Risk Law, Laws 1951, c. 233. Section 1 of the Act is a declaration of legislative finding that the Korean hostilities had brought about the existence "of a serious public emergency in this state" and that "the employment of members of subversive groups and organizations by government presents a grave peril to the national security." Section 5 of the Act provides that the appointing officer may transfer or suspend a person occupying a position within a "security agency" of the State after a finding based "upon all the evidence" that, "because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state." Pursuant to § 3 of the Act the State Civil Service Commission determined in 1953 that the New York Transit Authority is a "security agency" for purposes of the Act. In 1954, appellant Lerner, a subway conductor, was directed to appear before the Department of Investigation of the City of New York. On this and a subsequent appearance he refused to answer the question whether he was then a member of the Communist Party on the grounds that his answer might tend to incriminate him.

When this information was brought to the attention of the Transit Authority they sent a notice to appellant advising him that he was suspended under § 5 of the Security Risk Law because "reasonable grounds exist for

belief that, because of doubtful trust and reliability, your employment in the position of Conductor will endanger the security or defense of the nation and state." The Transit Authority specified the grounds for this belief: "[Y]ou refused to answer questions as to whether you were then a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States." Appellant brought this action in the New York state courts alleging, *inter alia,* that the finding that he was a security risk within the meaning of the New York statute is wholly without evidence and therefore violative of the Due Process Clause of the Fourteenth Amendment. The New York courts dismissed this contention by the following reasoning: (1) appellant's refusal to answer whether he was then a member of the Communist Party proves a lack of candor; (2) the lack of candor proves that he was of doubtful trust and reliability; and (3) doubtful trust and reliability proves further that appellant was a security risk within the meaning of the Act. This Court, without discussion, follows this chain of reasoning. But careful analysis, I believe, shows that it is fallacious and leads to an arbitrary result.

The proper consideration of this case requires, I repeat, that the true issue be stated with clarity. We are concerned with far more than, in the Court's phrase, "the validity of appellant's dismissal from his position as a subway conductor in the New York City Transit System." The issue is, rather, the validity of his dismissal *as a security risk.* The difference is profound, as I have suggested, for the label "security risk" inevitably invites in the public mind the deep suspicion of disloyalty, namely, that he is, in the words of the statute, a threat to "the security or defense of the nation and the state."

Of course, the term "security risk" is not synonymous with "disloyal." In certain positions—such as those involving access to secret information, for instance—an

employee who is an alcoholic or merely too talkative may well be considered a risk to security. But this is not such a case. Lerner handled no secrets. Common sense tells us that if a subway conductor is a security risk at all while at work he is such because he may engage in sabotage. Indeed, the record makes clear that it was just this danger that motivated the New York authorities in extending the Security Risk Law to the Transit System.

The only evidence relied upon to show that Lerner is a disloyal person is his refusal to answer the question whether he was a member of the Communist Party. It might be conceded that the question was relevant to his qualifications for his job and therefore properly asked. But once the propriety of the question was established, the New York Court of Appeals approved treating the nature of the question as though it were irrelevant to the determination of the ultimate fact of disloyalty. And this Court too says that the finding that Lerner is a security risk could be based on a refusal to "give any other information about himself which might be relevant to his employment." But can we suppose that a subway conductor would be branded a security risk if he refused to answer a question about his health? Of course the answer is no, although the question is plainly relevant to his qualifications for employment. It may well be that in such a case the State would be fully justified in discharging the employee as "untrustworthy and unreliable." But one would hardly stretch reason so far as further to label him a "security risk." To do so would be arbitrary in the extreme. It is equally arbitrary here, for New York and this Court expressly disavow the drawing of any inferences from the nature of the question asked or from Lerner's refusal to answer it. Nonetheless, by invoking the formalized procedures of its Security Risk Law, New York has publicly announced that it possesses the evidence required by the terms of that statute to justify the

conclusion that Lerner is in fact a disloyal American. Yet the record is wholly devoid of the essential requisite of evidence to support the ultimate finding of disloyalty. Cf. *Tot* v. *United States,* 319 U. S. 463. In this plainly arbitrary manner, Lerner is gratuitously defamed, his honor and reputation indelibly stained. And the wound is far deeper than the occasion demands, for certainly New York cannot lack procedures under which he could have been discharged without blemishing his name.

BEILAN *v.* BOARD OF PUBLIC EDUCATION.

Here also, the Court has not, in my opinion, stated or decided the true issue of due process tendered by this case. I doubt that a meritorious question for our review would be presented if the issue was, as the Court says, the constitutional validity of a dismissal solely for refusal of the teacher to answer the relevant questions asked by the School Superintendent in private interviews. I might agree that the Due Process Clause imposes no restraint against dismissal of a teacher who refuses to answer his superior's questions asked in the privacy of his office and related to the teacher's fitness to continue in his position.

But in reality Beilan was not dismissed by the Pennsylvania school authorities upon that ground. The question whether he had been an officer in the Communist Party in 1944 was first asked of Beilan by the Superintendent at a private interview on June 25, 1952. Beilan did not refuse at that time to answer but asked permission to consult counsel. The Superintendent summoned him again on October 14, 1952, and it was on that date that Beilan advised the Superintendent that he declined to answer that or similar questions. The Superintendent had told Beilan at the first interview that the question was asked because the Superintendent had information which reflected on Beilan's loyalty. Almost fourteen months elapsed before Beilan was suspended and the

charges preferred which led to his dismissal. In that interval Beilan's superiors had twice rated him in the high satisfactory range of competency. Had the authorities seriously regarded Beilan as incompetent because of his refusal to answer the Superintendent's question they would hardly have waited so long before suspending him. The record is clear that proceedings were actually initiated not because of that refusal to answer but because on November 18, 1953, Beilan asserted the privilege against self-incrimination under the Fifth Amendment when interrogated at a publicly televised hearing held in Philadelphia by a Subcommittee of the Committee on Un-American Activities of the House of Representatives. Beilan testified at that hearing that he was not then a member of the Communist Party and had never advocated the overthrow of the Government by force or violence but pleaded the protection of the Fifth Amendment when asked questions directed to past party membership and activities. Five days later, on November 23, 1953, the Superintendent notified Beilan that he had been rated "unsatisfactory" because he had refused to answer the Superintendent's question and also because "[y]ou invoked the Fifth Amendment of the Federal Constitution" when questioned as to "past associations with organizations of doubtful loyalty" by the Subcommittee. The opinion on Beilan's administrative appeal which sustained his dismissal by the Board of Education makes it clear that the authorities viewed Beilan's invocation of the Fifth Amendment before the Subcommittee as an admission of disloyalty. The opinion states: "[B]y all the concepts of logic and reason the teacher admits that he has done something for which he might be prosecuted criminally." It is this administrative record which Beilan must present to his next employer. Cf. *Harmon* v. *Brucker,* 355 U. S. 579.

The Court of Common Pleas found that the administrative proceedings were actually concerned solely with the question of Beilan's suspected disloyalty and reversed upon the ground that "the legislature intended to deal with the matter of loyalty solely by the method of procedure provided in the [Pennsylvania] Loyalty Act."

The Pennsylvania Supreme Court, however, did not pass upon the question of the propriety of the inference of disloyalty drawn by the administrative authorities from Beilan's invocation of the Fifth Amendment before the Subcommittee. That question is, therefore, not before us. The Pennsylvania Supreme Court held that the action of the authorities might be sustained solely because Beilan had refused to answer the Superintendent's question. But this is to sustain a finding of Beilan's disloyalty without competent evidence of the fact. As in *Lerner* the inference of disloyalty is arbitrary in the extreme. Yet Pennsylvania, like New York in the *Lerner* case, publicly announces contrary to the fact that it possesses competent evidence justifying the conclusion that Beilan is in fact a disloyal American. In my view Beilan also is, in that arbitrary manner, denied due process of law in violation of the Fourteenth Amendment.

I would reverse both judgments.

ASHDOWN *v.* UTAH.

CERTIORARI TO THE SUPREME COURT OF UTAH.

No. 158. Argued April 1, 1958.—Decided June 30, 1958.

Petitioner claims that her conviction in a state court of first-degree murder was obtained by use in evidence of an oral confession which had been obtained in such a manner that its use violated due process of law under the Fourteenth Amendment. Her husband had died suddenly. Arriving at the cemetery just after the interment, the sheriff asked her to come to the courthouse, which she did. There she talked with the sheriff, a deputy sheriff and the district attorney, all of whom she knew. The district attorney advised her that she did not have to answer any questions and was entitled to an attorney, but she did not request an attorney until after her oral confession. She was treated in a temperate and courteous manner. She was told that her husband had died of poisoning, and the matter was approached as if to discover whether it had been accidental. The district attorney told her that he had once been cleared of a criminal charge by cooperating with the investigators. The officers let her talk freely on family matters without interruption. About four and a half hours after the interview began, she made the oral confession in issue here. Meanwhile, her father and uncle had come to the building and asked to see her, but they were not permitted to do so until after the interview. *Held:* The record contains ample support for a finding that the officers did not take advantage of petitioner and that nothing they did had the effect of overbearing her will; and the judgment is affirmed. Pp. 427–431.

5 Utah 2d 59, 296 P. 2d 726, affirmed.

J. Vernon Erickson, acting under appointment by the Court, 355 U. S. 853, argued the cause and filed a brief for petitioner.

Walter L. Budge, Deputy Attorney General of Utah, argued the cause for respondent. With him on the brief was *E. R. Callister,* Attorney General.

MR. JUSTICE BURTON delivered the opinion of the Court.

A jury in a Utah court found petitioner, Mrs. Ashdown, guilty of the first-degree murder of her husband and recommended a life sentence. The question before us is whether petitioner's oral confession was obtained in such a manner as to make its use in evidence a violation of the due process of law required by the Fourteenth Amendment to the Constitution of the United States. This issue was thoroughly considered by the trial court which made findings in relation to it. The Supreme Court of Utah reviewed the record in detail and upheld the admission of the confession. 5 Utah 2d 59, 296 P. 2d 726. We granted certiorari. 353 U. S. 981. Our independent review of the record brings us to the same conclusion.

On July 5, 1955, Ray Ashdown, petitioner's husband, died suddenly in his home in Cedar City, Utah. Petitioner had summoned a doctor who arrived shortly before Ray Ashdown's death. The doctor testified that the deceased gave the appearance of having been poisoned and that he told the doctor just before he died that he had taken some bitter-tasting lemon juice about a half hour earlier. On being called, the sheriff made a thorough search of the Ashdown home but found no trace of any poison. An autopsy was performed, and the contents of the deceased's stomach was sent to the state chemist's office for analysis. The report, received by the sheriff on July 9, stated that the stomach of the deceased contained strychnine.

July 9 was the day of the funeral. Promptly after receipt of the chemist's report, the sheriff went to the cemetery, arriving just after the interment. Through petitioner's brother-in-law, the sheriff asked that petitioner come to the County and City Building. At about 4 p. m. she and her sister arrived at the sheriff's office.

The sheriff asked to talk with petitioner privately and she consented. They went across the hall to an empty courtroom where the sheriff, a deputy sheriff and the district attorney, all people known by the petitioner, talked with her for the next five and one-half hours.

The sheriff told petitioner the results of the autopsy and the chemist's report. Within the first half hour, the district attorney advised her that she did not have to answer any questions and that she was entitled to consult with an attorney. She made no request for an attorney at that time. She said she did not think she could add anything to help the investigation, but she mentioned her husband had been despondent on several occasions. The officers let her talk freely on family matters without interruption and such conversation consumed about half the time spent in the interview. The sheriff attempted to direct her attention to discovering whether her husband's death might have been due to an accident. To impress her with the importance of the distinction between murder and manslaughter, the district attorney read her some of the statutes relating to those crimes. In addition, he told her about an experience he had in the Army in Europe. He said he had been accused of killing five men but, by cooperating with investigating officials, he had been cleared of all blame for those deaths.

The officers reviewed in detail the events of July 5. Petitioner admitted giving her husband a cup of lemon juice about a half hour before his death. She said she had put salt in the juice and denied that she might have mistakenly used poison instead of salt. The sheriff asked whether the deceased drank all of the lemon juice offered him. Petitioner replied that he had not, and that she had thrown out the remainder and put the cup, unwashed, on top of the Frigidaire. In their search of the house, the officers found the cup, washed, standing on the drain-

board. When asked about it, petitioner said that, after she had gone for the second time to a neighbor's house to call the doctor (who arrived before she returned), she had washed the cup and placed it where the officers found it. Petitioner could not explain why she had walked past the doctor and her husband, who was at that moment in the last extremity, to wash a cup. Petitioner several times asked whether the officers wanted her to confess to something she had not done, and they repeatedly told her they did not.

Petitioner, at one point, stated that her husband had put the strychnine in the lemon juice. After a brief interrogation as to how he had done it, the sheriff told her he did not believe her husband had poisoned himself. Petitioner then confessed that she had put five or six grains of strychnine in the cup. She said she had planned to take it herself but later decided to give it to her husband. The sheriff testified that she was emotionally upset, crying and sobbing. The confession came about four and one-half hours after the questioning began. Petitioner hesitated to say where she had obtained the strychnine and suggested she should have an attorney. The sheriff did not respond to this request. He said merely that she had told them everything except where the poison came from, and she might as well tell that "and get this over with." She then told where she had obtained the strychnine.

Meanwhile, petitioner's father and uncle had come to the County and City Building. They asked to see petitioner and their request was denied, pending completion of the interview. They waited in the sheriff's office and, at his request, made several trips to the Ashdown home. From their position in the hall outside the courtroom, they heard petitioner crying and sobbing. After petitioner had confessed, the sheriff asked her whether she

wanted to see her relatives. At first she refused, saying she was ashamed to face them, but the sheriff persisted and she eventually consented.

On the 10th, the sheriff prepared a written statement of what petitioner had said the day before and took it to her cell. She was told she could sign the statement or not as she wished, and she could make changes. She examined the statement carefully, made numerous changes, and signed it.

At the trial, the court held an extended hearing in the absence of the jury on the admissibility of petitioner's confessions. Petitioner took the stand during the preliminary hearing but testified only as to what the district attorney had said. She did not challenge any other statements of the sheriff, the deputy sheriff or the district attorney. The trial court ruled that all statements made by petitioner after her request for an attorney, including the written statement, should be excluded. Thus, only the oral confession was introduced in evidence before the jury.

Petitioner emphasizes the statement of the district attorney that he had once avoided a criminal charge by cooperating with the investigating officers. Petitioner argues that this statement was an implied promise of immunity or leniency to be exercised in return for a confession. We agree with the Supreme Court of Utah that, under the circumstances, this statement was not improper. It was made long before petitioner confessed and in connection with the search for an accidental explanation of the death. Moreover, petitioner was repeatedly told not to confess to something she had not done.

A study of the record as a whole convinces us that the interview with petitioner was temperate and courteous. The sheriff proceeded cautiously and acted with consideration for the feelings of petitioner. For example, he explained that the reason he did not seek a written state-

ment until the day after the interview was that "We thought we would talk to her on the 10th, she would be calm and wouldn't be excited and she would know what she was doing. We didn't want to feel like taking advantage of her." Petitioner's emotional distress during the interview may be attributed to her remorse, rather than to any coercive conduct of the officers. There is nothing in the record which indicates that the sheriff chose to question petitioner immediately after her husband's funeral in order to capitalize on her feelings. Rather, he appears to have taken the first opportunity to talk with her after it had been established that her husband's death was caused by poisoning. The questioning was done by officers whom petitioner knew. She was not questioned in relays or made to repeat a story over and over while the interrogators searched for an inconsistency or flaw. She was allowed to talk without interruption about such matters as she chose. In sum, we find ample support in this record for a finding that the officers did not intend to take advantage of petitioner and that nothing they did had the effect of overbearing her will.

Accordingly, the judgment is

Affirmed.

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

The uncle and the father of petitioner appeared at the sheriff's office shortly after petitioner was arrested. The uncle testified that he said, "I don't think she has got a right to be questioned without her father's presence or some attorney." The father testified that he said, "I made the remark that it didn't look to me like a fair, square deal, to railroad that girl into that sheriff's office without counsel or friends of any description."

The uncle and the father were denied admission. They were calmed by the assurance that the accused had a

lawyer at her side to aid her under the questioning of the police—which was not true.

The request of a next of kin or friend outside the jail that counsel be furnished the accused who was inside under examination should be demand enough. Certainly those on the outside would have calmer judgment than the accused. They should speak for her unless it is clear, as it was not in this case, that the accused had waived her right to a lawyer and had elected to talk instead. For the reasons stated in my dissent in *Crooker* v. *California, post,* p. 441, decided this day, I would reverse this judgment of conviction.

CROOKER *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 178. Argued April 2, 1958.—Decided June 30, 1958.

Petitioner, a 31-year-old college graduate who had attended the first year of law school and had studied criminal law, was convicted in a state court of murder and sentenced to death, and his conviction was affirmed by the State Supreme Court. He claims that his conviction violated the Due Process Clause of the Fourteenth Amendment, because (1) the confession admitted in evidence over his objection was coerced, and (2) even if it was voluntary, it occurred while he was without counsel because of denials of his requests for an opportunity to obtain counsel. During the 14 hours between his arrest and confession, he asked several times for an opportunity to get counsel, but this was denied until after he had confessed. Meanwhile, he refused to take a lie detector test, refused to answer many questions, and showed full awareness of his right to be silent. He was advised by a police lieutenant that he need not answer any questions he did not wish to answer. The questioning by several police officers was intermittent, and petitioner was given coffee, milk and a sandwich and allowed to smoke whenever he liked. *Held:* The judgment is affirmed. Pp. 434–441.

1. On the record, this Court is unable to say that petitioner's confession was anything other than voluntary. Pp. 434–438.

2. Denial by state officials of the request of an accused for an opportunity to engage counsel at any stage of the pre-trial proceedings in a criminal case violates due process, if he is so prejudiced thereby as to make his subsequent trial lacking in basic fairness; but the record in this case does not show that petitioner was so prejudiced. Pp. 438–441.

47 Cal. 2d 348, 303 P. 2d 753, affirmed.

Robert W. Armstrong argued the cause and filed a brief for petitioner.

William E. James, Deputy Attorney General of California, argued the cause for respondent. With him on

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the brief were *Edmund G. Brown,* Attorney General, *William B. McKesson* and *Fred N. Whichello.*

A. L. Wirin and *Fred Okrand* filed a brief for the American Civil Liberties Union of Southern California.

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner, under sentence of death for the murder of his paramour, claims that his conviction in a California court violates Fourteenth Amendment due process of law because (1) the confession admitted into evidence over his objection had been coerced from him by state authorities, and (2) even if his confession was voluntary it occurred while he was without counsel because of the previous denial of his request therefor. The Supreme Court of California affirmed the conviction. 47 Cal. 2d 348, 303 P. 2d 753. Certiorari was granted because of the serious due process implications that attend state denial of a request to employ an attorney. 354 U. S. 908 (1957).[1] We conclude, however, that no violation of constitutional right has occurred.

The record here clearly reveals that prior to petitioner's confession he asked for and was denied opportunity to call his lawyer. We first consider that denial in connection with petitioner's contention that his subsequent confession was involuntary in nature.

It is well established that the Fourteenth Amendment prohibits use of coerced confessions in state prosecutions. *E. g., Brown* v. *Mississippi,* 297 U. S. 278 (1936); *Watts* v.

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[1] The grant of certiorari was limited to two questions:

"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?"

Indiana, 338 U. S. 49 (1949); *Fikes* v. *Alabama,* 352 U. S. 191 (1957). As in *Thomas* v. *Arizona,* 356 U. S. 390, and *Payne* v. *Arkansas,* 356 U. S. 560, both decided this Term, we consider the undisputed facts in the record to ascertain whether the confession resulted from police coercion or the exercise of petitioner's own free will.

The victim's son discovered her body the morning of July 5, 1955, stabbed and strangled to death in the bedroom of her Los Angeles home. She was last known to be alive about 1 a. m. the same day, when she talked with a friend by telephone.

Petitioner was arrested in his apartment at 1:30 that afternoon and subsequently was charged with the murder. He was then 31 years of age, a college graduate who had attended the first year of law school. While going to law school he had been a houseboy in the home of the victim. That position led to an illicit relationship with her, which she had attempted several times to terminate in the month preceding her death. The week of her death, after telling petitioner they had been found out, she had requested, and he had agreed, that he would never see her again.

Despite this understanding, he returned to her house late in the afternoon of July 4. Finding no one at home, he hid nearby for the ostensible purpose of discovering who was "threatening" her. From his hiding place he watched the victim return home with an escort around midnight. Shortly thereafter he saw the escort leave and watched the victim talk on the the telephone. He claims that he then left the vicinity to return to his apartment, never having entered the house that evening.

At the time of his arrest, petitioner was questioned about scratches that were evident on his neck and hands. He attributed the former to shaving and the latter to a traffic mishap on his way to the beach on July 4. However he refused to reveal where the accident occurred.

After his apartment was searched, petitioner was taken to the Los Angeles Police Station, where he was photographed and asked to take a lie detector test. He refused to submit to the test, and indicated that he wanted to call an attorney. At no time, however, does it appear that petitioner was offered the use of a telephone. Aside from sporadic questioning at his apartment, petitioner was interrogated for the first time from 8:30–9:30 p. m., the questioning being conducted by four officers and centering around his refusal of the lie detector test. During this time he asked for an opportunity to get a lawyer, naming a specific attorney whom he thought might represent him, but was told that "after [the] investigation was concluded he could call an attorney."

At 9:30 p. m. petitioner was transferred to the West Los Angeles Police Station, where five officers questioned him from 11 p. m. until shortly after midnight. He then was formally "booked," and given a physical examination by a police physician. The third and last questioning period was conducted by the same five men from approximately 1–2 a. m. July 6. For the next hour petitioner wrote and signed a detailed confession of the murder. Afterward, he was taken to the victim's home to re-enact the crime. At 5 a. m. he was put in jail and permitted to sleep.

That afternoon, a full day after his arrest, he was taken to the office of the Los Angeles County District Attorney to orally repeat the written confession. Petitioner balked at doing so and again asked that his attorney be called. Thereupon the District Attorney placed the call for him and listened to the conversation while petitioner talked on an extension phone with the attorney. Neither petitioner nor his attorney was aware that a tape recording was being made of everything that transpired in the office. The District Attorney interrupted at one point to deny that petitioner was forced to answer police questions,

and later to advise that the most convenient time for the attorney to see petitioner would be at 7 p. m. back at the West Los Angeles Police Station. After the phone call, petitioner was returned to jail to meet his attorney that evening. From that time forward, through both arraignment and trial, he was represented by his own counsel.

In the 14 hours between his arrest and confession, petitioner was given coffee and allowed to smoke whenever he liked. He also was given milk and a sandwich a few hours after his arrest. Before being transferred to the West Los Angeles Police Station he was advised by a police lieutenant, "You don't have to say anything that you don't want to," and he in fact refused to answer many questions both before and after the transfer. At such times he simply stated he "would rather not answer, or rather not make a statement about that."

The bare fact of police "detention and police examination in private of one in official state custody" does not render involuntary a confession by the one so detained. *Brown* v. *Allen,* 344 U. S. 443, 476 (1953). Neither does an admonition by the police to tell the truth, *Sparf* v. *United States,* 156 U. S. 51, 55–56 (1895), nor the failure of state authorities to comply with local statutes requiring that an accused promptly be brought before a magistrate.[2] *Fikes* v. *Alabama,* 352 U. S. 191 (1957).

Petitioner's claim of coercion, then, depends almost entirely on denial of his request to contact counsel.[3] This

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[2] Section 849 of the California Penal Code provides that a person arrested without a warrant must be brought before the nearest or most accessible magistrate in the county of arrest "without unnecessary delay." Cal. Penal Code, 1956, § 849.

[3] Even if within the scope of the limited grant of certiorari, claims of physical violence—"third degree" methods—were denied by witnesses for the State, and hence are not part of the undisputed portions of the record which we consider here. The ambiguous reply by one police officer, "I don't think we hurt you," in response to petitioner's

Court has not previously had occasion to determine the character of a confession obtained after such a denial. But we have held that confessions made by indigent defendants prior to state appointment of counsel are not thereby rendered involuntary, even in prosecutions where conviction without counsel would violate due process under the Fourteenth Amendment. *Brown* v. *Allen,* 344 U. S. 443, 474–476 (1953); *Stroble* v. *California,* 343 U. S. 181, 196–198 (1952); *Gallegos* v. *Nebraska,* 342 U. S. 55, 64–68 (1951). To be sure, coercion seems more likely to result from state denial of a specific request for opportunity to engage counsel than it does from state failure to appoint counsel immediately upon arrest. That greater possibility, however, is not decisive. It is negated here by petitioner's age, intelligence, and education. While in law school he had studied criminal law; indeed, when asked to take the lie detector test, he informed the operator that the results of such a test would not be admissible at trial absent a stipulation by the parties. Supplementing that background is the police statement to petitioner well before his confession that he did not have to answer questions. Moreover, the manner of his refusals to answer indicates full awareness of the right to be silent. On this record we are unable to say that petitioner's confession was anything other than voluntary.

We turn now to the contention that even if the confession be voluntary, its use violates due process because it was obtained after denial of petitioner's request to contact his attorney. Petitioner reaches this position by reasoning first that he has been denied a due process right

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assertion in the District Attorney's office that the officer struck him, cannot alter the contradicted state of the evidence when the same officer categorically denied the claim on cross-examination at the trial.

to representation and advice from his attorney,[4] and secondly that the use of any confession obtained from him during the time of such a denial would itself be barred by the Due Process Clause, even though freely made. We think petitioner fails to sustain the first point, and therefore we do not reach the second.

The right of an accused to counsel for his defense, though not firmly fixed in our common-law heritage, is of significant importance to the preservation of liberty in this country. See 1 Cooley's Constitutional Limitations (8th ed. 1927) 696–700; 2 Story on the Constitution (4th ed. 1873) § 1794. That right, secured in state prosecutions by the Fourteenth Amendment guaranty of due process, includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to "a fair opportunity to secure counsel of his own choice." *Powell* v. *Alabama,* 287 U. S. 45, 53 (1932); *Chandler* v. *Fretag,* 348 U. S. 3 (1954).

Under these principles, state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, *Chandler* v. *Fretag, supra,* but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of "that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California,* 314 U. S. 219, 236 (1941). Cf. *Moore* v. *Michigan,* 355 U. S.

[4] At times petitioner appears to urge "a rule" barring use of a voluntary confession obtained after state denial of a request to contact counsel regardless of whether any violation of a due process right to counsel occurred. That contention is simply an appeal to the supervisory power of this Court over the administration of justice in the federal courts. See *McNabb* v. *United States,* 318 U. S. 332 (1943), which, significantly enough, petitioner cites. The short answer to such a contention here is that this conviction was had in a state, not a federal, court.

155, 160 (1957). The latter determination necessarily depends upon all the circumstances of the case.

In *House* v. *Mayo,* 324 U. S. 42 (1945), an uneducated man in his twenties, a stranger to the area, was brought before a court to be sentenced on two convictions previously returned against him. He was there presented for the first time with a burglary information filed by the State, asked for and was denied opportunity to engage counsel, and finally pleaded guilty to the information, thereby obviating any necessity for trial of the charge on the merits. We held that a due process right to counsel was denied.

In contrast, the sum total of the circumstances here during the time petitioner was without counsel is a voluntary confession by a college-educated man with law school training who knew of his right to keep silent. Such facts, while perhaps a violation of California law,[5] do not approach the prejudicial impact in *House* v. *Mayo, supra,* and do not show petitioner to have been so "taken advantage of," *Townsend* v. *Burke,* 334 U. S. 736, 739 (1948), as to violate due process of law.

Petitioner, however, contends that a different rule should determine whether there has been a violation of right to counsel. He would have every state denial of a request to contact counsel be an infringement of the constitutional right *without regard to the circumstances of the case.* In the absence of any confession, plea or waiver—or other event prejudicial to the accused—such a doctrine would create a complete anomaly, since nothing would remain that could be corrected on new trial.

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[5] Section 825 of the California Penal Code provides that after an arrest, an attorney "may at the request of the prisoner or any relative of such prisoner, visit the person so arrested." Any officer in charge of the prisoner who wilfully refuses to let the attorney see the prisoner is made guilty of a misdemeanor. Cal. Penal Code, 1956, § 825.

Refusal by state authorities of the request to contact counsel necessarily would then be an absolute bar to conviction. On the other hand, where an event has occurred while the accused was without his counsel which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney. Due process, a concept "less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," *Betts* v. *Brady,* 316 U. S. 455, 462 (1942), demands no such rule.[6]

Affirmed.

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

When petitioner was first arrested, and before any real interrogation took place, he asked that his attorney be present. "I had no objection to talking with them about whatever they had to talk about, but . . . I wanted counsel with me . . . . I wanted an attorney with me before I would talk with them."

[6] It is suggested that this decision extends the rule of *Betts* v. *Brady,* 316 U. S. 455 (1942), to a capital case, thereby overruling, I should suppose, *Powell* v. *Alabama,* 287 U. S. 45, and related cases. But those decisions involve another problem, trial and conviction of the accused without counsel after state refusal to appoint an attorney for him. What due process requires in one situation may not be required in another, and this, of course, because the least change of circumstances may provide or eliminate fundamental fairness. The ruling here that due process does not always require immediate honoring of a request to obtain one's own counsel in the hours after arrest, hardly means that the same concept of fundamental fairness does not require state appointment of counsel before an accused is put to trial, convicted and sentenced to death.

That was petitioner's testimony; and it is verified by the testimony of Sergeant Gotch of the police.

> "A. I stated to him that after our investigation was concluded he could call an attorney, and if he didn't have funds to hire an attorney, when he went to Court a public defender would be assigned to handle his case.
>
> "He then stated that he had a friend who had been an instructor at Pepperdine College that would probably handle the case for him. I asked him who the name was, and he said it was a man by the name of Simpson, who lived in Long Beach.
>
> "Q. He asked you if he could call an attorney at that time, and you told him that he could call after your investigation was completed, is that right?
>
> "A. I told him, after I was through with the investigation, he could make a call."

This demand for an attorney was made over and again prior to the time a confession was extracted from the accused. Its denial was in my view a denial of that due process of law guaranteed the citizen by the Fourteenth Amendment.

The Court finds no prejudice from the denial of the right to consult counsel; and it bases that finding on the age, intelligence, and education of petitioner. But it was said in *Glasser* v. *United States,* 315 U. S. 60, 76, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." That was a federal prosecution. But what is true of the need for counsel in a federal case is equally true in a state case.

Betts v. *Brady,* 316 U. S. 455, held that in a state criminal trial the request of the accused for counsel can be denied and a judgment of conviction sustained as not in

violation of due process, where the offense is not a capital one, cf. *Williams* v. *Kaiser,* 323 U. S. 471, and the Court on review determines there was no fundamental unfairness resulting from the denial of counsel. The rule of *Betts* v. *Brady,* which never applied to a capital case, see *Powell* v. *Alabama,* 287 U. S. 45, is now made to do so. Assuming that *Betts* v. *Brady* was properly decided, there is no basis in reason for extending it to the denial of a request for counsel when the accused is arrested on a capital charge.

The Court properly concedes that the right to counsel extends to pretrial proceedings as well as to the trial itself. The need is as great then as at any time. The right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself. See *Chandler* v. *Fretag,* 348 U. S. 3, 10. It may also be necessary as a restraint on the coercive power of the police. The pattern of the third degree runs through our cases: a lone suspect unrepresented by counsel against whom the full coercive force of a secret inquisition is brought to bear. See *Lisenba* v. *California,* 314 U. S. 219; *Ashcraft* v. *Tennessee,* 322 U. S. 143; *Haley* v. *Ohio,* 332 U. S. 596; *Watts* v. *Indiana,* 338 U. S. 49; *Leyra* v. *Denno,* 347 U. S. 556. The third degree flourishes only in secrecy. One who feels the need of a lawyer and asks for one is asking for some protection which the law can give him against a coerced confession. No matter what care is taken innocent people are convicted of crimes they did not commit, see Borchard, Convicting the Innocent (1932); Frank and Frank, Not Guilty (1957). We should not lower the barriers and deny the accused any procedural safeguard against coercive police practices.[1] The trial of the issue of coercion is

[1] The use of techniques that make men admit crimes they did not commit and embrace ideas they oppose is told in Communist Interrogation, Indoctrination and Exploitation of American Military and

seldom helpful. Law officers usually testify one way, the accused another. The citizen who has been the victim of these secret inquisitions has little chance to prove coercion. The mischief and abuse of the third degree will continue as long as an accused can be denied the right to counsel at this the most critical period of his ordeal.[2] For what takes

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Civilian Prisoners, S. Rep. No. 2832, 84th Cong., 2d Sess.

Prof. Sam Bass Warner wrote in How Can The Third Degree Be Eliminated? 1 Bill of Rights Rev. 24, 25 (1940): "Everywhere the formula for successful detective work is that laid down by former Captain Fiaschetti of the New York City police: 'You get a bit of information, and then you grab the suspect and break him down. That is how detective work is done—a general formula.'"

See Report of Committee on Lawless Enforcement of Law, Am. Bar Assn., 1 Am. J. Police Sci. 575; The Third Degree, 4 Report to the National Commission on Law Observance and Enforcement (1931) 13; The Report of the President's Committee on Civil Rights (1947) 25 *et seq.*

[2] Dean Roscoe Pound wrote in 1934 as follows about this problem: "In the United States the feeling of police and prosecutors that they ought to be able to interrogate suspected persons long ago led to a systematic development of extra-legal or downright illegal examinations by officials, with every external appearance of legality. These examinations have become so much a matter of course that we may read in every morning paper how police or prosecutor examined (the word usually chosen is 'grilled') so and so for anywhere from ten to forty-eight or more consecutive hours, going at him in relays to wear him out and break him down. They are now taken to be the established practice. Prosecutors often conduct them with a pretence of authority when those subjected to them are ignorant, unadvised as to their rights, insignificant, or without means of employing counsel. Indeed, so bold have those who resort to those practices become, that we now read in the newspapers how this man or that was held '*incommunicado*' in a police station or jail while the grilling process was going on.

. . . . . .

"No amount of thundering against the third degree and its derivatives and analogues will achieve anything. The temper of the public will not permit of strengthening the constitutional safeguards

place in the secret confines of the police station may be more critical than what takes place at the trial.

> "If at any time, from the time of his arrest to final determination of his guilt or innocence, an accused really needs the help of an attorney, it is in the pre-trial period. . . . Indeed, the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate

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of the accused. For some time to come the tendency is likely to be in the opposite direction. Indeed, a feeling that the public are with them is largely behind the boldness with which high-handed, secret, extra-legal interrogations of persons held *incommunicado* are constantly carried on.

"My proposition is that the remedy for the third degree and its derivatives is to satisfy the reasonable demands of the police and the prosecutors for an interrogation of suspected persons and thus do away with the excuse for extra-legal questionings.

"I submit that there should be express provision for a legal examination of suspected or accused persons before a magistrate; that those to be examined should be allowed to have counsel present to safeguard their rights; that provision should be made for taking down the evidence so as to guarantee accuracy. As things are, it is not the least of the abuses of the system of extra-legal interrogation that there is a constant conflict of evidence as to what the accused said and as to the circumstances under which he said or was coerced into saying it." 24 J. Crim. L. & C. 1014, 1016, 1017.

As recently stated by T. B. Smith, a distinguished Scottish lawyer:

"The opportunities for exerting pressure on a suspect to confess are greatest when there is no judicial supervision, no legal representation and no public scrutiny. If an accused at his trial seeks to retract a confession allegedly extorted by third-degree methods, his word will stand alone against several police witnesses who may be expected to deny improper pressure. It is well known that in the totalitarian states extra-judicial pressure by brain-washing can eventually convince even the accused that he has committed the most improbable offenses, but when a confession has been extorted by less thorough third-degree methods it is likely to be retracted at the trial. The accused may, nevertheless, by then have damaged his position irreparably." 32 Tulane L. Rev. 349, 354.

> defense he may have long before he is arraigned and put on trial." Note, Criminal Procedure—Right to Counsel Prior to Trial, 44 Ky. L. J. 103–104.

Or as stated by a Committee headed by Prof. Zechariah Chafee, "A person accused of crime needs a lawyer right after his arrest probably more than at any other time." [3]

The Court speaks of the education of this petitioner and his ability to take care of himself. In an opinion written by Mr. Justice Sutherland the Court said, "Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama,* 287 U. S. 45, 69. Mr. Justice Sutherland spoke of the trial itself. But what is true of the trial is true of the preparation for trial and of the period commencing with the arrest of the accused. No matter how well educated and how well trained in the law an accused may be, he is sorely in need of legal advice once he is arrested for an offense that may exact his life.

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[3] See Chafee, Documents on Fundamental Human Rights, Pamphlets 1–3 (1951–1952), p. 541.

The Scots view was recently stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate,* 1954 Sess. Cas. 66, 78:

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e. g.,* to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

The innocent as well as the guilty may be caught in a web of circumstantial evidence that is difficult to break. A man may be guilty of indiscretions but not of the crime. He may be implicated by ambiguous circumstances difficult to explain away. He desperately needs a lawyer to help extricate him if he's innocent. He has the right to receive the benefit of the advice of his own counsel at the trial, as we held in *Chandler* v. *Fretag,* 348 U. S. 3, 9. That same right should extend to the pretrial stage.

The need of a lawyer in the pretrial investigation, if the constitutional rights of the accused are to be preserved, was stated by MR. JUSTICE BLACK, dissenting, in *In re Groban,* 352 U. S. 330, 340–343:

> "The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. This is particularly true when the officer is accompanied by several of his assistants and they all vouch for his story. But when the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced.
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> "The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provides still another protection to the witness. Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter, he

> is subject to their uncontrolled will. . . . Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders."

The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest.[4]

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[4] Quite a few of the States provide that procedural safeguard against coercive police practices. The California Penal Code, § 825, provides:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who wilfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of five hundred dollars, to be recovered by action in any court of competent jurisdiction."

Another type of statute is that contained in Kan. Gen. Stat., 1949, § 62–1304a, which provides:

"That any person held in restraint of his liberty pending trial or held for investigation in any jail or other place of confinement in this state, shall be permitted upon request to immediately confer privately with an attorney of his choice in the same room with such attorney and without any barriers between such person and his attorney, and without any listening in or recording devices."

For statutes similar to the Kansas Act see Colo. Rev. Stat. Ann., 1953 (1957 Cum. Supp.), c. 39–1–1; Ill. Rev. Stat., 1955, c. 38, § 449.1; Vernon's Ann. Mo. Stat., 1953, § 544.170; Mont. Rev. Codes, 1947, § 93–2117; N. H. Rev. Stat. Ann., 1955, c. 594:16; N. C. Gen. Stat., 1953 (1957 Cum. Supp.), § 15–47; Page's Ohio Rev. Code Ann., 1954, § 2935.16. See also § 37 of the A. L. I. Model Code of Criminal Procedure.

Syllabus.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* ALABAMA EX REL. PATTERSON, ATTORNEY GENERAL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 91. Argued January 15–16, 1958.—Decided June 30, 1958.

Petitioner is a nonprofit membership corporation organized under the laws of New York for the purpose of advancing the welfare of Negroes. It operates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner. It had local affiliates in Alabama and opened an office of its own there without complying with an Alabama statute which, with some exceptions, requires a foreign corporation to qualify before doing business in the State by filing its corporate charter and designating a place of business and an agent to receive service of process. Alleging that petitioner's activities were causing irreparable injury to the citizens of the State for which criminal prosecution and civil actions at law afforded no adequate relief, the State brought an equity suit in a state court to enjoin petitioner from conducting further activities in, and to oust it from, the State. The court issued an *ex parte* order restraining petitioner, *pendente lite*, from engaging in further activities in the State and from taking any steps to qualify to do business there. Petitioner moved to dissolve the restraining order, and the court, on the State's motion, ordered the production of many of petitioner's records, including its membership lists. After some delay, petitioner produced substantially all the data called for except its membership lists. It was adjudged in contempt and fined $100,000 for failure to produce the lists. The State Supreme Court denied certiorari to review the contempt judgment, and this Court granted certiorari. *Held:*

1. Denial of relief by the State Supreme Court did not rest on an adequate state ground, and this Court has jurisdiction to entertain petitioner's federal claims. Pp. 454–458.

2. Petitioner has a right to assert on behalf of its members a claim that they are entitled under the Federal Constitution to be protected from being compelled by the State to disclose their affiliation with the Association. Pp. 458–460.

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3. Immunity from state scrutiny of petitioner's membership lists is here so related to the right of petitioner's members to pursue their lawful private interests privately and to associate freely with others in doing so as to come within the protection of the Fourteenth Amendment. The State has failed to show a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of petitioner's membership lists is likely to have. Accordingly, the judgment of civil contempt and the fine which resulted from petitioner's refusal to produce its membership lists must fall. Pp. 460–466.

(a) Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment. Pp. 460–461.

(b) In the circumstances of this case, compelled disclosure of petitioner's membership lists is likely to constitute an effective restraint on its members' freedom of association. Pp. 461–463.

(c) Whatever interest the State may have in obtaining the names of petitioner's ordinary members, it has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order. Pp. 463–466.

4. The question whether the state court's temporary restraining order preventing petitioner from soliciting support in the State violates the Fourteenth Amendment is not properly before this Court, since the merits of the controversy have not been passed upon by the state courts. Pp. 466–467.

265 Ala. 349, 91 So. 2d 214, reversed and cause remanded.

Robert L. Carter argued the cause for petitioner. With him on the brief were *Thurgood Marshall, Arthur D. Shores, William T. Coleman, Jr., George E. C. Hayes, William R. Ming, Jr., James M. Nabrit, Jr., Louis H. Pollak* and *Frank D. Reeves.*

Edmon L. Rinehart, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief were *John Patterson,* Attorney General, and *MacDonald Gallion* and *James W. Webb,* Assistant Attorneys General.

MR. JUSTICE HARLAN delivered the opinion of the Court.

We review from the standpoint of its validity under the Federal Constitution a judgment of civil contempt entered against petitioner, the National Association for the Advancement of Colored People, in the courts of Alabama. The question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association. The judgment of contempt was based upon petitioner's refusal to comply fully with a court order requiring in part the production of membership lists. Petitioner's claim is that the order, in the circumstances shown by this record, violated rights assured to petitioner and its members under the Constitution.

Alabama has a statute similar to those of many other States which requires a foreign corporation, except as exempted, to qualify before doing business by filing its corporate charter with the Secretary of State and designating a place of business and an agent to receive service of process. The statute imposes a fine on a corporation transacting intrastate business before qualifying and provides for criminal prosecution of officers of such a corporation. Ala. Code, 1940, Tit. 10, §§ 192–198. The National Association for the Advancement of Colored People is a nonprofit membership corporation organized under the laws of New York. Its purposes, fostered on a nationwide basis, are those indicated by its name,* and it oper-

*The Certificate of Incorporation of the Association provides that its ". . . principal objects . . . are voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to

ates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner. The first Alabama affiliates were chartered in 1918. Since that time the aims of the Association have been advanced through activities of its affiliates, and in 1951 the Association itself opened a regional office in Alabama, at which it employed two supervisory persons and one clerical worker. The Association has never complied with the qualification statute, from which it considered itself exempt.

In 1956 the Attorney General of Alabama brought an equity suit in the State Circuit Court, Montgomery County, to enjoin the Association from conducting further activities within, and to oust it from, the State. Among other things the bill in equity alleged that the Association had opened a regional office and had organized various affiliates in Alabama; had recruited members and solicited contributions within the State; had given financial support and furnished legal assistance to Negro students seeking admission to the state university; and had supported a Negro boycott of the bus lines in Montgomery to compel the seating of passengers without regard to race. The bill recited that the Association, by continuing to do business in Alabama without complying with the qualification statute, was ". . . causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief . . . ." On the day the complaint was filed, the Circuit Court issued *ex parte* an order restraining the Association, *pendente lite*, from engaging in

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secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law."

further activities within the State and forbidding it to take any steps to qualify itself to do business therein.

Petitioner demurred to the allegations of the bill and moved to dissolve the restraining order. It contended that its activities did not subject it to the qualification requirements of the statute and that in any event what the State sought to accomplish by its suit would violate rights to freedom of speech and assembly guaranteed under the Fourteenth Amendment to the Constitution of the United States. Before the date set for a hearing on this motion, the State moved for the production of a large number of the Association's records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama "members" and "agents" of the Association. It alleged that all such documents were necessary for adequate preparation for the hearing, in view of petitioner's denial of the conduct of intrastate business within the meaning of the qualification statute. Over petitioner's objections, the court ordered the production of a substantial part of the requested records, including the membership lists, and postponed the hearing on the restraining order to a date later than the time ordered for production.

Thereafter petitioner filed its answer to the bill in equity. It admitted its Alabama activities substantially as alleged in the complaint and that it had not qualified to do business in the State. Although still disclaiming the statute's application to it, petitioner offered to qualify if the bar from qualification made part of the restraining order were lifted, and it submitted with the answer an executed set of the forms required by the statute. However petitioner did not comply with the production order, and for this failure was adjudged in civil contempt and fined $10,000. The contempt judgment provided that the fine would be subject to reduction or remission if compliance

were forthcoming within five days but otherwise would be increased to $100,000.

At the end of the five-day period petitioner produced substantially all the data called for by the production order except its membership lists, as to which it contended that Alabama could not constitutionally compel disclosure, and moved to modify or vacate the contempt judgment, or stay its execution pending appellate review. This motion was denied. While a similar stay application, which was later denied, was pending before the Supreme Court of Alabama, the Circuit Court made a further order adjudging petitioner in continuing contempt and increasing the fine already imposed to $100,000. Under Alabama law, see *Jacoby* v. *Goetter, Weil & Co.*, 74 Ala. 427, the effect of the contempt adjudication was to foreclose petitioner from obtaining a hearing on the merits of the underlying ouster action, or from taking any steps to dissolve the temporary restraining order which had been issued *ex parte,* until it purged itself of contempt. But cf. *Harrison* v. *St. Louis & S. F. R. Co.,* 232 U. S. 318; *Hovey* v. *Elliott,* 167 U. S. 409.

The State Supreme Court thereafter twice dismissed petitions for certiorari to review this final contempt judgment, the first time, 91 So. 2d 221, for insufficiency of the petition's allegations and the second time on procedural grounds. 265 Ala. 349, 91 So. 2d 214. We granted certiorari because of the importance of the constitutional questions presented. 353 U. S. 972.

I.

We address ourselves first to respondent's contention that we lack jurisdiction because the denial of certiorari by the Supreme Court of Alabama rests on an independent nonfederal ground, namely, that petitioner in applying for certiorari had pursued the wrong appellate

remedy under state law. Respondent recognizes that our jurisdiction is not defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support," *Ward* v. *Board of County Commissioners,* 253 U. S. 17, 22. It thus becomes our duty to ascertain, ". . . in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank* v. *Bryan,* 282 U. S. 765, 773.

The Alabama Supreme Court held that it could not consider the constitutional issues underlying the contempt judgment which related to the power of the State to order production of membership lists because review by certiorari was limited to instances ". . . where the court lacked jurisdiction of the proceeding, or where on the face of it the order disobeyed was void, or where procedural requirements with respect to citation for contempt and the like were not observed, or where the fact of contempt is not sustained . . . ." 265 Ala., at 353, 91 So. 2d, at 217. The proper means for petitioner to obtain review of the judgment in light of its constitutional claims, said the court, was by way of mandamus to quash the discovery order prior to the contempt adjudication. Because of petitioner's failure to pursue this remedy, its challenge to the contempt order was restricted to the above grounds. Apparently not deeming the constitutional objections to draw into question whether "on the face of it the order disobeyed was void," the court found no infirmity in the contempt judgment under this limited scope of review. At the same time it did go on to consider petitioner's constitutional challenge to the order to produce membership lists but found it untenable since membership lists were not privileged against disclosure pursuant to reasonable state demands and since the privilege against self-incrimination was not available to corporations.

We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment. As early as 1909 that court said in such a case, *Ex parte Dickens,* 162 Ala. 272, at 276, 279–280, 50 So. 218, at 220, 221:

> "Originally, on certiorari, only the question of jurisdiction was inquired into; but this limit has been removed, and now the court 'examines the law questions involved in the case which may affect its merits.' . . .
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> ". . . [T]he judgment of this court is that the proper way to review the action of the court in cases of this kind is by certiorari, and not by appeal.
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> "We think that certiorari is a better remedy than mandamus, because the office of a 'mandamus' is to require the lower court or judge to act, and not 'to correct error or to reverse judicial action,' . . . whereas, in a proceeding by certiorari, errors of law in the judicial action of the lower court may be inquired into and corrected."

This statement was in full accord with the earlier case of *Ex parte Boscowitz,* 84 Ala. 463, 4 So. 279, and the practice in the later Alabama cases, until we reach the present one, appears to have been entirely consistent with this rule. See *Ex parte Wheeler,* 231 Ala. 356, 358, 165 So. 74, 75–76; *Ex parte Blakey,* 240 Ala. 517, 199 So. 857; *Ex parte Sellers,* 250 Ala. 87, 88, 33 So. 2d 349, 350. For example, in *Ex parte Morris,* 252 Ala. 551, 42 So. 2d 17, decided as late as 1949, the petitioner had been held in contempt for his refusal to obey a court order to produce names of members of the Ku Klux Klan. On writ of certiorari, constitutional grounds were urged in part for

reversal of the contempt conviction. In denying the writ of certiorari, the Supreme Court concluded that petitioner had been accorded due process, and in explaining its denial the court considered and rejected various constitutional claims relating to the validity of the order. There was no intimation that the petitioner had selected an inappropriate form of appellate review to obtain consideration of all questions of law raised by a contempt judgment.

The Alabama cases do indicate, as was said in the opinion below, that an order requiring production of evidence ". . . *may* be reviewed on petition for mandamus." 265 Ala., at 353, 91 So. 2d, at 217. (Italics added.) See *Ex parte Hart,* 240 Ala. 642, 200 So. 783; cf. *Ex parte Driver,* 255 Ala. 118, 50 So. 2d 413. But we can discover nothing in the prior state cases which suggests that mandamus is the *exclusive* remedy for reviewing court orders after disobedience of them has led to contempt judgments. Nor, so far as we can find, do any of these prior decisions indicate that the validity of such orders can be drawn in question by way of certiorari only in instances where a defendant had no opportunity to apply for mandamus. Although the opinion below suggests no such distinction, the State now argues that this was in fact the situation in all of the earlier certiorari cases, because there the contempt adjudications, unlike here, had followed almost immediately the disobedience to the court orders. Even if that is indeed the rationale of the Alabama Supreme Court's present decision, such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitu-

tional rights. Cf. *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673.

That there was justified reliance here is further indicated by what the Alabama Supreme Court said in disposing of petitioner's motion for a stay of the first contempt judgment in this case. This motion, which was filed prior to the final contempt judgment and which stressed constitutional issues, recited that "[t]he only way in which the [Association] can seek a review of the validity of the order upon which the adjudication of contempt is based [is] by filing a petition for Writ of Certiorari in this Court." In denying the motion, 265 Ala. 356, 357, 91 So. 2d 220, 221, the Supreme Court stated:

> "It is the established rule of this Court that the proper method of reviewing a judgment for civil contempt of the kind here involved is by a petition for common law writ of certiorari . . . .
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> "But the petitioner here has not applied for writ of certiorari, and we do not feel that the petition [for a stay] presently before us warrants our interference with the judgment of the Circuit Court of Montgomery County here sought to be stayed."

We hold that this Court has jurisdiction to entertain petitioner's federal claims.

II.

The Association both urges that it is constitutionally entitled to resist official inquiry into its membership lists, and that it may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists. We think that petitioner argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative before this

Court. In so concluding, we reject respondent's argument that the Association lacks standing to assert here constitutional rights pertaining to the members, who are not of course parties to the litigation.

To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. *Tileston* v. *Ullman,* 318 U. S. 44; Robertson and Kirkham, Jurisdiction of the Supreme Court (1951 ed.), § 298. This rule is related to the broader doctrine that constitutional adjudication should where possible be avoided. See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346–348 (concurring opinion). The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court. See *Barrows* v. *Jackson,* 346 U. S. 249, 255–259; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 183–187 (concurring opinion).

If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies . . ." may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views. The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely

affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members. Cf. *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–536.

III.

We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment. Petitioner argues that in view of the facts and circumstances shown in the record, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs. It contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Thomas* v. *Collins,* 323 U. S. 516, 530. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See *Gitlow* v. *New York,* 268 U. S. 652, 666; *Palko* v. *Connecticut,* 302 U. S. 319, 324; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Staub* v. *City of Baxley,* 355 U. S. 313, 321. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the

effect of curtailing the freedom to associate is subject to the closest scrutiny.

The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action, cf. *De Jonge* v. *Oregon, supra; Near* v. *Minnesota,* 283 U. S. 697, to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. See *American Communications Assn.* v. *Douds,* 339 U. S. 382, 402. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. Thus in *Douds,* the Court stressed that the legislation there challenged, which on its face sought to regulate labor unions and to secure stability in interstate commerce, would have the practical effect "of discouraging" the exercise of constitutionally protected political rights, 339 U. S., at 393, and it upheld the statute only after concluding that the reasons advanced for its enactment were constitutionally sufficient to justify its possible deterrent effect upon such freedoms. Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. *United States* v. *Rumely,* 345 U. S. 41, 46–47; *United States* v. *Harriss,* 347 U. S. 612, 625–626. The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. *Grosjean* v. *American*

Press Co., 297 U. S. 233; *Murdock* v. *Pennsylvania*, 319 U. S. 105.

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn.* v. *Douds, supra*, at 402: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. Cf. *United States* v. *Rumely, supra*, at 56–58 (concurring opinion).

We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and

its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.

We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association. See *American Communications Assn.* v. *Douds, supra,* at 400; *Schneider* v. *State,* 308 U. S. 147, 161. Such a ". . . subordinating interest of the State must be compelling," *Sweezy* v. *New Hampshire,* 354 U. S. 234, 265 (concurring opinion). It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.

It is important to bear in mind that petitioner asserts no right to absolute immunity from state investigation, and no right to disregard Alabama's laws. As shown by its substantial compliance with the production order, petitioner does not deny Alabama's right to obtain from it such information as the State desires concerning the pur-

poses of the Association and its activities within the State. Petitioner has not objected to divulging the identity of its members who are employed by or hold official positions with it. It has urged the rights solely of its ordinary rank-and-file members. This is therefore not analogous to a case involving the interest of a State in protecting its citizens in their dealings with paid solicitors or agents of foreign corporations by requiring identification. See *Cantwell* v. *Connecticut, supra,* at 306; *Thomas* v. *Collins, supra,* at 538.

Whether there was "justification" in this instance turns solely on the substantiality of Alabama's interest in obtaining the membership lists. During the course of a hearing before the Alabama Circuit Court on a motion of petitioner to set aside the production order, the State Attorney General presented at length, under examination by petitioner, the State's reason for requesting the membership lists. The exclusive purpose was to determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute, and the membership lists were expected to help resolve this question. The issues in the litigation commenced by Alabama by its bill in equity were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them. As matters stand in the state court, petitioner (1) has admitted its presence and conduct of activities in Alabama since 1918; (2) has offered to comply in all respects with the state qualification statute, although pre-

serving its contention that the statute does not apply to it; and (3) has apparently complied satisfactorily with the production order, except for the membership lists, by furnishing the Attorney General with varied business records, its charter and statement of purposes, the names of all of its directors and officers, and with the total number of its Alabama members and the amount of their dues. These last items would not on this record appear subject to constitutional challenge and have been furnished, but whatever interest the State may have in obtaining names of ordinary members has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order.

From what has already been said, we think it apparent that *Bryant* v. *Zimmerman,* 278 U. S. 63, cannot be relied on in support of the State's position, for that case involved markedly different considerations in terms of the interest of the State in obtaining disclosure. There, this Court upheld, as applied to a member of a local chapter of the Ku Klux Klan, a New York statute requiring any unincorporated association which demanded an oath as a condition to membership to file with state officials copies of its ". . . constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year." N. Y. Laws 1923, c. 664, §§ 53, 56. In its opinion, the Court took care to emphasize the nature of the organization which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice. Furthermore, the situation before us is significantly different from that in *Bryant,* because the organization there had made no effort to comply with

any of the requirements of New York's statute but rather had refused to furnish the State with *any* information as to its local activities.

We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. Accordingly, the judgment of civil contempt and the $100,000 fine which resulted from petitioner's refusal to comply with the production order in this respect must fall.

IV.

Petitioner joins with its attack upon the production order a challenge to the constitutionality of the State's *ex parte* temporary restraining order preventing it from soliciting support in Alabama, and it asserts that the Fourteenth Amendment precludes such state action. But as noted above, petitioner has never received a hearing on the merits of the ouster suit, and we do not consider these questions properly here. The Supreme Court of Alabama noted in its denial of the petition for certiorari that such petition raised solely a question pertinent to the contempt adjudication. "The ultimate aim and purpose of the litigation is to determine the right of the state to enjoin petitioners from doing business in Alabama. That question, however, is not before us in this proceeding." 265 Ala., at 352, 91 So. 2d, at 216. The proper method for raising questions in the state appellate courts pertinent to the underlying suit for an injunction appears

to be by appeal, after a hearing on the merits and final judgment by the lower state court. Only from the disposition of such an appeal can review be sought here.

For the reasons stated, the judgment of the Supreme Court of Alabama must be reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed.

LERNER *v.* CASEY ET AL., CONSTITUTING THE NEW YORK CITY TRANSIT AUTHORITY.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 165. Argued March 4, 1958.—Decided June 30, 1958.

In an investigation conducted under the New York Security Risk Law, appellant, a subway conductor employed by the New York City Transit Authority, was summoned to the office of the Commissioner of Investigation of New York City and asked whether he was then a member of the Communist Party. He refused to answer, claiming his privilege against self-incrimination under the Fifth Amendment, and he persisted in this refusal after being warned that it might lead to his dismissal and after being given time to reconsider and to obtain counsel. Based upon this refusal, appellees found that "reasonable grounds exist for belief that, because of his doubtful trust and reliability," appellant's continued employment would endanger national and state security, and they suspended him and later discharged him after he failed to avail himself of an opportunity to submit statements or affidavits showing why he should be reinstated. Without pursuing his administrative remedies before the State Civil Service Commission, he sued in a state court for reinstatement; that court dismissed the suit; its decision was sustained by the State's highest court; and he appealed to this Court. *Held:* Appellant's discharge did not violate his rights under the Federal Constitution. Pp. 470–479.

1. Since the constitutional questions before this Court relate primarily to the propriety of the findings made by appellees, rather than to the validity of the provisions of the state law, the appeal is dismissed; but certiorari is granted. P. 473.

2. Appellant is in no position to claim that the state law deprives him of procedural due process by providing for dismissal of employees without a hearing, opportunity for cross-examination or disclosure of the evidence upon which dismissal is based, since his own refusal to answer blocked such proceedings and in any event he failed to pursue his administrative remedy. P. 473.

3. Since the highest state court considered that appellant was not discharged on the ground that he was a member of the Communist Party, he cannot claim that the statute offends due process by making it possible to base dismissal of an employee on mere

present membership in the Communist Party without regard to the character of such membership. Pp. 474–475.

4. The manner in which the Security Risk Law was applied to appellant did not violate his rights under the Fourteenth Amendment. Pp. 475–479.

(a) The highest state court held that appellant's discharge was not based upon any inference of Communist Party membership drawn from the exercise of his Fifth Amendment privilege nor upon the assertion of that constitutional protection, but rather upon a finding of "doubtful trust and reliability" based upon his lack of candor in refusing to answer questions relevant to his employment put to him by his employer. Pp. 475–476.

(b) *Slochower* v. *Board of Higher Education,* 350 U. S. 551, distinguished. Pp. 476–477.

(c) New York's classification of employees found to be of doubtful trust and reliability as "security risks" is not so arbitrary as to be constitutionally impermissible when applied to one in appellant's position. P. 478.

(d) Appellant's assertion of his Fifth Amendment privilege in these state proceedings did not preclude the State from concluding that his failure to answer questions relevant to his employment engendered reasonable doubt as to his trustworthiness and reliability. Pp. 478–479.

2 N. Y. 2d 355, 141 N. E. 2d 553, affirmed.

Leonard B. Boudin argued the cause for appellant. With him on the brief was *Victor Rabinowitz.*

Daniel T. Scannell argued the cause for appellees. With him on the brief were *Helen R. Cassidy* and *Edward L. Cox, Jr.*

Ruth Kessler Toch, Assistant Attorney General, argued the cause for the State of New York, as *amicus curiae,* urging affirmance. With her on the brief were *Louis J. Lefkowitz,* Attorney General, and *Paxton Blair,* Solicitor General.

David I. Shapiro and *Stephen C. Vladeck* filed a brief for the New York Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case raises questions under the Fourteenth Amendment to the Constitution of the United States concerning the validity of appellant's dismissal from his position as a subway conductor in the New York City Transit System. The dismissal was pursuant to the Security Risk Law of the State of New York, N. Y. Laws 1951, c. 233, as amended, N. Y. Laws 1954, c. 105.

The Security Risk Law, enacted by New York in 1951,[1] provides in pertinent part as follows: The State Civil Service Commission is authorized to classify any bureau or agency within the State as a "security agency" (§ 3), defined as any unit of government ". . . wherein functions are performed which are necessary to the security or defense of the nation and the state . . . ." (§ 2.) The appointing authority in each such agency is given powers of suspension and dismissal as to any employee if, after investigation, it is found that, ". . . upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person . . . [in a security agency] would endanger the security or defense of the nation and the state" (§ 5). Such evidence is not to be restricted by normal rules prevailing in the courts, and the required finding may be based upon an employee's past conduct ". . . which may include, . . . but shall not be limited to evidence of . . . (d) membership in any organization or group found by the state civil service commission to be subversive" (§ 7).[2]

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[1] The state statute was originally passed as an emergency measure and thereafter extended from year to year. The present terminal date is June 30, 1958.

[2] A subversive organization is defined in § 8 as one which is found ". . . to advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, vio-

A discharged employee has a right of appeal to the Civil Service Commission, which may take further evidence (§ 6).

In November 1953 the Commission determined the New York City Transit Authority, which the appellees in this case constitute, to be a "security agency," [3] and in March 1954 it listed the Communist Party of the United States as a "subversive group," adopting, as contemplated by the Security Risk Law, the similar listing of the State Board of Regents made under the provisions of the Feinberg Law, N. Y. Laws 1949, c. 360, after hearings at which the Party appeared by counsel. In September 1954 appellant was summoned to the office of the Commissioner of Investigation of the City of New York in the course of an investigation being conducted under the Security Risk Law.[4] Appellant, who had been sworn, was asked whether he was *then* a member of the Communist Party, but he refused to answer and claimed his privilege against self-incrimination under the Fifth Amendment to the Federal Constitution.[5] After he had

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lence or any unlawful means, or to advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine . . . ."

[3] The New York Court of Appeals held that the Transit Authority was a state body corporate subject to classification under the Security Risk Law and sustained the Commission's determination that it was a "security agency." 2 N. Y. 2d 355, 365–367, 141 N. E. 2d 533, 538–539. We consider ourselves bound by these holdings.

[4] The Court of Appeals held that the Commissioner of Investigation, although a city official, was authorized to act with respect to these matters arising under the Security Risk Law and to conduct these investigations.

[5] Appellant did not specifically state that his refusal to answer was based on his belief that an answer might incriminate him but simply explained his silence by reference to the "Fifth Amendment." We consider this reference, without regard to the availability of the Fifth Amendment to appellant in this state investigation (see p. 477, *infra*), to be equivalent to an assertion of a claim of possible self-incrimination. See *Quinn* v. *United States*, 349 U. S. 155, 162–163; *Emspak* v. *United States*, 349 U. S. 190, 194.

been advised of the provisions of the Security Risk Law and given time to reconsider his refusal and to engage counsel, appellant, accompanied by counsel, made two further appearances in September and October before the Department of Investigation, on each of which he adhered to his initial position.

Appellees, informed of these events, thereupon adopted a resolution suspending appellant without pay and sent him a copy of the resolution with a covering letter. This letter notified appellant that his suspension followed a finding under § 5 of the Security Risk Law ". . . that upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability . . . ," appellant's continued employment would endanger national and state security. This finding was based on appellant's refusal ". . . to answer questions as to whether or not he was a member of the Communist Party and [invocation of] the Fifth Amendment to the Constitution of the United States . . . ." Appellant was also advised, pursuant to § 5 of the Security Risk Law, that he had thirty days within which to submit statements or affidavits showing why he should be reinstated. At the expiration of this period appellees, having heard nothing further from appellant, dismissed him from his position by a resolution which confirmed the previous "suspension" findings.

Appellant did not appeal to the Civil Service Commission, as was his statutory right, but brought this proceeding in the state courts for reinstatement. He attacked appellees' actions on various grounds, including the constitutional grounds asserted here. The State Supreme Court, assuming jurisdiction despite appellant's failure to exhaust his administrative remedies, upheld the Security Risk Law and its application to appellant as constitutional, ruled adversely to appellant's state law contentions, and dismissed the proceeding. 138 N. Y. S.

2d 777. The Appellate Division, 2 App. Div. 2d 1, 154 N. Y. S. 2d 461 (2d Dept.), and the Court of Appeals, 2 N. Y. 2d 355, 141 N. E. 2d 533, both affirmed, each by a divided court. An appeal to this Court was brought under 28 U. S. C. § 1257 (2), and we postponed to the hearing on the merits the question of our jurisdiction. 355 U. S. 803. As will appear from this opinion, we consider that the constitutional questions before us relate primarily, and more substantially, to the propriety of the findings made by appellees rather than to the validity of the provisions of the Security Risk Law. Accordingly, we think it the better course to dismiss the appeal, and to treat the papers as a petition for a writ of certiorari, which is hereby granted.[6] 28 U. S. C. § 2103. Cf. *Sweezy* v. *New Hampshire,* 354 U. S. 234, 236.

We address ourselves initially to appellant's constitutional challenges to the Security Risk Law in its entirety or to certain of its provisions. It is said that New York's statute deprives him of procedural due process, in that it provides for dismissal of employees in the first instance without a statutory right to a hearing, opportunity for cross-examination, or disclosure of the evidence on which dismissal is based. However, appellant is in no position to complain of procedural defects in the statute. His own refusal to answer blocked proceedings at his appearances before the Department of Investigation, and more important he failed to pursue his administrative remedy by appealing to and obtaining a hearing before the State Civil Service Commission.[7]

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[6] For convenience, we shall continue to refer to the parties as appellant and appellees.

[7] We must also reject the contention that appellant was denied due process in that the resolution made the basis for his dismissal noted not only his refusal to answer but also ". . . that further investigation has revealed activities on the part of [appellant] which give

Appellant further argues that the Security Risk Law could not be applied to him in 1954 since at that time no public emergency existed which could justify the law. But New York's right to enact legislation to protect its public service against the employment of persons fairly deemed untrustworthy and unreliable, and therefore security risks, can hardly be regarded as constitutionally dependent upon the existence of a public emergency, and we do not think it open to us to inquire into the motives which led the State Legislature to extend the Security Risk Law beyond its original effective period. Nor can we say that it was so irrational as to make it constitutionally impermissible for New York to apply this statute to one employed in the major artery of New York's transportation system, even though appellant's daily task was simply to open and shut subway doors. We are not here concerned with the wisdom, but solely with the constitutional validity, of the application of this statute to appellant.

Finally, the claim that the statute offends due process because dismissal of an employee may be based on mere present membership in the Communist Party, without regard to the character of such membership, cf. *Wieman* v. *Updegraff*, 344 U. S. 183, must also fail. Apart from the fact that the statute simply makes membership in an organization found to be subversive one of the elements which may enter into the ultimate determination as to "doubtful trust and reliability," appellant, as the Court

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reasonable ground for belief that he is not a good security risk. . . ." These other activities were not revealed to appellant. But this issue is not before us, since the state court sustained the dismissal solely on the basis of appellant's refusal to answer. In any event had appellant pursued his administrative remedy, he could have sought disclosure and review of such evidence before the Civil Service Commission.

of Appeals viewed the administrative proceedings and as we accordingly treat them here, was not discharged on grounds that he was a party member.

We come then to what we consider appellant's major constitutional claim, which goes to the manner in which the Security Risk Law was applied to him. It is contended that the administrative finding of reasonable grounds for belief that he was "of doubtful trust and reliability," and therefore a security risk, offends due process. The contention is (1) that the finding rests on an inference, that appellant was a member of the Communist Party, which was drawn from appellant's invocation of the Fifth Amendment, and that this inference lacked any rational connection with appellant's refusal to answer based on the exercise of this constitutional privilege; and (2) that the drawing of such an inference was in any event in derogation of the policy behind the Fifth Amendment privilege and contrary to the teaching of this Court's decision in *Slochower* v. *Board of Higher Education,* 350 U. S. 551. We think this contention both misconceives the basis on which the Court of Appeals sustained appellant's dismissal and assumes incorrectly the availability of the Fifth Amendment to appellant in these proceedings. Consequently it must be rejected in both its aspects.

As we read its opinion, the Court of Appeals held that appellant had been discharged neither because of any inference of Communist Party membership which was drawn from the exercise of the Fifth Amendment privilege nor because of the assertion of that constitutional protection, but rather because of the doubt created as to his "reliability" by his refusal to answer a relevant question put by his employer, a doubt which the court held justifiable quite independently of appellant's reasons for his silence. In effect, the administrative action was inter-

preted to rest solely on the refusal to respond. The Court of Appeals said:

> "[N]o inference of membership in [the Communist] party was drawn from [appellant's] refusal to reply to the question asked . . . . [Appellant] was not discharged for invoking the Fifth Amendment; he was discharged for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to Communist party membership." 2 N. Y. 2d, at 372, 141 N. E. 2d, at 542.

In other words, we read the court's opinion as meaning that a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness, cf. *Garner* v. *Board of Public Works,* 341 U. S. 716; *Beilan* v. *Board of Public Education, ante,* p. 399, decided today, just as if he had refused to give any other information about himself which might be relevant to his employment. It was this lack of candor which provided the evidence of appellant's doubtful trust and reliability which under the New York statutory scheme constituted him a security risk. The Court of Appeals went on to reason that had appellant refused, without more, to answer the question, the finding of "doubtful trust and reliability" would have undoubtedly been permissible, and that the basis for such a finding, in appellant's refusal to answer, was not destroyed by the claim of the Fifth Amendment privilege because the Commissioner was not required to accept that claim as an adequate explanation of the refusal.

Accepting, as we do, these premises of the state court's opinion, we find no constitutional block to its decision sustaining appellant's dismissal from employment. Postponing for the moment the question whether appellant was entitled to rely in this local investigation on the federal privilege, it seems clear that the discharge here

in any event was unlike that in *Slochower* v. *Board of Higher Education, supra,* in that, as definitively interpreted by the Court of Appeals, it was not based on the fact that the employee had asserted Fifth Amendment rights. Further, in *Slochower* such a claim had been asserted in a federal inquiry having nothing to do with the qualifications of persons for state employment, and the Court in its opinion carefully distinguished that situation from one where, as here, a State is conducting an inquiry into fitness of its employees. Nor, as the Court of Appeals stressed, was the claim of possible self-incrimination made the basis for an inference that appellant was a Communist and therefore unreliable. Hence we are not faced here with the question whether party membership may rationally be inferred from a refusal to answer a question directed to present membership where the refusal rests on the belief that an answer might incriminate, cf. *Adamson* v. *California,* 332 U. S. 46, or with the question whether membership in the Communist Party which might be "innocent" can be relied upon as a ground for denial of state employment. Cf. *Wieman* v. *Updegraff, supra; Konigsberg* v. *State Bar of California,* 353 U. S. 252; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232.

We think it scarcely debatable that had there been no claim of Fifth Amendment privilege, New York would have been constitutionally entitled to conclude from appellant's refusal to answer what must be conceded to have been a question relevant to the purposes of the statute and his employment, cf. *Garner* v. *Board of Public Works, supra,* that he was of doubtful trust and reliability. Such a conclusion is not "so strained as not to have a reasonable relation to the circumstances of life as we know them." *Tot* v. *United States,* 319 U. S. 463, 468. This Court pointed out in *Garner* that a government employee can be required upon pain of dismissal to respond

to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan* v. *Board of Public Education, supra.* Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan,* an absolute duty to respond to permissible inquiry upon threat of dismissal for refusal, has in these proceedings held that an employee lacking in candor to his governmental employer evidences doubt as to his trust and reliability. Finally, unlike the situation involved in *Konigsberg* v. *State Bar of California, supra,* there is here no problem of inadequate notice as to the consequences of refusal to answer, for appellant was specifically notified that continued refusal might lead to his dismissal.

The fact that New York has chosen to base its dismissal of employees whom it finds to be of doubtful trust and reliability on the ground that they are in effect "security risks" hardly requires a different determination. The classification is not so arbitrary that we would be justified in saying that it is constitutionally impermissible in its application to one in appellant's position. Neither the New York statute nor courts purported to equate this ground for dismissal with "disloyalty." That term, which carries a distinct connotation, was never relied upon by New York as justification for appellant's dismissal.

The issue then reduces to the narrow question whether the conclusion which could otherwise be reached from appellant's refusal to answer is constitutionally barred because his refusal was accompanied by the assertion of a Fifth Amendment privilege. We think it does not. The federal privilege against self-incrimination was not available to appellant through the Fourteenth Amendment in this state investigation. *Knapp* v. *Schweitzer, ante,* p. 371, decided today; *Adamson* v. *California,*

supra. And we see no merit in appellant's suggestion that, despite the teachings of these cases, the plea was available to him in this instance because the State was acting as agent for, or in collaboration with, the Federal Government. This contention finds no support in the record. Hence we are not here concerned with the protection, as a matter of policy or constitutional requirement, to be accorded persons who under similar circumstances, in a federal inquiry, validly invoke the federal privilege. Cf. 18 U. S. C. § 3481; *Wilson* v. *United States,* 149 U. S. 60; *Slochower* v. *Board of Higher Education, supra; Grunewald* v. *United States,* 353 U. S. 391. Under these circumstances, we cannot say that appellant's explanation for his silence precluded New York from concluding that his failure to respond to relevant inquiry engendered reasonable doubt as to his trustworthiness and reliability.

We hold that appellant's discharge was not in violation of rights assured him by the Federal Constitution.

Affirmed.

[For concurring opinion of Mr. Justice Frankfurter, see *ante,* p. 409.]

[For dissenting opinion of Mr. Chief Justice Warren, see *ante,* p. 411.]

[For dissenting opinion of Mr. Justice Douglas, joined by Mr. Justice Black, see *ante,* p. 412.]

[For dissenting opinion of Mr. Justice Brennan, see *ante,* p. 417.]

GIORDENELLO *v.* UNITED STATES.

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

No. 549. Argued May 21, 1958.—Decided June 30, 1958.

With no indictment and on his own complaint, a federal officer obtained a warrant for petitioner's arrest, but obtained no search warrant. His complaint was not based on his personal knowledge, did not indicate the source of his belief that petitioner had committed a crime and set forth no other sufficient basis for a finding of probable cause. With this warrant, he arrested petitioner and seized narcotics in his possession. The arrest and seizure were not challenged at petitioner's arraignment, but a motion to suppress the use of the narcotics in evidence was made and denied before his trial. They were admitted in evidence at his trial in a federal district court and he was convicted. *Held:* The arrest and seizure were illegal, the narcotics should not have been admitted in evidence, and petitioner's conviction must be set aside. Pp. 481–488.

1. By waiving preliminary examination before the Commissioner, petitioner did not surrender his right to contest in court the validity of the warrant on the grounds here asserted. Pp. 483–484.

2. Under Rules 3 and 4 of the Federal Rules of Criminal Procedure, read in the light of the Fourth Amendment, probable cause was not shown by the complaint and the warrant for arrest was issued illegally. Pp. 484–487.

3. Having relied entirely in the courts below on the validity of the warrant, the Government cannot contend in this Court that the arrest was justified apart from the warrant, because the arresting officer had probable cause to believe that petitioner had committed a felony; nor should the case be sent back to the District Court for a special hearing on the issue of probable cause. Pp. 487–488.

241 F. 2d 575, reversed.

William F. Walsh, acting under appointment by the Court, 355 U. S. 875, argued the cause and filed a brief for petitioner.

John L. Murphy argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner was convicted of the unlawful purchase of narcotics, see 26 U. S. C. (Supp. V) § 4704, after a trial without a jury before the Federal District Court for the Southern District of Texas. A divided Court of Appeals affirmed. 241 F. 2d 575. We granted certiorari to consider petitioner's challenge to the legality of his arrest and the admissibility in evidence of the narcotics seized from his person at the time of the arrest. 355 U. S. 811.

Agent Finley of the Federal Bureau of Narcotics obtained a warrant for the arrest of petitioner from the United States Commissioner in Houston, Texas, on January 26, 1956. This warrant, issued under Rules 3 and 4 of the Federal Rules of Criminal Procedure (see note 3, *infra*), was based on a written complaint, sworn to by Finley, which read in part:

> "The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.
>
> "And the complainant further states that he believes that ———— ———— are material witnesses in relation to this charge."

About 6 o'clock in the afternoon of the following day, January 27, Finley saw petitioner drive up to his residence in a car and enter the house. He emerged shortly

thereafter and drove away in the same car, closely followed in a second car by a person described by Finley as a "well-known police character." Finley pursued the cars until they stopped near another residence which was entered by petitioner. When petitioner left this residence, carrying a brown paper bag in his hand, and proceeded towards his car, Finley executed the arrest warrant and seized the bag, which proved to contain a mixture of heroin and other substances. Although warned of his privilege to remain silent, petitioner promptly admitted purchasing the heroin in Chicago and transporting it to Houston.

On January 28 petitioner appeared with counsel before a United States Commissioner. He waived the preliminary examination contemplated by Rule 5 of the Rules of Criminal Procedure, see p. 483, *infra,* and was arraigned on the complaint upon which the arrest warrant had been issued on January 26.[1] Prior to trial petitioner, alleging for the first time that his arrest and the coincident seizure from his person of the paper bag were illegal, moved to suppress for use as evidence the heroin found in the bag. This motion was denied by the District Court, and petitioner's conviction and its affirmance by the Court of Appeals followed.

In this Court petitioner argues, as he did below, that Finley's seizure of the heroin was unlawful, since the warrant of arrest was illegal and the seizure could be justified only as incident to a legal arrest, and that consequently the admission of the heroin into evidence was

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[1] The indictment returned against petitioner did not refer to the crime charged in the complaint but was based on two related offenses. One, charging possession of unlawfully imported narcotics, 21 U. S. C. § 174, was dropped by the Government prior to trial. The other, charging unlawful purchase of narcotics, 26 U. S. C. (Supp. V) § 4704, resulted in petitioner's conviction.

error which requires that his conviction be set aside. The Government contends that petitioner waived his right to challenge the legality of his arrest, and hence to object to the admissibility of this evidence, by failing to question the sufficiency of the warrant at the time he was brought before the United States Commissioner. It further asserts that the arrest warrant satisfied the Federal Rules of Criminal Procedure, and, alternatively, that the arrest can be sustained apart from the warrant because Finley had probable cause to believe that petitioner had committed a felony. The Government recognizes that since Finley had no search warrant, the heroin was admissible in evidence only if its seizure was incident to a lawful arrest, see *United States* v. *Rabinowitz,* 339 U. S. 56, 60, and that if the arrest was illegal the admission of this evidence was reversible error.

I.

We think it clear that petitioner, by waiving preliminary examination before the United States Commissioner, did not surrender his right subsequently to contest in court the validity of the warrant on the grounds here asserted. A claim of this nature may involve legal issues of subtlety and complexity which it would be unfair to require a defendant to present so soon after arrest, and in many instances, as here, before his final selection of counsel.

In addition, examination of the purpose of the preliminary examination before a Commissioner makes evident the unsoundness of the Government's position. Rule 5 (c) of the Federal Rules of Criminal Procedure provides in part:

> "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."

By waiving preliminary examination, a defendant waives no more than the right which this examination was intended to secure him—the right not to be held in the absence of a finding by the Commissioner of probable cause that he has committed an offense.

By the same token, the Commissioner here had no authority to adjudicate the admissibility at petitioner's later trial of the heroin taken from his person. That issue was for the trial court. This is specifically recognized by Rule 41 (e) of the Criminal Rules, which provides that a defendant aggrieved by an unlawful search and seizure may ". . . move the district court . . . to suppress for use as evidence anything so obtained on the ground that . . ." the arrest warrant was defective on any of several grounds. This was the procedural path followed by petitioner, and we hold it proper to put in issue the legality of the warrant. Cf. *Albrecht* v. *United States*, 273 U. S. 1, 9–11.

II.

Petitioner challenges the sufficiency of the warrant on two grounds: (1) that the complaint on which the warrant was issued was inadequate because the complaining officer, Finley, relied exclusively upon hearsay information rather than personal knowledge in executing the complaint; and (2) that the complaint was in any event defective in that it in effect recited no more than the elements of the crime charged, namely the concealment of heroin with knowledge of its illegal importation in violation of 21 U. S. C. § 174.[2]

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[2] It appears that in the courts below petitioner relied primarily, if not entirely, on the first of these grounds. That of course does not

It appears from Finley's testimony at the hearing on the suppression motion that until the warrant was issued on January 26 his suspicions of petitioner's guilt derived entirely from information given him by law enforcement officers and other persons in Houston, none of whom either appeared before the Commissioner or submitted affidavits. But we need not decide whether a warrant may be issued solely on hearsay information, for in any event we find this complaint defective in not providing a sufficient basis upon which a finding of probable cause could be made.

Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth "the essential facts constituting the offense charged," and (2) showing "that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it . . . ." [3] The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized," of course applies to

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prevent him from relying here also on the second ground, which raises simply a question of law as to the sufficiency of the complaint. See *United Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 412; *Weems* v. *United States,* 217 U. S. 349, 362; Fed. Rules Crim. Proc., Rule 52 (b).

[3] Rule 3: "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4 (a): ". . . 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 to any officer authorized by law to execute it. . . ."

arrest as well as search warrants. See *Ex parte Burford,* 3 Cranch 448; *McGrain* v. *Daugherty,* 273 U. S. 135, 154–157. The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint ". . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer. The insubstantiality of such an argument is illustrated by the facts of this very case, for Finley's testimony at the suppression hearing clearly showed that he had no personal knowledge of the matters on which his charge was based. In these circumstances, it is difficult to understand how the Commissioner could be expected

to assess independently the probability that petitioner committed the crime charged. Indeed, if this complaint were upheld, the substantive requirements would be completely read out of Rule 4, and the complaint would be of only formal significance, entitled to perfunctory approval by the Commissioner. This would not comport with the protective purposes which a complaint is designed to achieve.

It does not avail the Government to argue that because a warrant of arrest may be issued as of course upon an indictment, this complaint was adequate since its allegations would suffice for an indictment under Federal Rule of Criminal Procedure 7 (c). A warrant of arrest can be based upon an indictment because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant for the apprehension of the person so charged. Here, in the absence of an indictment, the issue of probable cause had to be determined by the Commissioner, and an adequate basis for such a finding had to appear on the face of the complaint.

III.

In the two lower courts the Government defended the legality of petitioner's arrest by relying entirely on the validity of the warrant.[4] In this Court, however, its principal contention has been that the arrest was justified *apart* from the warrant. The argument is that Texas law permits arrest without a warrant upon probable cause that the person arrested has committed a felony; that in the absence of a controlling federal statute, as in the case

[4] The Government asked the District Court to take judicial notice that petitioner was arrested on a "complaint and warrant." In addition, Finley's testimony and the "return" of the United States Marshal to the warrant leave no room for doubt that in fact the warrant constituted the basis for petitioner's arrest.

here, federal officers turn to the law of the State where an arrest is made as the source of their authority to arrest without a warrant, cf. *United States* v. *Di Re,* 332 U. S. 581, 589; *Johnson* v. *United States, supra,* at 15; and that Finley, on the basis of the facts he testified to before the District Court, must be deemed, within the standards of Texas law, to have had the probable cause necessary to arrest petitioner without a warrant.

We do not think that these belated contentions are open to the Government in this Court and accordingly we have no occasion to consider their soundness. To permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence of his own to rebut the contentions that the Government makes here for the first time.

Nor do we think that it would be sound judicial administration to send the case back to the District Court for a special hearing on the issue of probable cause which would determine whether the verdict of guilty and the judgment already entered should be allowed to stand. The facts on which the Government now relies to uphold the arrest were fully known to it at the time of trial, and there are no special circumstances suggesting such an exceptional course. Cf. *United States* v. *Shotwell Mfg. Co.,* 355 U. S. 233. This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant.

We hold that the seizure in this case was illegal, that the seized narcotics should therefore not have been admitted into evidence, and that petitioner's conviction accordingly must be set aside. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE CLARK, with whom MR. JUSTICE BURTON and MR. JUSTICE WHITTAKER concur, dissenting.

I agree that petitioner did not waive his right to attack the complaint by his waiver of preliminary examination. But I cannot agree to other conclusions of the Court which, for all practical purposes, free another narcotics peddler, this time on the ground that the complaint did not provide "a sufficient basis upon which a finding of probable cause could be made."

The complaint stated that petitioner "on or about January 26, 1956, at Houston, Texas . . . did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation," citing the statute violated. Petitioner contends that these allegations did not meet the "essential facts" requirement of Rule 3 of the Federal Rules of Criminal Procedure. The Court does not pass on this contention, but instead reverses on Rule 4, reasoning that the complaint was deficient because it contained "no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; [did] not indicate any sources for the complainant's belief; and [did] not set forth any other sufficient basis upon which a finding of probable cause could be made." I note that petitioner, in his 39-page brief, does not rely on Rule 4, satisfying himself with contentions under Rule 3.

The Court is entirely in error in advancing the Rule 4 ground. The complaint alleged an actual occurrence which under the law constituted a prima facie offense—possession of narcotics. Unlawful importation is presumed. 35 Stat. 614, as amended, 21 U. S. C. § 174. See *Casey* v. *United States,* 276 U. S. 413 (1928). Petitioner's contention is that the complaint imported personal knowledge when in fact it was based in part on information. It thus appears strange for the Court to say that "deficiencies" in the complaint "could not be

cured by the Commissioner's reliance upon a presumption . . . [of] personal knowledge." Implicit in petitioner's entire argument is the fact that no presumption was indulged. The complaint was positive and absolute in alleging that petitioner on a certain day and at a specific place "did receive [and] conceal" heroin. Therefore, the Court's first objection, *i. e.*, absence of an allegation of personal knowledge, is manifestly untenable. As to the second, concerning "sources for the complainant's belief," that is something never required in a complaint. In fact, as the Court well knows, sources are considered confidential in narcotics cases and divulgence is seldom required. Such a requirement is a wholly unnecessary and unwarranted extension of Rule 4. Finally, the catchall objection that the complaint did "not set forth any other sufficient basis" constituting probable cause overlooks the fact that Agent Finley directly and explicitly stated under oath that petitioner "did receive [and] conceal" heroin. It therefore follows as the night does the day that "probable cause" existed, and the Commissioner had no recourse other than to issue the warrant. Neither the Court nor petitioner points out what more must be alleged.

The caveat that the Commissioner "should not accept without question the complainant's mere conclusion" is not applicable here. If the statement that petitioner did "receive" and "conceal" narcotic drugs is a conclusion, it is also a fact. Unlike other criminal offenses, narcotics violations require no specific intent, and there is no need to spell out facts tending to show such intent. The distinction the Court draws between conclusions and facts is untenable because there is no need here for inferences, unlike ordinary criminal cases. If the accused has "possession" he has committed an offense, absent satisfactory explanation therefor. And certainly one cannot "receive" and "conceal" without having "possession."

Relating the purpose served by a complaint to that of an application for a search warrant, as the Court does here, citing *Johnson* v. *United States,* 333 U. S. 10 (1948), is most unfortunate. The obliteration of valid distinctions between the two can have little effect on narcotics cases, because subsequent to the arrest here the Congress authorized officers to make arrests without a warrant where there are "reasonable grounds to believe that the person to be arrested has committed or is committing" a narcotics offense. 70 Stat. 570, 26 U. S. C. (Supp. V) § 7607. But in other fields of criminal law enforcement it increases the great burden already placed on officers and, like the requirement as to "sources" and "other evidentiary facts," only beclouds what was clear as to the requisites of a complaint. The considerations underlying arrest are not apposite to those of search. As we have seen, arrests can be made in narcotics cases without a warrant where "reasonable grounds" are present. Prior to this Federal Act, state law was applicable and in Texas permitted arrests without a warrant on "probable cause" to believe a narcotics offense had been committed. See *Giacona* v. *State,* 164 Tex. Cr. R. 325, 326, 327, 298 S. W. 2d 587, 588–589; *Thomas* v. *State,* 163 Tex. Cr. R. 68, 69–70, 288 S. W. 2d 791, 792. Search warrants, on the other hand, are required by the Fourth Amendment "notwithstanding facts unquestionably showing probable cause." *Agnello* v. *United States,* 269 U. S. 20, 33 (1925).* The Court does not strike down this complaint directly on the Fourth Amendment, but merely on an extension of Rule 4. It is unfortunate that through this byplay the constitutional limitations surrounding search and seizure are extended to the long-recognized powers of arrest.

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*Searches incident to a valid arrest are, of course, excepted.

Until petitioner came here he in no way attacked the complaint on the ground that it "recited no more than the elements of the crime charged." The Court admits as much. See footnote 2 in the majority opinion. Nevertheless, in the face of this admission and without either of the parties depending on Rule 4, much less briefing and arguing it, the Court strikes down this conviction on that ground. In the same breath it tags as "belated" and refuses on that account to pass on the unanswerable position of the Government, which *was* fully briefed and argued, that the arrest may be upheld under state law, *United States* v. *Di Re,* 332 U. S. 581, 589 (1948), as one on probable cause without a warrant. *United States* v. *Rabinowitz,* 339 U. S. 56, 60 (1950). I cannot subscribe to such a double standard. I ask, how in fairness can the Court consider and decide the case on a point not relied on below by petitioner and at the same time throw out the Government's claim as belated? And particularly so since the Court of Appeals recognized that claim in this language:

> "Moreover, there was enough in the record to make it clear that an honest official might well have thought he was fully observing the legal restraints placed upon his actions, and that he had *good cause for arrest even if the warrant already obtained was invalid since he believed he saw a felony being committed in his presence* . . . ." (Emphasis added.) 241 F. 2d 575, 579.

But assuming that the claim is belated, it states the law and our duty is to apply it. Such purblindness may set petitioner free, but it shackles law enforcement. I dissent.

JONES *v.* UNITED STATES.

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

No. 331. Argued April 7–8, 1958.—Decided June 30, 1958.

Having good reason to believe that it sheltered an illicit distillery, a federal officer obtained a daytime search warrant for petitioner's home but obtained no warrant for his arrest. After dark and without using the search warrant, but with good reasons to believe that liquor was being illegally distilled in the house, federal officers forced their way into the house and, without arresting anyone there at the time, seized distilling equipment. Petitioner was then absent, and he was not arrested until he returned to the house an hour later. At petitioner's trial in a federal court, the distilling equipment was admitted in evidence over his objection, and he was convicted of violations of federal liquor laws. *Held:* The search and seizure violated the Fourth Amendment, for they cannot be justified on the ground that the officers had probable cause to believe that the house contained contraband materials; and the admission of evidence so seized vitiated the conviction. Pp. 494–500.

(a) Probable cause for belief that certain articles subject to seizure are in a home cannot of itself justify a search without a warrant. Pp. 497–499.

(b) *United States* v. *Rabinowitz*, 339 U. S. 56, distinguished. P. 499.

(c) The issue whether the search and seizure were justified as incident to petitioner's lawful arrest is not fairly presented in this case, for the testimony of the federal officers makes clear that their purpose in entering the house was to search for the distilling equipment, not to arrest petitioner. Pp. 499–500.

245 F. 2d 32, reversed.

Wesley R. Asinof argued the cause and filed a brief for petitioner.

Eugene L. Grimm argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

After a trial without a jury in the Federal District Court for the Northern District of Georgia, petitioner was found guilty of various violations of the federal liquor laws, stemming from and including the possession of an unregistered still. See 26 U. S. C. (Supp. V) §§ 5601, 5216, 5008, 5681. His claim is that some of the evidence used against him at the trial should have been suppressed because it was obtained by an unlawful search and seizure by federal officers, and that its admission vitiates his conviction. The importance of maintaining strict standards for the admissibility of evidence so challenged in the federal courts led us to grant certiorari. 355 U. S. 810.

Federal alcohol agents received information on April 30, 1956, that petitioner's farmhouse near Dawsonville, Georgia, was the site of an illicit distillery in current operation. Investigating this lead, the agents discovered spent mash, a product resulting from the distilling of alcohol out of mash, in a hollow behind petitioner's house. The running mash emerged from a concealed rubber hose which, when traced as far as was consistent with caution, led close to petitioner's home. On May 1, four federal agents and one state officer returned to this vicinity. The officers observed mash still emerging from the hose, detected the distinctive odor of hot mash from the direction of the house, and heard coming from within the house the sounds of voices and of a blower burner, commonly used in that area to heat distilleries.

At 2 a. m. on May 2, the officers abandoned their watch and returned to the nearby city of Gainesville. During the day, Federal Agent Langford obtained from the United States Commissioner there a *daytime* search warrant for petitioner's house on the basis of an affidavit

describing what had been discovered and asserting the officer's belief that the house sheltered an illicit distillery. Late that afternoon, but still in daylight, the five officers resumed their surveillance of the house. Rather than execute the daytime warrant at once, they decided to make further observations to determine which parties were implicated in the operations and whether any vehicles were being used.

About 9 p. m., after darkness had set in, a truck entered petitioner's yard and retreated out of the officers' sight behind the house. Loud noises were heard, and when the truck shortly thereafter sought to regain the public road in front of the house, it became stuck in petitioner's driveway. The officers arrested the two men in the truck and seized what turned out to be 413 gallons of nontaxpaid liquor. At that time a passenger car carrying petitioner's wife and children drove into the yard. The wife rushed to the house and reached the doorway before the federal officers who were then advancing towards it. She sought to block entry by placing her arms across the door, and when informed by Langford of his identity as a federal officer, she demanded to see his search warrant. Langford said that a warrant was not required, and the officers brushed past Mrs. Jones into the house, seizing from the hands of her young boy a shotgun which he was brandishing in an apparent effort to prevent entry.

In the house at that time, in addition to Mrs. Jones and the children, were petitioner's father and brother. The officers did not arrest any of them, but immediately engaged in a general search of the house. The evidence later admitted against petitioner at the trial, including a boiler, fuel burner, and 15 barrels, was seized in rear rooms and in the attic. Petitioner was arrested when he returned to his house about one hour after the search had been completed.

Petitioner moved before trial to suppress the use in evidence of the articles seized in his home. During the hearing on this motion, the Government conceded that by the time petitioner's house was searched the daytime search warrant had expired, and it disclaimed any intention on the part of the federal officers to execute it. Rather it urged that ". . . it is the reasonableness of the search which is under question." Federal Agent Evans testified that he thought a nighttime search warrant could be dispensed with because ". . . the crime was being committed in our presence, at least I assumed we had probable cause for that." [1] And Agent Langford explained his position by stating: ". . . I thought we had sufficient evidence to go in the premises without a search warrant." [2] The court, in denying the motion to suppress, entered findings of fact and conclusions of law wherein it stated:

> "The court finds that the facts and circumstances within the knowledge of the officers were sufficient in themselves to warrant a man of reasonable caution

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[1] This witness further testified: "Q. What crime did you see committed inside the house before you went inside to search the place? A. I didn't see any crime. Q. What crime did you say was committed in your presence? A. The one I saw was the transporting of the whiskey out through his yard. Q. Through his yard? A. Yes, sir. Q. You stopped that truck, didn't you? A. Yes, sir. Q. You arrested the occupants of that truck, did you not? A. Yes, sir. Q. Neither one of the occupants of that truck fled into that house, did they? A. No, sir. Q. So you had no knowledge that anyone else was even in the house, had you? A. If you mean by 'knowledge,' did I see anyone else inside the house, no, sir."

[2] On cross-examination, Langford testified: "Q. Mrs. Jones did ask you not to come in, did she not? A. That is correct. Q. Mrs. Jones asked you, did she or not ask you to wait until her husband got there? A. I believe she did, yes." These answers amplified his earlier testimony: "Q. . . . Then you didn't wait until Mr. Jones, himself, came home, did you? A. I did not. Q. Yet they were his premises? A. That is correct."

> in the belief that an offense was being committed and therefore the Court finds that probable cause for the search existed at the time the search was made."

Since this was so, and since ". . . a cautious man [would have been warranted] in the belief that [petitioner] was guilty of the offense of operating an illicit distillery in his home . . . ," the court deemed the search reasonable, and hence justified, despite the failure of the officers to obtain a nighttime warrant, and despite their ability, under the circumstances, to have sought such a warrant before entering the house. In so holding, the District Court relied upon *United States* v. *Rabinowitz,* 339 U. S. 56. The Court of Appeals affirmed on the basis of the findings of the district judge. 245 F. 2d 32.

Although it must be recognized that the basis of the two lower court decisions is not wholly free from ambiguity, a careful consideration of the record satisfies us that the search and seizure were considered to have been justified because the officers had probable cause to believe that petitioner's house contained contraband materials which were being utilized in the commission of a crime, and not because the search and seizure were incident to petitioner's arrest. So viewed the judgments below cannot be squared with the Fourth Amendment to the Constitution of the United States[3] and with the past decisions of this Court.

It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. *Agnello* v.

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[3] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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United States, 269 U. S. 20, 33; [4] *Taylor* v. *United States,* 286 U. S. 1, 6. The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. See, *e. g., Johnson* v. *United States,* 333 U. S. 10, 14; *McDonald* v. *United States,* 335 U. S. 451, 455; cf. *Giordenello* v. *United States,* decided today, *ante,* p. 480. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, which implements the Fourth Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant. Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified.

The facts of this case impressively bear out these observations, for it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home that occurred in this instance. The Criminal Rules specifically deal with searches of this character by restricting nighttime warrants to situations where the affidavits upon which they are issued ". . . are *positive* that the property is . . . in the place to be searched . . . ." Rule 41 (c). (Italics added.) This Rule is hardly compatible with a principle that a search

[4] In *Agnello* the Court said: "Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. . . . Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." 269 U. S., at 33.

without a warrant can be based merely upon probable cause.

The case of *United States* v. *Rabinowitz, supra,* upon which the District Court relied, has no application here. There federal agents, without a search warrant, explored the office of the defendant and thereby obtained evidence used against him at trial. But immediately after entering the office and before their search, the agents executed a warrant they had previously obtained for the defendant's arrest. The Court stressed that the legality of the search was entirely dependent upon an initial valid arrest. 339 U. S., at 60. The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them. See, *e. g., United States* v. *Jeffers,* 342 U. S. 48, 51; *Brinegar* v. *United States,* 338 U. S. 160; *Johnson* v. *United States, supra,* at 14–15. None of these exceptions obtains in this case.

The Government, however, for the first time now maintains that the search and seizure were justifiable as incident to petitioner's lawful arrest. Its argument is: The federal agents involved in this search had authority under federal law to arrest without a warrant upon probable cause to believe that a person had committed a felony. From the record it is "rational" to infer that the federal agents entered petitioner's house with the purpose of arresting him, upon probable cause to believe that he was guilty of a felony and that he was then in the house. Consequently, the agents' entry was justified and, once in the house, while searching for petitioner, they could properly seize all contraband material in plain sight. The fact that petitioner was not found should not vitiate the legality of the seizures.

These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a

dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment. But we do not consider this issue fairly presented by this case, for the record fails to support the theory now advanced by the Government. The testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, and not to arrest petitioner. See notes 1 and 2, *supra*, p. 496.[5]

Since the evidence obtained through this unlawful search was admitted at the trial, the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE BLACK concurs in the result.

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

Although there are many ways to kill a cat, drowning remains the most favored. The Court applies that method to this conviction—drowning it by watering down the Findings of Fact and Conclusions of Law. By attributing to them a diluted meaning, the judgments of the District Court and the Court of Appeals are rendered insupportable.

The District Court found that the officers in this moonshine liquor case received information that petitioner, previously known to them as a liquor law violator, was operating an illicit distillery in his home. In the course of an investigation the officers (1) found "spent mash" flowing from a hose which was traced to within 75 yards

[5] We cannot accept the suggestion that the entry was justified since it was made to disarm petitioner's young son of the shotgun. The record plainly enough reveals that this was but a passing episode in the course of the entry, and that the officers immediately proceeded to a search of the entire house.

of the house, (2) heard a "blower burner" of the type generally used in illicit distilleries, (3) smelled the odor of hot mash coming from the house, and (4) heard the moving of heavy objects from within the house. These observations were gained over a two-day period. On the third day the officers returned with a daylight search warrant, but decided to resume surveillance instead of immediately executing the warrant. After dark, as one person left the house to walk up the road, the officers heard conversation, specifically, an inquiry as to whether "they were ready for the truck to be brought to the house." An empty truck then entered the yard and drove to the back door of the house, where a thumping sound suggesting "activity with heavy objects" was heard. The truck, heavily laden, became stuck on its attempt to leave the yard; its two occupants then were arrested, and its contents—413 gallons of nontaxpaid liquor—were seized. Thereafter, petitioner's wife and son, who had just arrived, attempted to bar the officers' entry into the house, telling them to wait until petitioner returned. The officers entered anyway, and in the course of a search, found the disputed evidence. The record reveals that petitioner was not found in the search of the premises, but was arrested when he returned later in the evening.

From these findings common sense would seem to dictate the conclusion that the officers, not believing the statement of petitioner's wife that he was not there, entered the house to find and arrest petitioner. It was his house, he was known as a prior offender, and it was he who was implicated by the tip which launched the investigation. The district judge, in fact, concluded that "the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that Roy Jones was guilty of the offense of operating an illicit distillery in his home . . . ."

The Court, however, takes these findings and conclusions to mean that both the District Court and the Court of Appeals considered the search and seizure justified "because the officers had probable cause to believe that petitioner's house contained contraband materials which were being utilized in the commission of a crime, and not because the search and seizure were incident to petitioner's arrest."

It is our duty, when the meaning of the findings is somewhat doubtful, to so construe them as to conform with and uphold the judgment. Cf. *Larkin* v. *Upton,* 144 U. S. 19, 21 (1892); *Loring* v. *Frue,* 104 U. S. 223, 224 (1881). This the Court has not done. The Court's construction is all the more surprising because it places the judgments below in direct conflict with an elementary rule of hornbook law, namely, that officers may not search a dwelling without a warrant "notwithstanding facts unquestionably showing probable cause." *Agnello* v. *United States,* 269 U. S. 20, 33 (1925). I feel certain the four learned judges on the two lower courts were well acquainted with the *Agnello* rule, and that they used the words "probable cause" as referring *not* ultimately to the search of the premises, but instead to the arrest of petitioner and any others violating the law within the house. This is borne out by the definition with which the trial judge introduced the crucial paragraph of his Conclusions of Law: "Probable cause is reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged." Furthermore, the trial judge relied on *United States* v. *Rabinowitz,* 339 U. S. 56 (1950), a case where the legality of a search hinged on the legality of an arrest. The majority, noting the judge's use of *Rabinowitz,* would have us believe that the case "has no application here"; on the contrary, it would appear that the majority

has overlooked the only reason for which the case was cited.

I submit that the officers had authority to enter the house, arrest any persons engaged in the illicit operation, and, not finding petitioner, arrest him upon his return to the scene. Under the law as I have always understood it, an officer, even over protest, may enter a house to make an arrest where he has probable cause to believe that a felony is being or has been committed and that the perpetrators are in the house. *Mullaney* v. *United States,* 82 F. 2d 638; *Appell* v. *United States,* 29 F. 2d 279; *Mattus* v. *United States,* 11 F. 2d 503; 1 Wharton, Criminal Procedure (10th ed.), § 51; Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 798, 800–807. Cf. *Taylor* v. *United States,* 286 U. S. 1, 6 (1932); *Agnello* v. *United States, supra,* at 30. There being probable cause here to believe that a felon was within the house, the entry of the officers was lawful, even though after a complete search the belief was found to be incorrect. *Love* v. *United States,* 170 F. 2d 32, 33. Such a circumstance "cannot be distinguished on any reasonable basis from the search of the premises of an accused as an incident to the lawful arrest of his person . . . ." *Martin* v. *United States,* 183 F. 2d 436, 439.

Since the entry of petitioner's home was lawful, the officers had a right to seize the contraband property. The only test is the lawfulness of the officers' activity when they come upon the offending property. If the seizure follows a lawful entry to effect an arrest, as here, then it is valid. See *Harris* v. *United States,* 331 U. S. 145 (1947), seizure during lawful search incident to arrest for another crime; *Steele* v. *United States,* 267 U. S. 498 (1925), seizure during execution of warrant for different property.

I believe that these principles control here, and would, therefore, affirm.

CICENIA *v.* LAGAY, SUPERINTENDENT, NEW JERSEY STATE PRISON FARM.

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

No. 177. Argued April 2, 1958.—
Decided June 30, 1958.

Claiming that his conviction of murder in a state court on a plea of *non vult* violated the Due Process Clause of the Fourteenth Amendment, petitioner applied to a Federal District Court for a writ of habeas corpus, which was denied. He had retained counsel before his arrest; but, while being questioned by state police, he was repeatedly denied the right to consult his counsel until he had confessed. He was not permitted to inspect his confession before pleading to the indictment. *Held:* Petitioner's conviction did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 505–511.

1. An independent examination of the record satisfies this Court that the District Court was justified in concluding that petitioner failed to substantiate the charge that his confession was coerced. P. 508.

2. Refusal to permit petitioner to consult his counsel while being questioned by the state police did not of itself violate the Fourteenth Amendment. *Crooker* v. *California*, *ante*, p. 433. Pp. 508–510.

3. In the absence of a showing of prejudice, petitioner was not denied due process by the trial judge's discretionary refusal to permit him to inspect his written confession before pleading to the indictment. Pp. 510–511.

240 F. 2d 844, affirmed.

Dickinson R. Debevoise argued the cause and filed a brief for petitioner.

C. William Caruso argued the cause for respondent. With him on the brief were *Grover C. Richman, Jr.*, Attorney General of New Jersey, and *Charles V. Webb, Jr.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

We are asked to reverse under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States a state conviction which was entered upon a plea of *non vult* to an indictment for first degree murder.

In the evening of March 17, 1947, Charles Kittuah, the owner of a small dry goods store in Newark, New Jersey, was shot and killed during the course of a robbery. The crime remained unsolved until December 17, 1949, when the Newark police obtained information implicating the petitioner and two others, Armando Corvino and John DeMasi. Petitioner lived with his parents at Orange, New Jersey. Apparently acting at the request of the Newark police, the Orange police sought to locate petitioner at his home. When told that he was out, the police left word that he was to report at the Orange police headquarters the following day. Petitioner sought the advice of Frank A. Palmieri, a lawyer, who advised him to report as requested. Petitioner did so, accompanied by his father and brother. Upon arrival at the Orange police station at 9 a. m. on December 18, petitioner was separated from the others and taken by detectives to the Newark police headquarters. At approximately 2 p. m. the same day petitioner's father, brother and Mr. Palmieri, the lawyer, arrived at the Newark station. Mr. Palmieri immediately asked to see petitioner, but this request was refused by the police. He repeated this request at intervals throughout the afternoon and well into the evening, but without success. During this period petitioner, who was being questioned intermittently by the police, asked to see his lawyer. These requests were also denied. Lawyer and client were not permitted to confer until 9:30 p. m., by which time petitioner had made and signed a written confession to the murder of Kittuah. The confession is not in the record.

Petitioner was arraigned the next day, December 19, and subsequently indicted, along with Corvino and DeMasi, both of whom had also confessed to the murder. Thereafter, petitioner moved in the Essex County Court for an order requiring the State to produce for inspection before trial his confession and the confessions of his co-defendants and, alternatively, for an order suppressing his confession on the ground that it had been illegally obtained. The County Court denied the motion. The Superior Court of New Jersey dismissed the appeal, 9 N. J. Super. 135, 75 A. 2d 476, and the Supreme Court of New Jersey affirmed the dismissal, with modifications. 6 N. J. 296, 78 A. 2d 568. The State Supreme Court held that New Jersey had no procedure like that under Rule 41 (e) of the Federal Rules of Criminal Procedure by which inadmissible evidence could be suppressed before trial; that under New Jersey law criminal defendants did not have an absolute right to inspect their confessions in advance of trial; and that the trial judge in this instance did not abuse his discretion in disallowing such an inspection.

Following his failure to suppress or obtain inspection of his confession, petitioner, on the advice of his attorney, offered to plead *non vult* to the indictment. In New Jersey such a plea is subject to discretionary acceptance by the trial court, *State* v. *Martin*, 92 N. J. L. 436, 106 A. 385, and carries a maximum sentence of life imprisonment. Petitioner's plea was accepted by the trial court, as were the similar pleas of Corvino and DeMasi, whose cases are not before us. Petitioner and his two co-defendants were thereupon sentenced to life imprisonment at hard labor.

Thereafter petitioner commenced habeas corpus proceedings in the New Jersey courts, alleging that his plea of *non vult* was actuated by the existence of the confession, and that the conviction entered upon such plea was

vitiated under both the State and Federal Constitutions because the confession was coerced and because it had been taken in derogation of his right to the assistance of counsel. The County Court, the Superior Court, and the Supreme Court of New Jersey in turn denied relief,[1] and this Court denied certiorari. 350 U. S. 925. Petitioner then commenced in the District Court for New Jersey the federal habeas corpus proceeding before us, attacking his conviction on the grounds stated above. The District Court discharged the writ, holding that petitioner had failed to establish the involuntariness of the confession and that the State's refusal to permit petitioner to communicate with counsel during the police inquiry did not deprive him of due process. 148 F. Supp. 98. The Court of Appeals affirmed, 240 F. 2d 844, and we granted certiorari to consider the constitutional questions presented. 354 U. S. 908.[2]

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[1] The opinions of the County Court and Superior Court are not reported. The State Supreme Court wrote no opinion.

[2] Although the State does not contend that the case is not properly here, we have nevertheless felt obliged to consider our jurisdiction in view of the following circumstances: New Jersey has a rule that a defendant who pleads guilty waives the right to attack a confession on which such plea is based. See *In re Domako,* 20 N. J. Super. 314, 90 A. 2d, 30, aff'd, 11 N. J. 591, 95 A. 2d 505. Following that rule, the Essex County Court held that petitioner could not attack his conviction on habeas corpus. On appeal the Superior Court did not advert to that question, but affirmed the County Court on the ground that under New Jersey law petitioner had no constitutional right to counsel prior to arraignment. See *State* v. *Grillo,* 11 N. J. 173, 93 A. 2d 328. The State Supreme Court gave no reasons for denying leave to appeal. Since the Superior Court had dealt with petitioner's constitutional claims on the merits, the two lower federal courts decided that they had the power to consider them. Cf. *Brown* v. *Allen,* 344 U. S. 443, 486; *Hawk* v. *Olson,* 326 U. S. 271, 278. We agree that jurisdiction exists. In the absence of a definitive New Jersey ruling that the *Domako* waiver principle applies to a plea of *non vult,* we shall not assume that the New Jersey Supreme Court's

An independent examination of the record satisfies us that the District Court was justified in concluding that petitioner failed to substantiate the charge that his confession was coerced. Petitioner does not now contend to the contrary. He continues to contend, however, that under the Fourteenth Amendment his confession, even though voluntary, was nevertheless vitiated by police refusal to permit him to confer with counsel during his detention at Newark police headquarters, and that because his plea of *non vult* was based on the confession, the conviction must fall as well.[3]

The contention that petitioner had a constitutional right to confer with counsel is disposed of by *Crooker* v. *California, ante,* p. 433, decided today. There we held that California's failure to honor Crooker's request during a period of police interrogation to consult with a lawyer, as yet unretained, did not violate the Fourteenth Amendment. Because the present case, in which petitioner was denied an opportunity to confer with the lawyer whom he had already retained, sharply points up the constitutional issue involved, some additional observations are in order.

We share the strong distaste expressed by the two lower courts over the episode disclosed by this record. Cf. *Stroble* v. *California,* 343 U. S. 181, 197–198. Were this a federal prosecution we would have little difficulty in

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decision denying leave to appeal was based on that nonfederal ground. Cf. *Stembridge* v. *Georgia,* 343 U. S. 541. Our conclusion is strengthened by the fact that the Superior Court did not rely on the *Domako* rule, and by the absence of any challenge to our jurisdiction by the State.

[3] Since we conclude that the police refusal to allow petitioner to consult with his lawyer did not violate the Fourteenth Amendment, we need not consider the State's further contention that petitioner was not denied due process because the confession was never "used" against him, he having pleaded *non vult* to the indictment. But cf. *Herman* v. *Claudy,* 350 U. S. 116.

dealing with what occurred under our general supervisory power over the administration of justice in the federal courts. See *McNabb* v. *United States,* 318 U. S. 332. But to hold that what happened here violated the Constitution of the United States is quite another matter.

The difficulties inherent in the problem require no extensive elaboration. Cf. *Watts* v. *Indiana,* 338 U. S. 49, 57–62 (opinion of Jackson, J.). On the one hand, it is indisputable that the right to counsel in criminal cases has a high place in our scheme of procedural safeguards. On the other hand, it can hardly be denied that adoption of petitioner's position would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases. A satisfactory formula for reconciling these competing concerns is not to be found in any broad pronouncement that one must yield to the other in all instances. Instead, as we point out in *Crooker* v. *California, supra,* this Court, in judging whether state prosecutions meet the requirements of due process, has sought to achieve a proper accommodation by considering a defendant's lack of counsel one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness. See *House* v. *Mayo,* 324 U. S. 42, 45–46; *Payne* v. *Arkansas,* 356 U. S. 560, 567.

In contrast, petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved. Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel. Even in federal prosecutions this Court has refrained from laying down any such inflexible rule. See *McNabb* v. *United States, supra; Mallory* v. *United States,* 354 U. S. 449. Still less should we impose this standard on each of the 48 States as a mat-

ter of constitutional compulsion.[4] It is well known that law-enforcement problems vary widely from State to State, as well as among different communities within the same State. This Court has often recognized that it is of the "very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice." *Hoag* v. *New Jersey,* 356 U. S. 464, 468. See *Maxwell* v. *Dow,* 176 U. S. 581; *Twining* v. *New Jersey,* 211 U. S. 78. The broad rule sought here and in *Crooker* would require us to apply the Fourteenth Amendment in a manner which would be foreign both to the spirit in which it was conceived and the way in which it has been implemented by this Court.

Petitioner's remaining constitutional contention can be disposed of briefly. He argues that he was deprived of due process because New Jersey required him to plead to the indictment for murder without the opportunity to inspect his confession.

The Fourteenth Amendment does not reach so far. As stated by the Supreme Court of New Jersey in the earlier proceedings in this case, 6 N. J. 296, at 299–301, 78 A. 2d 568, at 570–571, the rule in that State is that the trial judge has discretion whether or not to allow inspection before trial. This is consistent with the practice in many other jurisdictions. See, *e. g., State* v. *Haas,* 188 Md. 63, 51 A. 2d 647; *People* v. *Skoyec,* 183 Misc. 764, 50 N. Y. S. 2d 438; *State* v. *Clark,* 21 Wash. 2d 774, 153 P. 2d 297. In *Leland* v. *Oregon,* 343 U. S. 790, 801–802,

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[4] New Jersey is not alone in its rule that an accused has no right to consult with counsel during the period between arrest and arraignment. See *State* v. *Rogers,* 143 Conn. 167, 120 A. 2d 409; *Utah* v. *Sullivan,* 227 F. 2d 511; *People* v. *Kelly,* 404 Ill. 281, 89 N. E. 2d 27. Most States have not had occasion to rule on the issue before us, and it is generally quite unclear in state law when the right to have counsel begins. See Beaney, The Right to Counsel in American Courts, 127–128; 3 A. L. R. 2d 1003, 1032 *et seq.*

this Court held that in the absence of a showing of prejudice to the defendant it was not a violation of due process for a State to deny counsel an opportunity before trial to inspect his client's confession. It is true that in *Leland* the confession was made available to the defense at the trial several days before its case was rested, whereas here petitioner pleaded *non vult* without an opportunity to see the confession. We think that the principle of that case is nonetheless applicable. As was said in *Leland* (343 U. S., at 801), although it may be the "better practice" for the prosecution to comply with a request for inspection, we cannot say that the discretionary refusal of the trial judge to permit inspection in this case offended the Fourteenth Amendment. Cf. *Application of Tune*, 230 F. 2d 883, 890–892.

Affirmed.

MR. JUSTICE BRENNAN 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.

Petitioner, pursuant to a request left by the police at his home on Saturday, December 17, appeared at headquarters in Orange, New Jersey, at 9 a. m. on the 18th. He did so on the advice of his lawyer, Frank A. Palmieri. Petitioner's brother and father accompanied him on this visit but were separated from him on arrival at the headquarters. Shortly thereafter petitioner was taken to Newark where he was interrogated by the police until 9:30 p. m. when he confessed. Between 2 p. m. and 9:30 p. m. Mr. Palmieri asked over and again to see his client; but his requests were not granted. On this phase of the case the District Court said:

> "Mr. Palmieri was not produced as a witness on the trial of this case, but his affidavit was admitted by

stipulation. The contents of his affidavit and the testimony of petitioner's father and brother are at variance with the testimony of the Newark police as to the manner in which petitioner and his counsel were restrained from communicating with each other. According to petitioner's witnesses Palmieri's pleas were met with blunt refusals and remarks such as 'We're working on him.' The police claim to have been much more decorous. But whether it was done flippantly or courteously, the fact remains that for over seven hours the Newark police formed an insuperable barrier between an accused who wanted to see his counsel, and counsel who wanted to see his client. And it was during these seven hours that the police and an assistant prosecutor were able to obtain a detailed confession from petitioner." 148 F. Supp. 98, 99–100.

The District Court reached "without enthusiasm" the conclusion that petitioner's constitutional rights had not been impaired. *Id.*, at 104. The Court of Appeals evinced the same lack of enthusiasm for the result. 240 F. 2d 844. Both lower courts felt that any correction of this unjust result should come from us. I regret that we have not taken this case, and the companion cases, as the occasion to bring our decisions into tune with the constitutional requirement for fair criminal proceedings against the citizen. I would reverse the judgment for the reasons stated in my dissent in *Crooker* v. *California, ante,* p. 441.

Syllabus.

SPEISER *v.* RANDALL, ASSESSOR OF CONTRA COSTA COUNTY, CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 483. Argued April 8–9, 1958.—Decided June 30, 1958.*

Solely because they refused to subscribe oaths that they do not advocate the overthrow of the Federal or State Government by force, violence or other unlawful means, or advocate the support of a foreign government against the United States in event of hostilities, appellants were denied tax exemptions provided for veterans by the California Constitution. The filing of such an oath was required by a California statute as a prerequisite to qualification for the tax exemption, in order to effectuate a provision of the State Constitution denying any tax exemption to any person who advocates such actions, which was construed by the State Supreme Court as denying tax exemptions only to claimants who engage in speech which may be criminally punished consistently with the free-speech guarantees of the Federal Constitution. *Held:* Enforcement of this provision through procedures which place the burdens of proof and persuasion on the taxpayers denied them freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment. Pp. 514–529.

1. A discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. Pp. 518–520.

2. The method chosen by California for determining whether a claimant is a member of the class to which its Supreme Court has said that the tax exemption is denied does not provide the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment before free speech may be denied, since it places on the taxpayer the burden of proving that he is not a member of that class. Pp. 520–529.

(a) When a State undertakes to restrain unlawful advocacy, it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights. Pp. 520–521.

(b) The California procedure places upon the taxpayer the burden of proving that he does not criminally advocate the over-

*Together with No. 484, *Prince* v. *City and County of San Francisco*, also on appeal from the same Court.

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throw of the Federal or State Government by force, violence or other unlawful means or advocate the support of a foreign government against the United States in the event of hostilities. Pp. 521–523.

(c) It does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech. Pp. 523–525.

(d) Since free speech is involved, due process requires in the circumstances of this case that the State bear the burden of showing that appellants engaged in criminal speech. Pp. 525–526.

(e) *Garner* v. *Board of Public Works,* 341 U. S. 716; *Gerende* v. *Board of Supervisors,* 341 U. S. 56, and *American Communications Assn.* v. *Douds,* 339 U. S. 382, distinguished. Pp. 527–528.

(f) When the constitutional right to speak is sought to be deterred by a State's general taxing program, due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. Pp. 528–529.

(g) Since the entire statutory procedure violated the requirements of due process by placing the burdens of proof and persuasion on them, appellants were not obliged to take even the first step in such procedure as a condition for obtaining the tax exemption. P. 529.

48 Cal. 2d 472, 903, 311 P. 2d 544, 546, reversed and causes remanded.

Lawrence Speiser argued the cause for appellants. With him on the brief was *Franklin H. Williams.*

George W. McClure argued the cause for appellee in No. 483, and *Robert M. Desky* argued the cause for appellee in No. 484. With them on the brief was *Dion R. Holm.*

Shad Polier, Will Maslow and *Leo Pfeffer* filed a brief for the American Jewish Congress, as *amicus curiae.*

Mr. Justice Brennan delivered the opinion of the Court.

The appellants are honorably discharged veterans of World War II who claimed the veterans' property-tax

exemption provided by Art. XIII, § 1¼, of the California Constitution. Under California law applicants for such exemption must annually complete a standard form of application and file it with the local assessor. The form was revised in 1954 to add an oath by the applicant: "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities." Each refused to subscribe the oath and struck it from the form which he executed and filed for the tax year 1954–1955. Each contended that the exaction of the oath as a condition of obtaining a tax exemption was forbidden by the Federal Constitution. The respective assessors denied the exemption solely for the refusal to execute the oath. The Supreme Court of California sustained the assessors' actions against the appellants' claims of constitutional invalidity.[1] We noted probable jurisdiction of the appeals. 355 U. S. 880.

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[1] Appellant in No. 483 sued for declaratory relief in the Superior Court of Contra Costa County. Five judges sitting *en banc* held that both § 19 of Art. XX and § 32 of the Revenue and Taxation Code were invalid under the Fourteenth Amendment as restrictions on freedom of speech. The California Supreme Court reversed. 48 Cal. 2d 903, 311 P. 2d 546.

Appellant in No. 484 sued in the Superior Court for the City and County of San Francisco to recover taxes paid under protest and for declaratory relief. The court upheld the validity of both the constitutional provision and § 32 of the Code. The Supreme Court affirmed. 48 Cal. 2d 472, 311 P. 2d 544.

In both cases the Supreme Court adopted the reasoning of its opinion in *First Unitarian Church* v. *County of Los Angeles,* 48 Cal. 2d 419, 311 P. 2d 508, in which identical issues are discussed at length. Hereinafter we will refer to that opinion as expressing the views of the California Supreme Court in the present cases.

Article XX, § 19, of the California Constitution, adopted at the general election of November 4, 1952, provides as follows:

> "Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:
>
> . . . . . .
>
> "(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.
>
> "The Legislature shall enact such laws as may be necessary to enforce the provisions of this section."

To effectuate this constitutional amendment the California Legislature enacted § 32 of the Revenue and Taxation Code, which requires the claimant, as a prerequisite to qualification for any property-tax exemption, to sign a statement on his tax return declaring that he does not engage in the activities described in the constitutional amendment.[2] The California Supreme Court held that

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[2] Section 32 provides:

"Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any

this declaration, like other statements required of those filing tax returns, was designed to relieve the tax assessor of "the burden . . . of ascertaining the facts with reference to tax exemption claimants." 48 Cal. 2d 419, 432, 311 P. 2d 508, 515. The declaration, while intended to provide a means of determining whether a claimant qualifies for the exemption under the constitutional amendment, is not conclusive evidence of eligibility. The assessor has the duty of investigating the facts underlying all tax liabilities and is empowered by § 454 of the Code to subpoena taxpayers for the purpose of questioning them about statements they have furnished. If the assessor believes that the claimant is not qualified in any respect, he may deny the exemption and require the claimant, on judicial review, to prove the incorrectness of the determination. In other words, the factual determination whether the taxpayer is eligible for the exemption under the constitutional amendment is made in precisely the same manner as the determination of any other fact bearing on tax liability.

The appellants attack these provisions, *inter alia,* as denying them freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment.[3]

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such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution."

[3] This contention was raised in the complaint and is argued in the brief in this Court. The California Supreme Court rejected the contention as without merit. 48 Cal. 2d 472, 475, 311 P. 2d 544, 545–546.

Appellants also argue that these provisions are invalid (1) as invading liberty of speech protected by the Due Process Clause

I.

It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. The Supreme Court of California recognized that these provisions were limitations on speech but concluded that "by no standard can the infringement upon freedom of speech imposed by section 19 of article XX be deemed a substantial one." 48 Cal. 2d 419, 440, 311 P. 2d 508, 521. It is settled that speech can be effectively limited by the exercise of the taxing power. *Grosjean* v. *American Press Co.*, 297 U. S. 233. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech. This contention did not prevail before the California courts, which recognized that conditions imposed upon the granting of privileges or gratuities must be "reasonable." It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. See *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156; cf. *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 430–431 (Brandeis, J., dissenting). This Court has similarly rejected the contention that speech was not abridged when the

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of the Fourteenth Amendment; (2) as denying equal protection because the oath is required only as to property-tax and corporation-income-tax exemptions, but not as to the householder's personal-income-tax, gift-tax, inheritance-tax, or sales-tax exemptions; and (3) as violating the Supremacy Clause because this legislation intrudes in a field of exclusive federal control, *Pennsylvania* v. *Nelson*, 350 U. S. 497. Our disposition of the cases makes considerations of these questions unnecessary.

sole restraint on its exercise was withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board, *American Communications Assn.* v. *Douds,* 339 U. S. 382, 402, or the opportunity for public employment, *Wieman* v. *Updegraff,* 344 U. S. 183. So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is "frankly aimed at the suppression of dangerous ideas." *American Communications Assn.* v. *Douds, supra,* at 402.

The Supreme Court of California construed the constitutional amendment as denying the tax exemptions only to claimants who engage in speech which may be criminally punished consistently with the free-speech guarantees of the Federal Constitution. The court defined advocacy of "the overthrow of the Government . . . by force or violence or other unlawful means" and advocacy of "support of a foreign government against the United States in event of hostilities" as reaching only conduct which may constitutionally be punished under either the California Criminal Syndicalism Act, Cal. Stat. 1919, c. 188, see *Whitney* v. *California,* 274 U. S. 357, or the Federal Smith Act, 18 U. S. C. § 2385. 48 Cal. 2d, at 428, 311 P. 2d, at 513. It also said that it would apply the standards set down by this Court in *Dennis* v. *United States,* 341 U. S. 494, in ascertaining the circumstances which would justify punishing speech as a crime.[4] Of course the constitutional and statutory provisions here involved must be read in light of the restrictive construction that the California court, in the exercise of its function of interpreting state law, has placed upon them. For

[4] The California Supreme Court construed these provisions as inapplicable to mere belief. On oral argument counsel for the taxing authorities further conceded that the provisions would not apply in the case of advocacy of mere "abstract doctrine." See *Yates* v. *United States,* 354 U. S. 298, 312–327.

the purposes of this case we assume without deciding that California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned.[5]

II.

But the question remains whether California has chosen a fair method for determining when a claimant is a member of that class to which the California court has said the constitutional and statutory provisions extend. When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. *Kingsley Books, Inc.,* v. *Brown,* 354 U. S. 436, 441–442; *Near* v. *Minnesota,* 283 U. S. 697; cf. *Cantwell* v. *Connecticut,* 310 U. S. 296, 305; *Joseph Burstyn, Inc.,* v. *Wilson,* 343 U. S. 495; *Winters* v. *New York,* 333 U. S. 507; *Niemotko* v. *Maryland,* 340 U. S. 268; *Staub* v. *City of Baxley,* 355 U. S. 313.

To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important

[5] Appellants contend that under this Court's decision in *Pennsylvania* v. *Nelson,* 350 U. S. 497, the State can no longer enforce its criminal statutes aimed at subversion. We need not decide whether this contention is sound; nor need we consider whether, if it is, it follows that California cannot deny tax exemptions to those who in fact are in violation of the federal and state sedition laws.

must be the procedural safeguards surrounding those rights. Cf. *Powell* v. *Alabama,* 287 U. S. 45, 71. When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, cf. *Dennis* v. *United States, supra; Whitney* v. *California, supra,* the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. Compare *Kunz* v. *New York,* 340 U. S. 290, with *Feiner* v. *New York,* 340 U. S. 315. It becomes essential, therefore, to scrutinize the procedures by which California has sought to restrain speech.

The principal feature of the California procedure, as the appellees themselves point out, is that the appellants, "as taxpayers under state law, have the affirmative burden of proof, in Court as well as before the Assessor. . . . [I]t is their burden to show that they are proper persons to qualify under the self-executing constitutional provision for the tax exemption in question—i. e., that they are not persons who advocate the overthrow of the government of the United States or the State by force or violence or other unlawful means or who advocate the support of a foreign government against the United States in the event of hostilities. . . . [T]he burden is on *them* to produce evidence justifying their claim of exemption." [6]

[6] The California Supreme Court held that § 19 of Art. XX of the State Constitution was in effect self-executing. "[U]nder the tax laws of the state wholly apart from section 32 it is the duty of the assessor to ascertain the facts with reference to the taxability or

Not only does the initial burden of bringing forth proof of nonadvocacy rest on the taxpayer, but throughout the judicial and administrative proceedings the burden lies on the taxpayer of persuading the assessor, or the court, that he falls outside the class denied the tax exemption. The declaration required by § 32 is but a part of the probative process by which the State seeks to determine which taxpayers fall into the proscribed category.[7] Thus

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exemption from taxation of property within his jurisdiction. And it is also the duty of the property owner to cooperate with the assessor and assist him in the ascertainment of these facts by declarations under oath." 48 Cal. 2d, at 430, 311 P. 2d, at 514–515.

In all events, if the assessor "is satisfied from his investigations that the exemption should not be allowed he may assess the property as not exempt and if contested compel a determination of the facts in a suit to recover the tax paid under protest. In such a case it would be necessary for the claimant to allege and prove facts with reference to the nature, extent and character of the property which would justify the exemption and compliance with all valid regulations in the presentation and prosecution of the claim. In any event it is the duty of the assessor to ascertain the facts from any legal source available. In performing this task he is engaged in the assembly of facts which are to serve as a guide in arriving at his conclusion whether an exemption should or should not be allowed. That conclusion is in no wise a final determination that the claimant belongs to a class proscribed by section 19 of article XX or is guilty of any activity there denounced. The presumption of innocence available to all in criminal prosecutions does not in a case such as this relieve or prevent the assessor from making the investigation enjoined upon him by law to see that exemptions are not improperly allowed. His administrative determination is not binding on the tax exemption claimant but it is sufficient to authorize him to tax the property as nonexempt and to place the burden on the claimant to test the validity of his administrative determination in an action at law." 48 Cal. 2d, at 431–432, 311 P. 2d, at 515.

[7] It is suggested that the opinion of the California Supreme Court be read as holding that "the filing, whether the oath be true or false, would conclusively establish the taxpayer's eligibility for an exemption." But the California court expressly states that "it is the duty of the assessor to see that exemptions are not allowed contrary to law

the declaration cannot be regarded as having such independent significance that failure to sign it precludes review of the validity of the procedure of which it is a part. Cf. *Staub* v. *City of Baxley, supra,* at 318–319. The question for decision, therefore, is whether this allocation of the burden of proof, on an issue concerning freedom of speech, falls short of the requirements of due process.

It is of course within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 97, 105. "[O]f course the legislature may go a good way in raising . . . [presumptions] or in changing the burden of proof, but there are limits. . . . [I]t is not within the province of a legis-

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and this of course includes those which are contrary to the prohibitions provided for in section 19 of article XX," 48 Cal. 2d 419, 431, 311 P. 2d 508, 515, and that the "mandatory and prohibitory" provision of § 19 of Art. XX "applies to all tax exemption claimants." 48 Cal. 2d, at 428, 311 P. 2d, at 513. Indeed, the tax authorities of California themselves point out that the signing of the declaration is not conclusive of the right to the tax exemption. The brief of the taxing authorities in the companion case, *First Unitarian Church* v. *County of Los Angeles, post,* p. 545, states, "Section 32 is an evidentiary provision. Its purpose and effect are to afford to the Assessor information *to guide his compliance* with and his enforcement of the Constitution's prohibition . . . ." (Emphasis supplied.)

It is also suggested that this Court construe the California legislation contrary to the clearly expressed construction of the California Supreme Court and thus avoid decision of the question of procedural due process. But this construction would not avoid decision of constitutional questions but rather would create the necessity for decision of the broader constitutional question of the validity of § 19 of Art. XX. A more fundamental objection to the suggestion, of course, is that it does violence to the basic constitutional principle that the construction of state laws is the exclusive responsibility of the state courts.

lature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Refining Co.,* 241 U. S. 79, 86. The legislature cannot "place upon all defendants in criminal cases the burden of going forward with the evidence . . . . [It cannot] validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible." *Tot* v. *United States,* 319 U. S. 463, 469. Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has "proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." *Morrison* v. *California,* 291 U. S. 82, 88–89. In civil cases too this Court has struck down state statutes unfairly shifting the burden of proof. *Western & A. R. Co.* v. *Henderson,* 279 U. S. 639; cf. *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43.

It is true that due process may not always compel the full formalities of a criminal prosecution before criminal advocacy can be suppressed or deterred, but it is clear that the State which attempts to do so must provide procedures amply adequate to safeguard against invasion speech which the Constitution protects. *Kingsley Books, Inc.,* v. *Brown, supra.* It is, of course, familiar practice in the administration of a tax program for the taxpayer to carry the burden of introducing evidence to rebut the determination of the collector. *Phillips* v. *Dime Trust Co.,* 284 U. S. 160, 167; *Brown* v. *Helvering,* 291 U. S. 193, 199. But while the fairness of placing the burden of proof on the taxpayer in most circumstances is

recognized, this Court has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax was shown to be in reality a penalty for a crime. *Lipke* v. *Lederer,* 259 U. S. 557; cf. *Helwig* v. *United States,* 188 U. S. 605. The underlying rationale of these cases is that where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue. Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech.

It is true that in the present case the appellees purport to do no more than compute the amount of the taxpayer's liability in accordance with the usual procedures, but in fact they have undertaken to determine whether certain speech falls within a class which constitutionally may be curtailed. As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. *Thomas* v. *Collins,* 323 U. S. 516; cf. *Yates* v. *United States,* 354 U. S. 298. The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. *Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208; *United States* v. *New York, N. H. & H. R. Co.,* 355 U. S. 253; *Sampson* v. *Channell,* 110 F. 2d 754, 758. There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first

instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. *Tot* v. *United States, supra.* Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. *Kingsley Books, Inc.*, v. *Brown, supra.*

The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis* v. *United States, supra,* provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." *Bailey* v. *Alabama,* 219 U. S. 219, 239.

The appellees, in controverting this position, rely on cases in which this Court has sustained the validity of loyalty oaths required of public employees, *Garner* v. *Board of Public Works,* 341 U. S. 716, candidates for public office, *Gerende* v. *Board of Supervisors,* 341 U. S. 56, and officers of labor unions, *American Communications Assn.* v. *Douds, supra.* In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. The purpose of the legislation sustained in the *Douds* case, the Court found, was to minimize the danger of political strikes disruptive of interstate commerce by discouraging labor unions from electing Communist Party members to union office. While the Court recognized that the necessary effect of the legislation was to discourage the exercise of rights protected by the First Amendment, this consequence was said to be only indirect. The congressional purpose was to achieve an objective other than restraint on speech. Only the method of achieving this end touched on protected rights and that only tangentially. The evil at which Congress had attempted to strike in that case was thought sufficiently grave to justify limited infringement of political rights. Similar considerations governed the other cases. Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. The present legislation, however, can have no such justification. It purports to deal directly with speech and the expression of political ideas. "Encouragement to loyalty to our institutions . . . [is a doctrine] which the state has plainly promulgated and intends to foster." 48 Cal.

2d, at 439, 311 P. 2d, at 520. The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against any other citizen, by imposing penalties to deter the unlawful conduct.

Moreover, the oaths required in those cases performed a very different function from the declaration in issue here. In the earlier cases it appears that the loyalty oath, once signed, became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The oath was not part of a device to shift to the officeholder the burden of proving his right to retain his position.[8] The signer, of course, could be prosecuted for perjury, but only in accordance with the strict procedural safeguards surrounding such criminal prosecutions. In the present case, however, it is clear that the declaration may be accepted or rejected on the basis of incompetent information or no information at all. It is only a step in a process throughout which the taxpayer must bear the burden of proof.

Believing that the principles of those cases have no application here, we hold that when the constitutional

[8] Significantly, the New York statute which this Court upheld in *Adler* v. *Board of Education,* 342 U. S. 485, provided that public-school teachers could be dismissed on security grounds only after a hearing at which the official pressing the charges sustained his burden of proof by a fair preponderance of the evidence.

right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech. Accordingly, though the validity of § 19 of Art. XX of the State Constitution be conceded *arguendo,* its enforcement through procedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process. It follows from this that appellants could not be required to execute the declaration as a condition for obtaining a tax exemption or as a condition for the assessor proceeding further in determining whether they were entitled to such an exemption. Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure.

The judgments are reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BURTON concurs in the result.

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

MR. JUSTICE BLACK, whom MR. JUSTICE DOUGLAS joins, concurring.*

California, in effect, has imposed a tax on belief and expression. In my view, a levy of this nature is wholly out of place in this country; so far as I know such a thing

*[NOTE: This opinion applies also to No. 382, *First Unitarian Church* v. *County of Los Angeles,* and No. 385, *Valley Unitarian-Universalist Church* v. *County of Los Angeles, post,* p. 545.]

has never even been attempted before. I believe that it constitutes a palpable violation of the First Amendment, which of course is applicable in all its particulars to the States. See, *e. g., Staub* v. *City of Baxley,* 355 U. S. 313; *Poulos* v. *New Hampshire,* 345 U. S. 395, 396–397; *Everson* v. *Board of Education,* 330 U. S. 1, 8; *Thomas* v. *Collins,* 323 U. S. 516; *Board of Education* v. *Barnette,* 319 U. S. 624, 639; *Douglas* v. *Jeannette,* 319 U. S. 157, 162; *Martin* v. *Struthers,* 319 U. S. 141; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571; *Bridges* v. *California,* 314 U. S. 252, 263; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Schneider* v. *State,* 308 U. S. 147, 160; *Lovell* v. *Griffin,* 303 U. S. 444, 450; *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Gitlow* v. *New York,* 268 U. S. 652, 666. The mere fact that California attempts to exact this ill-concealed penalty from individuals and churches and that its validity has to be considered in this Court only emphasizes how dangerously far we have departed from the fundamental principles of freedom declared in the First Amendment. We should never forget that the freedoms secured by that Amendment—Speech, Press, Religion, Petition and Assembly—are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities. See *American Communications Assn.* v. *Douds,* 339 U. S. 382, 445 (dissenting opinion); *Dennis* v. *United States,* 341 U. S. 494, 580 (dissenting opinion).

This case offers just another example of a wide-scale effort by government in this country to impose penalties and disabilities on everyone who is or is suspected of being a "Communist" or who is not ready at all times and all places to swear his loyalty to State and Nation. Compare *Adler* v. *Board of Education,* 342 U. S. 485, 496 (dis-

senting opinion); *Wieman* v. *Updegraff,* 344 U. S. 183, 193 (concurring opinion); *Barsky* v. *Board of Regents,* 347 U. S. 442, 456, 472 (dissenting opinions). Government employees, lawyers, doctors, teachers, pharmacists, veterinarians, subway conductors, industrial workers and a multitude of others have been denied an opportunity to work at their trade or profession for these reasons. Here a tax is levied unless the taxpayer makes an oath that he does not and will not in the future advocate certain things; in Ohio those without jobs have been denied unemployment insurance unless they are willing to swear that they do not hold specific views; and Congress has even attempted to deny public housing to needy families unless they first demonstrate their loyalty. These are merely random samples; I will not take time here to refer to innumerable others, such as oaths for hunters and fishermen, wrestlers and boxers and junk dealers.

I am convinced that this whole business of penalizing people because of their views and expressions concerning government is hopelessly repugnant to the principles of freedom upon which this Nation was founded and which have helped to make it the greatest in the world. As stated in prior cases, I believe "that the First Amendment grants an absolute right to believe in any governmental system, [to] discuss all governmental affairs, and [to] argue for desired changes in the existing order. This freedom is too dangerous for bad, tyrannical governments to permit. But those who wrote and adopted our First Amendment weighed those dangers against the dangers of censorship and deliberately chose the First Amendment's unequivocal command that freedom of assembly, petition, speech and press shall not be abridged. I happen to believe this was a wise choice and that our free way of life enlists such respect and love that our Nation cannot be imperiled by mere talk." *Carlson* v. *Landon,* 342 U. S. 524, 555-556 (dissenting opinion).

Loyalty oaths, as well as other contemporary "security measures," tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be. The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant. I am certain that loyalty to the United States can never be secured by the endless proliferation of "loyalty" oaths; loyalty must arise spontaneously from the hearts of people who love their country and respect their government. I also adhere to the proposition that 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." *Yates* v. *United States*, 354 U. S. 298, 344 (separate opinion).

If it be assumed however, as MR. JUSTICE BRENNAN does for purposes of this case, that California may tax the expression of certain views, I am in full agreement with him that the procedures it has provided to determine whether petitioners are engaged in "taxable" advocacy violate the requirements of due process.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK agrees, concurring.

While I substantially agree with the opinion of the Court, I will state my reasons more fully and more explicitly.

I. The State by the device of the loyalty oath places the burden of proving loyalty on the citizen. That pro-

cedural device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established. This technique is an ancient one that was denounced in an early period of our history.

Alexander Hamilton, writing in 1784 under the name Phocion, said:

> ". . . let it be supposed that instead of the mode of indictment and trial by jury, the Legislature was to declare, that every citizen who did not swear he had never adhered to the King of Great Britain, should incur all the penalties which our treason laws prescribe. Would this not be . . . a direct infringement of the Constitution? . . . it is substituting a new and arbitrary mode of prosecution to that ancient and highly esteemed one, recognized by the laws and the Constitution of the State,—I mean the trial by jury." 4 The Works of Alexander Hamilton (Fed. ed. 1904) 269–270.

Hamilton compared that hypothetical law to an actual one passed by New York on March 27, 1778, whereby a person who had served the King of England in enumerated ways was declared "to be utterly disabled disqualified and incapacitated to vote either by ballot or *viva voce* at any election" in New York. N. Y. Laws 1777–1784, 35. An oath was required [1] in enforcement of that law.[2]

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[1] The oath was prescribed by the Council in charge of the Southern District of New York. The Council, authorized by the Act of October 23, 1779, was composed of the Governor, President of the Senate, Chancellor, Supreme Court judges, Senators, Assemblymen, Secretary of State, Attorney General, and County Court judges. The Council was to assume authority "whenever the enemy shall abandon or be dispossessed of the same, and until the legislature can be convened," N. Y. Laws 1777–1784, 192. The Council governed from November 25, 1783, to February 5, 1784. See Barck,

[*Footnote 2 is on page 534*]

Hamilton called this "a subversion of one great principle of social security: to wit, that every man shall be presumed innocent until he is proved guilty." 4 The Works of Alexander Hamilton (Fed. ed. 1904) 269. He went on to say "This was to invert the order of things; and, instead of obliging the State to prove the guilt in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty. It was to excite scruples in the honest and conscientious, and to hold out a bribe to perjury." *Ibid.*

New York City 1776–1783 (1931), 220–221. Among the powers of the Council was control of elections.

The election oath prescribed by the Council read as follows:

"I ..... do solemnly, without any mental Reservation or Equivocation whatsoever, swear and declare, and call God to witness (or if of the People called Quakers, affirm) that I renounce and abjure all Allegiance to the King of Great-Britain; and that I will bear true Faith and Allegiance to the State of New-York, as a Free and Independent State, and that I will in all Things, to the best of my Knowledge and Ability, do my Duty as a good and faithful Subject of the said State ought to do. So help me God." Independent Gazette, Dec. 13, 1783.

The Council further provided:

"That if any Person presenting himself to give his Vote, shall be suspected of, or charged with having committed any of the Offences above specified, it shall be Lawful for the Inspectors, or Superintendents (as the Case may be) to inquire into and determine the Fact whereof such Person shall be suspected, or wherewith he shall be charged, as the Cause of Disqualification, on the Oath of one or more Witnesses, or on the Oath of the Party so suspected or charged, at their Discretion; and if such Fact shall, in the Judgement of the Inspectors or Superintendents, be established, it shall be lawful for them, and they are hereby required, to reject the Vote of such Person at such Election." Independent Gazette, Dec. 13, 1783.

[2] Other loyalty oaths appeared during this early period. Suspected persons were required to take a loyalty oath. N. Y. Laws 1777–1784, 87. The same was required of lawyers. *Id.*, at 155, 420. And see Flick, Loyalism in New York During the American Revolution, 14 Studies in History, Economics and Public Law (Columbia Univ. 1901) 9 (*passim*).

If the aim is to apprehend those who have lifted a hand against the Government, the procedure is unconstitutional.

If one conspires to overthrow the Government, he commits a crime. To make him swear he is innocent to avoid the consequences of a law is to put on him the burden of proving his innocence. That method does not square with our standards of procedural due process, as the opinion of the Court points out.

The Court in *Cummings* v. *Missouri*, 4 Wall. 277, 328, denounced another expurgatory oath that had some of the vices of the present one.

> "The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties."

II. If the aim of the law is not to apprehend criminals but to penalize advocacy, it likewise must fall. Since the time that Alexander Hamilton wrote concerning these oaths, the Bill of Rights was adopted; and then much later came the Fourteenth Amendment. As a result of the latter a rather broad range of liberties was newly guaranteed to the citizen against state action. Included were those contained in the First Amendment—the right to speak freely, the right to believe what one chooses, the right of conscience. *Stromberg* v. *California*, 283 U. S. 359; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Staub* v. *City of Baxley*, 355 U. S. 313. Today what one thinks or believes, what one utters and says have the full protection

of the First Amendment. It is only his actions that government may examine and penalize. When we allow government to probe his beliefs and withhold from him some of the privileges of citizenship because of what he thinks, we do indeed "invert the order of things," to use Hamilton's phrase. All public officials—state and federal—must take an oath to support the Constitution by the express command of Article VI of the Constitution. And see *Gerende* v. *Election Board,* 341 U. S. 56. But otherwise the domains of conscience and belief have been set aside and protected from government intrusion. *Board of Education* v. *Barnette,* 319 U. S. 624. What a man thinks is of no concern to government. "The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas* v. *Collins,* 323 U. S. 516, 531. Advocacy and belief go hand in hand. For there can be no true freedom of mind if thoughts are secure only when they are pent up.

In *Murdock* v. *Pennsylvania, supra,* we stated, "Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful." 319 U. S., at 116. If the Government may not impose a tax upon the expression of ideas in order to discourage them, it may not achieve the same end by reducing the individual who expresses his views to second-class citizenship by withholding tax benefits granted others. When government denies a tax exemption because of the citizen's belief, it penalizes that belief. That is different only in form, not substance, from the "taxes on knowledge" which have had a notorious history in the English-speaking world. See *Grosjean* v. *American Press Co.,* 297 U. S. 233, 246–247.

We deal here with a type of advocacy which, to say the least, lies close to the "constitutional danger zone." *Yates* v. *United States,* 354 U. S. 298, 319. Advocacy which is in no way brigaded with action should always be pro-

tected by the First Amendment. That protection should extend even to the ideas we despise. As Mr. Justice Holmes wrote in dissent in *Gitlow* v. *New York,* 268 U. S. 652, 673, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." It is time for government—state or federal—to become concerned with the citizen's advocacy when his ideas and beliefs move into the realm of action.

The California oath is not related to unlawful action. To get the tax exemption the taxpayer must swear he "does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities." [3] The Court construes the opinion of the California Supreme Court as applying the same test of illegal advocacy as was sustained against constitutional challenge in *Dennis* v. *United States,* 341 U. S. 494. That case held that advocacy of the overthrow of government by force and violence was not enough, that incitement to action, as well as clear and present danger, were also essential ingredients. *Id.,* at 512, 509–510. As *Yates* v. *United States, supra,* makes clear, there is still a clear constitutional line between advocacy of abstract doctrine and advocacy of action. The California Supreme Court said, to be sure, that the oath in question "is concerned" with that kind of advocacy.[4] But it nowhere says that oath is limited to that kind of advocacy. It seemed to think that advocacy was itself action for it said, "What one may merely believe is not prohibited.

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[3] Calif. Rev. & Tax Code, § 32; and see Calif. Const., Art. XX, § 19.

[4] 48 Cal. 2d 419, 440, 311 P. 2d 508, 520.

It is only advocates of the subversive doctrines who are affected. Advocacy constitutes action and the instigation of action, not mere belief or opinion." [5]

However the California opinion may be read, these judgments should fall. If the construction of the oath is the one I prefer, then the Supreme Court of California has obliterated the line between advocacy of abstract doctrine and advocacy of action. If the California oath has been limited by judicial construction to the type of advocacy condemned in *Dennis,* it still should fall. My disagreement with that decision has not abated. No conspiracy to overthrow the Government was involved. Speech and speech alone was the offense. I repeat that thought and speech go hand in hand. There is no real freedom of thought if ideas must be suppressed. There can be no freedom of the mind unless ideas can be uttered.

I know of no power that enables any government under our Constitution to become the monitor of thought, as this statute would have it become.

MR. JUSTICE CLARK, dissenting.

The decision of the Court turns on a construction of California law which regards the filing of the California tax oath as introductory, not conclusive, in nature. Hence, once the oath is filed, it may be "accepted or rejected on the basis of incompetent information or no information at all." And the filing is "only a step in a process throughout which the taxpayer must bear the burden of proof."

No California case, least of all the present one, compels such an understanding of § 32 of the California Revenue and Taxation Code. Neither appellant here filed the required oath, so the procedural skeleton of this case is not enlightening. If anything, the opinion of the state

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[5] 48 Cal. 2d, at 434, 311 P. 2d, at 517.

court indicates that the filing, whether the oath be true or false, would conclusively establish the taxpayer's eligibility for an exemption. Thus, in explaining the effect of § 32, the California court stated:

> "For the obvious purpose, among others, of avoiding litigation, the Legislature, throughout the years has sought to relieve the assessor of the burden, on his own initiative and at the public expense, of ascertaining the facts with reference to tax exemption claimants. In addition to the means heretofore and otherwise provided by law the Legislature, with special reference to the implementation of section 19 of article XX, has enacted section 32. That section provides a direct, time saving and relatively inexpensive method *of ascertaining the facts.*" (Emphasis added.) 48 Cal. 2d 419, 432, 311 P. 508, 515–516.

Moreover, the recourse of the State in the event a false oath is filed is expressly provided by § 32: "Any person or organization who makes such declaration knowing it to be false is guilty of a felony." The majority relies heavily on the duty of the assessor to "[investigate] the facts underlying all tax liabilities," as well as his subpoena power incident thereto under § 454 of the California Tax Code. But the California court adverts to those matters only under a hypothetical state of facts, namely, in the absence of the aid provided by § 32. 48 Cal. 2d, at 430–432, 311 P. 2d, at 515. The essential point is that, whatever the assessor's duty, § 32 provides for its discharge on the basis of the declarations alone.

On the other hand, if it be thought that the Supreme Court of California is ambiguous on this matter, then it is well established that our duty is to so construe the state oath as to avoid conflict with constitutional guarantees of due process. *Garner* v. *Board of Public Works,* 341 U. S. 716, 723–724 (1951); *Gerende* v. *Board of*

Supervisors of Elections, 341 U. S. 56 (1951). Two years ago we construed filing of the non-Communist affidavit required by § 9 (h) of the National Labor Relations Act as being conclusive in character, holding that the criminal sanction provided in that section was the exclusive remedy for the filing of a false affidavit. *Leedom* v. *International Union of Mine, Mill & Smelter Workers,* 352 U. S. 145 (1956). That Act bars issuance of a complaint or conducting an investigation upon the application of a union unless the prescribed non-Communist affidavit is filed by each officer of the union. Article XX, § 19, of the California Constitution expressly prohibits a tax exemption to any person or organization that advocates violent overthrow of either the California or the United States Governments, or advocates the support of a foreign government against the United States in the event of hostilities, and provides for legislative implementation thereof. By § 32 the California Legislature has required only the filing of the affidavit. The terms of § 9 (h) of the National Labor Relations Act and § 32 of the California Tax Code, therefore, establish identical procedures. That identity points up the inappropriateness of the Court's construction of § 32.

Even if the Court's interpretation of California law is correct, I cannot agree that due process requires California to bear the burden of proof under the circumstances of this case. This is not a criminal proceeding. Neither fine nor imprisonment is involved. So far as Art. XX, § 19, of the California Constitution and § 32 of the California Tax Code are concerned, appellants are free to speak as they wish, to advocate what they will. If they advocate the violent and forceful overthrow of the California Government, California will take no action against them under the tax provisions here in question. But it

will refuse to take any action *for them,* in the sense of extending to them the legislative largesse that is inherent in the granting of any tax exemption or deduction. In the view of the California court, "An exemption from taxation is the exception and the unusual. . . . It is a bounty or gratuity on the part of the sovereign and when once granted may be withdrawn." 48 Cal. 2d, at 426, 311 P. 2d, at 512. The power of the sovereign to attach conditions to its bounty is firmly established under the Due Process Clause. Cf. *Ivanhoe Irrigation District* v. *McCracken,* 357 U. S. 275, 295 (1958). Traditionally, the burden of qualifying rests upon the one seeking the grace of the State. The majority suggests that traditional procedures are inadequate when "a person is to suffer a penalty for a crime." But California's action here, declining to extend the grace of the State to appellants, can in no proper sense be regarded as a "penalty." The case cited by the majority, *Lipke* v. *Lederer,* 259 U. S. 557 (1922), involves an altogether different matter, imposition of a special tax upon one who engaged in certain illegal conduct, by a statute that described the levy as a "tax *or penalty.*" (Emphasis added.) 259 U. S., at 561.

The majority, however, would require that California bear the burden of proof under the circumstances of this case because "the transcendent value of speech is involved." This is a wholly novel doctrine, unsupported by any precedent, and so far as I can see, inapposite to several other decisions of this Court upholding the application of similar oaths to municipal employees, *Garner* v. *Board of Public Works,* 341 U. S. 716 (1951); public school teachers, *Adler* v. *Board of Education,* 342 U. S. 485 (1952); candidates for public office, *Gerende* v. *Board of Supervisors,* 341 U. S. 56 (1951); and labor union officials, *American Communications Assn.* v. *Douds,* 339

U. S. 382 (1950). See also *Davis* v. *Beason,* 133 U. S. 333 (1890), as to voters in territorial elections. All of those decisions, by virtue of the oath involved, put the burden on the individual to come forward and disavow activity involving "the transcendent value of speech." The majority attempts to distinguish them on the basis of their involving a greater state interest in justification of restricting speech, and also on the ground that the oaths there involved were conclusive in nature. The first distinction, however, seems pertinent only to the validity of an oath requirement in the first place, not to burden of proof under such a requirement. The second distinction, which *arguendo* I accept as true at this point, seems exceedingly flimsy, since even an oath that is conclusive in nature forces the applicant to the burden of coming forward and making the requisite declaration. So far as impact on freedom of speech is concerned, the further burden of proving the declarations true appears close to being *de minimis.*

The majority assumes, without deciding, that California may deny a tax exemption to those in the proscribed class. I think it perfectly clear that the State may do so, since only that speech is affected which is criminally punishable under the Federal Smith Act, 18 U. S. C. § 2385, or the California Criminal Syndicalism Act, Cal. Stat., 1919, c. 188. And California has agreed that its interpretation of criminal speech under those Acts shall be in conformity with the decisions of this Court, *e. g., Yates* v. *United States,* 354 U. S. 298 (1957); *Dennis* v. *United States,* 341 U. S. 494 (1951); *Whitney* v. *California,* 274 U. S. 357 (1927). The interest of the State that justifies restriction of speech by imposition of criminal sanctions surely justifies the far less severe measure of denying a tax exemption, provided the lesser sanction bears reasonable relation to the evil at which the State

aims. Cf. *American Communications Assn.* v. *Douds, supra.* The general aim of the constitutional and legislative provisions in question is to restrict advocacy of violent or forceful overthrow of State or National Government; the particular aim is to avoid state subsidization of such advocacy by refusing the State's bounty to those who are so engaged. The latter has been denominated the "primary purpose" by the California Supreme Court. 48 Cal. 2d, at 428, 311 P. 2d, at 513. In view of that, reasonable relation is evident on the face of the matter.

Refusal of the taxing sovereign's grace in order to avoid subsidizing or encouraging activity contrary to the sovereign's policy is an accepted practice. We have here a parallel situation to federal refusal to regard as "necessary and ordinary," and hence deductible under the federal income tax, those expenses deduction of which would frustrate sharply defined state policies. See *Tank Truck Rentals, Inc.,* v. *Commissioner,* 356 U. S. 30 (1958).

If the State's requirement of an oath in implementing denial of this exemption be thought to make an inroad upon speech over and above that caused by denial of the exemption, or even by criminal punishment of the proscribed speech, I find California's interest still sufficient to justify the State's action. The restriction must be considered in the context in which the oath is set—appeal to the largesse of the State. The interest of the State, as before pointed out, is dual in nature, but its primary thrust is summed up in an understandable desire to insure that those who benefit by tax exemption do not bite the hand that gives it.

Appellants raise other issues—pre-emption of security legislation under *Pennsylvania* v. *Nelson,* 350 U. S. 497 (1956), and denial of equal protection because the oath is not required for all types of tax exemptions—which the majority does not pass upon. I treat of them only so far

as to say that I think neither has merit, substantially for the reasons stated in the opinion of the Supreme Court of California.

If my interpretation of § 32 is correct, I assume that California will afford appellants another opportunity to take the oath, this time knowing that its filing will have conclusive effect. For the reasons stated above, I would affirm the judgment.

FIRST UNITARIAN CHURCH OF LOS ANGELES *v.* COUNTY OF LOS ANGELES ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 382. Argued April 8, 1958.—Decided June 30, 1958.*

Solely because they refused to subscribe oaths that they do not advocate the overthrow of the Federal Government by force, violence or other unlawful means, or advocate the support of a foreign government against the United States in the event of hostilities, petitioners were denied tax exemptions provided by the California Constitution for real property and buildings used solely and exclusively for religious worship. *Held:* Enforcement of the underlying prohibition through procedures which place the burdens of proof and persuasion on the taxpayer violates the Due Process Clause of the Fourteenth Amendment. *Speiser* v. *Randall, ante,* p. 513. Pp. 546–547.

48 Cal. 2d 419, 899, 311 P. 2d 508, 540, reversed and causes remanded.

A. L. Wirin argued the causes for petitioners. With him on the brief were *Fred Okrand, Robert L. Brock* and *George T. Altman.*

Gordon Boller argued the causes for respondents. With him on the brief was *Harold W. Kennedy.*

Briefs of *amici curiae* urging reversal were filed by *Harold Evans* and *Allen S. Olmsted, 2nd,* for the Philadelphia Yearly Meeting of the Religious Society of Friends, and *Claude C. Smith* for the American Friends Service Committee, Inc., in No. 385, *Kenneth W. Greenawalt* for the American Civil Liberties Union, and *Stanley A. Weigel* and *Frank B. Frederick* for the First Methodist Church of San Leandro and the First Unitarian Church of Berkeley in Nos. 382 and 385.

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*Together with No. 385, *Valley Unitarian-Universalist Church, Inc.,* v. *County of Los Angeles et al.,* also on certiorari to the same Court.

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MR. JUSTICE BRENNAN delivered the opinion of the Court.

These are companion cases to *Speiser* v. *Randall* and *Prince* v. *City and County of San Francisco, ante,* p. 513. The petitioners claimed the property-tax exemption provided by Art. XIII, § 1½, of the California Constitution for real property and buildings used solely and exclusively for religious worship. The Los Angeles assessor denied the exemptions because each petitioner refused to subscribe, and struck from the prescribed application form, the oath that they did not advocate the overthrow of the Government of the United States and of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in the event of hostilities. Each petitioner sued in the Superior Court in and for the County of Los Angeles to recover taxes paid under protest and for declaratory relief. Both contended that the exaction of the oath pursuant to § 19 of Art. XX of the State Constitution and § 32 of the California Revenue and Taxation Code was forbidden by the Federal Constitution. The court upheld the validity of the provisions in the action brought by petitioner First Unitarian Church of Los Angeles, and the Supreme Court of California affirmed. 48 Cal. 2d 419, 311 P. 2d 508. We granted certiorari. 355 U. S. 853. The Superior Court in the action brought by petitioner Valley Unitarian-Universalist Church, Inc., upheld the validity of the provisions under the Federal Constitution but held that § 32 of the Revenue and Taxation Code violated the California Constitution because it excluded or exempted householders from the requirement. The Supreme Court of California reversed, 48 Cal. 2d 899, 311 P. 2d 540, and we granted certiorari, 355 U. S. 854.

In addition to the contentions advanced by the appellants in *Speiser* v. *Randall,* the petitioners argue that the

provisions are invalid under the Fourteenth Amendment as abridgments of religious freedom and as violations of the principle of separation of church and state. Our disposition of the cases, however, makes consideration of these questions unnecessary. For the reasons expressed in *Speiser* v. *Randall,* we hold that the enforcement of § 19 of Art. XX of the State Constitution through procedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process.

The judgments are reversed and the causes remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BURTON concurs in the result.

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

[For concurring opinion of MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS, see *ante,* p. 529.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK agrees, concurring.

What I have said in *Speiser* v. *Randall* and *Prince* v. *San Francisco,* decided this day, *ante,* p. 532, is sufficient for these cases as well. But there is a related ground on which the decision in these *Unitarian* cases should rest. We know from the record one principle of that church:

> "The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs."

We stated in *Girouard* v. *United States,* 328 U. S. 61, 69, "The test oath is abhorrent to our tradition." See *American Communications Assn.* v. *Douds,* 339 U. S. 382, 445 (dissenting opinion). The reason for that abhorrence is the supremacy of conscience in our constitutional scheme. As we stated in *Board of Education* v. *Barnette,* 319 U. S. 624, 642, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

There is no power in our Government to make one bend his religious scruples to the requirements of this tax law.

MR. JUSTICE CLARK, dissenting.

For the reasons stated in my dissenting opinion in No. 483, *Speiser* v. *Randall,* and No. 484, *Prince* v. *San Francisco, ante,* p. 538, I cannot agree either that California law imposes the burden which the Court considers here, or that such a burden in any event would cause the procedure established by § 32 of the California Revenue and Taxation Code to violate the Due Process Clause of the Fourteenth Amendment. Again for reasons stated in my dissenting opinion in *Speiser* and *Prince, supra,* I find no violation of the constitutional right to freedom of speech.

The majority notes the further contention here that freedom of religion is abridged, but has no occasion to consider it. The California court found that no tenet of petitioners' respective religions embraces the activity which is the subject of the state provisions. Nor does it appear that such activity can be characterized as religious in nature. Cf. *Davis* v. *Beason,* 133 U. S. 333 (1890); *Reynolds* v. *United States,* 98 U. S. 145 (1879). I would affirm.

CARITATIVO *v.* CALIFORNIA ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 561. Argued May 21, 1958.—
Decided June 30, 1958.*

California law forbids the execution of an insane person but leaves to the sole judgment of the prison warden the initiation of proceedings to determine the sanity of a condemned criminal in his custody. If the warden "has good reason to believe" that a condemned prisoner has become insane, he must so advise the district attorney, who must institute court proceedings leading to a determination of the prisoner's sanity by a jury. But, if the warden does not take the first step, no judge, court, or officer, other than the Governor, can suspend the execution of a death sentence. Petitioners had been convicted of murder and sentenced to death, and their convictions had been affirmed by the State Supreme Court. Subsequently, the warden of the prison where they were confined determined that there was no reason to believe them insane and refused to institute proceedings to determine their sanity. The State Supreme Court denied writs of habeas corpus to review the warden's determinations. *Held:* The judgments are affirmed on the authority of *Solesbee* v. *Balkcom,* 339 U. S. 9.

Affirmed.

George T. Davis argued the cause and filed a brief for petitioner in No. 561.

A. J. Zirpoli argued the cause and filed a brief for petitioner in No. 562.

Clarence A. Linn, Assistant Attorney General of California, argued the cause for respondents in No. 561, and *Arlo E. Smith,* Deputy Attorney General of California, argued the cause for respondent in No. 562. With them on the briefs was *Edmund G. Brown,* Attorney General.

*Together with No. 562, *Rupp* v. *Dickson, Acting Warden,* also on certiorari to the same Court.

PER CURIAM.

The judgments are affirmed. *Solesbee* v. *Balkcom,* 339 U. S. 9, 12.

MR. JUSTICE HARLAN, concurring.

Being uncertain as to the full implications of *Solesbee* v. *Balkcom,* 339 U. S. 9, I prefer not to rely on that decision in disposing of these cases.

I proceed on the premise that the Fourteenth Amendment prohibits a State from executing a prisoner who has become insane after his conviction. Even so, I do not believe that the procedure established by California to deal with such cases, in evident recognition of the grave interest at stake, can upon the records before us be said to offend due process.

The California statute in substance imposes on the warden a mandatory duty to make a continuing check on the mental condition of condemned prisoners and to notify the district attorney whenever he finds grounds for belief that a prisoner has become insane. Upon being so advised, it is the unqualified duty of the district attorney to submit the issue of the prisoner's sanity to a jury in judicial proceedings in which the prisoner is entitled to be heard. The prisoner is given no right to commence such proceedings himself, or to be heard in connection with the warden's initiating determination. Affidavits submitted by the warden disclose that his statutory duty is carried out under a regular procedure pursuant to which the prison psychiatric staff submits reports to the warden as to all condemned prisoners soon after their arrival at the prison, and also submits a special psychiatric report within 20 days of a scheduled execution.

This procedure, in my opinion, satisfies the test of fundamental fairness which underlies due process. At the post-conviction stage of a capital case, it seems to me

entirely proper for the State to condition a prisoner's right to a sanity trial upon a preliminary determination by a responsible official that "good reason" exists for the belief that the prisoner has become insane. Surely it is not inappropriate for California to lodge this grave responsibility in the hands of the warden, the official who beyond all others has had the most intimate relations with, and best opportunity to observe, the prisoner. And having regard to the natural and impelling impulse of lawyers representing condemned men to stave off their execution as long as possible, I also think it constitutionally permissible for the State to conclude that such a preliminary determination should be made *ex parte*. It is a legitimate consideration for California to take into account that an adversary proceeding on the issue of probable cause might open the door to interminable delaying maneuvers in capital cases, contrary to the sound administration of justice. For example, unless this Court were prepared to accept as conclusive the warden's representation that he had reckoned with the condemned prisoner's submissions, whenever such a representation is challenged, it would inevitably invite judicial proceedings to determine whether the warden had in fact acted properly on every occasion that a condemned man claimed that he had become insane.

Granting that under the Fourteenth Amendment the warden may not refrain from making a responsible and good-faith determination, no considerations of this kind are suggested by either of the records before us. The warden's affidavits show that the usual procedures were followed here; that the prison psychiatrists unanimously concluded that each of the petitioners was sane; that the warden personally observed their conduct; and that "neither from the psychiatric reports, his own observation, nor the reports of his custodial staff has he any reason to believe [petitioners] presently insane." In

addition, the warden affirms his intention to institute the required proceedings to determine petitioners' sanity if and when he has "good reason" to believe either of them insane. Petitioners do not controvert the substance of these affirmations, but simply claim that they were denied due process because the warden acted without according them an opportunity to be heard or to submit further data.

In the absence of any challenge to the warden's affirmations that he followed the customary California procedure, that is, that he determined petitioners' sanity on the basis of responsible medical advice and on his own personal observations, and in the absence of any allegation that he acted in bad faith, I cannot say that the petitioners were denied due process solely because the warden declined, in the exercise of his discretion, to consider also the professions sought to be made on their behalf.

For these reasons I concur in the Court's affirmance of the two judgments.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

By its summary disposition of these cases, the Court extends the disturbing decision in *Solesbee* v. *Balkcom*, 339 U. S. 9, where it was found that a State did not offend due process by leaving to the private judgment of its governor, in which the victim had no part, the determination of the sanity of a man condemned to death. Now it appears that this determination, upon which depends the fearful question of life or death, may also be made on the mere say-so of the warden of a state prison, according to such procedure as he chooses to pursue, and more particularly without any right on the part of a man awaiting death who claims that insanity has supervened to have his case put to the warden. There can hardly be a comparable situation under our constitutional scheme of things in which an interest so great, that an insane man

not be executed, is given such flimsy procedural protection, and where one asserting a claim is denied the rudimentary right of having his side submitted to the one who sits in judgment.

Petitioners in both these cases have been convicted of murder in the first degree and sentenced to death. Their convictions were affirmed by the Supreme Court of California. *People* v. *Caritativo,* 46 Cal. 2d 68, 292 P. 2d 513; *People* v. *Rupp,* 41 Cal. 2d 371, 260 P. 2d 1. Subsequently, each petitioned that court for habeas corpus to review the determination of the warden of San Quentin, where they are confined awaiting execution, that there is no reason to believe petitioners insane and his refusal to institute proceedings under California law to determine their present sanity. To review the denial of these petitions, *Caritativo* v. *Teets,* 48 A. C. (Minutes, May 8, 1957); *Rupp* v. *Teets,* 49 A. C. (Minutes, Aug. 27, 1957), we granted certiorari. 355 U. S. 853, 854.

Sections 3700 and 3701 of the California Penal Code set forth the procedure to be followed in determining the sanity of a person condemned to death. Section 3700 provides that, "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken." Section 3701 provides that, "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be

summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry."

The warden in the present cases did not institute proceedings pursuant to these sections leading to a judicial determination of petitioners' sanity. According to the petitions for habeas corpus filed in the California Supreme Court, he did not do so in spite of the fact that "there is good reason to believe" that petitioners are insane. Affidavits of the warden, appended to briefs filed in this Court, state that he has observed the petitioners and examined reports submitted to him by prison psychiatrists, and that he has no reason to believe that petitioners are insane. Furthermore, that he "intends to follow the statutes of California and to institute proceedings to determine [petitioners'] . . . sanity pursuant to section 3701 of the Penal Code, if and when he has 'good reason to believe' [they are] . . . insane."

In Rupp's petition for habeas corpus, it is stated that the conclusions of the prison psychiatrists, upon which the warden professed to rely in reaching his determination that there was no reason to think Rupp insane, were made without benefit of the complete medical and psychiatric reports relating to Rupp's past history of mental disease. This history is set forth in detail in the petition and shows a continuous record of mental disease extending over many years. It is also stated that the warden has refused to allow a private psychiatrist, employed by Rupp's sister, to examine the prisoner to determine his sanity, and has refused to let Rupp's attorneys examine the prison psychiatric records. In regard to Caritativo, it is clear from the warden's affidavit that he refused counsel permission to have the prisoner examined by a private psychiatrist, and declared that he would "rely on the advice of the members of his staff as to the mental condition of Bart Luis Caritativo."

It is now perfectly clear, as it was not when the Court decided *Phyle* v. *Duffy,* 334 U. S. 431, that there is no remedy whatsoever under California law if the warden fails to perform the duties imposed upon him by § 3701. Neither habeas corpus nor mandamus is available to review his determination that there is no reason to believe a condemned man insane. His determination on this issue is not a "preliminary determination," but both an initial and final determination. The fate of the condemned man rests entirely with the warden, and depends on his willingness to consider the prisoner's sanity, and, if he decides to consider this question, his willingness to hear and rationally appraise information relevant to such a determination. Beyond the warden, under California law, there is no recourse of right. Even if no reasonable man would say that the condemned prisoner is sane, still, if the warden does not choose to call this fact to the attention of the district attorney, the insane prisoner will be executed. Thus, even if constitutional requirements are met by the procedure set forth in the California statute, under which the warden may determine the question of sanity without any opportunity for the condemned man to put his case, there is no way under California law to inquire into whether the warden has in fact followed this rudimentary procedure and made any inquiry whatsoever into the prisoner's sanity. The only assurance that he has done so in the present cases comes from the warden's own affidavits, two of which were introduced for the first time with respondents' briefs filed in this Court.

Under the California statute, what information the warden considers, and the manner in which he considers it, in the common experience of lawyers a factor vital in determining the outcome of any legal inquiry, are matters resting solely with the warden. He may make his determination *ex parte,* and, as evidently was true in the

present cases, without affording the condemned man, his counsel, or family, any opportunity whatsoever to present evidence or arguments highly relevant to the proper disposition of the case and therefore essential to be considered, from a rational point of view, if the warden is properly to perform the duty imposed upon him by law. In these cases the warden relied almost exclusively on the reports of his staff and refused to allow examination of petitioners by independent psychiatrists. If the petition for habeas corpus filed on behalf of Rupp is to be believed, and for our purposes it must be believed for it was not traversed, he was denied the opportunity to put before the warden much information on his medical history that would be highly pertinent to any inquiry into his present sanity, and, at the least, was highly relevant to a fair judgment whether further inquiry should be pursued.

In considering the adequacy of this procedure, it is important to bear in mind that California does not tolerate the execution of the insane. California Penal Code, § 1367. On the contrary, from the beginning of its history as a State, California has explicitly forbidden it. Cal. Stat. 1850, c. 119, § 615. The State has adhered to a view set deep in the Common Law and part and parcel of our notions of what is tolerable in a civilized society. The reasons for this view, explaining and justifying the profound abhorrence with which the execution of the insane has long been regarded, I have set forth in my dissent in *Solesbee* v. *Balkcom,* 339 U. S. 9, 14. Time has not discredited or weakened the force of these reasons. It is not merely a matter of administrative grace, to be dispensed at the will of the warden, that an insane man not be executed. It is a matter of right under both California law and the Federal Constitution. So important does California consider the matter that, in § 3701 of the Penal Code, it has provided for a judicial proceeding and jury determination of the question of sanity once the warden

has notified the district attorney. So, substantially, it has been from the beginning in California. Cal. Stat. 1850, c. 119, § 502. I make no claim that the Due Process Clause requires an opportunity to persons in the place of petitioners to have their claim tested in a judicial proceeding. I do not even suggest that there must be a formal adversary hearing before the warden. I do insist on the mandatory requirement that some procedure be established for assuring that the warden give ear to a claim that the circumstances warrant his submission of the issue of sanity to a determination in accordance with the procedure set forth in the California statutes.

Surely the right of an insane man not to be executed, a right based on moral principles deeply embedded in the traditions and feelings of our people and itself protected by the Due Process Clause of the Fourteenth Amendment, merits the procedural protection that that Amendment safeguards. What kind of a constitutional right is it, especially if life is at stake, the vindication of which rests wholly in the hands of an administrative official whose actions cannot be inquired into, and who need not consider the claims of the person most vitally affected, the person in whom the constitutional right is said to inhere? In *Solesbee* v. *Balkcom, supra,* the Court found that a State had not offended due process in constituting its governor an "apt and special tribunal" for determining, in *ex parte* proceedings, the sanity of a condemned man at the time of execution. The Court relied particularly on "the solemn responsibility of a state's highest executive." 339 U. S., at 13. It analogized the function given the governor to the power to pardon and reprieve, powers traditionally confided to the chief executive of the State. It did not appear in that case whether, in exercising this function, the governor had declined to hear statements on the defendant's behalf. In the present case, however, the determination is not to be made on the

"solemn responsibility of a state's highest executive," but by a prison warden. There is no apparent reason why this awesome power, surely without parallel under our law in the freedom of its exercise and the seriousness of its consequences, should not after today's decision be entrusted to still lower administrative officials. It is no reflection on the qualities of wardens and similar officials to point out that when wielded by them in *ex parte* proceedings this power can scarcely be assimilated to the chief executive's traditional power to pardon or reprieve. Finally, in these cases, it does appear that the warden did in fact refuse to consider evidence tendered on the prisoners' behalf, and refused to allow an examination by independent psychiatrists. He expressly rested his determination on the untested conclusions of his own staff.

Audi alteram partem—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them—executive, legislative, and judicial—whenever any individual, however lowly and unfortunate, asserts a legal claim. It is beside the point that the claim may turn out not to be meritorious. It is beside the point that delay in the enforcement of the law may be entailed. The protection of a constitutional right to life ought not be subordinated to the fear that some lawyers will be wanting in the observance of their professional responsibilities. The right to be heard somehow by someone before a claim is denied, particularly if life hangs in the balance, is far greater in importance to society, in the light of the sad history of its denial, than inconvenience in the execution of the law. If this is true when mere property interests are at stake, see *Walker* v. *City of Hutchinson,* 352 U. S. 112; *Covey* v. *Town of Somers,* 351 U. S. 141; *Mullane* v. *Central Hanover Bank*

& Trust Co., 339 U. S. 306, how much more so when the difference is between life and death. As Mr. Justice Holmes said, happily speaking for the Court, in *United States* v. *Oppenheimer*, 242 U. S. 85, 87, "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt."

It may well be that if the warden of a California prison cannot act on his arbitrary judgment—for it is inherently arbitrary if the condemned man or those who speak for him are not allowed to be heard—in deciding whether there is good reason to believe that a person about to be executed is insane, that unworthy claims will be put to the warden and perchance add to delays in the execution of the law. But far better such minor inconveniences, and an effective penal administration ought to find no difficulty in making them minor, than that the State of California should have on its conscience a single execution that would be barbaric because the victim was in fact, though he had no opportunity to show it, mentally unfit to meet his destiny.

FEDERAL TRADE COMMISSION *v.* NATIONAL CASUALTY CO.

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

No. 435. Argued April 9–10, 1958.—Decided June 30, 1958.*

The Federal Trade Commission ordered respondent insurance companies to cease and desist from certain advertising practices found by the Commission to be false, misleading and deceptive, in violation of § 5 of the Federal Trade Commission Act. The orders purported to apply in States having laws forbidding such practices as well as in States not having such laws. The companies' advertising material was prepared by them and shipped in bulk to local agents who distributed it locally. Only an insubstantial amount went directly from the companies to the public, and there was no use of radio, television, or other means of mass communication by the companies. The Courts of Appeals set aside the Commission's orders on the ground that, under the McCarran-Ferguson Act, the Commission had no jurisdiction to make such orders effective in States having laws forbidding such practices. *Held:* The judgments are affirmed. Pp. 561–565.

243 F. 2d 719, 245 F. 2d 883, affirmed.

Ralph S. Spritzer argued the causes for petitioner. On the brief were *Solicitor General Rankin, Earl W. Kintner* and *James E. Corkey.*

John F. Langs argued the cause and filed a brief for respondent in No. 435.

J. D. Wheeler argued the cause and filed a brief for respondent in No. 436.

A brief of *amici curiae* urging affirmance was filed by *Paul L. Adams,* Attorney General of Michigan, *Samuel J. Torina,* Solicitor General, and *Stanton S. Faville,* Chief

*Together with No. 436, *Federal Trade Commission* v. *American Hospital & Life Insurance Co.,* on certiorari to the United States Court of Appeals for the Fifth Circuit.

Assistant Attorney General, joined in by State Attorneys General *Robert Morrison* of Arizona, *Bruce Bennett* of Arkansas, *Duke W. Dunbar* of Colorado, *John J. Bracken* of Connecticut, *Richard W. Ervin* of Florida, *Eugene Cook* of Georgia, *Latham Castle* of Illinois, *Edwin K. Steers* of Indiana, *Norman A. Erbe* of Iowa, *John Anderson, Jr.* of Kansas, *Jo M. Ferguson* of Kentucky, *Jack P. F. Gremillion* of Louisiana, *C. Ferdinand Sybert* of Maryland, *John M. Dalton* of Missouri, *Clarence S. Beck* of Nebraska, *Harvey Dickerson* of Nevada, *Louis C. Wyman* of New Hampshire, *Fred M. Standley* of New Mexico, *Louis J. Lefkowitz* of New York, *Leslie R. Burgum* of North Dakota, *William Saxbe* of Ohio, *Mac Q. Williamson* of Oklahoma, *Robert Y. Thornton* of Oregon, *Thomas D. McBride* of Pennsylvania, *J. Joseph Nugent* of Rhode Island, *T. C. Callison* of South Carolina, *Phil Saunders* of South Dakota, *George F. McCanless* of Tennessee, *Will Wilson* of Texas, *E. Richard Callister* of Utah, *A. S. Harrison, Jr.* of Virginia, *Frederick M. Reed* of Vermont, *John J. O'Connell* of Washington, *W. W. Barron* of West Virginia, *Stewart G. Honeck* of Wisconsin and *Thomas O. Miller* of Wyoming.

Briefs of *amici curiae* urging affirmance were also filed by *Franklin J. Marryott, L. J. Carey, Joseph P. Craugh, John W. Joanis* and *Garl Watkins* for the American Mutual Insurance Alliance, *Whitney North Seymour* for the Health Insurance Association of America, and *Hugh B. Cox* and *H. Thomas Austern* for the Life Insurance Association of America and the American Life Convention.

PER CURIAM.

The Courts of Appeals for the Fifth and Sixth Circuits have set aside cease-and-desist orders of the Federal Trade Commission prohibiting respondent insurance companies from carrying on certain advertising practices

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found by the Commission to be false, misleading, and deceptive, in violation of the Federal Trade Commission Act, 15 U. S. C. § 45.[1] These orders seek to proscribe activities within the boundaries of States that have their own statutes prohibiting unfair and deceptive insurance practices as well as within States that do not. The courts below concluded that in view of the existence of these statutes, the McCarran-Ferguson Act, 15 U. S. C. §§ 1011–1015, prohibits the Federal Trade Commission from regulating such practices within the States having these statutes. We granted certiorari to review this interpretation of an important federal statute. 355 U. S. 867.

Respondents, the National Casualty Company in No. 435 and the American Hospital and Life Insurance Company in No. 436, engage in the sale of health and accident insurance. National is licensed to sell policies in all States, as well as the District of Columbia and Hawaii, while American is licensed in fourteen States. Solicitation of business for National is carried on by independent agents who operate on commission. The company's advertising material is prepared by it and shipped in bulk to these agents, who distribute the material locally and assume the expense of such dissemination. Only an insubstantial amount of any advertising goes directly by mail from the company to the public, and there is no use of radio, television, or other means of mass communication by the company. American does not materially differ from National in method of operation.

The pertinent portions of the McCarran-Ferguson Act are set forth in the margin.[2] An examination of that

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[1] The decision of the Court of Appeals for the Fifth Circuit is reported at 243 F. 2d 719. The decision of the Court of Appeals for the Sixth Circuit is reported at 245 F. 2d 883.

[2] "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is

statute and its legislative history establishes that the Act withdrew from the Federal Trade Commission the authority to regulate respondents' advertising practices in those States which are regulating those practices under their own laws.[3]

Petitioner asserts that for constitutional reasons the McCarran-Ferguson Act should be construed to authorize federal regulation in these cases. It is urged that because Congress understood that in accordance with due process there are territorial limitations on the power of the States to regulate an interstate business, it did not intend to foreclose federal regulation of interstate insurance as a supplement to state action.[4] However, petitioner con-

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in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law. . . ." 59 Stat. 33, as amended, 61 Stat. 448, 70 Stat. 908.

[3] The crucial proviso in Section 2 (b) was the subject of extended debate. See, especially, the remarks of Senator McCarran, 91 Cong. Rec. 1443, and Senator Ferguson, 91 Cong. Rec. 1481. A substantial amount of material appears during the formulating period of the McCarran-Ferguson Act. See, *e. g.,* S. Rep. No. 20, 79th Cong., 1st Sess.; H. R. Rep. No. 143, 79th Cong., 1st Sess., and the remarks of Senators Ferguson, Murdock, and Radcliffe, 91 Cong. Rec. 482–483, and of Representatives Hancock and Gwynne, 91 Cong. Rec. 1087, 1089–1090.

[4] Cf., *e. g.,* H. R. Rep. No. 143, 79th Cong., 1st Sess. 3, and 91 Cong. Rec. 1442.

cedes that this constitutional infirmity on the power of the States does not operate to hinder state regulation of the advertising practices of the respondents in the instant cases. Whatever may have been the intent of Congress with regard to interstate insurance practices which the States cannot for constitutional reasons regulate effectively, that intent is irrelevant in the cases before us. Respondents' advertising programs require distribution by their local agents, and there is no question but that the States possess ample means to regulate this advertising within their respective boundaries. Cf., *e. g., Robertson* v. *California,* 328 U. S. 440, 445, n. 6, 461.[5]

Petitioner also argues in a different vein that even if the McCarran-Ferguson Act bars federal regulation where state regulation has been effectively applied, the exercise of Commission authority in these cases should be upheld because the States have not "regulated" within the meaning of the Section 2 (b) proviso. This argument is not persuasive in the instant cases. Each State in question has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision.[6] Petitioner does not argue that the statutory provisions here under review were mere pretense. Rather, it urges that a general prohibition designed to guarantee certain standards of conduct is too "inchoate" to be "regulation" until that prohibition has been crystallized into "administrative elaboration of these standards and application in individual cases." However, assum-

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[5] See also *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313; *Osborn* v. *Ozlin,* 310 U. S. 53.

[6] At the time the complaints were filed thirty-six States had enacted the "Model Unfair Trade Practices Bill for Insurance." Eight others had statutes essentially the same in effect as the "Model Bill."

ing there is some difference in the McCarran-Ferguson Act between "legislation" and "regulation," nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioner. So far as we can determine from the records and arguments in these cases, the proviso in Section 2 (b) has been satisfied.

The judgments of the Courts of Appeals are

Affirmed.

AARON ET AL. *v.* COOPER ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, ET AL.

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

No. 1095. Decided June 30, 1958.

A Federal District Court entered an order authorizing public school officials of Little Rock, Ark., to suspend until January 1961 a plan of racial integration previously approved by that Court and affirmed by the Court of Appeals; and it denied a stay of its suspension order pending appeal. After an appeal to the Court of Appeals had been docketed and application for a stay had been made to that Court, petitioners applied to this Court for a writ of certiorari to review the order of the District Court before the Court of Appeals had had an opportunity to act on the petition for a stay or to hear the appeal. *Held:* The writ is denied on the assumption that the Court of Appeals will act upon the application for a stay or the appeal in ample time to permit arrangements to be made for the next school year. Pp. 566–567.

Thurgood Marshall, Wiley A. Branton, Constance Baker Motley and *Jack Greenberg* for petitioners.

PER CURIAM.

On June 21, 1958, the District Court for the Eastern District of Arkansas entered an order authorizing the members of the School Board of Little Rock, Arkansas, and the Superintendent of Schools, to suspend until January 1961 a plan of integration theretofore approved by that court in August 1956, *Aaron* v. *Cooper,* 143 F. Supp. 855, and affirmed by the Court of Appeals for the Eighth Circuit in April 1957. 243 F. 2d 361. On June 23, 1958, the District Court denied an application for a stay of execution of its order. An appeal was docketed in the

Court of Appeals for the Eighth Circuit on June 24, 1958, and there is pending in that court an application for a stay of the District Court's order.

By the present petition this Court is asked to bring the case here before the Court of Appeals has had an opportunity to act upon the petition for a stay or to hear the appeal. The power of the Court to do so has been exercised but rarely, and the issues and circumstances relevant to the present petition do not warrant its exercise now. The order that the District Court suspended has, in different postures, been before the Court of Appeals for the Eighth Circuit three times already. *Aaron* v. *Cooper,* 243 F. 2d 361; *Thomason* v. *Cooper,* 254 F. 2d 808 (April 28, 1958); *Faubus* v. *United States,* 254 F. 2d 797 (April 28, 1958). That court is the regular court for reviewing orders of the District Court here concerned, and the appeal and the petition for a stay are matters properly to be adjudicated by it in the first instance.

We have no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay or the appeal in ample time to permit arrangements to be made for the next school year.

Accordingly, the petition for certiorari is

Denied.

FIRST METHODIST CHURCH OF SAN LEANDRO ET AL. *v.* HORSTMANN, ASSESSOR OF ALAMEDA COUNTY, CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 485. Decided June 30, 1958.

48 Cal. 2d 901, 311 P. 2d 542, reversed on the authority of cases cited.

Stanley A. Weigel, Lawrence Speiser and *Frank B. Frederick* for appellants.

J. F. Coakley for appellees, and *Arthur M. Carden* for the City of San Leandro, appellee.

PER CURIAM.

The judgment is reversed. No. 382, *First Unitarian Church of Los Angeles* v. *County of Los Angeles, ante,* p. 545; No. 385, *Valley Unitarian-Universalist Church, Inc.,* v. *County of Los Angeles, ante,* p. 545; No. 483, *Speiser* v. *Randall, ante,* p. 513, and No. 484, *Prince* v. *City and County of San Francisco, ante,* p. 513, decided this day.

MR. JUSTICE CLARK dissents for the reasons set forth in his dissenting opinions in Nos. 382 and 385, and Nos. 483 and 484, decided this day.

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

COLUMBIA BROADCASTING SYSTEM, INC., ET AL. *v.* ATKINSON ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 756. Decided June 30, 1958.*

Appeals dismissed and certiorari denied.

Reported below: 49 Cal. 2d 338, 316 P. 2d 960.

Homer I. Mitchell for the Columbia Broadcasting System, Inc., et al., appellants in Nos. 756 and 757.

Henry Kaiser, Emanuel L. Gordon and *Michael G. Luddy* for appellant in No. 759.

Harold A. Fendler and *Daniel A. Weber* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeals are dismissed. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

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

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*Together with No. 757, *Radio Corporation of America et al.* v. *Anderson et al.*, and No. 759, *American Federation of Musicians of the United States and Canada* v. *Atkinson et al.*, also on appeals from the same Court.

PENNSYLVANIA ET AL. *v.* BOARD OF DIRECTORS OF CITY TRUSTS OF PHILADELPHIA ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 947. Decided June 30, 1958.

Appeal dismissed and certiorari denied.

Reported below: 391 Pa. 434, 138 A. 2d 844.

Thomas D. McBride, Attorney General, and *Lois G. Forer,* Deputy Attorney General, for the Commonwealth of Pennsylvania, *Abraham L. Freedman* and *David Berger* for the City of Philadelphia et al., and *William T. Coleman, Jr., Raymond Pace Alexander* and *Louis H. Pollak* for Foust et al., appellants.

Arthur Littleton for the Substituted Trustees, appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

NATIONAL BISCUIT CO. *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT.

No. 990. Decided June 30, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 390 Pa. 642, 136 A. 2d 821.

Roy J. Keefer and *Leslie M. Swope* for appellant.

Thomas D. McBride, Attorney General of Pennsylvania, and *George W. Keitel,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

PRIMBS *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 730, Misc. Decided June 30, 1958.

Appeal dismissed for want of a substantial federal question.

Appellant *pro se*.

Roger Arnebergh and *Philip E. Grey* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

JOINES *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 387. Decided June 30, 1958.

Certiorari granted; judgment vacated; and case remanded for consideration in light of *Jones* v. *United States, ante,* p. 493.

Reported below: 246 F. 2d 278.

Judson E. Ruch and *R. Palmer Ingram* for petitioner.

Solicitor General Rankin, Warren Olney, III, then Assistant Attorney General, and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Third Circuit is vacated and the case is remanded for consideration in light of No. 331, *Jones* v. *United States, ante,* p. 493, decided this day.

MR. JUSTICE BURTON and MR. JUSTICE CLARK dissent for the reasons set forth in the dissenting opinion in No. 331, decided this day.

INDIVIGLIO ET AL. *v.* UNITED STATES.

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

No. 753. Decided June 30, 1958.

Certiorari granted.

Upon consideration of the entire record and the confession of error by the Solicitor General, judgment reversed on authority of cases cited.

Reported below: 249 F. 2d 549.

Bernard A. Golding for petitioners.

Solicitor General Rankin for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. Upon consideration of the entire record and the confession of error by the Solicitor General, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed. *Jencks* v. *United States,* 353 U. S. 657. See also *Agnello* v. *United States,* 269 U. S. 20, and *Giordenello* v. *United States, ante,* p. 480, decided this day.

ROSS *v.* SCHNECKLOTH, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 513, Misc. Decided June 30, 1958.*

Certiorari granted; judgments vacated; and cases remanded for consideration in the light of *Eskridge* v. *Washington State Prison Board, ante,* p. 214.

Reported below: No. 513, Misc., 51 Wash. 2d 893, 318 P. 2d 975.

Petitioners *pro se.*

John J. O'Connell, Attorney General of Washington, and *Michael R. Alfieri,* Assistant Attorney General, for respondent in No. 596, Misc.

PER CURIAM.

The motions for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments of the Supreme Court of Washington are vacated and the cases are remanded for consideration in light of *Eskridge* v. *Washington State Prison Board, ante,* p. 214.

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*Together with No. 596, Misc., *Woods* v. *Rhay, Superintendent, Washington State Penitentiary,* also on petition for writ of certiorari to the same Court.

GIORDENELLO *v.* UNITED STATES.

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

No. 515, Misc. Decided June 30, 1958.

Certiorari granted and judgment reversed on authority of *Giordenello* v. *United States*, *ante*, p. 480.

Reported below: 249 F. 2d 549.

William F. Walsh for petitioner.

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the United States Court of Appeals for the Fifth Circuit is reversed. No. 549, *Giordenello* v. *United States*, *ante*, p. 480, decided this day.

MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE WHITTAKER dissent for the reasons set forth in the dissenting opinion in No. 549, decided this day.

URRUTIA *v.* UNITED STATES.

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

No. 756, Misc. Decided June 30, 1958.

Certiorari granted.

Upon consideration of the entire record and the confession of error by the Solicitor General, judgment reversed and case remanded for hearing.

Reported below: 253 F. 2d 501.

Petitioner *pro se.*

Solicitor General Rankin, Assistant Attorney General Anderson, Robert S. Erdahl and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Upon consideration of the entire record and the confession of error by the Solicitor General, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed and the case is remanded for hearing.

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HANSFORD *v.* UNITED STATES.

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

No. 826, Misc. Decided June 30, 1958.

Certiorari granted; judgment vacated; and case remanded for consideration in the light of *Ellis* v. *United States,* 356 U. S. 674.

Petitioner *pro se.*

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded to that court for consideration in light of *Ellis* v. *United States,* 356 U. S. 674. It is ordered that the judgment in this case issue forthwith.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 578 and 901 were purposely omitted, in order to make it possible to publish the 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.

ORDERS FROM JUNE 9 THROUGH JUNE 30, 1958.

JUNE 9, 1958.

Miscellaneous Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Claims beginning June 4, 1958, and continuing thereafter for such time as may be necessary to consider the cases heard that day, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

No. 479, Misc. CAGLE *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for the United States.

No. 640, Misc. GLANCY *v.* HEINZE, WARDEN; and
No. 686, Misc. DUNNE *v.* WASHINGTON ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 753, Misc. COURTNEY *v.* HEINZE, WARDEN;
No. 759, Misc. PALMER *v.* ROGERS, ATTORNEY GENERAL, ET AL.;
No. 761, Misc. KIRBY *v.* MARYLAND ET AL.;
No. 769, Misc. FANTER *v.* UNITED STATES;
No. 777, Misc. CRABTREE *v.* UNITED STATES; and
No. 791, Misc. BILDERBACK *v.* WILKINSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. The petition for an order approving payment on account of an additional fee to the Special Master is granted and the parties are ordered to make additional 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 following proportions: Arizona, 28%; California, 28%; United States, 28%; Nevada, 12%; New Mexico, 2%; and Utah, 2%.

The 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.

On the petition were *Charles H. Reed* for the State of Arizona, plaintiff, *Northcutt Ely,* Assistant Attorney General, for the State of California et al., defendants, and *W. T. Mathews,* Special Assistant Attorney General, for the State of Nevada, *Paul L. Billhymer,* Assistant Attorney General, for the State of New Mexico, and *E. R. Callister,* Attorney General, for the State of Utah, interveners. *Solicitor General Rankin* for the United States, intervener.

No. 742, Misc. BERTONE *v.* TAYLOR, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. *Horace S. King* for petitioner.

No. 565, Misc. MCGRADY *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se. A. S. Harrison,* Attorney General of Virginia, and *Thomas M. Miller,* Assistant Attorney General, for respondent.

Certiorari Granted.

No. 956. HOWARD *v.* LYONS ET AL. C. A. 1st Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Bernard Cedarbaum* for petitioner. Reported below: 250 F. 2d 912.

No. 877. THE TUNGUS ET AL. *v.* SKOVGAARD, ADMINISTRATRIX, ET AL. C. A. 3d Cir. Certiorari granted. *James M. Estabrook* and *David P. H. Watson* for petitioners. *Nathan Baker* and *Milton Garber* for Skovgaard, respondent. Reported below: 252 F. 2d 14.

No. 929. SCULL *v.* VIRGINIA EX REL. COMMITTEE ON LAW REFORM AND RACIAL ACTIVITIES. Supreme Court of Appeals of Virginia. Certiorari granted. *Joseph L. Rauh, Jr., John Silard* and *Karl Sorg* for petitioner. *Leslie Hall* for respondent.

No. 955. UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION *v.* HALECKI, ADMINISTRATRIX. C. A. 2d Cir. Certiorari granted. *Lawrence J. Mahoney* for petitioners. *Nathan Baker, Bernard Chazen* and *Milton Garber* for respondent. Reported below: 251 F. 2d 708.

No. 968. CRUMADY *v.* THE JOACHIM HENDRIK FISSER ET AL.; and

No. 971. THE JOACHIM HENDRIK FISSER *v.* NACIREMA OPERATING CO., INC. C. A. 3d Cir. Certiorari granted. *Abraham E. Freedman* for petitioner in No. 968. *John H. Dougherty* for petitioner in No. 971, and The Joachim Hendrik Fisser et al., respondents in No. 968. *John J. Monigan, Jr.* for the Nacirema Operating Co., Inc., respondent. Reported below: 249 F. 2d 818.

No. 965. FLAXER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *David Rein* and *Joseph Forer* for petitioner. *Solicitor General Rankin* and *Philip R. Monahan* for the United States. Reported below: 103 U. S. App. D. C. 319, 258 F. 2d 413.

No. 417, Misc. SMITH *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. *Marion Rushton* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 250 F. 2d 842.

No. 474, Misc. CASH *v.* CULVER, STATE PRISON CUSTODIAN. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Florida granted. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *Edward S. Jaffry,* Special Assistant Attorney General, for respondent.

Certiorari Denied. (*See also No. 565, Misc., supra.*)

No. 884. BENJAMIN ET AL. *v.* CITY OF COLUMBUS ET AL. Supreme Court of Ohio. Certiorari denied. *Waymon Belton McLeskey* for petitioners. *Russell Leach* for respondents. Reported below: 167 Ohio St. 103, 146 N. E. 2d 854.

No. 950. GOLDBLATT BROS., INC., *v.* KOSLEY. C. A. 7th Cir. Certiorari denied. *Stanford Clinton* and *Robert A. Sprecher* for petitioner. *Edmund A. Schroer* for respondent. Reported below: 251 F. 2d 558.

No. 902. FEAK ET AL. *v.* CITY OF TOLEDO ET AL. Supreme Court of Ohio. Certiorari denied. *Dan H. McCullough* for petitioners. *Charles T. Lawton* and *William D. Driscoll* for respondents. Reported below: 167 Ohio St. 167, 146 N. E. 2d 603.

No. 958. MEADS *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 140 Ct. Cl. 526, 156 F. Supp. 938.

No. 960. ORTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Philip R. Monahan* and *Carl G. Coben* for the United States. Reported below: 253 F. 2d 312.

No. 967. NOIA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Maurice Edelbaum* for petitioner. *Edward S. Silver* and *William I. Siegel* for respondent. Reported below: 3 N. Y. 2d 596, 148 N. E. 2d 139.

No. 972. CANADAY ET AL. *v.* TENNESSEE. Supreme Court of Tennessee, Middle Division. Certiorari denied. *H. G. B. King* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 310 S. W. 2d 428.

No. 991. FORBES ET AL. *v.* CITY OF HOUSTON ET AL. Court of Civil Appeals of Texas, First Supreme Judicial District. Certiorari denied. *W. Ervin James* for petitioners. *Homer T. Bouldin* and *David T. Searls* for the City of Houston et al., respondents. Reported below: 304 S. W. 2d 542.

No. 913. CRUMP *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Melvin B. Lewis* for petitioner. Reported below: 12 Ill. 2d 402, 147 N. E. 2d 76.

No. 953. CONSOLIDATED TRIMMING CORP. *v.* LOUDON. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Leonard L. Kalish* and *William E. Friedman* for petitioner.

No. 973. SCHLOSSER *v.* COMMONWEALTH EDISON CO. ET AL. C. A. 7th Cir. Certiorari denied. *Harry R. Booth* for petitioner. *William R. Ming, Jr.* for respondents. Reported below: 250 F. 2d 478.

No. 975. FARMER *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. *Fyke Farmer, pro se. Solicitor General Rankin* for respondents. Reported below: 252 F. 2d 490.

No. 992. KELLY, EXECUTOR, *v.* CONSOLIDATED PACKAGING MACHINERY CORP. ET AL. C. A. 7th Cir. Certiorari denied. *J. Edgar Kelly* for petitioner. *John Vaughan Groner* and *James P. Hume* for respondents. Reported below: 253 F. 2d 49.

No. 999. SLADE ET AL. *v.* BOARD OF EDUCATION OF HARFORD COUNTY ET AL. C. A. 4th Cir. Certiorari denied. *Thurgood Marshall* and *Jack Greenberg* for petitioners. *Wilson K. Barnes* for respondents. Reported below: 252 F. 2d 291.

No. 1009. NATIONAL PRODUCING CO., INC., ET AL. *v.* ANDERSON. C. A. 2d Cir. Certiorari denied. *Thomas A. Gaffney* for petitioners. *Richard W. Condon* and *James L. Nelligan* for respondent. Reported below: 254 F. 2d 834.

No. 1001. CARLI *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. *Dominic H. Frinzi* for petitioner. *Stewart G. Honeck,* Attorney General of Wisconsin, and *William A. Platz,* Assistant Attorney General, for respondent. Reported below: 2 Wis. 2d 429, 86 N. W. 2d 434, 87 N. W. 2d 830.

No. 961. OSSLO ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Bail having been temporarily granted in this case by MR. JUSTICE DOUGLAS on April 29, 1958, it is ordered that said order continue until June 23, 1958, and then terminate. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Aaron Sapiro* and *Charles P. Scully* for petitioners. *Edmund G. Brown,* Attorney General of California, and *William E. James* and *Norman H. Sokolow,* Deputy Attorneys General, for respondent. Reported below: 50 Cal. 2d 75, 323 P. 2d 397.

No. 1014. HARRIS ET AL. *v.* CITY OF NEW YORK ET AL. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that the petition for writ of certiorari should be granted. *David I. Shapiro* and *Harris L. Present* for petitioners. *Peter Campbell Brown, Benjamin Offner* and *Anthony Curreri* for the City of New York et al., *Edward D. Burns, Porter R. Chandler, William R. Meagher* and *Martin Fogelman* for Fordham University, *Samuel I. Rosenman* and *Max Freund* for Webb & Knapp Lincoln Square Corporation, and *William Eldred Jackson* and *Rebecca M. Cutler* for Lincoln Center for the Performing Arts, Inc., respondents. Reported below: 4 N. Y. 2d 268, 150 N. E. 2d 396.

No. 1024. GENERAL CASUALTY CO. *v.* GRUBB, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied. *Suel O. Arnold* for petitioner. Reported below: 253 F. 2d 51.

No. 954. SMITH *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to supplement record denied. Certiorari denied. *Joseph A. St. Ana* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 252 F. 2d 120.

No. 1030. JACKSON, WARDEN, ET AL. *v.* UNITED STATES EX REL. WADE. Motion to dispense with printing of the response to the petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for petitioners. *Philip C. Potter, Jr.* for respondent. Reported below: 256 F. 2d 7.

No. 457, Misc. FAVORS *v.* TUCKER, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se. W. W. Barron,* Attorney General of West Virginia, and *Fred H. Caplan,* Assistant Attorney General, for respondent. Reported below: 143 W. Va. —, 100 S. E. 2d 411.

No. 632, Misc. HARMON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 102 U. S. App. D. C. 138, 251 F. 2d 379.

No. 634, Misc. HARLESS *v.* IOWA. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se. Norman A. Erbe,* Attorney General of Iowa, and *Freeman H. Forrest,* Assistant Attorney General, for respondent. Reported below: 249 Iowa 530, 86 N. W. 2d 210.

No. 617, Misc. HOLT *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Reported below: 310 S. W. 2d 40.

No. 633, Misc. BROWN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 636, Misc. AYALA *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied.

No. 637, Misc. FISHER *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 641, Misc. GRIFFIN *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 669, Misc. LESSER *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 670, Misc. NICOL ET AL. *v.* NATIONAL SAVINGS & TRUST CO., EXECUTOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bruce E. Lambert* and *Jessie P. Grandy* for petitioners. *Arthur P. Drury, John M. Lynham, John E. Powell* and *David C. Bastian* for respondent. Reported below: 102 U. S. App. D. C. 68, 250 F. 2d 36.

No. 687, Misc. SMITH *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 237 Ind. 532, 146 N. E. 2d 86.

No. 701, Misc. KULIKAUSKAS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 5 App. Div. 2d 690, 168 N. Y. S. 2d 995.

No. 682, Misc. VEGA-MURRILLO *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 685, Misc. CORBIN *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 391 Pa. 265, 137 A. 2d 467.

No. 688, Misc. LEHNER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 691, Misc. REESE *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 692, Misc. ROBINSON *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 694, Misc. SONS *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 696, Misc. GILSON *v.* KEENAN, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 697, Misc. BUCANIS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 26 N. J. 45, 138 A. 2d 739.

No. 698, Misc. MIKKA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 703, Misc. DUNCAN *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 251 F. 2d 846.

No. 705, Misc. HILL *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 712, Misc. HAWLK *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 718, Misc. BATES *v.* CALIFORNIA ADULT AUTHORITY. Supreme Court of California. Certiorari denied.

No. 720, Misc. TRAMAGLINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 721, Misc. COATES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 725, Misc. POPE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 733, Misc. BECK *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 741, Misc. WYERS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 746, Misc. BRIMAGE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 747, Misc. SEWARD *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 748, Misc. SHIPMAN *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 749, Misc. SMALLWOOD *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 216 Md. 16, 139 A. 2d 242.

No. 750, Misc. SMITH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 762, Misc. SMITH *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 764, Misc. ADINOLFI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 26 N. J. 170, 139 A. 2d 48.

No. 765, Misc. CONWAY *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied.

No. 767, Misc. WISSENFELD *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 772, Misc. DUTTON *v.* EYMAN, WARDEN, ET AL. Supreme Court of Arizona. Certiorari denied.

No. 773, Misc. PRATT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 778, Misc. HARRIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

Rehearing Denied.

No. 343. AMERICAN MOTORS CORP. ET AL. *v.* CITY OF KENOSHA, 356 U. S. 21. Petition for rehearing of United States denied.

No. 18. CITY OF DETROIT ET AL. *v.* MURRAY CORPORATION OF AMERICA ET AL.; and

No. 36. CITY OF DETROIT ET AL. *v.* MURRAY CORPORATION OF AMERICA ET AL., 355 U. S. 489. Petitions for rehearing of the Murray Corporation of America and the United States denied. MR. JUSTICE FRANKFURTER has filed the following dissent.

MR. JUSTICE FRANKFURTER, dissenting.

The petitions for rehearing in these cases should be granted. Petitioners direct attention to the statement in the Court's opinion of March 3, 1958, 355 U. S. 489, 492 (Prelim. Print), that "There is no contention that these taxes were levied directly against the United States or its property." The contentions made by the parties throughout this litigation and the characteristics of the taxes sustained make evident that the case was decided under a misapprehension of what was in issue. Simply to delete from the quoted sentence reference to what the parties contended, as has now been done, cannot delete the significance of its original inclusion in the opinion as a manifestation of the direction of the Court's thoughts. In reaching the conclusion that the tax here involved is indistinguishable from a tax on the privilege of possessing or using government property, the Court proceeded on mistaken notions about Michigan tax law and its administration.

The petitions for rehearing make more vivid than did the original briefs the distinction between the ad valorem property tax that was in fact imposed and a privilege tax with which the former was identified. The distinction is deeply embedded in Michigan statutory and constitutional law, and guides taxing authorities in their administration of the local statutes. The tax that Michigan levied and this Court sustained is imposed on the prop-

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erty of the United States. Property is the subject of the tax and is the ultimate reliance for its satisfaction. The State has a lien on the property to assure collection. The person in possession on tax day is liable for the tax, but, since he has a right of recovery against the owner secured by a lien, he is in effect simply a collector of the tax. It is persuasively shown that, had the state authorities been satisfied that full ownership in the particular property was in the United States—an issue for controlling determination by this Court—the tax would not have been imposed. Indeed, as to tools concededly owned by the United States, no attempt was made to collect a tax. Such administrative practice by the taxing authorities would be inexplicable if the tax were conceived as an excise, a privilege tax, that is, on possession of property.

The petitions for rehearing have thrown into sharp relief the fact that the tax here imposed is simply an ordinary ad valorem tax imposed on the property, a tax indistinguishable from that in *United States* v. *County of Allegheny,* 322 U. S. 174. Therefore this tax is sustainable, unless Michigan law is to be construed in a way wholly at variance with the actual provisions of the state statutes and demonstrated administrative practice thereunder, only by disregarding *Allegheny* or overruling it. The Court does not purport to overrule *Allegheny.* The erroneous hypothesis about Michigan law underlying the Court's opinion could hardly have failed to obscure the full implications of the decision the Court was called upon to make. Due regard for the importance of these cases—as a matter of federal finance, of course, but even more so from the point of view of federal-state relations—and the demands of sound adjudication call for reargument. The Court would then be able to consider the power of a State to levy a tax undis-

putably imposed upon property owned by the United States. Because I deem a reargument to be required, I do not mean to imply that it would lead to a different result. The basis of an adjudication may be as important as the decision. The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process.

No. 816. NEW YORKER MAGAZINE, INC., *v.* GEROSA, COMPTROLLER OF THE CITY OF NEW YORK, ET AL., 356 U. S. 339;

No. 850. POMPEI WINERY, INC., *v.* OHIO BOARD OF LIQUOR CONTROL, 356 U. S. 937;

No. 859. BOSTON & PROVIDENCE RAILROAD CORP. ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., ET AL., 356 U. S. 939;

No. 334, Misc. BILDERBACK *v.* UNITED STATES, 356 U. S. 940;

No. 510, Misc. LEE *v.* BURFORD, WARDEN, 356 U. S. 935; and

No. 554, Misc. BILDERBACK *v.* UNITED STATES, 356 U. S. 946. Petitions for rehearing denied.

JUNE 16, 1958.

Order Appointing Clerk.

IT IS ORDERED that James R. Browning be appointed Clerk of this Court effective August 15, 1958, to succeed John T. Fey whose resignation shall be effective at the close of business August 14, 1958. Mr. Browning shall take the oath of office and give bond as required by statute and the order of this Court entered November 22, 1948.

Miscellaneous Orders.

No. 20. SCHAFFER TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL., 355 U. S. 83. The motion to allow and tax costs is granted. *Peter T. Beardsley* and *William J. O'Brien, Jr.* for appellants. *J. D. Feeney, Jr., Joseph H. Hays, Amos Mathews, H. F. Chapman, Carl Helmetag, Jr., James G. Lane* and *Ed White* for the Akron, Canton & Youngstown Railroad Co. et al., appellees.

No. 796, Misc. HOUSE *v.* GRIMES, SHERIFF;

No. 801, Misc. GIROUX *v.* LANGLOIS, ACTING WARDEN; and

No. 802, Misc. SANDERS *v.* MADIGAN, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 716, Misc. FARNUM *v.* CONNECTICUT ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Samuel A. Hirshowitz* and *Harold Borgwald,* Assistant Attorneys General, for the New York State Department of Mental Hygiene, appellee.

No. 717, Misc. FARNUM *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS; and

No. 793, Misc. SHANE *v.* RAGEN, WARDEN. Motions for leave to file petitions for writs of mandamus denied.

No. 683, Misc. HARTSFIELD *v.* SLOAN, U. S. DISTRICT JUDGE. Motion of United States Conference of Mayors for leave to file brief, as *amicus curiae,* granted. Motion for leave to file petition for writ of mandamus denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN think that a rule

to show cause should issue. *Morris B. Abram* for petitioner. *Eugene Cook,* Attorney General, *Freeman Leverett, Robert H. Hall,* Assistant Attorneys General, and *B. D. Murphy* for the Secretary of State of Georgia, and *Charles J. Bloch* for Bell, Chairman, Georgia State Democratic Executive Committee, et al., filed briefs in opposition to the motion for leave to file petition for writ of mandamus. *Wallace M. Cohen* filed a brief for the United States Conference of Mayors, as *amicus curiae,* urging that the motion for leave to file petition for writ of mandamus be granted.

Probable Jurisdiction Noted.

No. 838. NEW YORK CENTRAL RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL.;

No. 918. ERIE RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL.; and

No. 948. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL. Appeals from the United States District Court for the District of New Jersey. In these cases probable jurisdiction is noted. The motion to strike memorandum for appellees, United States and Interstate Commerce Commission, in support of statements as to jurisdiction in No. 838 is denied. *Thomas E. Dewey* and *Gerald E. Dwyer* for appellant in No. 838. *Charles W. Hutchinson, Raymond J. Lamb* and *Frederick G. Hoffmann* for appellant in No. 918. *Joseph J. Biunno* for appellant in No. 948. *Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane* and *Charlie H. Johns, Jr.* for the United States and the Interstate Commerce Commission, appellees in Nos. 838 and 918. *David D. Furman,* Acting Attorney General of New Jersey, and *William A. Roberts,* for the Board of Public Utility Commissioners et al., and *Milton T. Lasher,*

Mr. Roberts and *Edgar Turlington* for Bergen County, New Jersey, et al., appellees in No. 838. *Mr. Furman* and *Joseph P. Lordi* and *Felix G. Forlenza,* Deputy Attorneys General of New Jersey, for the Board of Public Utility Commissioners of New Jersey et al., appellees in No. 918. Reported below: No. 838, 158 F. Supp. 98; Nos. 918 and 948, 158 F. Supp. 104.

No. 943. UNITED STATES *v.* RADIO CORPORATION OF AMERICA ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Bernard M. Hollander* and *Raymond M. Carlson* for the United States. *Bernard G. Segal, Edward W. Mullinix, Josephine H. Klein* and *Lawrence J. McKay* for appellees. Reported below: 158 F. Supp. 333.

Certiorari Granted. (*See No. 723, Misc., ante, p. 219.*)

Certiorari Denied. (*See also No. 104, ante, p. 77, No. 677, Misc., ante, p. 218, and No. 755, Misc., ante, p. 220.*)

No. 926. CHINN *v.* CHINN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Eugene X. Murphy* for petitioner. *Belford V. Lawson, Jr.* and *Marjorie A. McKenzie* for respondent. Reported below: 102 U. S. App D. C. 150, 251 F. 2d 391.

No. 966. NEW MEXICO *v.* BEGAY. Supreme Court of New Mexico. Certiorari denied. *Fred M. Standley,* Attorney General of New Mexico, and *Robert F. Pyatt* and *Alfred P. Whittaker,* Assistant Attorneys General, for petitioner. *Norman M. Littell, Laurence Davis* and *Charles M. Tansey, Jr.* for respondent. Reported below: 63 N. M. 409, 320 P. 2d 1017.

No. 963. FARNUM *v.* CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied.

No. 969. DAVIDITIS, ALIAS DAVIS, ET AL. *v.* NATIONAL BANK OF MATTOON, MATTOON, ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 970. VOGLINO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Ellsworth T. Simpson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 253 F. 2d 794.

No. 977. STERN ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Paul O'Dwyer* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Yeagley, Philip R. Monahan* and *Carl G. Coben* for the United States. Reported below: 249 F. 2d 720.

No. 981. PITTSTON COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Rollin Browne* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Myron C. Baum* for respondent. Reported below: 252 F. 2d 344.

No. 983. TELESERVICE CO. OF WYOMING VALLEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Edward P. Morgan* and *Herbert E. Forrest* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 254 F. 2d 105.

No. 985. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 253 F. 2d 95.

No. 989. MANSFIELD ET UX. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Lloyd Fletcher* and *Scott P. Crampton* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Grant W. Wiprud* for the United States. Reported below: 141 Ct. Cl. 579, 159 F. Supp. 346.

No. 996. WARNER *v.* LIEBERMAN ET AL. C. A. 7th Cir. Certiorari denied. *Richard Dillon* for petitioner. *John F. Zimmermann* for respondents. Reported below: 253 F. 2d 99.

No. 1018. CHANAN DIN KHAN *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Nathaniel S. Colley* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 253 F. 2d 547.

No. 577, Misc. DUKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Stanley E. Sparrowe* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 255 F. 2d 721.

No. 616, Misc. BUONO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 255 F. 2d 721.

No. 612, Misc. BALLARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Thomas Whelan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 255 F. 2d 721.

No. 618, Misc. COVINGTON *v.* INDEMNITY INSURANCE CO. OF NORTH AMERICA ET AL. C. A. 5th Cir. Certiorari denied. *Richard E. McDaniel* for petitioner. *J. Austin Barnes* for respondents. Reported below: 251 F. 2d 930.

No. 643, Misc. GRAY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 646, Misc. HARDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 250 F. 2d 580.

No. 648, Misc. WALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 251 F. 2d 616.

No. 673, Misc. JENKINS ET AL. *v.* DELL PUBLISHING CO., INC. C. A. 3d Cir. Certiorari denied. Petitioners *pro se*. *Charles F. C. Arensberg* for respondent. Reported below: 251 F. 2d 447.

No. 678, Misc. CARNEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 679, Misc. BROWNLOW *v.* FLORIDA ET AL. Supreme Court of Florida. Certiorari denied

No. 729, Misc. ROBINSON *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 690, Misc. GRIFFIN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 103 U. S. App. D. C. 317, 258 F. 2d 411.

No. 702, Misc. SWITZER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Walter H. Maloney* and *Llewellyn A. Luce* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *William J. Schafer, III*, for the United States. Reported below: 252 F. 2d 139.

No. 708, Misc. LEICK *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *Charles Ginsberg* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John W. Patterson* and *John B. Barnard, Jr.,* Assistant Attorneys General, for respondent. Reported below: 136 Colo. 535, 322 P. 2d 674.

No. 735, Misc. JOHNSON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 737, Misc. DREHER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 751, Misc. JORDAN *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. *W. Edward Morgan* for petitioner. Reported below: 83 Ariz. 248, 320 P. 2d 446.

No. 788, Misc. BYRD *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 216 Md. 656, 140 A. 2d 694.

No. 734, Misc. JOHNSON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 779, Misc. WARWICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 797, Misc. DAVIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 165 Tex. Cr. R. ——, 310 S. W. 2d 73.

Rehearing Denied.

No. 213. WEBSTER MOTOR CAR CO. *v.* PACKARD MOTOR CAR CO. ET AL., 355 U. S. 822. Motion for leave to file a second petition for rehearing denied.

JUNE 23, 1958.

Miscellaneous Orders.

Pursuant to the provisions of Title 28, U. S. C., § 42, It is ordered that MR. JUSTICE FRANKFURTER be, and he is hereby, temporarily assigned to the Sixth Circuit as Circuit Justice from July 19, 1958, to September 1, 1958.

No. 251. PANAMA CANAL CO. *v.* GRACE LINE, INC., ET AL.; and

No. 252. GRACE LINE, INC., ET AL. *v.* PANAMA CANAL CO., 356 U. S. 309. The application for amendment of the opinion is denied. *C. Dickerman Williams* and *J. Stewart Harrison* for applicants-respondents. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Herman Marcuse* filed a memorandum in opposition for the Panama Canal Co.

No. 692. GUERLAIN, INC., *v.* UNITED STATES;

No. 751. PARFUMS CORDAY, INC., *v.* UNITED STATES; and

No. 752. LANVIN PARFUMS, INC., *v.* UNITED STATES. Appeals from the United States District Court for the Southern District of New York. (Probable jurisdiction noted, No. 692, 355 U. S. 937; Nos. 751 and 752, 355 U. S. 951.) The motion for leave to file brief of the Webster Motor Car Company, as *amicus curiae,* is denied.

No. 834. GINSBURG *v.* STERN ET AL., 356 U. S. 932. The motion to remand is denied.

No. 157. CIUCCI *v.* ILLINOIS, 356 U. S. 571. Petition for rehearing or modification of opinion and judgment denied.

No. 461, Misc. MARTINEZ *v.* SOUTHERN UTE TRIBE OF THE SOUTHERN UTE RESERVATION ET AL., 356 U. S. 960. Petition for rehearing and motion for leave to amend complaint denied.

No. 768, Misc. GENERAL HOUSES, INC., *v.* BRUCHHAUSEN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus or, in the alternative, for writ of prohibition or certiorari, denied. *Horace A. Young* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for Floete, Administrator of General Services, and *Thomas J. McFadden* for the Marloch Manufacturing Corporation et al.

No. 813, Misc. DELTENRE *v.* TINSLEY, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted. (*See also Nos. 107, 122–125, 412, 921, 986 and 1012, ante, pp. 235, 275, 345, 346, 347, 348.*)

No. 957. DICK *v.* NEW YORK LIFE INSURANCE CO. C. A. 8th Cir. Certiorari granted. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Pershing Boe* for petitioner. *Harold W. Bangert* for respondent. Reported below: 252 F. 2d 43.

No. 998. SAN DIEGO BUILDING TRADES COUNCIL ET AL. *v.* GARMON ET AL. Supreme Court of California. Certiorari granted. Motion to use record in No. 50, October Term, 1956, granted. *Charles P. Scully, Walter Wencke* and *Mathew Tobriner* for petitioners. *James W. Archer* for respondents. Reported below: 49 Cal. 2d 595, 320 P. 2d 473.

No. 790, Misc. WILLIAMS *v.* OKLAHOMA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Criminal Court of Appeals of Oklahoma granted. Reported below: 321 P. 2d 990.

Certiorari Denied. (*See also No. 952, ante, p. 344, and No. 768, Misc., ante, p. 924.*)

No. 655. DONG WING OTT ET AL. *v.* MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Elmer Fried* for petitioners. *Solicitor General Rankin* for respondent. Reported below: 245 F. 2d 875, 247 F. 2d 769.

No. 1002. FLORIDA EX REL. ARNOLD *v.* REVELS, CIRCUIT COURT JUDGE. Supreme Court of Florida. Certiorari denied. *Chester Bedell* for petitioner. Reported below: 100 So. 2d 51.

No. 987. FRIEDMAN *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Victor B. Harris* and *Seymour Krieger* for petitioner. *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for respondents. Reported below: 102 U. S. App. D. C. 282, 252 F. 2d 846.

No. 988. ELGIN CORPORATION *v.* ATLAS BUILDING PRODUCTS CO. C. A. 10th Cir. Certiorari denied. *Dee C. Blythe* for petitioner. *William A. Sloan* and *J. F. Hulse* for respondent. Reported below: 251 F. 2d 7.

No. 993. MOORE ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John D. Cofer* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 254 F. 2d 213.

No. 1000. STALEY MILLING CO. *v.* A. E. STALEY MANUFACTURING CO. C. A. 7th Cir. Certiorari denied. *Wallace H. Martin, Montgomery S. Winning* and *Robert Bonynge* for petitioner. *Thomas W. Samuels, Carl R. Miller* and *William T. Woodson* for respondent. Reported below: 253 F. 2d 269.

No. 1005. UNITED STATES *v.* FIELD ET AL. Court of Claims. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Sondra K. Slade* for the United States. *Guy Emery* and *Harry E. Wood* for respondents. Reported below: 141 Ct. Cl. 307, 312, 157 F. Supp. 936, 158 F. Supp. 580.

No. 1011. LILLIONS ET VIR *v.* PUGET SOUND MUTUAL SAVINGS BANK. Supreme Court of Washington. Certiorari denied. *Christ D. Lillions* for petitioners.

No. 1003. DORCHESTER CORPORATION *v.* NATURAL GAS PIPELINE CO. OF AMERICA ET AL. C. A. 3d Cir. Certiorari denied. *Gene M. Woodfin* for petitioner. *Solicitor General Rankin* for the Federal Power Commission, and *Carl McGowan* for the Natural Gas Pipeline Co. of America, respondents. Reported below: 253 F. 2d 3.

No. 1004. KNIGHT MORLEY CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *John F. Langs* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Owsley Vose* for respondent. Reported below: 251 F. 2d 753.

No. 1006. SCIRIA *v.* LEHMANN, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. *Henry C. Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 248 F. 2d 519.

No. 1007. CROW *v.* FAULKNER ET AL., DISBARMENT COMMITTEE. Supreme Court of Ohio. Certiorari denied. *Reed M. Winegardner* and *J. Harvey Crow* for petitioner. *D. Harland Jackman* and *Edwin L. English* for respondents.

No. 728, Misc. MILLER *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 1033. BROOKS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Rudolph F. Becker, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 253 F. 2d 362.

No. 1010. CENTRAL RAILROAD CO. OF NEW JERSEY ET AL. *v.* NEELD, DIRECTOR, DIVISION OF TAXATION, DEPARTMENT OF TREASURY, ET AL. Supreme Court of New Jersey. Certiorari denied. *Augustus Nasmith* for the Delaware, Lackawanna & Western Railroad Co., *Joseph C. Glavin* for the Pennsylvania Railroad Co. et al., and *Raymond J. Lamb* for the Erie Railroad Co. et al., petitioners. *David D. Furman,* Attorney General of New Jersey, and *Theodore L. Botter* and *William L. Boyan,* Deputy Attorneys General, for Neeld, *Leo Rosenblum* for the City of Jersey City et al., *James Rosen* for the Township of Weehawken, *Herbert H. Fine* for the City of Hoboken, *Vincent J. Casale* for the City of Newark, and *Norman Heine* for the City of Camden, respondents. Reported below: 26 N. J. 172, 139 A. 2d 110.

No. 740, Misc. DEUTSCHMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 254 F. 2d 487.

No. 809, Misc. KITCHEN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 1020. SWARTZ ET UX. *v.* ROGERS, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Eugene Gressman, Max M. Kampelman, Richard Schifter* and *Joseph Robbie* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 103 U. S. App. D. C. 1, 254 F. 2d 338.

No. 1013. BOVEY, WARDEN, *v.* GRANDSINGER. C. A. 8th Cir. Certiorari denied. *Clarence S. Beck,* Attorney General of Nebraska, and *Ralph D. Nelson,* Special Assistant Attorney General, for petitioner. Reported below: 253 F. 2d 917.

No. 984. MERWIN LIGHTERAGE CO., INC., *v.* VIRGIN ISLANDS CORP. C. A. 3d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Henry F. Butler* and *John D. Merwin* for petitioner. *F. Herbert Prem* and *Warren H. Young* for respondent. Reported below: 251 F. 2d 872.

No. 997. TALIAFERRO *v.* COAKLEY, SUPERIOR COURT JUDGE, ET AL. District Court of Appeal of California, First Appellate District. Motion to dispense with the printing of the petition granted. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and application.

No. 556, Misc. ADAMS *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se. Raymond R. Start* for respondent. Reported below: 391 Pa. 140, 137 A. 2d 508.

No. 623, Misc. JOHNSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 789, Misc. MORRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 671, Misc. WOODARD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *De Long Harris* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *William J. Schafer, III,* for the United States. Reported below: 102 U. S. App. D. C. 393, 254 F. 2d 312.

No. 693, Misc. ANDERSEN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Eugene X. Murphy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 102 U. S. App. D. C. 313, 253 F. 2d 335.

No. 1016. RUDIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Louis M. Hopping* and *William G. Comb* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *William J. Schafer, III,* for the United States. Reported below: 254 F. 2d 45.

No. 819, Misc. DAY *v.* MCELROY, SECRETARY OF DEFENSE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harry E. Wood* and *Guy Emery* for petitioner. Reported below: 103 U. S. App. D. C. 101, 255 F. 2d 179.

No. 806, Misc. EPHRAIM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 13 Ill. 2d 456, 150 N. E. 2d 152.

No. 713, Misc. MURPHY *v.* LOUISIANA ET AL. Supreme Court of Louisiana. Certiorari denied. Reported below: 234 La. 909, 102 So. 2d 61.

No. 711, Misc. ALLEN *v.* MURPHY, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 5 App. Div. 2d 956, 172 N. Y. S. 2d 563.

No. 726, Misc. SANDERS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 5 App. Div. 2d 766, 170 N. Y. S. 2d 975.

No. 1008. B & G ELECTRIC CO. *v.* G. E. BASS & CO., INC. C. A. 5th Cir. Certiorari denied. *Robert L. Taylor* for petitioner. Reported below: 252 F. 2d 698.

No. 731, Misc. HARPER *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 743, Misc. CATO *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Leo F. Lightner* for petitioner. *Daniel L. O'Connor* for respondent.

No. 744, Misc. MOORE *v.* MCNEILL, DIRECTOR, MATTEAWAN STATE HOSPITAL. Supreme Court of New York, Dutchess County. Certiorari denied.

No. 700, Misc. ROMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Warren M. Christopher* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 253 F. 2d 513.

No. 714, Misc. BOLISH *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 391 Pa. 550, 138 A. 2d 447.

No. 780, Misc. FORSYTHE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *David D. Furman*, Attorney General of New Jersey, and *William L. Boyan*, Deputy Attorney General, for respondent.

No. 710, Misc. IN RE MCNALLY. C. A. 9th Cir. Certiorari denied. Reported below: 254 F. 2d 813.

No. 774, Misc. JONES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bennett Boskey* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *William J. Schafer, III*, for the United States. Reported below: 103 U. S. App. D. C. 326, 258 F. 2d 420.

No. 699, Misc. MURRAY ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 250 F. 2d 489.

No. 543, Misc. CATO *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Petitioner *pro se*. *Edmund G. Brown*, Attorney General of California, *Clarence A. Linn*, Assistant Attorney General, and *Arlo E. Smith*, Deputy Attorney General, for respondents.

No. 722, Misc. LUSK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Motion to dispense with the printing of the petition granted. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *S. Dee Hanson* for respondent. Reported below: 250 F. 2d 591.

Rehearing Denied. (*See also No. 157 and No. 461, Misc., supra.*)

No. 15. PUBLIC SERVICE COMMISSION OF UTAH ET AL. *v.* UNITED STATES ET AL., 356 U. S. 421;

No. 57. BYRD *v.* BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., 356 U. S. 525;

No. 84. MASCIALE *v.* UNITED STATES, 356 U. S. 386; and

No. 386, Misc. MILLER *v.* THORN, ANCILLARY EXECUTRIX, ET AL., 355 U. S. 965. Petitions for rehearing denied.

No. 40. HOAG *v.* NEW JERSEY, 356 U. S. 464. Rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 846. BROWN *v.* UNITED STATES, 356 U. S. 938. Motion for leave to file petition for rehearing denied.

Dismissal Under Rule 60.

No. 846, Misc. JOHNSON *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *William H. Timbers* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 254 F. 2d 175.

JUNE 30, 1958.

Miscellaneous Orders.

No. 1057. CASH *v.* CULVER, STATE PRISON CUSTODIAN. Certiorari, 357 U. S. 904, to the Supreme Court of Florida. It is ordered that *Irwin L. Langbein, Esquire,* of West Palm Beach, Florida, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1, Original. NEW MEXICO *v.* COLORADO. It is ordered that *Joseph C. Thoma* of Washington, D. C., be, and he is hereby, appointed Boundary Commissioner in this case in the place of *Arthur D. Kidder,* deceased.

No. 832, Misc. HARRISON *v.* SETTLE, WARDEN; and No. 839, Misc. MOSES *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Motions for leave to file petitions for writs of habeas corpus denied.

No. 853, Misc. BAILEY *v.* HUXMAN, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 833, Misc. HUNTER *v.* BIBB, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 836, Misc. KNIGHT *v.* RAGEN, WARDEN, ET AL. Motion for leave to file petition for writ of prohibition and other relief denied.

Certiorari Granted. (*See also Nos. 165, 387, 753 and Misc. Nos. 513, 515, 596, 756 and 826, ante, pp. 468, 573, 574, 575, 576, 575, 577, 578.*)

No. 77, Misc. GREENE *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. *James H. Heller* for petitioner. *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Roger Fisher* and *Beatrice Rosenberg* for the United States. Reported below: 100 U. S. App. D. C. 396, 246 F. 2d 677.

No. 591. HARRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. *Morris A. Shenker, Bernard J. Mellman* and *Sidney M. Glazer* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 248 F. 2d 196.

No. 290, Misc. WOODY *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 258 F. 2d 535.

No. 411, Misc. DRAPER *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted. *Osmond K. Fraenkel* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General McLean* and *Beatrice Rosenberg* for the United States. Reported below: 248 F. 2d 295.

No. 639, Misc. HEFLIN *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 251 F. 2d 69.

Certiorari Denied. (*See also Nos. 756, 757, 759, 947 and 1095, ante, pp. 569, 570, 566.*)

No. 1022. MAYO *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Woodrow Seals* for petitioner. Reported below: —— Tex. Cr. R. ——, 314 S. W. 2d 834.

No. 903. WEISE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Edward Mosk* and *Sam Rosenwein* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 251 F. 2d 867.

No. 1017. DU BOYES, INC., ET AL. *v.* BOUCHER ET AL. C. A. 2d Cir. Certiorari denied. *Maxwell E. Sparrow* and *J. Preston Swecker* for petitioners. *Thomas A. McGovern* and *Burton L. Knapp* for respondents. Reported below: 253 F. 2d 948.

No. 1019. WATKINS ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John H. Weir* and *Curtiss K. Thompson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Grant W. Wiprud* for the United States. Reported below: 252 F. 2d 722.

No. 1023. CALLAS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph A. Solovei* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 253 F. 2d 838.

No. 419. EASTERN AIR LINES, INC., *v.* MOE. C. A. 5th Cir. Certiorari denied. *E. Smythe Gambrell* and *W. Glen Harlan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 246 F. 2d 215.

No. 1026. FERGUSON *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *A. L. Kearns* for petitioner. *John T. Corrigan* for respondent. Reported below: 167 Ohio St. 294, 147 N. E. 2d 663.

No. 1021. WILLMUT GAS & OIL CO. *v.* UNITED GAS PIPE LINE CO. ET AL. Supreme Court of Mississippi. Certiorari denied. *Garner W. Green, Sr.* for petitioner. *Thomas Fletcher* and *C. Huffman Lewis* for respondents. *Bryce Rea, Jr.* filed a brief for the City of Hattiesburg, Mississippi, as *amicus curiae,* in support of the petition for a writ of certiorari. Reported below: —— Miss. ——, ——, 97 So. 2d 530, 100 So. 2d 609.

No. 1025. BERLINER ET AL. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Milton W. King, Bernard I. Nordlinger, Wallace Luchs, Jr.* and *Robert B. Frank* for petitioners. *Chester H. Gray, Milton D. Korman* and *Henry E. Wixon* for respondent. Reported below: 103 U. S. App. D. C. 351, 258 F. 2d 651.

No. 704, Misc. SMITH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John D. Fauntleroy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 103 U. S. App. D. C. 48, 254 F. 2d 751.

No. 661, Misc. SMITH *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *Odis M. Henderson,* Special Assistant Attorney General, for respondent.

No. 1047. COSTELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edward Bennett Williams, Agnes A. Neill* and *Morris Shilensky* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Myron C. Baum* for the United States. Reported below: 255 F. 2d 876.

No. 1048. KLEPPER ET AL. *v.* MANUFACTURERS LIFE INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. *Andrew J. Dritsas* and *Albert Barnett Klepper* for petitioners. *Nicholas Conover English* for the Manufacturers Life Insurance Co., respondent.

No. 1053. HARTE-HANKS NEWSPAPERS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Dan Moody* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman* for the United States. Reported below: 254 F. 2d 366.

No. 354, Misc. WILLIAMS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se. Paul L. Adams,* Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondent.

No. 656, Misc. TIPTON *v.* DICKSON, WARDEN, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se. Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *Arlo E. Smith,* Deputy Attorney General, for respondents.

No. 1045. JOHNSON FARE BOX CO. *v.* DOYLE, TRUSTEE IN REORGANIZATION, ET AL. C. A. 2d Cir. Certiorari denied. *Joseph Lorenz* for petitioner. *Edward D. Burns* for Doyle, respondent. Reported below: 250 F. 2d 656.

No. 709, Misc. KENDRICK *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 102 U. S. App. D. C. 296, 252 F. 2d 860.

No. 707, Misc. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 252 F. 2d 369.

No. 1037. KAMEN SOAP PRODUCTS CO., INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Samuel E. Hirsch* and *Sheldon E. Bernstein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 140 Ct. Cl. 566.

No. 785, Misc. GRADY *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Reported below: 51 Wash. 2d 1, 314 P. 2d 930.

No. 736, Misc. CHASE *v.* KEENAN, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 754, Misc. HAMILTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 102 U. S. App D. C. 298, 252 F. 2d 862.

No. 787, Misc. UPSHAW *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 102 U. S. App. D. C. 299, 252 F. 2d 863.

No. 727, Misc. SHAW *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 745, Misc. ANDREWS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *William J. Schafer, III,* for the United States. Reported below: 252 F. 2d 788.

No. 752, Misc. TITTMAN *v.* GREAT NORTHERN RAILWAY CO. C. A. 9th Cir. Certiorari denied. *Ben Anderson* for petitioner. *Thomas Balmer* and *Harry T. Davenport* for respondent. Reported below: 252 F. 2d 793.

No. 757, Misc. BARRETT *v.* LOONEY, WARDEN. C. A. 10th Cir. Certiorari denied. *Joseph P. Jenkins* for petitioner. *Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for respondent. Reported below: 252 F. 2d 588.

No. 775, Misc. SOUTHERS *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 766, Misc. DALOIA *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 770, Misc. ROARK *v.* WEST ET AL. C. A. 5th Cir. Certiorari denied. *I. H. Spears* for petitioner. Reported below: 251 F. 2d 956.

No. 771, Misc. NEGRON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 760, Misc. SCHUMACHER *v.* GAYNOR, EXECUTOR, ET AL. Supreme Court of Iowa. Certiorari denied.

No. 776, Misc. BLACKMON *v.* WAGENER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 253 F. 2d 10.

No. 781, Misc. LOZOYA *v.* RAMIREZ ET AL. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for respondents. Reported below: 253 F. 2d 85.

No. 782, Misc. ROMANO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 783, Misc. TUCKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 255 F. 2d 271.

No. 784, Misc. THOMPSON *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 724, Misc. WORBETZ *v.* GOODMAN, WARDEN. Supreme Court of New Jersey. Certiorari denied. Reported below: 26 N. J. 245, 139 A. 2d 471.

No. 786, Misc. BOWEN *v.* NEW YORK. Supreme Court of New York, Bronx County. Certiorari denied.

No. 792, Misc. HULBERT *v.* MARTIN, WARDEN. Supreme Court of New York, Wyoming County. Certiorari denied.

No. 799, Misc. PEABODY *v.* GULOTTA, DISTRICT ATTORNEY OF NASSAU COUNTY, NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 795, Misc. BEASLEY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 798, Misc. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 255 F. 2d 18.

No. 794, Misc. CATRON *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 800, Misc. GULLAHORN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 255 F. 2d 928.

No. 803, Misc. WOLF *v.* BROWNELL, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. *John Caughlan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for respondents. Reported below: 253 F. 2d 141.

No. 805, Misc. LEGGETT *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Kenneth Coffelt* for petitioner. Reported below: —— Ark. ——, 311 S. W. 2d 521.

No. 849, Misc. WILKINS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 103 U. S. App. D. C. 322, 258 F. 2d 416.

No. 838, Misc. GARDNER *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 217 Md. 653, 141 A. 2d 684.

No. 867, Misc. ECKWERTH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Stephen C. Vladeck* for petitioner. Reported below: 4 N. Y. 2d 811, 923, 149 N. E. 2d 894, 151 N. E. 2d 351.

No. 822, Misc. MILLER, ALIAS WARNER, *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 13 Ill. 2d 84, 148 N. E. 2d 455.

No. 823, Misc. WIGGINS *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 252 F. 2d 205.

No. 827, Misc. WELLS *v.* KEITH, WARDEN. Supreme Court of Georgia. Certiorari denied. Petitioner *pro se.* *Eugene Cook,* Attorney General of Georgia, and *E. Freeman Leverett,* Assistant Attorney General, for respondent. Reported below: 213 Ga. 858, 102 S. E. 2d 533.

No. 820, Misc. LUCAS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 845, Misc. RICHARDSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Frank D. O'Connor* and *Benj. J. Jacobson* for respondent. Reported below: 4 N. Y. 2d 224, 149 N. E. 2d 875.

No. 818, Misc. GOLDBERG *v.* WAGNER, MAYOR OF THE CITY OF NEW YORK, ET AL. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Peter Campbell Brown* and *Seymour B. Quel* for respondents.

No. 852, Misc. LINDEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 855, Misc. NELSON *v.* WARDEN OF MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 216 Md. 648, 140 A. 2d 516.

No. 821, Misc. HOLLAND *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 874, Misc. RISER *v.* TEETS, WARDEN. C. A. 9th Cir. Certiorari denied. *George T. Davis* for petitioner. Reported below: 253 F. 2d 844.

Rehearing Denied.

No. 88. THOMAS *v.* ARIZONA, 356 U. S. 390;

No. 868. AQUA HOTEL CORP. ET AL. *v.* MCLAUGHLIN, TRUSTEE IN REORGANIZATION, ET AL., 356 U. S. 965;

No. 898. MCKINNEY *v.* KELLEY, 356 U. S. 972;

No. 909. GIARDANO ET AL. *v.* UNITED STATES, 356 U. S. 973;

No. 913. CRUMP *v.* ILLINOIS, *ante*, p. 906;

No. 914. GERNIE ET AL. *v.* UNITED STATES, 356 U. S. 968;

No. 942. HOOVER *v.* UNITED STATES, 356 U. S. 960;

No. 980. MORRISON, MAYOR OF NEW ORLEANS, ET AL. *v.* DAVIS ET AL., 356 U. S. 968; and

No. 455, Misc. PRATT *v.* DEPARTMENT OF THE ARMY ET AL., 356 U. S. 226. Petitions for rehearing denied.

No. 21. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW–CIO) ET AL. *v.* RUSSELL, 356 U. S. 634; and

No. 31. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* GONZALES, 356 U. S. 617. Petitions for rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of these applications.

No. 864. SPRIGGS *v.* PIONEER CARISSA GOLD MINES, INC., ET AL., 356 U. S. 950. Motion for leave to file petition for rehearing denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1955, 1956, AND 1957

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1955	1956	1957	1955	1956	1957	1955	1956	1957	1955	1956	1957
Number of cases on dockets	15	14	13	1,020	1,160	1,104	821	878	891	1,856	2,052	2,008
Number disposed of during terms	4	3	1	865	900	967	768	798	815	1,637	1,701	1,783
Number remaining on dockets	11	11	12	155	260	137	53	80	76	219	351	225

	TERMS		
	1955	1956	1957
Distribution of cases disposed of during terms:			
Original cases	4	3	1
Appellate cases on merits	222	236	297
Petitions for certiorari	643	664	670
Miscellaneous docket applications	768	798	815

	TERMS		
	1955	1956	1957
Distribution of cases remaining on dockets:			
Original cases	11	11	12
Appellate cases on merits	79	136	68
Petitions for certiorari	76	124	69
Miscellaneous docket applications	53	80	76

JULY 1, 1958.

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FEDERAL POWER ACT. See also **Jurisdiction**, 9.

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FEDERAL RULES OF CIVIL PROCEDURE. See **Procedure**, 7.

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1. *Supreme Court—Appeal—"Final" judgment holding state law invalid.*—Judgment of federal court of appeals holding state law invalid as repugnant to Federal Constitution and laws appealable to Supreme Court; finality of declaratory judgment. City of Chicago v. Atchison, T. & S. F. R. Co., p. 77.

2. *Supreme Court—Appeal—Decision of State Supreme Court based on construction of federal statute.*—When decision of State Supreme Court was based on construction of federal statutes, not on

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a holding that they were unconstitutional, this Court was without jurisdiction on appeal; but it granted certiorari. Ivanhoe Irrigation Dist. v. McCracken, p. 275.

3. *Supreme Court—Appeal—Judgment of state court—Adequate state ground.*—When state law was invoked only by interpretation given federal statute by state court, its judgment did not rest on an adequate state ground. Ivanhoe Irrigation Dist. v. McCracken, p. 275.

4. *Supreme Court—Appeal from state court—Validity of state statute not challenged.*—When appellants had not challenged constitutionality of state statute in state courts but only claimed that exercise of jurisdiction by state courts violated Federal Constitution, this Court was without jurisdiction of appeal; but it granted certiorari. Hanson v. Denckla, p. 235.

5. *Supreme Court—Appeal from state court—Constitutional question not seasonably presented.*—When constitutional question was not seasonably presented in state courts, this Court need not consider it on appeal from State Supreme Court. Hanson v. Denckla, p. 235.

6. *Supreme Court—Appeal to vindicate right of third party—Interest in outcome.*—When appellants had direct and substantial personal interest in outcome of litigation, they had standing to challenge jurisdiction of state court over nonresident third party who was indispensable party but was not served and did not appear. Hanson v. Denckla, p. 235.

7. *Supreme Court—Review of state judgment—Adequate state ground.*—When state judgment does not rest on adequate state ground, Supreme Court has jurisdiction to review state judgment denying rights under Federal Constitution. National Association for Advancement of Colored People v. Alabama, p. 449.

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9. *Court of Appeals—Review of orders of Federal Power Commission—"Exclusive" jurisdiction.*—Under § 313 (b) of Federal Power Act, Court of Appeals had "exclusive jurisdiction" to review order of Federal Power Commission, and its judgment was "final" and subject to review only by Supreme Court; could not be challenged collaterally in state court. City of Tacoma v. Taxpayers, p. 320.

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2. *National Labor Relations Act — Unfair labor practices — Employer's enforcement of "no solicitation" rule.*—Not unfair labor practice for employer to enforce rule forbidding employees to engage in pro-union solicitation during working hours or to distribute literature in employer's plant, even when employer was engaging in anti-union solicitation. Labor Board v. Steelworkers, p. 357.

3. *National Labor Relations Board—Subpoenas duces tecum—Motions to revoke—Delegation of authority.*—Though § 11 (1) of Act gives a person served with subpoena *duces tecum* right to petition Board to revoke it, there is no illegality in Board delegating to hearing officer right to rule preliminarily on motion, subject to final decision by Board. Labor Board v. Duval Jewelry Co., p. 1.

4. *National Labor Relations Board—Issuance of revocation of subpoenas—Delegation of authority.*—Issuance of subpoenas by Board on member thereof, being mandatory under § 11 (1) of Act, is ministerial act which may be delegated; Board may delegate authority to pass preliminarily on motion to revoke; General Counsel as "party" entitled to issuance of subpoenas. Lewis v. Labor Board, p. 10.

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2. *Supreme Court—Standing to appeal—Third party.*—Third party having direct and substantial personal interest had standing to secure review of judgment of Court of Appeals holding municipal code violative of Federal Constitution. City of Chicago v. Atchison, T. & S. F. R. Co., p. 77.

3. *Supreme Court—Appeal from state court—Question not seasonably presented to state court.*—On appeal from State Supreme Court, this Court will not determine question not seasonably presented to State Supreme Court. Hanson v. Denckla, p. 235.

4. *Supreme Court—Due process—State administrative proceedings blocked by appellant.*—Appellant who blocked state administrative proceedings by his own action cannot claim in this Court that he was denied procedural due process in such proceedings. Lerner v. Casey, p. 468.

5. *District Courts—Standing to sue—Association—Vindication of rights of members.*—National Association for Advancement of Colored People had standing to assert rights of members not to have their names disclosed. National Association for Advancement of Colored People v. Alabama, p. 449.

6. *District Courts—Declaratory Judgment Act—Suit to declare state law unconstitutional—Failure to exhaust administrative remedies.*—Interstate railroads need not apply to city for certificate of convenience and necessity and submit to administrative procedures before suing for judgment that city ordinance requiring such certificate for performing services as part of interstate commerce was invalid. City of Chicago v. Atchison, T. & S. F. R. Co., p. 77.

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3. *Income tax—Deficiencies of deceased taxpayer—Liability of beneficiary of life insurance.*—Where there was no lien, no fraud and no insolvency before death of taxpayer, liability of beneficiary of his life insurance policies in proceeding to collect deficiencies in his income taxes under § 311 of Internal Revenue Code of 1939 depended on state law. Commissioner v. Stern, p. 39.

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1. *"Board or any member thereof."*—§ 11 (1) of National Labor Relations Act. Lewis v. Labor Board, p. 10.

2. *"Exclusive jurisdiction."*—§ 313 of Federal Power Act. City of Tacoma v. Taxpayers, p. 320.

3. *"Final" judgment.*—§ 313 (b) of Federal Power Act. City of Tacoma v. Taxpayers, p. 320.

4. *"Final judgment."*—28 U. S. C. § 1254 (2). City of Chicago v. Atchison, T. & S. F. R. Co., p. 77.

5. *"Forcing or requiring . . . any employer or other person to cease . . . doing business with any other person."*—§ 8 (b) (4) (A) of the National Labor Relations Act. Carpenters' Union v. Labor Board, p. 93.

6. *"Incompetency."*—Pennsylvania Public School Code, § 1122. Beilan v. Board of Education, p. 399.

7. *"Liberty."*—Fourteenth Amendment. National Association for Advancement of Colored People v. Alabama, p. 449.

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8. *"Notwithstanding any statute of limitations, laches or lapse of time."*—Special Jurisdictional Act of July 14, 1952. United States v. Central Eureka Mining Co., p. 155.

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10. *"Other person."*—§ 8 (b) (4) (A) of National Labor Relations Act. Carpenters' Union v. Labor Board, p. 93.

11. *"Property."*—§ 3670 of Internal Revenue Code of 1939. United States v. Bess, p. 51.

12. *"Rights to property."*—§ 3670 of Internal Revenue Code of 1939. United States v. Bess, p. 51.

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