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VOLUME 358

CASES ADJUDGED

IN

THE SUPREME COURT

AT

AUGUST SPECIAL TERM, 1958

AND

OCTOBER TERM, 1958

OPINIONS AND DECISIONS PER CURIAM

AUGUST 28, 1958, THROUGH FEBRUARY 24, 1959

ORDERS AUGUST 28, 1958, THROUGH FEBRUARY 20, 1959

WALTER WYATT
REPORTER OF DECISIONS

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ERRATUM.

352 U. S. 863–864, No. 285: The citation to the decision below should be "145 F. Supp. 617."

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.[1]
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.
POTTER STEWART, Associate Justice.[2]

RETIRED

STANLEY REED, Associate Justice.[3]
SHERMAN MINTON, Associate Justice.

WILLIAM P. ROGERS, Attorney General.
J. LEE RANKIN, Solicitor General.
JAMES R. BROWNING, Clerk.[4]
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

Notes on p. IV.

NOTES.

[1] MR. JUSTICE BURTON retired effective October 13, 1958. See *post*, p. VII. By order entered January 26, 1959, he was designated and assigned to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit. See *post*, p. 943.

[2] THE HONORABLE POTTER STEWART, formerly a Judge of the United States Court of Appeals for the Sixth Circuit, was appointed an Associate Justice of this Court by President Eisenhower, a recess appointment, on October 14, 1958. He took the oaths and his seat on the same day. See *post*, p. XIII. He was nominated by President Eisenhower on January 17, 1959; the nomination was confirmed by the Senate on May 5, 1959; he was given a new commission on May 7, 1959; and he again took the oaths on May 15, 1959.

[3] MR. JUSTICE REED (retired) was designated and assigned to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit (see *post*, p. 860) and the United States Court of Claims (see *post*, p. 870).

[4] Mr. James R. Browning was appointed Clerk of the Court effective August 15, 1958. See 357 U. S. 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, POTTER STEWART, 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.

October 14, 1958.

(For next previous allotment, see 357 U. S., p. v.)

RETIREMENT OF MR. JUSTICE BURTON.

SUPREME COURT OF THE UNITED STATES.

MONDAY, OCTOBER 13, 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:

With the concurrence of all my colleagues, I announce with regret the retirement of Mr. Justice Burton from this Court at the conclusion of today's session.

The last thirteen years of his long and distinguished career of public service have been spent with us as a member of this Court. He has been a friend, counselor, and companion of all of us. We shall miss him greatly, but we hope that the more leisurely activities which he may now pursue will preserve his health and afford him the satisfactions to which his devoted services to his Government and mankind so justly entitle him.

Our appreciation of his services and our personal regard for him are more adequately expressed in a letter to him which, together with his letter of retirement, will be spread upon the Minutes of the Court.

His successor will take the oath of office tomorrow.

IT IS ORDERED by the Court that the accompanying correspondence between members of the Court and Mr. Justice Burton upon his retirement as an Associate Justice of the Court be this day spread upon the record, and that it also be printed in the reports of this Court.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE HAROLD H. BURTON,
Washington 25, D. C., October 2, 1958.

MY DEAR CHIEF JUSTICE:

In confirmation of my retirement from active service as an Associate Justice of this Court effective October 13, 1958, I enclose a copy of my letter of July 17, 1958, to the President, and of his reply of September 23, 1958.

Although I believe that my retirement at this time is in the best interests of all concerned, I wish to express my cordial regards and deep affection for each member of the Court with whom I have served. I appreciate greatly the privilege which has been mine to serve on this Court for thirteen years, and I thank each of my associates on the Bench, as well as the members of the staff of the Court, for their uniformly helpful and courteous co-operation.

As for the future, although I shall not be available for active service on the Court, I hope to be of service to its best interests.

Yours sincerely,

HAROLD H. BURTON.

THE CHIEF JUSTICE.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE HAROLD H. BURTON,
Washington 25, D. C., July 17, 1958.

MY DEAR MR. PRESIDENT:

Having passed the permissive retirement age of 70, and having rendered over 25 years of public service, including nearly 13 as a member of this Court, I hereby submit this notice of my retirement from further active service as an Associate Justice of the Supreme Court of

the United States to take effect at the close of Monday, October 13, 1958. I do this with regret but in accordance with competent medical advice and with a desire to serve the best interests of all concerned.

Mrs. Burton and I wish to express, through you, to the people of the United States our deep appreciation of the privilege which has been mine for so long to serve their interests to the extent of my ability to do so.

Respectfully yours,

HAROLD H. BURTON.

THE PRESIDENT,
The White House,
Washington, D. C.

THE WHITE HOUSE,
Washington, September 23, 1958.

DEAR MR. JUSTICE:

It is with great regret that I have read your notice of retirement on Monday, October 13, 1958, as an Associate Justice of the Supreme Court of the United States.

I share, with millions of our citizens, the conviction that, as a member of the Court, you served with high distinction and great dedication to the principles under which we live and the changing conditions of the world today. The decisions of the Court are helping to shape—as they have in the past—the destiny of our country. This realization has imposed upon you vital responsibilities, which I know you have discharged seriously and conscientiously. Your work on the Supreme Court was, of course, but a continuation of your earlier years of devoted and dedicated public service. Our country is indebted to you.

I trust that with the leisure your retirement will bring, your health will greatly improve.

Mrs. Eisenhower joins me in best wishes to you and Mrs. Burton, and in expressions of our feelings of personal friendship for you both.

Sincerely,

DWIGHT D. EISENHOWER.

The Honorable HAROLD H. BURTON,
Associate Justice,
Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington 25, D. C., October 13, 1958.

Honorable HAROLD H. BURTON,
Associate Justice of the Supreme Court,
Washington, D. C.

DEAR JUSTICE BURTON:

Your gain of freedom from the preoccupations of the Court is the loss of all your brethren. But we would not gainsay your greatly deserved right to pursue those satisfying activities that are, of necessity, so often denied busy public servants until their retirement. We know no person who, with clearer conscience, could leave to younger hands the specific task of protecting the Constitution of the United States and the institutions it guarantees.

Your entire adult life has been devoted to the public welfare, both through public service and the private pursuit of good causes. Your City and State, as well as your country, have greatly benefited from those activities. As Director of Law and as Mayor of your home City of Cleveland, as a State Legislator, as a soldier of the famous 91st Division and decorated by both the United States and Belgian Governments 40 years ago, as a United States Senator from the great State of Ohio, and for the past 13 years as a member of this Court, your life has been dedi-

cated to the Government under which we are privileged to live.

As a husband, father, churchman, public-spirited citizen, and tolerant, companionable fellow worker, you have endeared yourself to all who have passed your way.

Need we say that we, your brethren, will miss you? I am sure you know that we shall. Without exception, we believe that of all the Justices who have sat on this Bench, not one has adhered more closely than you to the ideal for which we all strive—"Equal Justice Under Law."

With the fondest wishes for the health and happiness of you and yours, we are

Sincerely,

EARL WARREN
HUGO L. BLACK
FELIX FRANKFURTER
WILLIAM O. DOUGLAS
TOM C. CLARK
JOHN MARSHALL HARLAN
WILLIAM J. BRENNAN, JR.
CHARLES E. WHITTAKER

APPOINTMENT OF MR. JUSTICE STEWART.

SUPREME COURT OF THE UNITED STATES.

TUESDAY, OCTOBER 14, 1958.

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

THE CHIEF JUSTICE said:

Yesterday the Court with regret noted the retirement of Mr. Justice Burton. Today we welcome his successor.

The President has appointed the Honorable Potter Stewart of Ohio, a judge of the United States Court of Appeals for the Sixth Circuit, to succeed Mr. Justice Burton. Justice Stewart has taken the Constitutional Oath administered by The Chief Justice. He is now present in Court. The Clerk will read his commission. He will then take the Judicial Oath, to be administered by the Clerk, after which the Marshal will escort him to his seat on the bench.

The Clerk then read the commission as follows:

DWIGHT D. EISENHOWER,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness and Learning of Potter Stewart of Ohio I do appoint him Associate Justice of the

Supreme Court of the United States and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Potter Stewart, until the end of the next session of the Senate of the United States and no longer; subject to the provisions of Law.

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

Done at the City of Washington this fourteenth day of October, in the year of our Lord one thousand nine hundred and fifty-eight and of the Independence of the United States of America the one hundred and eighty-third.

DWIGHT D. EISENHOWER.

By the President:
WILLIAM P. ROGERS
Attorney General.

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

The oaths taken by MR. JUSTICE STEWART are in the following words, viz:

I, Potter Stewart, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

POTTER STEWART

Subscribed and sworn to before me this fourteenth day of October A. D. 1958.

EARL WARREN,
Chief Justice of the United States.

I, Potter Stewart, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.

So help me God.

POTTER STEWART

Subscribed and sworn to before me this fourteenth day of October A. D. 1958.

JAMES R. BROWNING,
Clerk of the Supreme Court of the United States.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

AUGUST SPECIAL TERM, 1958.

COOPER ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* AARON ET AL.

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

No. 1. Argued September 11, 1958.—Decided September 12, 1958.—Opinion announced September 29, 1958.

Under a plan of gradual desegregation of the races in the public schools of Little Rock, Arkansas, adopted by petitioners and approved by the courts below, respondents, Negro children, were ordered admitted to a previously all-white high school at the beginning of the 1957–1958 school year. Due to actions by the Legislature and Governor of the State opposing desegregation, and to threats of mob violence resulting therefrom, respondents were unable to attend the school until troops were sent and maintained there by the Federal Government for their protection; but they

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† NOTE: The *per curiam* opinion announced on September 12, 1958, and printed in a footnote, *post,* p. 5, applies not only to this case but also to No. 1, Misc., August Special Term, 1958, *Aaron et al.* v. *Cooper et al.,* on application for vacation of order of the United States Court of Appeals for the Eighth Circuit staying issuance of its mandate, for stay of order of the United States District Court for the Eastern District of Arkansas, and for such other orders as petitioners may be entitled to, argued August 28, 1958.

attended the school for the remainder of that school year. Finding that these events had resulted in tensions, bedlam, chaos and turmoil in the school, which disrupted the educational process, the District Court, in June 1958, granted petitioners' request that operation of their plan of desegregation be suspended for two and one-half years, and that respondents be sent back to segregated schools. The Court of Appeals reversed. *Held:* The judgment of the Court of Appeals is affirmed, and the orders of the District Court enforcing petitioners' plan of desegregation are reinstated, effective immediately. Pp. 4–20.

1. This Court cannot countenance a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution in *Brown* v. *Board of Education*, 347 U. S. 483. P. 4.

2. This Court rejects the contention that it should uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify its holding in the *Brown* case have been further challenged and tested in the courts. P. 4.

3. In many locations, obedience to the duty of desegregation will require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. P. 7.

4. If, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), a District Court concludes that justification exists for not requiring the present nonsegregated admission of all qualified Negro children to public schools, it should scrutinize the program of the school authorities to make sure that they have developed arrangements pointed toward the earliest practicable completion of desegregation, and have taken appropriate steps to put their program into effective operation. P. 7.

5. The petitioners stand in this litigation as the agents of the State, and they cannot assert their good faith as an excuse for delay in implementing the respondents' constitutional rights, when vindication of those rights has been rendered difficult or impossible by the actions of other state officials. Pp. 15–16.

6. The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed

upon the actions of the Governor and Legislature, and law and order are not here to be preserved by depriving the Negro children of their constitutional rights. P. 16.

7. The constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." Pp. 16–17.

8. The interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." P. 18.

9. No state legislator or executive or judicial officer can war against the Constitution without violating his solemn oath to support it. P. 18.

10. State support of segregated schools through any arrangement, management, funds or property cannot be squared with the command of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws. P. 19.

257 F. 2d 33, affirmed.

Richard C. Butler argued the cause for petitioners. With him on the brief were *A. F. House* and, by special leave of Court, *John H. Haley, pro hac vice.*

Thurgood Marshall argued the cause for respondents. With him on the brief were *Wiley A. Branton, William Coleman, Jr., Jack Greenberg* and *Louis H. Pollak.*

Solicitor General Rankin, at the invitation of the Court, *post,* p. 27, argued the cause for the United States, as *amicus curiae,* urging that the relief sought by respondents should be granted. With him on the brief were *Oscar H. Davis, Philip Elman* and *Ralph S. Spritzer.*

Opinion of the Court by THE CHIEF JUSTICE, 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.

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown* v. *Board of Education*, 347 U. S. 483. That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown* v. *Board of Education* have been further challenged and tested in the courts. We reject these contentions.

The case was argued before us on September 11, 1958. On the following day we unanimously affirmed the judgment of the Court of Appeals for the Eighth Circuit, 257 F. 2d 33, which had reversed a judgment of the District Court for the Eastern District of Arkansas, 163 F. Supp. 13. The District Court had granted the application of the petitioners, the Little Rock School Board and School Superintendent, to suspend for two and one-half years the operation of the School Board's court-approved desegregation program. In order that the School Board

might know, without doubt, its duty in this regard before the opening of school, which had been set for the following Monday, September 15, 1958, we immediately issued the judgment, reserving the expression of our supporting views to a later date.* This opinion of all of the members of the Court embodies those views.

The following are the facts and circumstances so far as necessary to show how the legal questions are presented.

On May 17, 1954, this Court decided that enforced racial segregation in the public schools of a State is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. *Brown* v. *Board of Education,*

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*The following was the Court's *per curiam* opinion:

"PER CURIAM.

"The Court, having fully deliberated upon the oral arguments had on August 28, 1958, as supplemented by the arguments presented on September 11, 1958, and all the briefs on file, is unanimously of the opinion that the judgment of the Court of Appeals for the Eighth Circuit of August 18, 1958, 257 F. 2d 33, must be affirmed. In view of the imminent commencement of the new school year at the Central High School of Little Rock, Arkansas, we deem it important to make prompt announcement of our judgment affirming the Court of Appeals. The expression of the views supporting our judgment will be prepared and announced in due course.

"It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated August 18, 1958, 257 F. 2d 33, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, 163 F. Supp. 13, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, see 143 F. Supp. 855, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in *Brown* v. *Board of Education,* 347 U. S. 483, 349 U. S. 294, be reinstated. It follows that the order of the Court of Appeals dated August 21, 1958, staying its own mandate is of no further effect.

"The judgment of this Court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas."

347 U. S. 483. The Court postponed, pending further argument, formulation of a decree to effectuate this decision. That decree was rendered May 31, 1955. *Brown* v. *Board of Education,* 349 U. S. 294. In the formulation of that decree the Court recognized that good faith compliance with the principles declared in *Brown* might in some situations "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." *Id.,* at 300. The Court went on to state:

> "Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> "While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U. S., at 300–301.

Under such circumstances, the District Courts were directed to require "a prompt and reasonable start toward full compliance," and to take such action as was necessary to bring about the end of racial segregation in the public schools "with all deliberate speed." *Ibid.* Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

On May 20, 1954, three days after the first *Brown* opinion, the Little Rock District School Board adopted, and on May 23, 1954, made public, a statement of policy entitled "Supreme Court Decision—Segregation in Public Schools." In this statement the Board recognized that

> "It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed."

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Thereafter the Board undertook studies of the administrative problems confronting the transition to a desegregated public school system at Little Rock. It instructed the Superintendent of Schools to prepare a plan for desegregation, and approved such a plan on May 24, 1955, seven days before the second *Brown* opinion. The plan provided for desegregation at the senior high school level (grades 10 through 12) as the first stage. Desegregation at the junior high and elementary levels was to follow. It was contemplated that desegregation at the high school level would commence in the fall of 1957, and the expectation was that complete desegregation of the school system would be accomplished by 1963. Following the adoption of this plan, the Superintendent of Schools discussed it with a large number of citizen groups in the city. As a result of these discussions, the Board reached the conclusion that "a large majority of the residents" of Little Rock were of "the belief . . . that the Plan, although objectionable in principle," from the point of view of those supporting segregated schools, "was still the best for the interests of all pupils in the District."

Upon challenge by a group of Negro plaintiffs desiring more rapid completion of the desegregation process, the District Court upheld the School Board's plan, *Aaron* v. *Cooper,* 143 F. Supp. 855. The Court of Appeals affirmed. 243 F. 2d 361. Review of that judgment was not sought here.

While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. First came, in November 1956, an amendment to the State Constitution flatly commanding the Arkansas General Assembly to oppose "in every Constitutional manner the Un-consti-

tutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court," Ark. Const., Amend. 44, and, through the initiative, a pupil assignment law, Ark. Stat. 80–1519 to 80–1524. Pursuant to this state constitutional command, a law relieving school children from compulsory attendance at racially mixed schools, Ark. Stat. 80–1525, and a law establishing a State Sovereignty Commission, Ark. Stat. 6–801 to 6–824, were enacted by the General Assembly in February 1957.

The School Board and the Superintendent of Schools nevertheless continued with preparations to carry out the first stage of the desegregation program. Nine Negro children were scheduled for admission in September 1957 to Central High School, which has more than two thousand students. Various administrative measures, designed to assure the smooth transition of this first stage of desegregation, were undertaken.

On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school "off limits" to colored students. As found by the District Court in subsequent proceedings, the Governor's action had not been requested by the school authorities, and was entirely unheralded. The findings were these:

> "Up to this time [September 2], no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had frequently conferred with the Mayor and Chief of Police of Little Rock about taking appro-

priate steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the 9 colored students at Central High School. The Mayor considered that the Little Rock police force could adequately cope with any incidents which might arise at the opening of school. The Mayor, the Chief of Police, and the school authorities made no request to the Governor or any representative of his for State assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State government consulted with the Little Rock authorities about whether the Little Rock police were prepared to cope with any incidents which might arise at the school, about any need for State assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School." *Aaron* v. *Cooper,* 156 F. Supp. 220, 225.

The Board's petition for postponement in this proceeding states: "The effect of that action [of the Governor] was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this [District] Court, and from that date hostility to the Plan was increased and criticism of the officials of the [School] District has become more bitter and unrestrained." The Governor's action caused the School Board to request the Negro students on September 2 not to attend the high school "until the legal dilemma was solved." The next day, September 3, 1957, the Board petitioned the District Court for instructions, and the court, after a hearing, found that the Board's

request of the Negro students to stay away from the high school had been made because of the stationing of the military guards by the state authorities. The court determined that this was not a reason for departing from the approved plan, and ordered the School Board and Superintendent to proceed with it.

On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school but, as the District Court later found, units of the Arkansas National Guard "acting pursuant to the Governor's order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students . . . from entering," as they continued to do every school day during the following three weeks. 156 F. Supp., at 225.

That same day, September 4, 1957, the United States Attorney for the Eastern District of Arkansas was requested by the District Court to begin an immediate investigation in order to fix responsibility for the interference with the orderly implementation of the District Court's direction to carry out the desegregation program. Three days later, September 7, the District Court denied a petition of the School Board and the Superintendent of Schools for an order temporarily suspending continuance of the program.

Upon completion of the United States Attorney's investigation, he and the Attorney General of the United States, at the District Court's request, entered the proceedings and filed a petition on behalf of the United States, as *amicus curiae,* to enjoin the Governor of Arkansas and officers of the Arkansas National Guard from further attempts to prevent obedience to the court's order. After hearings on the petition, the District Court found that the School Board's plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction on Septem-

ber 20, 1957, enjoining the Governor and the officers of the Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan. 156 F. Supp. 220, affirmed, *Faubus* v. *United States,* 254 F. 2d 797. The National Guard was then withdrawn from the school.

The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school. 163 F. Supp., at 16. On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year. Eight of the Negro students remained in attendance at the school throughout the school year.

We come now to the aspect of the proceedings presently before us. On February 20, 1958, the School Board and the Superintendent of Schools filed a petition in the District Court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible. The Board therefore proposed that the Negro students already admitted to the school be with-

drawn and sent to segregated schools, and that all further steps to carry out the Board's desegregation program be postponed for a period later suggested by the Board to be two and one-half years.

After a hearing the District Court granted the relief requested by the Board. Among other things the court found that the past year at Central High School had been attended by conditions of "chaos, bedlam and turmoil"; that there were "repeated incidents of more or less serious violence directed against the Negro students and their property"; that there was "tension and unrest among the school administrators, the class-room teachers, the pupils, and the latters' parents, which inevitably had an adverse effect upon the educational program"; that a school official was threatened with violence; that a "serious financial burden" had been cast on the School District; that the education of the students had suffered "and under existing conditions will continue to suffer"; that the Board would continue to need "military assistance or its equivalent"; that the local police department would not be able "to detail enough men to afford the necessary protection"; and that the situation was "intolerable." 163 F. Supp., at 20–26.

The District Court's judgment was dated June 20, 1958. The Negro respondents appealed to the Court of Appeals for the Eighth Circuit and also sought there a stay of the District Court's judgment. At the same time they filed a petition for certiorari in this Court asking us to review the District Court's judgment without awaiting the disposition of their appeal to the Court of Appeals, or of their petition to that court for a stay. That we declined to do. 357 U. S. 566. The Court of Appeals did not act on the petition for a stay, but, on August 18, 1958, after convening in special session on August 4 and hearing the appeal, reversed the District Court, 257 F. 2d 33. On August 21, 1958, the Court of Appeals stayed its mandate

to permit the School Board to petition this Court for certiorari. Pending the filing of the School Board's petition for certiorari, the Negro respondents, on August 23, 1958, applied to MR. JUSTICE WHITTAKER, as Circuit Justice for the Eighth Circuit, to stay the order of the Court of Appeals withholding its own mandate and also to stay the District Court's judgment. In view of the nature of the motions, he referred them to the entire Court. Recognizing the vital importance of a decision of the issues in time to permit arrangements to be made for the 1958–1959 school year, see *Aaron* v. *Cooper,* 357 U. S. 566, 567, we convened in Special Term on August 28, 1958, and heard oral argument on the respondents' motions, and also argument of the Solicitor General who, by invitation, appeared for the United States as *amicus curiae,* and asserted that the Court of Appeals' judgment was clearly correct on the merits, and urged that we vacate its stay forthwith. Finding that respondents' application necessarily involved consideration of the merits of the litigation, we entered an order which deferred decision upon the motions pending the disposition of the School Board's petition for certiorari, and fixed September 8, 1958, as the day on or before which such petition might be filed, and September 11, 1958, for oral argument upon the petition. The petition for certiorari, duly filed, was granted in open Court on September 11, 1958, *post,* p. 29, and further arguments were had, the Solicitor General again urging the correctness of the judgment of the Court of Appeals. On September 12, 1958, as already mentioned, we unanimously affirmed the judgment of the Court of Appeals in the *per curiam* opinion set forth in the margin at the outset of this opinion, *ante,* p. 5.

In affirming the judgment of the Court of Appeals which reversed the District Court we have accepted without reservation the position of the School Board, the

Superintendent of Schools, and their counsel that they displayed entire good faith in the conduct of these proceedings and in dealing with the unfortunate and distressing sequence of events which has been outlined. We likewise have accepted the findings of the District Court as to the conditions at Central High School during the 1957–1958 school year, and also the findings that the educational progress of all the students, white and colored, of that school has suffered and will continue to suffer if the conditions which prevailed last year are permitted to continue.

The significance of these findings, however, is to be considered in light of the fact, indisputably revealed by the record before us, that the conditions they depict are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the *Brown* case and which have brought about violent resistance to that decision in Arkansas. In its petition for certiorari filed in this Court, the School Board itself describes the situation in this language: "The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace."

One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be sug-

gested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan* v. *Warley,* 245 U. S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. "A State acts by its legislative, its executive, or its judicial authorities. It can act in no

other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." *Ex parte Virginia,* 100 U. S. 339, 347. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia* v. *Rives,* 100 U. S. 313; *Pennsylvania* v. *Board of Directors of City Trusts of Philadelphia,* 353 U. S. 230; *Shelley* v. *Kraemer,* 334 U. S. 1; or whatever the guise in which it is taken, see *Derrington* v. *Plummer,* 240 F. 2d 922; *Department of Conservation and Development* v. *Tate,* 231 F. 2d 615. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Smith* v. *Texas,* 311 U. S. 128, 132.

What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury* v. *Madison,* 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State . . . ." *Ableman* v. *Booth,* 21 How. 506, 524.

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery . . . ." *United States* v. *Peters,* 5 Cranch 115, 136. A Governor who asserts a

power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . ." *Sterling* v. *Constantin,* 287 U. S. 378, 397–398.

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Bolling* v. *Sharpe,* 347 U. S. 497. The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution,

are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

Concurring opinion of MR. JUSTICE FRANKFURTER.*

While unreservedly participating with my brethren in our joint opinion, I deem it appropriate also to deal individually with the great issue here at stake.

By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences. This process was under way in Little Rock. The detailed plan formulated by the Little Rock School Board, in the light of local circumstances, had been approved by the United States District Court in Arkansas as satisfying the requirements of this Court's decree in *Brown* v. *Board of Education,* 349 U. S. 294. The Little Rock School Board had embarked on an educational effort "to obtain public acceptance" of its plan. Thus the process of the community's accommodation to new demands of law upon it, the development of habits of acceptance of the right of colored children to the equal protection of the laws guaranteed by the Constitution, had peacefully and promisingly begun. The condition in Little Rock before this process was forcibly impeded by those in control of the government of Arkansas was thus described by the District Court, and these findings of fact have not been controverted:

> "14. Up to this time, no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had

*[NOTE: This opinion was filed October 6, 1958.]

frequently conferred with the Mayor and Chief of Police of Little Rock about taking appropriate steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the 9 colored students at Central High School. The Mayor considered that the Little Rock police force could adequately cope with any incidents which might arise at the opening of school. The Mayor, the Chief of Police, and the school authorities made no request to the Governor or any representative of his for State assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State government consulted with the Little Rock authorities about whether the Little Rock police were prepared to cope with any incidents which might arise at the school, about any need for State assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School." 156 F. Supp. 220, 225.

All this was disrupted by the introduction of the state militia and by other obstructive measures taken by the State. The illegality of these interferences with the constitutional right of Negro children qualified to enter the Central High School is unaffected by whatever action or non-action the Federal Government had seen fit to take. Nor is it neutralized by the undoubted good faith of the Little Rock School Board in endeavoring to discharge its constitutional duty.

The use of force to further obedience to law is in any event a last resort and one not congenial to the spirit of our Nation. But the tragic aspect of this disruptive tactic was that the power of the State was used not to sustain law but as an instrument for thwarting law. The State of Arkansas is thus responsible for disabling one

of its subordinate agencies, the Little Rock School Board, from peacefully carrying out the Board's and the State's constitutional duty. Accordingly, while Arkansas is not a formal party in these proceedings and a decree cannot go against the State, it is legally and morally before the Court.

We are now asked to hold that the illegal, forcible interference by the State of Arkansas with the continuance of what the Constitution commands, and the consequences in disorder that it entrained, should be recognized as justification for undoing what the School Board had formulated, what the District Court in 1955 had directed to be carried out, and what was in process of obedience. No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force. To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy. On the few tragic occasions in the history of the Nation, North and South, when law was forcibly resisted or systematically evaded, it has signalled the breakdown of constitutional processes of government on which ultimately rest the liberties of all. Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society. What could this mean but to acknowledge that disorder under the aegis of a State has moral superiority over the law of the Constitution? For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. The State "must . . . yield to an authority that is paramount to the State." This language of command to a State is Mr. Justice Holmes', speaking for the Court that comprised Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Brandeis, Mr. Justice Sutherland,

Mr. Justice Butler, and Mr. Justice Stone. *Wisconsin* v. *Illinois,* 281 U. S. 179, 197.

When defiance of law judicially pronounced was last sought to be justified before this Court, views were expressed which are now especially relevant:

> "The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.
>
> "But from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. 'Civilization involves subjection of force to reason, and the agency of this subjection is law.' (Pound, *The Future of Law* (1937) 47 Yale L. J. 1, 13.) The conception of a government by laws dominated the thoughts of those who founded this

> Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be 'as free, impartial, and independent as the lot of humanity will admit.' So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for." *United States* v. *United Mine Workers,* 330 U. S. 258, 307–309 (concurring opinion).

The duty to abstain from resistance to "the supreme Law of the Land," U. S. Const., Art. VI, ¶ 2, as declared by the organ of our Government for ascertaining it, does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stilled. Active obstruction or defiance is barred. Our kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is "the supreme Law of the Land." (See President Andrew Jackson's Message to Congress of January 16, 1833, II Richardson, Messages and Papers of the Presidents (1896 ed.), 610, 623.) Particularly is this so where the declaration of what "the supreme Law" commands on an underlying moral issue is not the dubious pronouncement of a gravely divided Court but is the unanimous conclusion of a long-matured deliberative process. The Constitution is not the formulation of the

merely personal views of the members of this Court, nor can its authority be reduced to the claim that state officials are its controlling interpreters. Local customs, however hardened by time, are not decreed in heaven. Habits and feelings they engender may be counteracted and moderated. Experience attests that such local habits and feelings will yield, gradually though this be, to law and education. And educational influences are exerted not only by explicit teaching. They vigorously flow from the fruitful exercise of the responsibility of those charged with political official power and from the almost unconsciously transforming actualities of living under law.

The process of ending unconstitutional exclusion of pupils from the common school system—"common" meaning shared alike—solely because of color is no doubt not an easy, overnight task in a few States where a drastic alteration in the ways of communities is involved. Deep emotions have, no doubt, been stirred. They will not be calmed by letting violence loose—violence and defiance employed and encouraged by those upon whom the duty of law observance should have the strongest claim—nor by submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms.

For carrying out the decision that color alone cannot bar a child from a public school, this Court has recognized the diversity of circumstances in local school situations. But is it a reasonable hope that the necessary endeavors for such adjustment will be furthered, that racial frictions will be ameliorated, by a reversal of the process and interrupting effective measures toward the necessary goal? The progress that has been made in respecting the constitutional rights of the Negro children, according to the graduated plan sanctioned by the two

lower courts, would have to be retraced, perhaps with even greater difficulty because of deference to forcible resistance. It would have to be retraced against the seemingly vindicated feeling of those who actively sought to block that progress. Is there not the strongest reason for concluding that to accede to the Board's request, on the basis of the circumstances that gave rise to it, for a suspension of the Board's non-segregation plan, would be but the beginning of a series of delays calculated to nullify this Court's adamant decisions in the *Brown* case that the Constitution precludes compulsory segregation based on color in state-supported schools?

That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system. This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with Negro populations of large proportions. Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.

Lincoln's appeal to "the better angels of our nature" failed to avert a fratricidal war. But the compassionate wisdom of Lincoln's First and Second Inaugurals bequeathed to the Union, cemented with blood, a moral heritage which, when drawn upon in times of stress and strife, is sure to find specific ways and means to surmount difficulties that may appear to be insurmountable.

ORDERS FROM AUGUST 28 THROUGH SEPTEMBER 17, 1958.

AUGUST 28, 1958.

Miscellaneous Order.

No. 1, Misc. AARON ET AL. *v.* COOPER ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, ET AL. On application for vacation of the order of the United States Court of Appeals for the Eighth Circuit staying issuance of its mandate and for a stay of the order of the United States District Court for the Eastern District of Arkansas and for such other orders as petitioners may be entitled to. Argued August 28, 1958.

Having considered the oral arguments, the Court is in agreement with the view expressed by counsel for the respective parties and by the Solicitor General that petitioners' present application respecting the stay of the mandate of the Court of Appeals and of the order of the District Court of June 21, 1958, necessarily involves consideration of the merits of the Court of Appeals decision reversing the order of Judge Lemley. The Court is advised that the opening date of the High School will be September 15. In light of this, and representations made by counsel for the School Board as to the Board's plan for filing its petition for certiorari, the Court makes the following order:

1. The School Board's petition for certiorari may be filed not later than September 8, 1958.

2. The briefs of both parties on the merits may be filed not later than September 10, 1958.

3. The Solicitor General is invited to file a brief by September 10, 1958, and to present oral argument if he is so advised.

4. The Rules of the Court requiring printing of the petition, briefs, and record are dispensed with.

5. Oral argument upon the petition for certiorari is set for September 11, 1958, at twelve o'clock noon.

6. Action on the petitioners' application addressed to the stay of the mandate of the Court of Appeals and to the stay of the order of the District Court of June 21, 1958, is deferred pending the disposition of the petition for certiorari duly filed in accordance with the foregoing schedule.

Thurgood Marshall argued the cause for petitioners. With him on the brief were *Wiley A. Branton, Jack Greenberg* and *William Coleman, Jr.* *Richard C. Butler* argued the cause for respondents. With him on the brief was *A. F. House.* *Solicitor General Rankin,* at the invitation of the Court, argued the cause for the United States, as *amicus curiae,* urging that the relief sought by petitioners should be granted. With him on the brief were *Oscar H. Davis, Philip Elman* and *Ralph S. Spritzer.*

SEPTEMBER 4, 1958.

Dismissal Under Rule 60.

No. 116, October Term, 1958. AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *v.* UNITED STATES. Appeal from the United States District Court for the Southern District of New York. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Albert C. Bickford* for appellant. *Oscar H. Davis,* then Acting Solicitor General, for the United States. Reported below: 165 F. Supp. 643.

SEPTEMBER 11, 1958.

Miscellaneous Order.

No. 1, Misc. AARON ET AL. *v.* COOPER ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKAN-

SAS, INDEPENDENT SCHOOL DISTRICT, ET AL. On application for vacation of the order of the United States Court of Appeals for the Eighth Circuit staying issuance of its mandate and for a stay of the order of the United States District Court for the Eastern District of Arkansas and for such other orders as petitioners may be entitled to. Motion for leave to file brief of J. W. Fulbright, as *amicus curiae,* denied. Motion for leave to file brief of John Bradley Minnick, as *amicus curiae,* denied. Motion for leave to file brief of William Burrow, as *amicus curiae,* denied.

Certiorari Granted.

No. 1. COOPER ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* AARON ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Motion for leave to file brief of Arlington County Chapter, Defenders of State Sovereignty of Individual Liberties, as *amicus curiae,* denied. Motion for leave to file brief of James M. Burke, as *amicus curiae,* denied. Motion for leave to file suit for declaratory judgment in re Little Rock and for other relief denied. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted. *Richard C. Butler, A. F. House* and, by special leave of the Court, *John H. Haley, pro hac vice,* for petitioners. *Thurgood Marshall, Wiley A. Branton, William Coleman, Jr., Jack Greenberg* and *Louis H. Pollak* for respondents. *Solicitor General Rankin,* appearing at the invitation of the Court, adhered to his brief filed in No. 1, Misc., August Special Term, 1958, urging that the relief sought by respondents should be granted. With him on this brief were *Oscar H. Davis, Philip Elman* and *Ralph S. Spritzer.* Reported below: 257 F. 2d 33.

SEPTEMBER 12, 1958.

Dismissal Under Rule 60.

No. 38, Misc., October Term, 1958. BLOCH *v.* COMMISSIONER OF INTERNAL REVENUE. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Rankin* for respondent. Reported below: 254 F. 2d 277.

SEPTEMBER 17, 1958.

Dismissal Under Rule 60.

No. 87, October Term, 1958. ALLEN N. SPOONER & SONS, INC., ET AL. *v.* PORT OF NEW YORK AUTHORITY. 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. *Martin J. McHugh* was on the stipulation for petitioners. With him on the petition was *Thomas F. Daly*. *John M. Aherne* was on the stipulation for respondent. Reported below: 253 F. 2d 584.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1958.

MOORE *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 208. Decided October 13, 1958.

In this case arising under the Federal Employers' Liability Act, *held:* The proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury. Therefore, certiorari is granted, the judgment is reversed and the case is remanded.

312 S. W. 2d 769, reversed and case remanded.

Roberts P. Elam for petitioner.

Lyman J. Bishop for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Supreme Court of Missouri is reversed and the case is remanded for proceedings in conformity with this opinion. We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500; *Webb* v. *Illinois Central R. Co.*, 352 U. S. 512; *Shaw* v. *Atlantic Coast Line R. Co.*, 353 U. S. 920; *Futrelle* v. *Atlantic*

Coast Line R. Co., 353 U. S. 920; *Deen* v. *Gulf, C. & S. F. R. Co.*, 353 U. S. 925; *Thomson* v. *Texas & Pacific R. Co.*, 353 U. S. 926; *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360; *Ringhiser* v. *Chesapeake & O. R. Co.*, 354 U. S. 901; *McBride* v. *Toledo Terminal R. Co.*, 354 U. S. 517; *Gibson* v. *Thompson*, 355 U. S. 18; *Honeycutt* v. *Wabash R. Co.*, 355 U. S. 424; *Ferguson* v. *St. Louis-San Francisco R. Co.*, 356 U. S. 41.

MR. JUSTICE HARLAN concurs in the result for the reasons given in his memorandum in *Gibson* v. *Thompson*, 355 U. S. 18, 19. See also his dissenting opinion in *Sinkler* v. *Missouri Pacific R. Co.*, 356 U. S. 326, 332.

For the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, MR. JUSTICE FRANKFURTER is of the view that the writ of certiorari was improvidently granted.

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

In my view the record does not contain any evidence of negligence by respondent, but instead it affirmatively shows that the sole cause of petitioner's injury was his own negligent act. Hence, I think the Supreme Court of Missouri was right in holding that there was nothing to submit to a jury.

The undisputed facts, principally physical facts, are these. Respondent's tracks run in pairs to the south from a point just outside the waiting room of its Union Station in St. Louis. Between each pair of tracks is a concrete loading platform designed for the use of passengers in walking, and of respondent's employees in transporting baggage, to and from trains. The platform between tracks numbered 4 and 5 is the scene of this occurrence. It is about 18 inches high, 14 feet 1⅜ inches wide and 1,800

feet long. It is under a roof supported by metal posts 14 inches in diameter located down the center of the platform at 30-foot intervals. At the time of this occurrence a train was standing on track 4 abutting the west side of the platform, and an incoming train was being backed north toward the waiting room along the east side of the platform on track 5. Petitioner, who was employed by respondent as a baggage handler, was on this platform for the purpose of transporting baggage from the incoming train. He was using a hand cart, referred to in the evidence as a "flat wagon," which was 14 feet 8 inches long (including the handlebars at either end), 3 feet 8 inches wide, and supported in the center by an axle riding on two 26-inch wheels, operating both as a fulcrum and a pivot. Being some distance south of the point at which the baggage car was to be stopped for unloading, petitioner started pulling his cart to the north along the east side of the platform and adjacent to the moving train. After so proceeding a short way, he observed a 4-wheel wagon standing on the east side of the platform, slightly north and east of one of the roof supports, making it necessary for him to turn his cart to the left and to pass on the west half of the platform. At that time another hand cart, a few feet to the left and ahead of him, was also being moved to the north over the west half of the platform. In changing the course of his cart, petitioner pulled its north end to the west at such an angle as caused its south end to be pivoted and swung to the east against the third car of the moving train which, in turn, caused him to be thrown to the west against a car standing on track 4 and to be injured. Other wagons were on the platform but were either some distance behind or ahead of petitioner and had no connection with this occurrence.

It cannot be, and is not, denied that the casualty resulted solely from the collision of the cart with the moving

train. What caused this to happen? Petitioner admits that it was the turn of the cart that did so. He also admits that the turn was made by his own hand. How then may it be said that any act of respondent caused or contributed to cause the south end of the cart to collide with the moving train? Petitioner attempts to attribute his conduct in some way to the presence of the other hand cart which was being pulled to the north a few feet ahead and to the west of him, saying that except for its presence he "could have made that turn easy." Yet he admits not only that there was no contact between that cart and his, but also that it was moving ahead and away from him. Surely the presence of that moving cart at that place did not constitute negligence. Do not these admitted and indisputable physical facts show that the casualty was not one "resulting in whole or in part from the negligence of" respondent? Do they not show that the casualty was one "resulting in whole" from the negligence of petitioner? The Federal Employers' Liability Act does not create liability without fault. Liability under the Act is predicated on both negligence and causation. By the plain words of § 1 of the Act a railroad is made liable for injuries to its employees *"resulting* in whole or in part from [its] *negligence."* (Emphasis added.) 53 Stat. 1404, 45 U. S. C. § 51. "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury." *Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649, 653. I submit that the simple facts recited do not show even a "scintilla" or an "iota" of evidence, to say nothing of any substantial evidence, of negligence by respondent. Instead, I insist, they affirmatively show that it was petitioner's own act in turning the cart at

such an angle as brought its south end into collision with the moving train that was exclusively "the cause of the injury." *Ibid.*

To hold that these facts are sufficient to make a jury case of negligence under the Act is in practical effect to say that a railroad is an insurer of its employees. Such is not the law. For these reasons I dissent.

ODD FELLOWS OAKRIDGE CEMETERY ASSOCIATION ET AL. *v.* OAKRIDGE CEMETERY CORP. ET AL.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

No. 98. Decided October 13, 1958.*

Appeal dismissed for want of a substantial federal question.

Reported below: 14 Ill. App. 2d 378, 144 N. E. 2d 853.

Raymond Harkrider for appellants, and *John J. Enright* for the Pipefitters Association Local Union 597—U. A., appellant.

Emil N. Levin and *Elmer M. Leesman* for the Oakridge Cemetery Corporation, and *S. Ashley Guthrie* for the Village of Westchester, appellees.

PER CURIAM.

The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question.

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*Together with No. 99, *Odd Fellows Oakridge Cemetery Association et al.* v. *Oakridge Cemetery Corp. et al.*, on appeal from the Supreme Court of Illinois.

PERMIAN BASIN PIPELINE CO. *v.* RAILROAD COMMISSION OF TEXAS ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT.

No. 64. Decided October 13, 1958.

Appeal dismissed and certiorari denied.

Reported below: 302 S. W. 2d 238.

Lawrence I. Shaw, F. Vinson Roach and *R. Dean Moorhead* for appellant.

Will Wilson, Attorney General of Texas, and *James N. Ludlum,* First Assistant Attorney General, for the Railroad Commission of Texas, and *Charles L. Black* for the Atlantic Refining Co., 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.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.

UNITED STATES *v.* NATIONAL MALLEABLE & STEEL CASTINGS CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 160. Decided October 13, 1958.

Affirmed.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston and *Lewis Bernstein* for the United States.

Luther Day and *Curtis C. Williams, Jr.* for the National Malleable & Steel Castings Co., *James C. Davis, John B. Robinson, Jr.* and *Orrin B. Garner* for the American Steel Foundries, *Webb I. Vorys* for the Buckeye Steel Castings Co., *Wilmer Mechlin* for the Symington Wayne Corporation, *Charles W. Sellers* for the McConway & Torley Corporation, and *Kenneth F. Burgess, D. Robert Thomas, Jr.* and *Ashley M. Van Duzer* for the Association of American Railroads, appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

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

STEINBECK *v.* GEROSA, COMPTROLLER OF NEW YORK CITY, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 294. Decided October 13, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 4 N. Y. 2d 302, 151 N. E. 2d 170.

Irwin Karp for appellant.

Peter Campbell Brown and *Stanley Buchsbaum* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.

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NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL. *v.* COMMITTEE ON OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 84. Decided October 13, 1958.

Certiorari granted.

In view of representations of the Attorney General of Virginia that cause has become moot, judgment vacated and cause remanded.

Reported below: 199 Va. 665, 101 S. E. 2d 631.

Robert L. Carter, Oliver W. Hill, S. W. Tucker and *Martin A. Martin* for petitioners.

Albertis S. Harrison, Jr., Attorney General, and *William H. King,* Special Assistant to the Attorney General, filed a brief for the State of Virginia, as *amicus curiae,* in opposition to the petition.

PER CURIAM.

The petition for writ of certiorari is granted. In view of the representations of the Attorney General of Virginia that the cause has become moot, the judgment of the Supreme Court of Appeals of Virginia is vacated and the cause is remanded for such further proceedings as that court may deem appropriate.

SCHON *v.* SCHON, EXECUTOR.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 33, Misc. Decided October 13, 1958.

Appeal dismissed and certiorari denied.
Reported below: 99 So. 2d 302.

Appellant *pro se.*

Sanford M. Swerdlin for appellee.

PER CURIAM.

The motion to add the State of Florida as a party appellee is denied. The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

KITCHENS ET UX. *v.* UNITED STATES.

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

No. 31, Misc. Decided October 13, 1958.

Certiorari granted.

Judgment vacated and cause remanded for consideration in light of *Ellis* v. *United States*, 356 U. S. 674.

Petitioners *pro se*.

Solicitor General Rankin, Assistant Attorney General Rice and *Joseph F. Goetten* 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 Tenth Circuit is vacated and the case is remanded for consideration in light of *Ellis* v. *United States*, 356 U. S. 674.

GEO. F. ALGER CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 65. Decided October 13, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 166 Ohio St. 427, 143 N. E. 2d 835.

Edmund M. Brady, Taylor C. Burneson and *Paul D. Miller* for appellant.

William Saxbe, Attorney General of Ohio, *Hugh A. Sherer,* Chief Counsel, and *John M. Tobin,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

WESTLAKE HOSPITAL ASSOCIATION ET AL. *v.* BLIX ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 184. Decided October 13, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 13 Ill. 2d 183, 148 N. E. 2d 471.

Albert Langeluttig and *Jack Joseph* for appellants.

Joseph D. Block for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

LINDER *v.* COLLINS ET AL., MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF WALLACE COUNTY, KANSAS, ET AL.

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

No. 86. Decided October 13, 1958.

Affirmed.

Jesse I. Linder, John J. Yowell and *G. Kent Yowell* for appellant.

James E. Taylor and *Verne M. Laing* for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

PENNSYLVANIA RAILROAD CO. *v.* BOROUGH OF SAYREVILLE ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 179. Decided October 13, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 26 N. J. 197, 139 A. 2d 97.

Windsor F. Cousins and *Hugh B. Cox* for appellant.

David D. Furman, Attorney General of New Jersey, *Joseph T. Karcher* and *Samuel V. Convery* for appellees.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

SHIPPERS' CAR SUPPLY COMMITTEE *v.* INTERSTATE COMMERCE COMMISSION ET AL.

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

No. 141. Decided October 13, 1958.

160 F. Supp. 939, affirmed.

Wm. P. Ellis for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane and *Carroll T. Prince, Jr.* for the United States and the Interstate Commerce Commission, and *Charles W. Burkett, Jr.* and *James E. Lyons* for the Southern Pacific Co., appellees.

Robert Y. Thornton, Attorney General, filed a brief for the State of Oregon, as *amicus curiae,* urging that probable jurisdiction be noted.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

DYE *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 151. Decided October 13, 1958.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

UNITED STATES STEEL CORP. *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 163. Decided October 13, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 51 Wash. 2d 224, 316 P. 2d 1099.

George V. Powell for appellant.

John J. O'Connell, Attorney General of Washington, and *Robert L. Simpson,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion for leave to file brief of Berkshire Hathaway, Inc., as *amicus curiae,* is denied. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

WALTERS *v.* CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 35, Misc. Decided October 13, 1958.

Appeal dismissed and certiorari denied.
Reported below: 145 Conn. 60, 138 A. 2d 786.

Samuel Sumner Freedman for appellant.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

GROCHOWIAK *v.* PENNSYLVANIA.

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA DISTRICT.

No. 166. Decided October 13, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 184 Pa. Super. 522, 136 A. 2d 145.

John W. Keller and *Mitchell Salem Fisher* for appellant.

Thomas D. McBride, Attorney General of Pennsylvania, *Frank P. Lawley, Jr.* and *Harry J. Rubin,* Deputy Attorneys General, and *George C. Eppinger* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

MARANZE *v.* MONTGOMERY COUNTY BOARD OF ELECTIONS ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 144, Misc. Decided October 13, 1958.

Appeal dismissed and certiorari denied.
Reported below: 167 Ohio St. 323, 148 N. E. 2d 229.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

GRANIERI *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 117, Misc. Decided October 13, 1958.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

UNITED STATES EX REL. FARNSWORTH *v.* MURPHY, WARDEN, ET AL.

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

No. 82, Misc. Decided October 13, 1958.

Certiorari granted.

Judgment vacated and case remanded to District Court for a hearing.

Reported below: 254 F. 2d 438.

Nicholas John Stathis for petitioner.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* Assistant Solicitor General, and *George K. Bernstein,* Assistant Attorney General, for respondents.

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 Second Circuit is vacated and the case is remanded to the District Court for a hearing.

SANGAMON VALLEY TELEVISION CORP. *v.* UNITED STATES ET AL.

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

No. 235. Decided October 20, 1958.

Certiorari granted.

In view of representations of the Solicitor General concerning testimony given before a Congressional investigating committee after the decision of the Court of Appeals, judgment vacated and cause remanded to that Court for such action as it may deem appropriate.

Reported below: 103 U. S. App. D. C. 113, 255 F. 2d 191.

D. M. Patrick and *E. Barrett Prettyman, Jr.* for petitioner.

Solicitor General Rankin, Assistant Attorney General Hansen, Warren E. Baker and *Richard A. Solomon* for the United States and the Federal Communications Commission, respondents.

Monroe Oppenheimer and *James H. Heller* for the Signal Hill Telecasting Corporation, respondent.

James A. McKenna, Jr. and *Vernon L. Wilkinson* for the American Broadcasting-Paramount Theatres, Inc., et al., respondents.

PER CURIAM.

The petition for writ of certiorari is granted. In view of the representations in the Solicitor General's brief on pages 7 and 8, concerning testimony given before the Subcommittee of Legislative Oversight of the House Committee on Interstate and Foreign Commerce subsequent to the decision by the Court of Appeals in this case, the

judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for such action as it may deem appropriate.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent in the above cases.* The matters referred to by the Court were not presented in the Court of Appeals and are not presented by these petitions. Agreeing with the Solicitor General that denial of the petitions for writs of certiorari would not foreclose appropriate consideration thereof by the Court of Appeals, we see no reason for vacating the Court of Appeals' judgments and, therefore, dissent from this disposition of the matter by the Court.

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*[NOTE: This dissent applies also to No. 242, *WIRL Television Corp.* v. *United States et al.*, *post*, p. 51.]

WIRL TELEVISION CORP. *v.* UNITED STATES ET AL.

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

No. 242. Decided October 20, 1958.

Certiorari granted.

Judgment vacated and case remanded to Court of Appeals for appropriate action in the light of the matter called to this Court's attention in No. 235, *Sangamon Valley Television Corp.* v. *United States et al.*, *ante*, p. 49, by the Solicitor General.

Reported below: 102 U. S. App. D. C. 341, 253 F. 2d 863.

Timothy W. Swain for petitioner.

Solicitor General Rankin, Assistant Attorney General Hansen, Warren E. Baker and *Richard A. Solomon* for the United States and the Federal Communications Commission, respondents.

James A. McKenna, Jr. and *Vernon L. Wilkinson* for the American Broadcasting-Paramount Theatres, Inc., respondent.

Jack P. Blume for the West Central Broadcasting Co., respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for appropriate action in the light of the matter called to this Court's attention on page 7 of the Solicitor General's brief in No. 235, *Sangamon Valley Television Corp.* v. *United States et al.*, *ante*, p. 49.

[For dissent of MR. JUSTICE CLARK and MR. JUSTICE HARLAN, see *ante*, p. 50.]

KOVRAK *v.* GINSBURG ET AL., MEMBERS OF THE COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 266. Decided October 20, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 392 Pa. 143, 139 A. 2d 889.

Filindo B. Masino and *William B. Ball* for appellant.

Robert W. Lees for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BOSTON FIVE CENTS SAVINGS BANK ET AL. *v.* CITY OF NEW BEDFORD.

APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS, BRISTOL COUNTY.

No. 273. Decided October 20, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: See 336 Mass. 651, 148 N. E. 2d 637.

Robert G. Dodge and *Harold S. Davis* for appellants.

Joseph C. Duggan for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

GRAHAM-WHITE SALES CORP. ET AL. *v.* PRIME MANUFACTURING CO.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 297. Decided October 20, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 3 Wis. 2d 156, 87 N. W. 2d 788.

Maxwell H. Herriott for appellants.

John W. Michael and *Herman E. Friedrich* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

NEW ORLEANS CITY PARK IMPROVEMENT ASSOCIATION *v.* DETIEGE ET AL.

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

No. 295. Decided October 20, 1958.

252 F. 2d 122, affirmed.

Ed J. de Verges for appellant.

PER CURIAM.

The judgment is affirmed.

MOUNTS *v.* WEST VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 125, Misc. Decided October 20, 1958.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

WORZ, INC., *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

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

No. 349. Decided October 27, 1958.

Certiorari granted.

In view of representations of the Solicitor General concerning testimony given before a congressional investigating committee after the decision of the Court of Appeals, judgment vacated and cause remanded to that Court for such action as it may deem appropriate.

Reported below: 103 U. S. App. D. C. 195, 257 F. 2d 199.

Eliot C. Lovett for petitioner.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, John L. Fitzgerald and *Richard A. Solomon* for the Federal Communications Commission, respondent.

PER CURIAM.

The petition for writ of certiorari is granted. In view of the representations in the Solicitor General's brief on pages 4 and 5, concerning testimony given before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce subsequent to the decision by the Court of Appeals in this case, the judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for such action as it may deem appropriate.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent. The matters referred to by the Court were not presented in the Court of Appeals and are not presented by this petition. Agreeing with the Solicitor General that denial

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of the petition for writ of certiorari would not foreclose appropriate consideration thereof by the Court of Appeals, we see no reason for vacating the Court of Appeals' judgment and, therefore, dissent from this disposition of the matter by the Court.

FELLOM ET AL. *v.* REDEVELOPMENT AGENCY OF THE CITY AND COUNTY OF SAN FRANCISCO ET AL.

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

No. 323. Decided October 27, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 157 Cal. App. 2d 243, 320 P. 2d 884.

Appellants *pro se*.

Dion R. Holm and *George E. Baglin* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

DEEN *v.* HICKMAN, CHIEF JUSTICE, SUPREME COURT OF TEXAS, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

No. 133, Misc. Decided October 27, 1958.

In a case arising under the Federal Employers' Liability Act, the Texas Supreme Court entered a judgment which was foreclosed by an earlier decision of this Court in the same case. *Held:* Leave to file a petition for writ of mandamus to require the Texas Supreme Court to conform its decision to the mandate of this Court is granted; but the writ is not issued, because it is assumed that the Texas Supreme Court will conform to this decision.

Reported below: See —— Tex. ——, 312 S. W. 2d 933.

David C. McCord and *Robert Lee Guthrie* for petitioner.

Luther Hudson for the Gulf, Colorado & Santa Fe Railway Co., respondent.

PER CURIAM.

In *Deen* v. *Gulf, Colorado & Santa Fe R. Co.*, 353 U. S. 925, this Court, having held "that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury," reversed the judgment of the Texas Court of Civil Appeals. On remand, that court held that the question of negligence was foreclosed by this Court's decision and affirmed a judgment in favor of the petitioner on condition that petitioner accept a remittitur. On review, the Texas Supreme Court remanded the case to the Court of Civil Appeals "with directions . . . to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding of negligence of

the defendant . . . is so against the weight and preponderance of the evidence as to require a new trial in the interest of justice, and, upon the basis of its said adjudication, to either affirm the judgment of the trial court or grant a new trial." The determination of that issue was foreclosed by *Deen* v. *Gulf, Colorado & Santa Fe R. Co., supra.* The motion for leave to file a petition requesting this Court to mandamus the Texas Supreme Court to conform its decision to our mandate in that case is granted. Assuming as we do that the Supreme Court of Texas will of course conform to the disposition we now make, we do not issue the writ of mandamus.

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

FONK ET AL. *v.* TOWN OF YORKVILLE.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 332. Decided October 27, 1958.

Appeal dismissed for want of a substantial federal question. Reported below: 3 Wis. 2d 371, 88 N. W. 2d 319.

Wm. J. P. Aberg for appellants.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

Per Curiam.

PEURIFOY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 46. Argued October 16, 20, 1958.—Decided November 10, 1958.

When a case arising under the Internal Revenue Laws turns on an issue of fact and it appears that, in reviewing the Tax Court's factual determination, the Court of Appeals has made a fair assessment of the record, this Court will not intervene. Pp. 59–61.

254 F. 2d 483, affirmed.

Daniel R. Dixon argued the cause for petitioners. With him on the brief was *Martin F. O'Donoghue.*

Earl E. Pollock argued the cause for respondent, *pro hac vice,* by special leave of Court. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Melva M. Graney.*

PER CURIAM.

The petitioners were employed as construction workers at a site in Kinston, North Carolina, for continuous periods of 20½ months, 12½ months, and 8½ months, respectively, ending in the year 1953. Each of the petitioners maintained a permanent residence elsewhere in North Carolina. In reporting his adjusted gross income for 1953 each petitioner deducted amounts expended for board and lodging at Kinston during the period of employment there, and for transportation from Kinston to his permanent residence upon leaving that employment. These deductions were disallowed by the respondent. Ensuing Tax Court proceedings resulted in a decision in favor of the petitioners. 27 T. C. 149. The Court of Appeals reversed. 254 F. 2d 483. We granted certiorari, 356 U. S. 956, to consider certain questions as

to the application of § 23 (a)(1)(A) of the Internal Revenue Code of 1939* raised by the course of decisions in the lower courts since our decision in *Commissioner* v. *Flowers,* 326 U. S. 465. However, as the case has been presented to us we have found it inappropriate to consider such questions.

The issue is whether the amounts in question constituted allowable deductions under § 23 (a)(1)(A). Generally, a taxpayer is entitled to deduct unreimbursed travel expenses under this subsection only when they are required by "the exigencies of business." *Commissioner* v. *Flowers, supra.* Application of this general rule would require affirmance of the judgment of the Court of Appeals in the present case.

To this rule, however, the Tax Court has engrafted an exception which allows a deduction for expenditures of the type made in this case when the taxpayer's employment is "temporary" as contrasted with "indefinite" or "indeterminate." Compare *Schurer* v. *Commissioner,* 3 T. C. 544; *Leach* v. *Commissioner,* 12 T. C. 20; *Albert* v. *Commissioner,* 13 T. C. 129, with *Warren* v. *Commissioner,* 13 T. C. 205; *Whitaker* v. *Commissioner,* 24 T. C. 750. The respondent does not in the present case challenge the validity of this exception to the general rule.

Resolution of this case as presented to us turns, therefore, upon a narrow question of fact—Was the petitioners'

*"§ 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

"(a) EXPENSES.

"(1) TRADE OR BUSINESS EXPENSES.

"(A) IN GENERAL.

"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . . ." 26 U. S. C. (1952 ed.) § 23 (a)(1)(A).

employment "temporary" or "indefinite"? The Tax Court, stating that "each case must be decided upon the basis of its own facts and circumstances," 27 T. C., at 157, found that their employment was temporary. The Court of Appeals, also recognizing that the question was "one of fact," held that on the record the Tax Court's finding of temporary employment was "clearly erroneous." 254 F. 2d, at 487.

In reviewing the Tax Court's factual determination, the Court of Appeals has made a fair assessment of the record. 26 U. S. C. (Supp. V) § 7482; Rule 52 (a), Fed. Rules Civ. Proc.; cf. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. That being so, this Court will not intervene. *Federal Trade Commission* v. *Standard Oil Co.,* 355 U. S. 396, 400–401; *Labor Board* v. *Pittsburgh S. S. Co.,* 340 U. S. 498, 502–503.

Affirmed.

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

As *Commissioner of Internal Revenue* v. *Flowers* [1] indicated, the prerequisites to a deduction for travel expenses under § 23 (a)(1)(A)[2] are threefold: The expenses must be reasonable and necessary,[3] they must be incurred while "away from home," and there must be a "direct connection between the expenditure and the carrying on of the trade or business *of the taxpayer or of his employer.*" (Emphasis supplied.) 326 U. S., at 470. I think the taxpayers in this case have met those conditions and should be allowed the claimed deductions.

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[1] 326 U. S. 465.

[2] § 162 (a)(2) of the 1954 Internal Revenue Code, 26 U. S. C. (Supp. V) § 162 (a)(2).

[3] There is no contention made that the expenses here were not reasonable and necessary.

The meaning of "home" was expressly left undecided in *Flowers* but is squarely presented in the instant case.[4] I disagree with the Commissioner's contention that "home" is synonymous with the situs of the employer's business. Such a construction means that the taxpayer who is forced to travel from place to place to pursue his trade must carry his home on his back regardless of the fact that he maintains his family at an abode which meets all accepted definitions of "home." I do not believe that Congress intended such a harsh result when it provided a deduction for traveling expenses. These construction workers do not have a permanent locus of employment as does the merchant or factory worker. They are required to travel from job to job in order to practice their trade. It would be an intolerable burden for them to uproot their families whenever they change jobs, if those jobs happen to take them to a different locality. When they do not undertake this burden they are living "away from home" [5] for the duration of the term of the jobs.[6]

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[4] The Court's opinion does not reach this question because it decides the case on a ground not raised by the respondent. See note 6, *infra*. Instead it affirms the Court of Appeals decision as relying on a factual determination. The Court of Appeals reversed the Tax Court because it thought the latter tribunal had unwarrantedly extended the "exception" to the *Flowers* case for expenses while "temporarily" away from home. Both courts agreed that taxpayers were away from their actual homes, but the Court of Appeals thought the absence of such duration precluded a deduction. Nowhere in the statute or in *Flowers* is a distinction made between "temporary" and "indefinite" absences from home, and in fact such a distinction improperly emphasizes duration of the absence as the determinative factor in deciding where the taxpayer's "home" actually is.

[5] This definition of "home" will not permit any taxpayer who lives apart from his family to deduct his maintenance expenses, no matter what the nature of his trade or his employer's business. If the ex-

[*Footnote 6 is on p. 63.*]

We have, then, not a question of fact which should be resolved below rather than here. We have a mixed question of law and fact. The facts will turn largely on the resolution of the question of law. The error below was mainly in assuming (albeit silently) a narrow construction of the statutory term "home."

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penses are necessary and appropriate to neither the employer's business nor the employee's trade, they are personal expenses under § 24 (a) (1) (§ 262 of the 1954 Internal Revenue Code). And of course the facts may show that a taxpayer has in fact abandoned his original "home" as his principal place of residence.

[6] The *Flowers* case does not hold, as the Court suggests, that the deduction is necessarily unavailable if not required by the exigencies of the *employer's* business. In that case a traveling expense deduction was denied a lawyer employed by a railroad who chose to maintain his home in Jackson, Mississippi, although, as the Court found, the permanent place of his business was in Mobile, Alabama. The Court held the expenses of traveling between Jackson and Mobile were not appropriate or necessary to the railroad's business. In the present case, however, the expenses incurred were necessary, not to the business of the contractor for whom the taxpayers worked, but for the taxpayers themselves in order to carry on their chosen trade. *Flowers* did not decide that, because expenses are not required by the employer's business, they can never be justified as necessary to the employee's trade. The Government does not here contend that the expenses were nondeductible because inappropriate to the trade or business of the employer, the ground of decision in *Flowers*. Such a contention was not assigned as a reason for disallowance of the deduction nor presented to the courts below.

CALIFORNIA *v.* WASHINGTON.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

No. 12, Original. Argued October 15–16, 1958.—Decided November 10, 1958.

Motion for leave to file bill of complaint denied.

Wallace Howland, Assistant Attorney General of California, argued the cause for plaintiff. With him on the brief were *Edmund G. Brown,* Attorney General, and *Leonard M. Sperry, Jr.,* Deputy Attorney General.

John J. O'Connell, Attorney General of Washington, and *Thomas R. Garlington* argued the cause for defendant. With them on the brief was *Franklin K. Thorp,* Assistant Attorney General.

Louis J. Lefkowitz, Attorney General, and *Paxton Blair,* Solicitor General, filed a brief for the State of New York, as *amicus curiae,* in support of the position taken by the plaintiff in its complaint.

PER CURIAM.

The motion for leave to file bill of complaint is denied. U. S. Const., Amend. XXI, § 2; *Indianapolis Brewing Co.* v. *Liquor Control Commission,* 305 U. S. 391; *Joseph S. Finch & Co.* v. *McKittrick,* 305 U. S. 395; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401; *State Board of California* v. *Young's Market Co.,* 299 U. S. 59.

HINKLE, ADMINISTRATRIX, ET AL. *v.* NEW ENGLAND MUTUAL INSURANCE COMPANY OF BOSTON, MASSACHUSETTS.

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

No. 28. Argued October 15, 1958.—Decided November 10, 1958.

Writ of certiorari dismissed as improvidently granted.
Reported below: 248 F. 2d 879.

Leland S. Forrest argued the cause and filed a brief for petitioners.

Phineas M. Henry argued the cause for respondent. With him on the brief was *Vincent V. R. Booth.*

PER CURIAM.

The writ of certiorari in this case is dismissed as improvidently granted. See *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387; *Estate of Spiegel* v. *Commissioner of Internal Revenue,* 335 U. S. 701, 707–708; *General Box Co.* v. *United States,* 351 U. S. 159, 165.

UNITED STATES *v.* HULLEY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 300. Decided November 10, 1958.

Certiorari granted; judgment reversed; and case remanded.
Reported below: 102 So. 2d 599.

Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott and *George F. Lynch* for the United States.

H. Leighton Thomas and *Ronald A. Capone* for respondents.

PER CURIAM.

The petition for writ of certiorari in this case is granted and judgment reversed and remanded to the Supreme Court of Florida. See *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47; *United States* v. *Gilbert Associates,* 345 U. S. 361; *United States* v. *New Britain,* 347 U. S. 81; *United States* v. *Acri,* 348 U. S. 211; *United States* v. *Liverpool & London Ins. Co.,* 348 U. S. 215; *United States* v. *Scovil,* 348 U. S. 218; *United States* v. *Colotta,* 350 U. S. 808; *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010; *United States* v. *Vorreiter,* 355 U. S. 15.

GULFPORT FARM & PASTURE CO. *v.* HANCOCK BANK.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 390. Decided November 10, 1958.

Appeal dismissed and certiorari denied.
Reported below: 232 Miss. 289, 98 So. 2d 862.

Edward I. Jones for appellant.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

LATHAM *v.* ECKLE, SUPERINTENDENT, LONDON PRISON FARM.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 190, Misc. Decided November 10, 1958.

Appeal dismissed and certiorari denied.
Reported below: 168 Ohio St. 14, 150 N. E. 2d 857.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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

BOSTON & MAINE RAILROAD ET AL. *v.* UNITED STATES ET AL.

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

No. 310. Decided November 17, 1958.*

In a suit to set aside an order of the Interstate Commerce Commission declaring that *per diem* rates charged by all railroads for the rental of freight cars to other railroads were not in excess of reasonable compensation, the District Court held that the Commission had adjudicatory jurisdiction under § 5 (d) of the Administrative Procedure Act to issue such an order; but it set aside the order and remanded the matter to the Commission for further proceedings, on the ground that the Commission had erred in rejecting, without more thorough investigation and more detailed findings, another method of compensation urged by some railroads as being more equitable. *Held:*

1. The appeal in No. 310 prematurely presented for decision the question whether the Commission had adjudicatory jurisdiction to determine a rate of uniform application throughout the industry or whether such a rate could be fixed only through the exercise of its rule-making power under § 1 (14) (a) of the Interstate Commerce Act; and the appeal is dismissed without prejudice to raising that issue again, if it survives further Commission proceedings. Pp. 69–72.

2. This also requires dismissal of the appeal in No. 322, which challenged the scope of the District Court's review. P. 72.

162 F. Supp. 289, appeal dismissed.

Carl E. Newton and *William T. Griffin* for the Boston & Maine Railroad et al., *Richard Swan Buell* for the New Jersey & New York Railroad Co. et al., and *Otto M. Buerger* for the Long Island Rail Road Co., appellants in No. 310. Of counsel was *Theodore S. Hope, Jr.*

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*Together with No. 322, *Chicago, Burlington & Quincy Railroad Co. et al.* v. *Boston & Maine Railroad et al.*, also on appeal from the same Court.

S. R. Brittingham, Jr., F. E. Baukhages, Hewitt Biaett, R. R. Bongartz, S. G. Boxley, R. D. Brooks, G. L. Buland, Martin L. Cassell, M. L. Countryman, Jr., E. S. Davis, Rowland L. Davis, Tom M. Davis, J. P. Fishwick, E. D. Grinnell, Jr., W. L. Grubbs, W. R. McDowell, R. K. Merrill, M. A. Meyer, Jr., Leo H. Pou, W. C. Purnell, J. F. Reilly, A. C. Scott, M. C. Smith, Frank Vesper, Toll R. Ware and *E. J. Zoll, Jr.* for appellants in No. 322, and the Chicago, Burlington & Quincy Railroad Co. et al., appellees in No. 310.

Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane and *I. K. Hay* for the United States and the Interstate Commerce Commission, appellees.

PER CURIAM.

These cases concern the range of the Interstate Commerce Commission's power over rates for car hire in railroading. Because they predominantly originate freight, long-haul trunk-line railroads own most of the freight cars in the industry. Short-haul terminal railroads, on the other hand, mainly terminate freight; to avoid needless duplication, they hire the cars of the long-haul roads rather than replace them with their own. The compensation to be paid for use of another's cars has, for the most part, been fixed by the railroads themselves, originally in terms of the mileage which borrowed cars traveled over the using road, later in the form of a flat *per diem* rate. Since September 1, 1947, the amount of the *per diem* has been adjusted in accordance with an agreement prepared by the Association of American Railroads (AAR). Prior to this litigation, the rates so established were followed by railroads generally, signers and nonsigners of the agreement alike.

In March 1951 the New York, Susquehanna & Western Railroad announced that it would no longer comply with

the then applicable *per diem*. Other terminal roads soon followed suit. In response, nineteen Class I long-haul roads filed a complaint with the Commission against five short-haul roads of the same Class and six short-line roads in Classes II and III. Additional roads intervening on one side or the other brought the total number involved to just over one hundred.

The complainants specifically declined to invoke the Commission's recognized rule-making power over car-hire rates conferred by § 1 (14)(a) of the Interstate Commerce Act, 40 Stat. 101, as amended, 41 Stat. 476, 49 U. S. C. § 1 (14)(a). Instead, they asked the Commission to declare that the various *per diems* in effect since November 1, 1949, were just and reasonable and that the public interest required uniform observance of those rates by all members of the industry. Relying on the power to issue declaratory orders granted by § 5 (d) of the Administrative Procedure Act, 60 Stat. 240, 5 U. S. C. § 1004 (d), the Commission held each *per diem* not in excess of reasonable compensation. Accordingly, it entered an order discontinuing the proceeding.

The terminal roads then brought an action before a statutory three-judge District Court to have this order set aside. As the court below noted, the effect of the Commission's action was "to require the respondent [terminal] carriers, and, indeed, as a practical matter all others, to pay the charges for car-use found to be reasonably compensatory . . . ." 162 F. Supp. 289, 292–293, n. 4. The terminal roads contended that determination of a uniform rate to be applied throughout the industry was beyond the Commission's adjudicatory jurisdiction and lay exclusively within its § 1 (14)(a) rule-making power.

This contention, which forms the basis of the appeal in No. 310, was rejected by the District Court, one judge dissenting. Nonetheless, that court set aside the Com-

mission's order on the merits. It pointed out that the Commission had erred in considering the repairs, depreciation and "car day divisor" components of the *per diem.* But it rested decision on the Commission's summary rejection of an alternative method of compensation, which would introduce a mileage factor into the *per diem,* advocated by certain of the terminal roads. In the Commission's view, that plan like the other "suggested plans for varying per diem charges could not be put into effect without an extensive investigation either by this Commission or by the A. A. R. The facts and arguments here presented are not persuasive that plans of this kind are desirable." 297 I. C. C. 291, 296. The District Court, on the other hand, thought the mileage factor approach had much to recommend it on its face and ruled:

> "In advance of a more thorough study we do not see the basis for the Commission's broad conclusion that the plan is both impractical and undesirable. To perform our function in the face of the persuasive evidence that the plan is both desirable and feasible we must have at least some inkling of the basis for the Commission's general conclusions to the contrary. In short we think the Commission erred in brushing aside a matter of such importance to so many vital links in our transportation system with little more than a casual wave of the hand." 162 F. Supp., at 298.

In its memorandum before this Court, the Commission has expressed its readiness to "proceed in accordance with the terms of the remand." As a result, we find the question raised by No. 310—whether the Commission has adjudicatory jurisdiction to determine a rate of uniform application throughout the industry or must engage in what the District Court characterized as the "full scale investigation" accompanying promulgation of a rule

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under § 1 (14)(a)—prematurely presented for decision. The Commission here recognizes that "further investigation" and "more detailed findings" will be requisite to compliance with the District Court's remand. Should such proceedings lead the Commission to reconsider its estimate of the desirability of a *per diem* embracing a mileage factor, the result might well be not a declaration that the present *per diem* is just and reasonable but the establishment of a new rate. If, conversely, the Commission adheres to its original view, it will be in the light of new findings derived from its further investigation. In either event, the proceedings on remand may lose the characteristics of a § 5 (d) declaration and take on those of a § 1 (14)(a) rule-making procedure, thereby causing the question now sought to be reviewed to disappear. As the Commission has appropriately observed, the record now presents what is essentially only "an interim ruling."

These considerations lead us to dismiss the appeal in No. 310 without prejudice to raising the "adjudicatory" issue again, if it survives the further Commission proceedings. This also disposes of No. 322, which is a cross appeal by the long-haul roads challenging the scope of the District Court's review.

It is so ordered.

COULTER ET AL. *v.* ANTHONY ET AL.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 291. Decided November 17, 1958.

Appeal dismissed and certiorari denied.

Reported below: 228 Ark. 192, 308 S. W. 2d 445.

U. A. Gentry for appellants.

J. E. Gaughan for 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.

HAWKINS *v.* UNITED STATES.

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

No. 20. Argued October 14, 1958.—Decided November 24, 1958.

At petitioner's trial in a Federal District Court in which he was convicted of violating the Mann Act, 18 U. S. C. § 2421, by transporting a girl from Arkansas to Oklahoma for immoral purposes, his wife was permitted to testify against him over his objection. *Held:* Though the wife did not object to testifying, admission of her testimony over his objection was error. Pp. 74–81.

(a) Though Congress or this Court, by decision or under its rule-making power, can change or modify the rule where reason or experience dictates, and some specific exceptions have been made, this Court is not now prepared to abandon so much of the old common-law rule as forbade one spouse to testify against the other over the latter's objection. Pp. 75–79.

(b) On the record in this case, it cannot be said that the wife's testimony did not have substantial influence on the jury, and its admission was not harmless error. Pp. 79–81.

249 F. 2d 735, reversed.

Kenneth R. King and *Byron Tunnell* argued the cause and filed a brief for petitioner.

Kirby W. Patterson argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was convicted and sentenced to five years imprisonment by a United States District Court in Oklahoma on a charge that he violated the Mann Act, 18 U. S. C. § 2421, by transporting a girl from Arkansas to Oklahoma for immoral purposes. Over petitioner's objection the District Court permitted the Government

to use his wife as a witness against him.[1] Relying on *Yoder* v. *United States,* 80 F. 2d 665, the Court of Appeals for the Tenth Circuit held that this was not error. 249 F. 2d 735. As other Courts of Appeals have followed a long-standing rule of evidence which bars a husband or wife from testifying against his or her spouse,[2] we granted certiorari. 355 U. S. 925.

The common-law rule, accepted at an early date as controlling in this country, was that husband and wife were incompetent as witnesses for or against each other. The rule rested mainly on a desire to foster peace in the family and on a general unwillingness to use testimony of witnesses tempted by strong self-interest to testify falsely. Since a defendant was barred as a witness in his own behalf because of interest, it was quite natural to bar his spouse in view of the prevailing legal fiction that husband and wife were one person. See 1 Coke, Commentary upon Littleton (19th ed. 1832), 6. b. The rule yielded to exceptions in certain types of cases, however. Thus, this Court in *Stein* v. *Bowman,* 13 Pet. 209, while recognizing the "general rule that neither a husband nor wife can be a witness for or against the other," noted that the rule does not apply "where the husband commits an offence against the person of his wife." 13 Pet., at 221. But the Court emphasized that no exception left spouses free to testify for or against each other merely because they so desired. 13 Pet., at 223.[3]

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[1] While the wife had been placed under bond to appear in District Court, she offered no objection in court to testifying against her husband.

[2] See, *e. g., Paul* v. *United States,* 79 F. 2d 561 (C. A. 3d Cir.); *Brunner* v. *United States,* 168 F. 2d 281 (C. A. 6th Cir.); *United States* v. *Walker,* 176 F. 2d 564 (C. A. 2d Cir.).

[3] *Stein* v. *Bowman* was a civil action involving testimony of a wife about conversations she had with her husband. The opinion shows, however, that the Court was concerned with the broader question here involved.

Aside from slight variations in application, and despite many critical comments, the rule stated in *Stein* v. *Bowman* was followed by this and other federal courts until 1933 when this Court decided *Funk* v. *United States,* 290 U. S. 371.[4] That case rejected the phase of the common-law rule which excluded testimony by spouses *for* each other. The Court recognized that the basic reason underlying this exclusion of evidence had been the practice of disqualifying witnesses with a personal interest in the outcome of a case. Widespread disqualifications because of interest, however, had long since been abolished both in this country and in England in accordance with the modern trend which permitted interested witnesses to testify and left it for the jury to assess their credibility. Certainly, since defendants were uniformly allowed to testify in their own behalf, there was no longer a good reason to prevent them from using their spouses as witnesses. With the original reason for barring favorable testimony of spouses gone the Court concluded that this aspect of the old rule should go too.

The *Funk* case, however, did not criticize the phase of the common-law rule which allowed either spouse to exclude adverse testimony by the other, but left this question open to further scrutiny. 290 U. S., at 373; *Griffin* v. *United States,* 336 U. S. 704, 714–715. More recently, Congress has confirmed the authority asserted by this Court in *Funk* to determine admissibility of evidence under the "principles of the common law as they

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[4] See, *e. g., Miles* v. *United States,* 103 U. S. 304; *Graves* v. *United States,* 150 U. S. 118; *Jin Fuey Moy* v. *United States,* 254 U. S. 189. Compare *Benson* v. *United States,* 146 U. S. 325, 331–333. For criticism of the rule, see 7 Bentham, Rationale of Judicial Evidence (Bowring ed. 1843), 480–486; 2 Wigmore, Evidence (3d ed. 1940), §§ 600–620; 8 *id.,* §§ 2227–2245; Hutchins and Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675.

may be interpreted . . . in the light of reason and experience." Fed. Rules Crim. Proc., 26. The Government does not here suggest that authority, reason or experience requires us wholly to reject the old rule forbidding one spouse to testify against the other. It does ask that we modify the rule so that while a husband or wife will not be compelled to testify against the other, either will be free to do so voluntarily. Nothing in this Court's cases supports such a distinction between compelled and voluntary testimony, and it was emphatically rejected in *Stein* v. *Bowman, supra,* a leading American statement of the basic principles on which the rule rests. 13 Pet., at 223. Consequently, if we are to modify the rule as the Government urges, we must look to experience and reason, not to authority.

While the rule forbidding testimony of one spouse *for* the other was supported by reasons which time and changing legal practices had undermined, we are not prepared to say the same about the rule barring testimony of one spouse *against* the other. The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now. Moreover, it is difficult to see how family harmony is less disturbed by a wife's voluntary testimony against her husband than by her compelled testimony. In truth, it seems probable that much more bitterness would be engendered by voluntary testimony than by that which is compelled. But the Government argues that the fact a husband or wife testifies against the other voluntarily is strong indication that the marriage is already gone. Doubtless this is often true. But not all marital flare-ups in which one spouse wants to hurt the other are permanent. The widespread

success achieved by courts throughout the country in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.

Of course, cases can be pointed out in which this exclusionary rule has worked apparent injustice. But Congress or this Court, by decision or under its rule-making power, 18 U. S. C. § 3771, can change or modify the rule where circumstances or further experience dictates. In fact, specific changes have been made from time to time. Over the years the rule has evolved from the common-law absolute disqualification to a rule which bars the testimony of one spouse against the other unless both consent. See *Stein* v. *Bowman, supra; Funk* v. *United States, supra; Benson* v. *United States,* 146 U. S. 325, 331–333; *United States* v. *Mitchell,* 137 F. 2d 1006, 1008. In 1887 Congress enabled either spouse to testify in prosecutions against the other for bigamy, polygamy or unlawful cohabitation. 24 Stat. 635. See *Miles* v. *United States,* 103 U. S. 304, 315–316. Similarly, in 1917, and again in 1952, Congress made wives and husbands competent to testify against each other in prosecutions for importing aliens for immoral purposes. 39 Stat. 878 (1917), re-enacted as 66 Stat. 230, 8 U. S. C. § 1328 (1952).

Other jurisdictions have been reluctant to do more than modify the rule. English statutes permit spouses to testify against each other in prosecutions for only certain types of crimes. See Evidence of Spouses in Criminal Cases, 99 Sol. J. 551. And most American States retain the rule, though many provide exceptions in some classes of cases.[5] The limited nature of these exceptions

[5] See 2 Wigmore, Evidence (3d ed. 1940), § 488; 8 *id.*, § 2240; Note, 38 Va. L. Rev. 359, 362–367.

shows there is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences. Under these circumstances we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned. As we have already indicated, however, this decision does not foreclose whatever changes in the rule may eventually be dictated by "reason and experience."

Notwithstanding the error in admitting the wife's testimony, we are urged to affirm the conviction upon the alternative holding of the Court of Appeals that her evidence was harmless to petitioner. See Fed. Rules Crim. Proc., 52 (a). But after examining the record we cannot say that her testimony did not have substantial influence on the jury. See *Kotteakos* v. *United States,* 328 U. S. 750, 764–765. Interstate transportation of the prosecutrix between Arkansas and Oklahoma was conceded, and the only factual issue in the case was whether petitioner's dominant purpose in making the trip was to facilitate her practice of prostitution in Tulsa, Oklahoma.[6]

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[6] The Mann Act, 18 U. S. C. § 2421, provides: "Whoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . .

. . . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

In construing this Act, we have held: "The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes. . . . An intention that the women or girls shall engage in the conduct outlawed by § 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct

The prosecutrix testified that petitioner agreed to take her to Tulsa where she could earn money by working as a prostitute with a woman called "Jane Wilson." Petitioner denied any intention on his part that the prosecutrix engage in such activity and testified, in effect, that her transportation was only an accommodation incidental to a business trip he was making to Oklahoma City, Oklahoma. Petitioner's dominant purpose for the trip was thus a sharply contested issue of fact which, on the evidence in the record, the jury could have resolved either way depending largely on whether it believed the prosecutrix or the petitioner. The Government placed "Jane Wilson" on the stand. In response to questions by the Assistant United States Attorney she swore that she was petitioner's wife and that she was a prostitute at the time petitioner took the prosecutrix to Tulsa. Not wholly satisfied with this testimony the prosecutor brought out for the first time on redirect examination that "Jane Wilson" had been a prostitute before she married petitioner. The mere presence of a wife as a witness against her husband in a case of this kind would most likely impress jurors adversely. When to this there is added her sworn testimony that she was a prostitute both before and after marriage we cannot be sure that her evidence, though in part cumulative, did not tip the scales against petitioner on the close and vital issue of whether his prime motivation in making the interstate trip was immoral. See *Krulewitch* v. *United States,* 336 U. S. 440, 444–445. At

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during or following the journey is insufficient to subject the transporter to the penalties of the Act.

. . . . . .

". . . What Congress has outlawed by the Mann Act . . . is the use of interstate commerce as a calculated means for effectuating sexual immorality." *Mortensen* v. *United States,* 322 U. S. 369, 374–375. See *Cleveland* v. *United States,* 329 U. S. 14, 19–20. Cf. *Hansen* v. *Haff,* 291 U. S. 559, 563.

least, use of the wife's testimony was a strong suggestion to the jury that petitioner was probably the kind of man to whom such a purpose would have been perfectly natural.

Reversed.

MR. JUSTICE STEWART, concurring.

The rule of evidence we are here asked to re-examine has been called a "sentimental relic." [1] It was born of two concepts long since rejected: that a criminal defendant was incompetent to testify in his own case, and that in law husband and wife were one. What thus began as a disqualification of either spouse from testifying at all yielded gradually to the policy of admitting all relevant evidence, until it has now become simply a privilege of the criminal defendant to prevent his spouse from testifying against him. Compare *Stein* v. *Bowman,* 13 Pet. 209; *Wolfle* v. *United States,* 291 U. S. 7, 14; *Funk* v. *United States,* 290 U. S. 371.[2]

Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny.[3] Surely "reason and experience" require that we do more than indulge in mere

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[1] See Comment, Rule 23 (2) of the Uniform Rules of Evidence.

[2] We are not dealing here with the quite different aspect of the marital privilege covering confidential communications between husband and wife. See *Wolfle* v. *United States,* 291 U. S. 7.

[3] Apparently some nineteen States have either abolished or substantially modified this privilege. See Note, 38 Va. L. Rev. 359, 365. In England the process has been a selective one, accomplished by legislation. See Evidence of Spouses in Criminal Cases, 99 Sol. J. 551. In 1938, the American Bar Association's Committee on Improvements in the Law of Evidence favored the abolition of the privilege on the part of the accused, 63 A. B. A. Rep. 595.

assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquillity.[4]

In the present case, however, the Government does not argue that this testimonial privilege should be wholly withdrawn. We are asked only to hold that the privilege is that of the witness and not the accused. Under such a rule the defendant in a criminal case could not prevent his wife from testifying against him, but she could not be compelled to do so.

A primary difficulty with the Government's contention is that this is hardly the case in which to advance it. A supplemental record filed subsequent to the oral argu-

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[4] The facts in the present case illustrate how unrealistic the Court's basic assumption may be. At the time of the acts complained of the petitioner's wife was living apart from him under an assumed name. At the time she testified they were also living apart. In his testimony the petitioner referred to her as his "ex-wife," explaining when his counsel corrected him that he and his wife had never lived together very much.

Before assuming that a change in the present rule would work such a wholesale disruption of domestic felicity as the Court's opinion implies, it would be helpful to know the experience in those jurisdictions where the rule has been abandoned or modified. It would be helpful also to have the benefit of the views of those in the federal system most qualified by actual experience with the operation of the present rule—the district judges and members of the practicing bar. The Judicial Conferences of the several Circuits would provide appropriate forums for imparting that kind of experience. 28 U. S. C. § 333.

It is obvious, however, that all the data necessary for an intelligent formulation "in the light of reason and experience" could never be provided in a single litigated case. This points to the wisdom of establishing a continuing body to study and recommend uniform rules of evidence for the federal courts, as proposed by at least two of the Circuit Judicial Conferences. See Annual Report of the Proceedings of the Judicial Conference of the United States, September 18–20, 1957, p. 43. See Joiner, Uniform Rules of Evidence for the Federal Courts. 20 F. R. D. 429.

ment shows that before "Jane Wilson" testified, she had been imprisoned as a material witness and released under $3,000 bond conditioned upon her appearance in court as a witness for the United States. These circumstances are hardly consistent with the theory that her testimony was voluntary. Moreover, they serve to emphasize that the rule advanced by the Government would not, as it argues, create "a standard which has the great advantage of simplicity." On the contrary, such a rule would be difficult to administer and easy to abuse. Seldom would it be a simple matter to determine whether the spouse's testimony were really voluntary, since there would often be ways to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent. Upon the present record, and as the issues have been presented to us, I therefore concur in the Court's decision.

FEDERAL HOUSING ADMINISTRATION *v.* THE DARLINGTON, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 13. Argued October 13, 1958.—Decided November 24, 1958.

Under § 608 of the National Housing Act and the regulations thereunder, appellee in 1949 obtained Federal Housing Administration insurance of its loan to finance the construction of an apartment house. Both before and after enactment of the Housing Act of 1954, providing specifically that the intent of the National Housing Act has been and is to exclude the use of such housing for transient or hotel purposes, appellee rented a few of the apartments to transients. Its right to do so was challenged by appellant. Appellee sued for a declaratory judgment that, so long as it operates its property "principally" for residential use, keeps apartments available for extended tenancies, and complies with the terms of the Act in existence at the time it obtained the insurance, it is entitled to rent to transients. *Held:*

1. Though there was no express provision on the point in the Act or regulations when appellee's mortgage was insured in 1949, the purpose of the Act, its administrative construction, and the meaning which a later Congress ascribed to it lead to the conclusion that appellee then had no right to rent to transients. Pp. 87–90.

2. The 1954 Act, prohibiting rental to transients by any insured mortgagor of multifamily housing, is not unconstitutional as applied to a mortgagor who obtained insurance before its enactment. Pp. 90–92.

154 F. Supp. 411, reversed.

Alan S. Rosenthal argued the cause for appellant. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Doub.*

J. C. Long argued the cause for appellee. With him on the brief were *W. Turner Logan* and *Heman H. Higgins, Jr.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves a construction of § 608 of the National Housing Act, 56 Stat. 303, 12 U. S. C. § 1743, as amended by § 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214, and the Regulations issued thereunder. The aim of the Act as stated in § 608 (b)(2) is to provide housing for veterans of World War II and their immediate families. That end is to be achieved by authorizing the Federal Housing Administration to insure mortgages covering those projects. § 608 (a). Mortgagors, eligible for insurance, are to be approved by the agency, which is empowered to require them "to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation." § 608 (b)(1).

Appellee is a South Carolina corporation formed in 1949 to obtain FHA mortgage insurance for an apartment house to be constructed in Charleston. The insurance issued and the apartment was completed. The Regulations, promulgated under the Act (24 CFR § 280 *et seq.*), provide that the mortgaged property shall be "designed principally for residential use, conforming to standards satisfactory to the Commissioner, and consisting of not less than eight (8) rentable dwelling units on one site . . . ." § 280.34. The Regulations further provide:

> "No charge shall be made by the mortgagor for the accommodations offered by the project in excess of a rental schedule to be filed with the Commissioner and approved by him or his duly constituted representative prior to the opening of the project for rental, which schedule shall be based upon a maximum average rental fixed prior to the insurance of the mortgage, and shall not thereafter be changed

except upon application of the mortgagor to, and the written approval of the change by, the Commissioner." § 280.30 (a).

Veterans and their families are given preference in the rentals; and discrimination against families with children is prohibited. § 280.24.

Appellee submitted to FHA its schedule of monthly rates for its different types of apartments. No schedule of rates for transients was supplied. Indeed there was no representation to FHA that any of the apartments would be furnished. But an affiliate of appellee without FHA knowledge furnished a number of apartments; and some were leased to transients on a daily basis at rentals never submitted to nor approved by FHA, part of the rental going to the affiliate as "furniture rental." Though appellee, as required by the Regulations (§ 280.30 (f)), made reports to FHA, it made no disclosure to the agency that it had either furnished some apartments or rented them to transients. But it continued to rent furnished apartments to transients both before and after 1954 when § 513 was added to the Act. 68 Stat. 610, 12 U. S. C. (Supp. V) § 1731b. The new section contained in subsection (a) the following declaration of congressional purpose:

"The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding." And see H. R. Rep. No. 1429, 83d Cong., 2d Sess., p. 17; S. Rep. No. 1472, 83d Cong., 2d Sess., p. 31.[1]

[1] The Act provides that, except for certain exceptions not relevant here, no new or existing multifamily housing with respect to which

Appellee persisted in its rental of space to transients. Appellant FHA persisted in maintaining that the practice was not authorized. In 1955 appellee brought this suit for a declaratory judgment that so long as it operates its property "principally" for residential use, keeps apartments available for extended tenancies, and complies with the terms of the Act in existence at the time it obtained the insurance, it is entitled to rent to transients. The District Court gave appellee substantially the relief which it demanded. 142 F. Supp. 341. On appeal, we remanded the cause for consideration by a three-judge court pursuant to 28 U. S. C. § 2282. 352 U. S. 977. On the remand a three-judge court adopted the earlier findings and conclusions of the single judge, 154 F. Supp. 411, attaching however certain conditions to the decree unnecessary to discuss here. It held that rental to transients was not barred by § 608 and that § 513 (a) as applied to respondent was unconstitutional. The case is here on direct appeal. 28 U. S. C. § 1253.

We take a different view. We do not think the Act gave mortgagors the right to rent to transients. There is no express provision one way or the other; but the limitation seems fairly implied. We deal with legislation passed to aid veterans and their families,[2] not with a law to promote the hotel or motel business. To be sure, the Regulations speak of property "designed principally for residential use" (§ 280.34)—words that by themselves would not preclude transient rentals. But those words,

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a mortgage is insured by the FHA shall be operated for transient purposes. § 513 (b). The Commissioner is authorized to define "rental for transient or hotel purposes" but in any event rental for any period less than 30 days constitutes rental for such purposes. § 513 (e).

[2] S. Rep. No. 1130, 79th Cong., 2d Sess.; H. R. Rep. No. 1580, 79th Cong., 2d Sess.

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as the Senate Report on the 1954 Amendment indicates,[3] were evidently used so as not to preclude some commercial rentals. Moreover, the Regulation goes on to describe the property that is insured as "dwelling units." *Id.* The word "dwelling" in common parlance means a permanent residence. A person can of course take up permanent residence even in a motel or hotel. But those who come for a night or so have not chosen it as a settled abode. Yet the idea of permanency pervades the concept of "dwelling." That was the construction given to § 608 by FHA in 1947 when it issued its book Planning Rental Housing Projects. "Housing" was there interpreted to mean "dwelling quarters for families—quarters which offer complete facilities for family life." There again the quality of permanency is implicit.[4] And if the

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[3] S. Rep. No. 1472, 83d Cong., 2d Sess., p. 31, states:

"Your committee does not believe the spirit of this intent is violated by the operation of a commercial establishment included to serve the needs of families residing in rental projects operated as permanent residential housing projects (as distinguished from those operated to provide transient accommodations) but it firmly believes that the operation of such establishments should not be conducted in such a manner as to convert the use of all or any portion of the housing units in the project from permanent, residential use to a project furnishing transient accommodations. . . ."

[4] The same tone is exhibited in the Committee Reports on the various amendments to § 608. For instance, in reporting the Veterans' Emergency Housing Act of 1946 the Senate Committee on Banking and Currency stated:

"Since a main purpose of these provisions [authorizations of additional insurance] is to reduce the risks assumed by builders in order to encourage a large volume of *housing,* the committee calls special attention to the fact that this portion of the bill places emphasis upon *rental housing.* It is the specific intent of the committee that those in charge of the program shall make every reasonable effort to obtain a substantial volume of *rental housing*—or in any event *housing* held for rental during the emergency—through the operation of title VI, both with respect to multifamily units and individual

provisions of appellee's charter are deemed relevant, it is not without interest to note the requirement that "Dwelling accommodations of the corporation shall be rented at a maximum average rental per room per month. . . ." Again the focus is on permanency.

In 1946 FHA made provisions in its application forms for estimates of annual operating expenses of the project. None of the expenses incident to transient accommodations—such as linen supply and cleaning expenses—were listed. Once more we may infer that the insurance program was not designed in aid of transients.

In a letter to field offices in 1951 explaining the criteria to be considered in passing on rent schedules and methods of operation, the FHA instructed them to: ". . . bear in mind that the objective of this Administration is the production of housing designed for occupancy of a relatively permanent nature and that transient occupancy is contrary to policy. No approval will be granted with respect to a proposal anticipating transient occupancy." That interpretation of the Act is clear and unambiguous, and, taken with the Regulations, indicates that the authority charged with administration of the statute construed it to bar rental to transients.

Moreover, as already mentioned, prior approval by FHA of all rental schedules was always required by § 280.30 of the Regulations and appellee never obtained nor sought approval of a schedule of rents for transients.

It is true that FHA felt it had the authority to approve rental schedules for transients. It gave such approval in

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units. While home ownership is to be encouraged, a large percentage of veterans do not yet possess the certainty of income or of location, or the financial means, to purchase homes at this time. The bill as approved by the House of Representatives included this attention to *rental housing*." S. Rep. No. 1130, 79th Cong., 2d Sess., p. 8. (Italics added.)

a dozen or more instances where it felt the public interest required it. We need not stop to inquire whether FHA had that authority.[5] We have said enough to indicate that no right or privilege to rent to transients is expressly included in the Act nor fairly implied. The contemporaneous construction of the Act by the agency entrusted with its administration is squarely to the contrary. In circumstances no more ambiguous than the present we have allowed contemporaneous administrative construction to carry the day against doubts that might exist from a reading of the bare words of a statute. See *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315. When Congress passed the 1954 Amendment, it accepted the construction of the prior Act which bars rentals to transients. Subsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction. See *United States* v. *Stafoff*, 260 U. S. 477, 480; *Sioux Tribe* v. *United States*, 316 U. S. 317, 329–330. The purpose of the Act, its administrative construction, and the meaning which a later Congress ascribed to it all point to the conclusion that the housing business to be benefited by FHA insurance did not include rental to transients.

If the question be less clear and free from doubt than we think, it is still one that lies in the periphery where vested rights do not attach. If we take as our starting point what the Court said in the *Sinking-Fund Cases*, 99 U. S. 700, 718—"Every possible presumption is in favor of the validity of a statute, and this continues until

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[5] The 1954 Amendment expressly gave FHA that power in certain limited situations. See § 513 (b).

the contrary is shown beyond a rational doubt"—we do not see how it can be said that the 1954 Act is unconstitutional as applied. Appellee is not penalized for anything it did in the past. The new Act applies prospectively only. So there is no possible due process issue on that score. As stated in *Fleming* v. *Rhodes,* 331 U. S. 100, 107, "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts." [6]

Moreover, one has to look long and hard to find even a semblance of a contractual right rising to the dignity of the one involved in *Lynch* v. *United States,* 292 U. S. 571. The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning. Congress by the 1954 Act was doing no more than protecting the regulatory system which it had designed. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end. Cf. *Veix* v. *Sixth Ward Assn.,* 310 U. S. 32; *Keefe* v. *Clark,* 322 U. S. 393. Invocation

[6] In *Fleming* a landlord had obtained a judgment of eviction in a state court prior to the enactment of the Price Control Extension Act, under which the Administrator had promulgated rules prohibiting removal of the tenants from the leased premises on the grounds asserted by the landlord. It was held that the landlord could be enjoined from evicting the tenants under the state judgment, as any "vested" rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power.

of the Due Process Clause to protect the rights asserted here would make the ghost of *Lochner* v. *New York*, 198 U. S. 45, walk again.

Reversed.

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

MR. JUSTICE FRANKFURTER, dissenting.

Here we have not the application of some broad, generalized legal conception, either of a statutory nature, like "restraint of trade" in the Sherman Law, or a constitutional provision, like "due process of law" or "the equal protection of the laws." Such conceptions do not carry contemporaneous fixity. By their very nature they imply a process of unfolding content.

Our immediate problem is quite different. The pre-1954 Housing Act does not leave us at large for judicial application of a generalized legislative policy in light of developing circumstances. The pre-1954 statute deals with a particularized problem in a particularized way. It presents the usual question of statutory construction where language is not clear enough to preclude human ingenuity from creating ambiguity. It is outside the judicial function to add to the scope of legislation. The task is imaginatively to extrapolate the contemporaneous answer that the Legislature would have given to an unconsidered question; here, whether rentals to transients were totally prohibited. It was not until 1954 that the Congress did deal with the question of the right of apartment-house owners to rent even a small number of apartments to transients without even remotely seeking to evade or to disadvantage the interests of veterans in whose behalf the Government, through the Federal Housing Administration, insured the mortgages of private owners. The opinions of the District Court and my

brother HARLAN seem to me compelling on the construction of the pre-1954 legislation.

This brings me to the validity of the 1954 enactment which presents for me a much more difficult question than that of the problem of statutory construction just considered. This is so because of the very weighty presumption of constitutionality that I deem it essential to attribute to any Act of Congress. This case falls between such cases sustaining the retroactive validity of legislation adversely affecting an existing interest as *Paramino Co.* v. *Marshall,* 309 U. S. 370, and *Fleming* v. *Rhodes,* 331 U. S. 100, on the one hand, and *Lynch* v. *United States,* 292 U. S. 571, on the other. While, to be sure, differentiation between "remedy" and "right" takes us into treacherous territory, the difference is not meaningless. The two earlier cases cited may fairly be deemed to sustain retroactive remedial modifications even though they affect existing "rights," while the *Lynch* case is a clear instance of the complete wiping out of what Mr. Justice Brandeis, in his opinion for the Court, called "vested rights." 292 U. S., at 577. Insofar as the 1954 Act applied to the earlier Darlington mortgage, it did not completely wipe out "vested rights." But on the proper construction of § 608, in the circumstances found by the District Court and not here challenged, the unavoidable application of the 1954 Act to the Darlington mortgage did substantially impair the "vested rights" of respondent. I would be less than respecting the full import of the *Lynch* case did I not apply it to the present situation.

Accordingly, I join MR. JUSTICE HARLAN'S opinion.

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

The question in this case is whether appellee Darlington is entitled to rent to transients (that is, so far as this case

is concerned, for periods of less than 30 days) a small number of apartments in its building, which is covered by a mortgage insured by the FHA. Darlington's FHA mortgage was consummated and insured in December 1949. At that time neither the controlling statute, § 608 of the National Housing Act, 56 Stat. 303, as amended, 12 U. S. C. § 1743, nor the regulations issued thereunder, 24 CFR § 280 *et seq.*, contained any provision prohibiting rentals to transients. Such provisions are found for the first time in § 513 of the Housing Act of 1954, 68 Stat. 610, 12 U. S. C. (Supp. V) § 1731b, passed some five years after this mortgage was made.

A three-judge District Court, largely adopting the findings and conclusions of the single district judge before whom this case was originally heard, held that as the law stood in 1949, when the mortgage here involved was issued, Darlington was not forbidden to make *occasional* transient rentals, and that the Federal Housing Administrator may not now prohibit such rentals since that would involve an unconstitutional retroactive application of the relevant provisions of the Housing Act of 1954.[1] This

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[1] The opinion of the district judge who first heard this case is reported at 142 F. Supp. 341. Subsequent references to the decision below are to that opinion.

The three-judge District Court's opinion is reported at 154 F. Supp. 411. Its decree imposed on Darlington (plaintiff) the following conditions:

"(a) The plaintiff shall not lease, or make available for leasing, for terms of less than thirty days more than 15% of the total number of apartments in the project.

"(b) The plaintiff shall not increase its schedule of rents and charges now in effect for rentals of apartments for less than thirty days and for furnishings and other incidentals offered or supplied in connection therewith.

"(c) The plaintiff shall not advertise itself as a 'hotel', nor shall it through the use of any advertising medium, the circulation of letters, the maintenance of signs, or otherwise solicit the business of

Court now holds that under the statute and regulations as they stood in 1949 Darlington was never entitled to make *any* transient rentals, and that in any event the prohibitory provisions of the 1954 Act may be applied to prevent such rentals. From these holdings I must dissent.

In construing the earlier statute the Court, in my opinion, has proceeded on an erroneous premise. The Court holds that "no right or privilege to rent to transients is expressly included in the [pre-1954] Act nor fairly implied." In my view, however, the true issue is not whether the statute under which Darlington's mortgage was insured *gave* the right to an FHA-insured mortgagor to make such rentals, but rather whether it *prohibited* such a mortgagor from making them. Given this as the issue, it seems to me that the record is compelling against the Court's conclusion as to § 608, that the provisions of the 1954 Act cannot be applied to one in Darlington's position, and that the decision below was clearly right.

1. As already noted, § 608 and the regulations implementing it were barren of any provision excluding rentals to transients at the time Darlington's mortgage was insured by the FHA.

2. The District Court found that (1) Darlington's rentals to transients even at the height of Charleston's transient season constituted no more than ten percent of the building's total available occupancy; (2) "no person entitled to priority has ever been rejected, and no one desiring so-called 'permanent' occupancy of an apart-

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transients for less than thirty days occupancy, or advise the general public of its willingness to provide accommodations for transients for periods of less than thirty days occupancy.

"(d) The plaintiff shall not provide occupants of its project with food or beverage room service, or maintain regular bell boy service."

The District Court retained jurisdiction of the cause for the purpose of effectuating its decree.

ment has been required to wait any time to obtain same"; and (3) Darlington "does not advertise as a hotel, has no license as such, and no signs appear indicating its willingness to accept transients." 142 F. Supp., at 349. According the utmost effect to the conceded purpose of § 608 to provide housing for World War II veterans and their families, and to the recitals in the regulations to the effect that property subject to FHA mortgages shall be "designed *principally* for residential use" (italics supplied), I am unable to understand why Darlington's practices, as found by the lower court, should be regarded as violative of either the letter or spirit of these statutory or regulatory provisions. Not until the passage of the 1954 Act do we find any suggestion that the words "designed principally for residential use" were, in the language of the Court, "evidently used so as not to preclude some commercial [as distinguished from transient] rentals."

3. As the FHA conceded and the District Court found, nothing in Darlington's charter, bylaws, mortgage, or mortgage note, all of which were subject to the FHA's advance approval, expressly restricted its right "to lease apartments in its project for periods of less than thirty (30) days." The only period of rental limitation appearing in any of these instruments was the following, contained in Darlington's charter: "Dwelling accommodations of the [appellee] shall not be rented for a period in excess of three years . . . ." 142 F. Supp., at 346. It is too much to attribute to the word "dwelling," as the Court now in effect does, an implied prohibition of less-than-30-days rentals.

4. The FHA had in a number of instances before 1954 actually given specific approval to less-than-30-days rentals by insured mortgagors where veteran demand for housing had fallen off, and when in 1955 Darlington inquired of the FHA the basis of its position that less-than-

30-days rentals by such mortgagors were not permissible the agency simply referred appellee to the provisions of the Housing Act of 1954. These events conclusively show that the Housing Administration did not construe the statute or regulations before 1954 to prohibit transient rentals altogether.

5. There is nothing in this record to indicate that Darlington was engaged in any kind of a scheme to subvert the purposes of this federal housing legislation. Its occasional transient rentals seem to have been nothing more than an effort to plug the gap in its revenues left by a falling off of the demand for long-term apartment space, and do not depict a *sub rosa* hotel operation.

Upon these undisputed facts, which are reinforced by other factors detailed in the two opinions below, I can find no basis for impugning the soundness of the District Court's holding that under the law as it existed at the time Darlington embarked upon this project nothing prohibited it from making the occasional transient rentals shown by this record. The 1954 Act was new, and not merely confirmatory, legislation.

Hence I consider that the FHA's position in this case must stand or fall on whether the less-than-30-days rental provision of the 1954 Act, which in terms applies to mortgagors insured before as well as after the Act's effective date (see 12 U. S. C. (Supp. V) § 1731b (b)), can be given application to Darlington to increase the obligations assumed by it under its 1949 contract with the United States. I do not think it can. As the District Court correctly put it: "When the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." 142 F. Supp., at 351. See *Lynch* v. *United States,* 292 U. S. 571; *Sinking-Fund Cases,* 99 U. S. 700, 718. What was said in the *Lynch* case as to contracts of war-risk insurance applies

here: "As Congress had the power . . . to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power." 292 U. S., at 579. I do not understand the Housing Administration to contend that the United States possesses general regulatory power over appellee outside the contractual relationship, and the Court has pointed to no such "paramount power" by which the imposition of the 1954 Act's prohibitions might be justified in this case. Under these circumstances I see no reason for disregarding the principles set forth in the cases cited, particularly when the District Court with ample justification found that "the 1954 Act is designed to afford relief for private interests, as distinguished from public purposes . . . ." 142 F. Supp., at 353.[2] Indeed the Court's treatment of this case seems to reinforce my view about the 1954 Act; else why all this straining to bring the matter under the pre-1954 statute?

I would affirm.

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[2] This fact is demonstrated by the rather unusual provision of the 1954 Act which gives hotel operators and owners the right to seek federal court injunctions against violations of the transient rental prohibition of the statute. 68 Stat. 611, 12 U. S. C. (Supp. V) § 1731b (i). See also the testimony of Arthur J. Packard and Earl M. Johnson, respectively Chairman of the Board and Treasurer of the American Hotel Association, before the congressional committees considering the bills which became the Housing Act of 1954. Hearings before the Senate Committee on Banking and Currency, 83d Cong., 2d Sess., on S. 2889, S. 2938, S. 2949, pp. 654–661; Hearings before the House Committee on Banking and Currency, 83d Cong., 2d Sess., on H. R. 7839, pp. 507–515.

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL. *v.* LEEDOM, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL.

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

No. 21. Argued November 10, 1958.—Decided November 24, 1958.

Dismissal by the National Labor Relations Board of petitioners' representation petition, on the sole ground of the Board's long-established policy of not asserting jurisdiction over the hotel industry as a class, was beyond the Board's power.

101 U. S. App. D. C. 414, 249 F. 2d 506, reversed and case remanded.

J. W. Brown argued the cause for petitioners. With him on the brief were *Ben Gettler* and *Jonas B. Katz.*

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

Thomas F. Daly and *Charles W. Merritt* filed a brief for the American Hotel Association, as *amicus curiae,* urging affirmance.

PER CURIAM.

We believe that dismissal of the representation petition on the sole ground of the Board's "long standing policy not to exercise jurisdiction over the hotel industry" as a class, is contrary to the principles expressed in *Office Employes* v. *Labor Board,* 353 U. S. 313, 318–320 (1957). The judgment is therefore reversed and the case remanded to the Court of Appeals for proceedings not inconsistent herewith.

EAGLE LION STUDIOS, INC., ET AL. *v.* LOEW'S INC. ET AL.

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

No. 17. Argued November 10, 12, 1958.—
Decided November 24, 1958.

248 F. 2d 438, affirmed by an equally divided Court.

William L. McGovern argued the cause for petitioners. With him on the brief were *Norman Diamond, Abe Krash* and *Seymour Krieger.*

S. Hazard Gillespie, Jr. argued the cause for Loew's Incorporated, respondent. With him on the brief was *Henry L. King.*

Edward C. Raftery argued the cause for RKO Theatres, Inc., et al., respondents. With him on the brief was *George A. Raftery.*

Oscar H. Davis, then Acting Solicitor General, *Assistant Attorney General Hansen* and *Henry Geller* filed a brief for the United States, as *amicus curiae.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

SHUTTLESWORTH ET AL. *v.* BIRMINGHAM BOARD OF EDUCATION OF JEFFERSON COUNTY, ALABAMA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 341. Decided November 24, 1958.

Judgment affirmed upon the limited grounds on which the District Court rested its decision.

Reported below: 162 F. Supp. 372.

James M. Nabrit, Jr., for appellants.

Ormond Somerville, Reid B. Barnes and *Jos. F. Johnston* for appellee.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the District Court rested its decision. 162 F. Supp. 372, 384.

GIVENS *v.* WEST VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 22, Misc. Decided November 24, 1958.

Appeal dismissed and certiorari denied.

Appellant *pro se*.

W. W. Barron, Attorney General of West Virginia, and *Fred H. Caplan* and *George H. Mitchell,* Assistant Attorneys General, for appellee.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Syllabus.

UNITED GAS PIPE LINE CO. *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL.

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

No. 23. Argued October 20–21, 1958.—Decided December 8, 1958.*

A natural gas pipeline company regulated under the Natural Gas Act supplies gas to a number of distributing companies under long-term service agreements filed with the Federal Power Commission which were construed by the Commission as obligating the purchasers to pay for the gas during the terms of the agreements not at a single specified rate but at the pipeline company's "going" rates as established from time to time in accordance with the procedures prescribed by the Act. *Held:* Under agreements so providing, nothing in the Natural Gas Act prevents the pipeline company, without further agreement with the purchasers, from changing its rates by filing new schedules under § 4 (d) of the Act, subject to review by the Commission under § 4 (e). Pp. 104–116.

(a) *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, distinguished. Pp. 109–111.

(b) The procedures prescribed by § 4 (d) and § 4 (e) are not limited to instances where the parties have mutually agreed upon specific new rates. Pp. 111–114.

(c) The Commission correctly determined the meaning of the service agreements here involved. Pp. 114–115.

(d) Nothing in the agreements here involved, as interpreted to permit the pipeline company to change its rates under § 4 (d) and § 4 (e) procedures, is hostile to any of the provisions or purposes of the Act. P. 115.

102 U. S. App. D. C. 77, 250 F. 2d 402, reversed.

Ralph M. Carson argued the causes for petitioners in Nos. 23 and 26. With him on the brief for petitioner in No. 23 were *Thomas Fletcher, C. Huffman Lewis, Morton*

*Together with No. 25, *Federal Power Commission* v. *Memphis Light, Gas and Water Division et al.*, and No. 26, *Texas Gas Transmission Corp. et al.* v. *Memphis Light, Gas and Water Division et al.*, also on certiorari to the same Court.

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E. Yohalem and *James J. Higginson.* On the brief for petitioners in No. 26 were *John T. Cahill* for the Texas Gas Transmission Corporation, *William S. Tarver* for the Southern Natural Gas Co., and *Richard J. Connor* and *Daniel James,* of counsel.

Solicitor General Rankin argued the cause for the Federal Power Commission. With him on the brief were *Willard W. Gatchell* and *William W. Ross.*

George E. Morrow and *Reuben Goldberg* argued the causes and filed a brief for the Memphis Light, Gas and Water Division et al., respondents.

Briefs of *amici curiae* urging affirmance in Nos. 23, 25 and 26 were filed by *Everett C. McKeage* for the State of California et al., *Joe T. Patterson,* Attorney General, and *Wade H. Creekmore,* Assistant Attorney General, for the State of Mississippi, *George F. McCanless,* Attorney General, and *Allison B. Humphreys,* Solicitor General, for the State of Tennessee, *Stewart G. Honeck,* Attorney General, and *Roy G. Tulane,* Assistant Attorney General, for the State of Wisconsin, *John J. O'Connell,* Attorney General, and *Frank P. Hayes,* Assistant Attorney General, for the State of Washington, *Garner W. Green* for the City of Hattiesburg, Mississippi, and *Roger Arnebergh, John C. Banks, Peter Campbell Brown, J. Elliott Drinard, Marshall F. Hurley, J. Frank McKenna, John C. Melaniphy, Charles S. Rhyne* and *J. Parker Connor* for the Member Municipalities of the National Institute of Municipal Law Officers.

MR. JUSTICE HARLAN delivered the opinion of the Court.

We review a judgment of the Court of Appeals for the District of Columbia Circuit which directed the Federal Power Commission to reject certain rate schedules for

natural gas filed with it by petitioner United Gas Pipe Line Company (United) under § 4 (d) of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*

United, a regulated natural gas pipeline company, supplies gas to Texas Gas Transmission Corporation (Texas Gas), Southern Natural Gas Company (Southern Gas), and Mississippi Valley Gas Company (Mississippi),[1] under a number of long-term service agreements made and filed with the Commission prior to September 30, 1955, each of which contains the following pricing provision: [2]

> "All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [the appropriate rate schedule designation is inserted here], *or any effective superseding rate schedules,* on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof." (Italics supplied.)

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[1] Mississippi, a natural gas distributing company, also purchases gas from Texas Gas and Southern Gas. Respondent Memphis Light, Gas and Water Division, an agency of the City of Memphis engaged in the distribution of natural gas, purchases gas from Texas Gas, and has no direct contract relations with United. However, it is obligated to reimburse Texas Gas for any increase in the latter's cost of gas acquired from United.

[2] Originally there were seven such agreements, of which five contained the provision quoted in the text. However, the other two were found by the Commission, and assumed by the Court of Appeals, to contain the equivalent of that provision, and one of the two was replaced by a superseding agreement explicitly containing the provision very shortly after the filing here at issue.

On September 30, 1955, United, proceeding under § 4 (d) of the Natural Gas Act, filed with the Commission new rate schedules, together with supporting data, increasing its prices for gas as of November 1, 1955, by amounts estimated to yield total additional annual revenues of $9,978,000 from sales under the agreements here involved and from other sales also subject to the Commission's jurisdiction. Exercising its powers under § 4 (e) of the Act, the Commission ordered a hearing as to the propriety of the new rates, and, except as to those relating to sales of gas for resale for industrial use only, suspended their effectiveness from November 1, 1955, to April 1, 1956, the maximum period of suspension authorized by the statute.[3] Thereafter Texas Gas, Southern Gas, Mis-

[3] Sections 4 (d) and 4 (e) of the National Gas Act read as follows:

§ 4 (d): "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such [filed] rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

§ 4 (e): "Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or

sissippi, Memphis, and others claiming an interest in the proceedings were permitted to intervene, and on February 6, 1956, the Commission commenced the taking of evidence as to the lawfulness of United's new rates under the "just and reasonable" standard of § 4 (e).

On February 27, 1956, this Court announced its decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, in which it was held that United could not escape a contract obligation to furnish Mobile with natural gas at a single specified price for a term of

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service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

The Commission did not suspend the rates applicable to sales for resale for industrial use only, as it has always taken the view that under the statute it is without power to suspend the effectiveness of these rates.

years by unilaterally filing an increased rate schedule under § 4 (d) of the Natural Gas Act. Following that decision the respondents in the present case for the first time moved the Commission to reject United's new rate schedules, claiming that their filing constituted an attempt on the part of United to change unilaterally the terms of its service agreements with Texas Gas, Southern, and Mississippi, and that such an attempt ran afoul of our decision in *Mobile*. Construing these agreements as in effect constituting undertakings by the purchasers to pay United's "going" rates, as established from time to time in accordance with the procedures prescribed by the Natural Gas Act, the Commission refused to reject United's filings. It distinguished *Mobile* on the ground that the contract there involved specified a single fixed rate for the gas to be supplied under it which United was contractually foreclosed from changing without the agreement of the purchaser. 16 F. P. C. 19, 15 P. U. R. 3d 279.

The Court of Appeals reversed. Accepting for the purposes of its decision the Commission's interpretation of United's service agreements, the Court of Appeals held that nonetheless the Commission lacked "jurisdiction" to consider under § 4 (e) the lawfulness of United's new rate schedules. The court regarded *Mobile* as establishing that § 4 (e) applies only to rate changes whose *specific amount* has been mutually agreed upon between a seller and purchaser, and that where a purchaser has not so agreed, a rate change can be effected only by action of the Commission under § 5 (a) of the Act.[4] Since the rates

[4] § 5 (a): "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or

set forth in United's new schedules had not been agreed to by its customers, the Court of Appeals therefore held that the Commission had no jurisdiction to proceed under § 4 (e) to examine them, and that accordingly United's filings under § 4 (d) should have been rejected. 102 U. S. App. D. C. 77, 250 F. 2d 402. We granted certiorari because of the claim that the Court of Appeals misinterpreted our decision in *Mobile,* and on the suggestion that its judgment seriously frustrates the proper administration of the Natural Gas Act. 355 U. S. 938.

It is apparent that the Court of Appeals misconceived the import of our decision in *Mobile.* The contract before the Court in that case required United to furnish natural gas to Mobile at a single fixed price of 10.7 cents per MCF (thousand cubic feet) for a period of 10 years. The contract contained no provision for any different rate, or for changing the agreed rate during the term of the agreement. It was argued by United that the Natural Gas Act gave it the right to abrogate this unqualified contract obligation and increase at will its price of gas to Mobile by filing new rate schedules under § 4 (d), subject only to the Commission's approval of such schedules under § 4 (e). In rejecting that contention this Court held that the Natural Gas Act, unlike the Interstate Commerce Act, "evinces no purpose to abrogate private

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that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

rate contracts as such," that the Act did not "empower natural gas companies to change their contracts unilaterally," and that in this respect regulated natural gas companies stood in no different position under the Act than they would have in the absence of the Act. 350 U. S., at 338, 340, 343. Since United had contractually bound itself to furnish gas to Mobile throughout the contract term at a particular price, we held that its obligation could be abrogated only by the Commission, in the exercise of its paramount regulatory authority under § 5 (a). *Ibid.*, at 344–345.

The United contract now before us, as construed by the Federal Power Commission and as viewed by the Court of Appeals for the purposes of decision, is vitally different from that in *Mobile*. On this view of the contract United bound itself to furnish gas to these customers during the life of the agreements *not* at a single fixed rate, as in *Mobile*, but at what in effect amounted to its current "going" rate. Contractually this left United free to change its rates from time to time, subject, of course, to the procedures and limitations of the Natural Gas Act. In such circumstances there is nothing in *Mobile* which suggests that United was not entitled to file its new schedules under § 4 (d), or that the Commission had no jurisdiction to consider them under § 4 (e). On the contrary we said in *Mobile* (350 U. S., at 343):

> ". . . except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. No more is necessary to give full meaning to all the provisions of the Act: consistent

> with this, § 4 (d) means simply that *no* change—neither a unilateral change to an *ex parte* rate nor an agreed-upon change to a contract—can be made by a natural gas company without the proper notice to the Commission. . . ."

The Court of Appeals therefore erred in reading *Mobile* as limiting the procedures prescribed by § 4 (d) and (e) to instances where the parties by mutual agreement had "reformed" a rate contract. The reason these procedures were unavailable to United in *Mobile* was because the company had bargained away by contract the right to change its rates unilaterally, and not because § 4 does not apply to such rate changes whether made pursuant to or in the absence of a contract.

Moreover, we find nothing in the scheme of the Natural Gas Act which would justify the restrictive application which the Court of Appeals' decision gives to § 4 (d) and (e). Section 4 (c) requires every natural gas company initially to file with the Commission its rates for any "sale subject to the jurisdiction of the Commission, . . . together with all contracts which in any manner affect or relate to such rates . . . ." Section 4 (d) provides for the giving of notice of any change "in any such rate . . . or contract relating thereto . . ." by filing new rate schedules with the Commission and keeping them open for public inspection.[5] And § 4 (e) authorizes Commission review of the lawfulness of any such changed rate.[6] The record before us affirmatively shows that United in the filings here at issue has complied with all the duties which these sections in terms impose upon it, and there is nothing in these sections which even remotely implies that § 4 (d) and (e) procedures are applicable to

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[5] See note 3, *supra*.

[6] See note 3, *supra*.

the filing and review of only those rate changes whose amount has been agreed upon by the seller and buyer.[7]

The important and indeed decisive difference between this case and *Mobile* is that in *Mobile* one party to a contract was asserting that the Natural Gas Act somehow gave it the right unilaterally to abrogate its contractual undertaking, whereas here petitioner seeks simply to assert, in accordance with the procedures specified by the Act, rights expressly reserved to it by contract. *Mobile* makes it plain that "§ 4 (d) on its face indicates no more than that *otherwise valid* changes cannot be put into effect without giving the required notice to the Commission." 350 U. S., at 339–340. (Italics supplied.) The necessary corollary of this proposition is that changes which in fact are "otherwise valid" in the light of the relationship between the parties can be put into effect under § 4 (d) by a seller through giving the required notice to the Commission. *Mobile* expressly notes that in the absence of any contractual relationship rates determined *ex parte* by the seller may be filed under § 4 (d). 350 U. S., at 343. We perceive no tenable basis of dis-

[7] A majority of the court below thought that such a limitation should be imported into the Act to fend against "debilitating Section 5 (a)" by making it possible for a seller to reserve by contract the right to avoid "the delay and the more stringent proof requirements of Section 5 (a)" through utilizing § 4 procedures. 102 U. S. App. D. C., at 82, note 3, 250 F. 2d, at 407, note 3. Apart from the fact that this approach seems to assume a negative answer to the very question at issue—whether Congress intended that natural gas companies should be permitted, so far as the statute is concerned, to file rate changes under § 4 (d) without securing prior customer agreement to the changed rate—it may be pointed out that the Commission appears consistently to have viewed the proof requirements under §§ 4 (e) and 5 (a) as equally "stringent." See FPC, Thirty-fifth Annual Report (1955), at 106; Thirty-fourth Annual Report (1954), at 106; Thirty-third Annual Report (1953), at 99.

tinction between the filing of such a rate in the absence of contract and a similar filing under an agreement which explicitly permits it.

Thus *Mobile,* properly understood, affirmatively establishes United's right to proceed under § 4 in the circumstances of this case. As we there said, "The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." 350 U. S., at 343. United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so. The Act comes into play as to rate changes only in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review such changes, and (3) authorizing the Commission, in the case of rates for sales of gas for other than exclusively industrial use, to suspend the new rates for a five-month period and thereafter to require the posting of a refund bond pending a determination of the lawfulness of the rates as changed. (See § 4 (d), (e), at note 3, *supra.*)

It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible. This concern was surely a proper one for Congress

to take into account in framing its regulatory scheme for the natural gas industry, cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603, and we think that it did so not only by preserving the "integrity" of private contractual arrangements for the supply of natural gas, 350 U. S., at 344 (subject of course to any overriding authority of the Commission), but also by providing in § 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review.

What has been said disposes of the question whether anything in the Natural Gas Act forbids a seller to change its rates pursuant to § 4 procedures simply because its customers have not agreed to the amount of the rate as changed. There remains the question whether United's service agreements reserved to it the power to make rate changes in this manner. The Commission found that the agreements so intended, but on its view of the case the Court of Appeals found it unnecessary to decide the question. We think it would be both unnecessary and dilatory for us to remand the case to the Court of Appeals for consideration of that issue, which involves matters peculiarly within the area of the Commission's special competence and as to which we could hardly be aided by a further examination of the record by the Court of Appeals. Indeed neither side suggests such a course, even alternatively, both asking us to decide the case in its present posture.

After scrutinizing the record we are satisfied that the Commission's determination as to the meaning of the service agreements here involved was amply supported both factually and legally. There is no necessity for us to embark upon a detailed discussion of the various contentions made by the parties, none of which appears to have been overlooked or misapprehended by the Commission. It seems sufficient to say that the record shows

that these agreements are typical of the "tariff-and-service" arrangements contemplated by Commission Order No. 144, 18 CFR § 154.1 *et seq.*;[8] that until this case no one connected with the industry seems to have thought that agreements of this sort precluded natural gas companies from changing their rates in accordance with and subject to § 4 (d) and (e) procedures;[9] and that the respondents' present contrary contentions had their sole genesis in a mistaken view of our decision in the *Mobile* case. Beyond this, we find nothing in these agreements, as interpreted by the Federal Power Commission, which is hostile to any of the provisions or purposes of the Natural Gas Act.[10]

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[8] When the Natural Gas Act became law in 1938, natural gas companies were permitted to file their existing sales contracts as rate schedules under § 4 (c). Schedules in this form were extremely lengthy, unwieldy, and otherwise unsatisfactory in that it was most difficult for customers, competitors, and the Commission itself to ascertain whether rates to various customers were unduly discriminatory or otherwise unreasonable. The Commission therefore proposed regulations requiring the conversion of rate contracts into a "tariff-and-service-agreement" system, and these regulations were promulgated in October 1948 as Order No. 144. Under the tariff-and-service-agreement system, the agreement between buyer and seller does not itself contain a price term, but rather refers to rate schedules of general applicability on file with the Commission. It is noteworthy that Order No. 144 expressly contemplates that a seller may reserve the "privilege" of filing rate changes under § 4 of the Act. 18 CFR § 154.38 (d) (3).

[9] Between the date of the *Mobile* decision and that of the court below it appears that only three purchasers of natural gas under service agreements similar to those here involved (one of them Mississippi, a respondent here) moved to dismiss changed rate schedules on the ground that the agreements did not permit their filing, although some 600 such purchasers were affected by rate changes filed during that period.

[10] Respondents argue that the "effective superseding rate" clause of the agreements must be read as referring only to superseding rates established after a § 5 (a) proceeding, because it would be unreason-

For the reasons given we hold that the Court of Appeals was in error in concluding that in the circumstances of this case United could not proceed to change its rates by filing under § 4 (d) of the statute.

Reversed.

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

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

This decision marks, I think, a retreat from our holding in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332. In every case the facts are, of course, different from those in the precedents. But here the dif-

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able to find that the buyer-signatories to the agreements had intended to authorize United to change its "industrial" rates by a § 4 (d) filing in light of the fact that such rates are not subject to suspension and refund under the statute. Apart from the circumstances that (1) United's "industrial" sales under these agreements appear to have been a relatively minor factor; (2) the clause would be entirely superfluous if construed as respondents would have it, since as a matter of law rate changes ordered by the Commission after a § 5 (a) proceeding would have been incorporated into the agreements, *Northern Pacific R. Co.* v. *St. Paul & Tacoma Lumber Co.*, 4 F. 2d 359 (C. A. 9th Cir. 1925), appeal dismissed, 269 U. S. 535; *Market Street R. Co.* v. *Pacific Gas & Electric Co.*, 6 F. 2d 633 (D. C. N. D. Cal. 1925), appeal dismissed, 271 U. S. 691; and (3) the "industrial" rates of United have consistently been below its other rates, the force of respondents' contention is wholly destroyed by the fact that it appears that the buyer-signatories to the agreements are entitled by contract with their customers to pass on any rate increases effected by United. Under these circumstances it can hardly be said to be inconceivable, or even unlikely, that the buyers would have been willing to authorize United to change its "going" rates to them under § 4 (d).

ference does not seem to me to be fundamental. The contract rate in the *Mobile* case which was sought to be changed unilaterally was fixed in a service agreement. Here the contract rate which was changed unilaterally was in the seller's rate schedule on file with the Commission.[1]

I thought the essence of our ruling in the *Mobile* case was in the words: "the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts." 350 U. S., at 344. That was emphasized over and again especially in the discussion of when unilateral and bilateral changes in rates were permissible:

> "to establish *ex parte,* and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." 350 U. S., at 343.

Like the judges of the Court of Appeals, I thought that this meant that all § 4 (d) rates had to be rates agreed upon by the parties to the contract. That is the reason, I thought, why Congress made the control of the Commission over such rates so slight. That the supervision is restricted is evidenced by two elements in § 4 (e): *first,* the Commission can suspend those agreed-

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[1] At the time the contract in *Mobile* was entered into the industry practice was to set rates in the service contracts which were filed with the Commission as the rate schedules. But in 1948 the Commission promulgated Order 144 requiring the conversion of all rate contracts into tariff-and-service agreement form. From that time on rates have not been included in the service contracts; rather, they are included in rate schedules of general applicability on file with the Commission to which reference is made in the individual service agreements. See 18 CFR § 154.1 *et seq.* Hence the difference in the price provision in the contracts involved here from that involved in *Mobile.*

upon changes for no more than five months; *second,* no power of suspension whatsoever is given to rates "for resale for industrial use only." [2]

But now we are told that the requirement of bilateral rate making is satisfied by the provision in the contract that the controlling rate is the "effective" rate and an "effective" rate is one which the selling company alone chooses to fix and file under § 4.

I find insuperable difficulties with that view. The contract does not say that the buyer will consent to any rate increase which the seller may file. It is an agreement to pay whatever may be the "effective" rate; it is not an agreement to the establishment of that new rate. The construction of this tariff is a question of law (see *Great No. R. Co.* v. *Merchants Elev. Co.,* 259 U. S. 285, 290) which we should resolve in light of the regulatory system that Congress has imposed on the industry.

The construction adopted by the Court has dire consequences. It makes a shambles of the Act so far as con-

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[2] Section 4 (e) provides in part:

"Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only . . . ."

sumer interests are concerned; and they are the ones the Act was designed to protect.[3] The ruling sacrifices these interests in the cause of those who exploit this field. Now the regulatory agency is left powerless to prevent a selling company, after the 30-day waiting period, from making consumers pay immediately whatever rate the company fixes. There is power in the Commission to suspend the new rate for five months; but in case of industrial rates even that limited power of suspension is absent. If the Commission should ultimately decide in a § 4 (e) proceeding that the new rates are not just and reasonable, the victory for the consumers may be an illusory one, for administrative difficulties make it doubtful that they will receive the benefit of any refunds.[4] And if the increases are in industrial rates, it appears that the Commission has no authority to require a refund of any unjustified increase collected before its order setting aside the increase. Even when the Commission catches up with the new high rate fixed by the selling company at its will and strikes it down, its action promises to have only a fleeting effect. The pipeline company can now in its unfettered discretion raise the rates again simply by

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[3] See *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610. Protection of the consumer interest was to be done through occupying a field from which the States had been barred. H. R. Rep. No. 709, 75th Cong., 1st Sess., p. 2.

[4] In its 1953 report to Congress the Commission recognized that "the collection of higher rates under bond, while providing protection to the pipeline company against ultimate loss in revenues, is unsatisfactory, burdensome, and presents many difficult problems for the company as well as for the distribution utilities which must pay the higher rates. The problem of distributing impounded funds to consumers in the event that proposed rate increases are denied even in part is time-consuming and expensive." Report, Federal Power Commission, 1953, p. 101.

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filing a new rate; and if it is an industrial rate, it cannot even be suspended.[5]

I would not construe the Act so as to produce such destructive consequences. I would allow the § 4 rates to embrace only the "rates agreed upon" by the pipeline and the customer, as we stated in the *Mobile* case, applying § 5 to all other cases. I fear that our failure to do so turns the real regulation over to the pipeline companies. I cannot imagine that the Congress that passed this Act envisaged any such tragic result for consumers; and we are not driven to it by unambiguous terms of the Act.

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[5] As stated by the State of Washington, *amicus curiae*, "By the legally available expedient of filing another schedule of increased rates under § 4 (d), any relief obtained by a Commission order after review could be effectively nullified 30 days after it was obtained."

UNITED STATES *v.* A & P TRUCKING CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 32. Argued October 20, 1958.—Decided December 8, 1958.

A partnership may be prosecuted as an entity under § 222 (a) of the Motor Carrier Act for "knowingly and willfully" violating certification requirements and motor carrier regulations of the Interstate Commerce Commission and under 18 U. S. C. § 835 for "knowingly" violating regulations for the safe transportation in interstate commerce of explosives and other dangerous articles. Pp. 121–127.

(a) The words "knowingly and willfully" in § 222 (a) and the word "knowingly" in § 835 do not eliminate partnerships from the coverage of these statutes. Pp. 125–126.

(b) A partnership can violate each of these statutes quite apart from the participation and knowledge of the partners as individuals. Pp. 126–127.

Reversed.

Ralph S. Spritzer argued the cause for the United States. With him on the brief were *Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit.*

Anthony J. Cioffi argued the cause for appellees. With him on the brief was *August W. Heckman.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case raises issues similar to those involved in *United States* v. *American Freightways Co.*, 352 U. S. 1020, where a dismissal of an information charging a partnership entity with violations of 18 U. S. C. § 835 was affirmed by an equally divided Court.

Appellees, two partnerships, were charged, as entities, in separate informations with violations of 18 U. S. C. § 835, which makes it criminal knowingly to violate Inter-

state Commerce Commission regulations for the safe transportation in interstate commerce of "explosives and other dangerous articles." Appellee A & P Trucking Company was also charged with numerous violations of 49 U. S. C. § 322 (a) (§ 222 (a) of the Motor Carrier Act of 1935).[1] The District Court dismissed, on motion, the informations on the ground that a partnership entity cannot be guilty of violating the statutes involved. The Government appealed directly to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731, and we noted probable jurisdiction. 356 U. S. 917. For reasons set forth below we hold that the informations were erroneously dismissed.

49 U. S. C. § 322 (a), the comprehensive misdemeanor provision of the Motor Carrier Act, provides that "any person knowingly and willfully violating any provision of this chapter [Part II of the Interstate Commerce

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[1] The information as to appellee A & P Trucking Company charged in one count an offense under 18 U. S. C. § 835 through the transportation by truck of chromic acid without the markings or placardings prescribed by 49 CFR § 77.823 (a). It charged in 34 other counts offenses under 49 U. S. C. § 322 (a), consisting of failure to comply with 49 CFR § 191.8, which prescribes physical examinations and certificates for drivers of trucks (one count), violation of 49 CFR, 1958 Cum. Pocket Supp., § 193.95 (a), which requires that common-carrier trucks be equipped with fire extinguishers (one count), and violation of 49 U. S. C. § 306 (a), which forbids the operation of a common-carrier truck in interstate commerce without a certificate of convenience and necessity (32 counts). The information as to appellee Hopla Trucking Company charged two violations of 18 U. S. C. § 835, in that Hopla shipped methanol, a flammable liquid, without properly marking or placarding the truck as required by 49 CFR § 77.823 (a), and without its driver having in his possession a paper showing the prescribed labels required for the outside containers of the methanol as required by 49 CFR § 77.817.

Subsequent to the filing of the information against A & P Trucking Company, 49 U. S. C. § 322 (a) was amended to increase the fines provided for its violation. See 49 U. S. C. (Supp. V) § 322 (a).

Act], or any rule, regulation, requirement, or order [of the Interstate Commerce Commission] thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined . . . ." The Motor Carrier Act also contains its own definition of the word "person": "The term 'person' means any individual, firm, *copartnership,* corporation, company, association, or joint-stock association; . . . ." (Italics supplied.) 49 U. S. C. § 303 (a).

18 U. S. C. § 835 provides that "whoever knowingly violates any such regulation [ICC regulations pertaining to the safe transport of dangerous articles] shall be fined not more than $1,000 or imprisoned not more than one year, or both; . . . ." The section makes such regulations binding on "all common carriers" engaged in interstate commerce. And 1 U. S. C. § 1, part of a chapter entitled "Rules of Construction" and in light of which § 835 must be read, provides that "in determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, *partnerships,* societies, and joint stock companies, as well as individuals; . . . ." (Italics supplied.) The word "whoever" in 18 U. S. C. § 835 must, therefore, be construed to include partnerships "unless the context indicates otherwise." [2]

We think that partnerships as entities may be proceeded against under both § 322 (a) and § 835. The pur-

[2] It is significant that the definition of "whoever" in 1 U. S. C. § 1 was first enacted into law as part of the very same statute which enacted into positive law the revised Criminal Code. 62 Stat. 683, 859 (1948). The connection between 1 U. S. C. § 1 and the Criminal Code, which includes § 835, is thus more than a token one, the very same statute which creates the crime admonishing that "whoever" is to be liberally interpreted.

pose of both statutes is clear: to ensure compliance by motor carriers, among others, with safety and other requirements laid down by the Interstate Commerce Commission in the exercise of its statutory duty to regulate the operations of interstate carriers for hire. In the effectuation of this policy it certainly makes no difference whether the carrier which commits the infraction is organized as a corporation, a joint stock company, a partnership, or an individual proprietorship. The mischief is the same, and we think that Congress intended to make the consequences of infraction the same.

True, the common law made a distinction between a corporation and a partnership, deeming the latter not a separate entity for purposes of suit. But the power of Congress to change the common-law rule is not to be doubted. See *United States* v. *Adams Express Co.*, 229 U. S. 381. We think it beyond dispute that it has done so in § 322 (a) for, as we have seen, "person" in that section is expressly defined in the Motor Carrier Act to include partnerships. We think it likewise has done so in § 835, since we find nothing in that section which would justify our not applying to the word "whoever" the definition given it in 1 U. S. C. § 1, which includes partnerships. Section 835 makes regulations promulgated by the ICC for the transportation of dangerous articles binding on *all* common carriers. In view of the fact that many motor carriers are organized as partnerships rather than as corporations, the conclusion is not lightly to be reached that Congress intended that some carriers should not be subject to the full gamut of sanctions provided for infractions of ICC regulations merely because of the form under which they were organized to do business.[3] More particularly, we per-

[3] Congress has specifically included partnerships within the definition of "person" in a large number of regulatory Acts, thus showing its intent to treat partnerships as entities. See, *e. g.*, Civil Aero-

ceive no reason why Congress should have intended to make partnership motor carriers criminally liable for infractions of § 322 (a), but not for violations of § 835.[4]

It is argued that the words "knowingly" (§ 835) and "knowingly and willfully" (§ 322 (a)) by implication eliminate partnerships from the coverage of the statutes, because a partnership, as opposed to its individual partners, cannot so act. But the same inability so to act *in fact* is true, of course, with regard to corporations and other associations; yet it is elementary that such impersonal entities can be guilty of "knowing" or "willful" violations of regulatory statutes through the doctrine of *respondeat superior.* Thus in *United States* v. *Adams Express Co., supra,* in which the Adams Express Co., a joint stock association, was indicted for "wilfully" receiving sums for expressage in excess of its scheduled rates, Mr. Justice Holmes said, at pp. 389–390:

> "It has been notorious for many years that some of the great express companies are organized as joint stock associations, and the reason for the amendment hardly could be seen unless it was intended to bring those associations under the act. As suggested in the argument for the Government, no one, certainly not the defendant, seems to have doubted that the statute now imposes upon them the duty to file schedules of rates. . . . But if it imposes upon them the duties under the words common carrier as interpreted, it is reasonable to suppose that the same

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nautics Act, 52 Stat. 979, 49 U. S. C. § 401 (27); Federal Communications Act, 48 Stat. 1066, 47 U. S. C. § 153 (i); Shipping Act, 39 Stat. 729, 46 U. S. C. § 801; Tariff Act, 46 Stat. 708, 19 U. S. C. § 1401 (d).

[4] The fact that § 835 provides for imprisonment, as well as fine, for its violation, whereas § 322 (a) provides only for fines, does not lead to a different conclusion. Cf. *United States* v. *Union Supply Co.,* 215 U. S. 50.

words are intended to impose upon them the penalty inflicted on common carriers in case those duties are not performed. . . .

"The power of Congress hardly is denied. The constitutionality of the statute as against corporations is established, *New York Central & Hudson River R. R. Co.* v. *United States,* 212 U. S. 481, 492, and no reason is suggested why Congress has not equal power to charge the partnership assets with a liability and to personify the company so far as to collect a fine by a proceeding against it by the company name. That is what we believe that Congress intended to do. . . ."

The policy to be served in this case is the same. The business entity cannot be left free to break the law merely because its owners, stockholders in the *Adams* case, partners in the present one, do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment.[5] Thus pressure is brought on those who own the entity to see to it that their agents abide by the law.[6]

We hold, therefore, that a partnership can violate each of the statutes here in question quite apart from the participation and knowledge of the partners as indi-

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[5] Since the two informations were held insufficient on their face, we must, for present purposes, accept as true their allegations that the offenses charged were not inadvertently committed.

[6] *Gordon* v. *United States,* 347 U. S. 909, relied on by appellees, is not to the contrary. That case held merely that *individual partners* could not be convicted of "willfully" violating the Defense Production Act of 1950 without a showing that they had knowledge of the criminal acts of their agents. Cf. *United States* v. *Dotterweich,* 320 U. S. 277. Here the Government does not seek to hold the individual partners, but only the partnerships as entities.

viduals. The corollary is, of course, that the conviction of a partnership cannot be used to punish the individual partners, who might be completely free of personal guilt. As in the case of corporations, the conviction of the entity can lead only to a fine levied on the firm's assets.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE WHITTAKER concur, dissenting in part.

18 U. S. C. § 835, unlike the Motor Carrier Act, has not explicitly subjected partnerships to criminal liability, and I do not think that such liability should be implied, for we are dealing with a penal statute which should be narrowly construed.

As Chief Justice Marshall wrote in *United States* v. *Wiltberger,* 5 Wheat. 76, 95, "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department."

With that approach we would not allow this criminal sanction to attach under 18 U. S. C. § 835. A corporation is an artificial, legally created entity that can have no "knowledge" itself and is said to have "knowledge" only through its employees. On the other hand a partnership means A, B, and C—the individuals who compose it. In this country the entity theory has not in general been extended to the partnership. Judge Learned Hand summarized the history in *Helvering* v. *Smith,* 90 F. 2d 590, 591–592. If Dean Ames had had his way, the mercantile or entity theory of the partnership would have prevailed. But those who took up the drafting of the Uniform Partnership Act after his death adhered to the common-law attitude toward a partnership—that

it is an aggregation of individuals. That is to say, the Act adopted the aggregate rather than the entity theory. And that Act is in force in about three-fourths of the States. One who combs the reports today can find cases espousing the entity theory. But they are in the minority and consciously reject the other theory. As Professor Williston has shown, the main stream of American partnership law follows the British course of treating the partnership in the pluralistic sense. The Uniform Partnership Act, 63 U. of Pa. L. Rev. 196, 208. We should therefore assume that this criminal statute, written against that background, reflects the conventional aggregate, not the exceptional entity, theory of the partnership.

We are dealing with a statute where liability depends on "culpable intent," as stated in *Boyce Motor Lines, Inc.*, v. *United States*, 342 U. S. 337, 342. The partners could not be held criminally responsible for the acts of their employees. *Gordon* v. *United States*, 347 U. S. 909. The partnership, being no more than the aggregate of the partners, should stand on the same footing, unless Congress explicitly provides otherwise. Title 1 U. S. C. § 1 defines "person" in any Act of Congress to include a partnership, "unless the context indicates otherwise." The context of 18 U. S. C. § 835 does indicate otherwise for the Act punishes only those who knowingly violate it. The aggregate theory of partnership law teaches that there can be no vicarious criminal liability where no partner is culpable.

If the rule of strict construction of a criminal statute is to obtain, 18 U. S. C. § 835 must be read narrowly to reflect the prevailing view of partnership law. If the entity theory is to be applied for the purpose of imposing criminal penalties on partnership assets, where the partners are wholly innocent of any wrongful act, it should be done only on the unequivocal command of Congress, as is the case under the Motor Carrier Act.

UNIVERSAL TRADES, INC., *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT.

No. 434. Decided December 8, 1958.

Appeal dismissed and certiorari denied.

Reported below: 392 Pa. 323, 141 A. 2d 204.

Manuel Kraus and *Roy J. Keefer* for appellant.

Thomas D. McBride, Attorney General of Pennsylvania, and *Edward Friedman,* Deputy Attorney General, for appellee.

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.

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

CILETTI ET AL. *v.* CITY OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

No. 418. Decided December 8, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 392 Pa. 204, 140 A. 2d 98.

Anthony L. Marino, Eugene C. Sloan, Wilbur F. Galbraith and *Miles Warner* for appellants.

Elder W. Marshall, Ernest R. von Starck, J. Wesley Oler and *Meyer Goldfarb* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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

SANDERS *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 214, Misc. Decided December 8, 1958.

Appeal dismissed and certiorari denied.
Reported below: 165 Tex. Cr. R. —, 312 S. W. 2d 640.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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

ULLNER *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 426. Decided December 8, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 167 Ohio St. 521, 150 N. E. 2d 413.

Robert P. Goldman for appellant.

Morton B. Icove filed a brief for the Ohio Civil Liberties Union et al., as *amici curiae,* in support of jurisdiction.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MR. JUSTICE FRANKFURTER and MR. JUSTICE STEWART took no part in the consideration or decision of this case.

VAN NEWKIRK *v.* McNEILL, SUPERINTENDENT, MATTEAWAN STATE HOSPITAL.

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

No. 258, Misc. Decided December 8, 1958.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed.

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

KIDD ET AL. *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 465. Decided December 8, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 167 Ohio St. 521, 150 N. E. 2d 413.

Allen Brown for appellants.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MR. JUSTICE FRANKFURTER and MR. JUSTICE STEWART took no part in the consideration or decision of this case.

LOEBER *v.* CALIFORNIA.

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

No. 260, Misc. Decided December 8, 1958.

Appeal dismissed and certiorari denied.
Reported below: 158 Cal. App. 2d 730, 323 P. 2d 136.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

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

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* FRISCO TRANSPORTATION CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 15. Argued October 13, 1958.—Decided December 15, 1958.*

Under what is now § 5 (2) (b) of the Interstate Commerce Act, the Commission authorized appellee, the wholly owned subsidiary of a railroad, to purchase the operating rights of several independent motor carriers. Each of the Commission's reports authorizing such purchases stated that the approval was subject "to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the railroad . . . ." Thereafter, without notice, hearing or other proceeding for the elimination of this reservation, the Commission issued to appellee certificates of public convenience and necessity which did not contain the reservation of power to impose restrictions. Still later, the Commission reopened the acquisition proceedings and found, after notice and hearing, that the omission of the reservation of such power from the certificates resulted from an inadvertent ministerial error of the Commission's staff, and it ordered that this error be corrected and that certain specified conditions consistent with the reservations be imposed. Appellee sued to have the order set aside. *Held:* The Commission's order is sustained. Pp. 134–146.

(1) On the record in this case, the Commission properly concluded that the omission from the certificates of the reservation of power to impose restrictions was not due to a conscious policy choice on the part of the Commission but resulted from an inadvertent ministerial error on the part of the Commission's staff. Pp. 140–144.

(2) Under § 17 (3) of the Act, the Commission had power to modify the certificates so as to correct these inadvertent ministerial

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*Together with No. 16, *Railway Labor Executives' Association et al.* v. *Frisco Transportation Co.*, and No. 19, *Interstate Commerce Commission* v. *Frisco Transportation Co.*, also on appeals from the same Court.

errors, and such action is not prohibited by § 212, which makes the issuance of a certificate the final step in the administrative process. Pp. 144–146.

153 F. Supp. 572, reversed.

Peter T. Beardsley argued the causes for appellants in Nos. 15 and 16. With him on a brief for appellants in No. 15 were *Gregory M. Rebman* and *Wentworth E. Griffin.*

Carroll J. Donohue, Clarence M. Mulholland, James L. Highsaw, Jr. and *Edward J. Hickey, Jr.* filed a brief for the Railway Labor Executives' Association et al., appellants in No. 16.

Robert W. Ginnane argued the cause for the Interstate Commerce Commission. With him on the brief was *Charlie H. Johns, Jr.*

Ernest D. Grinnell, Jr. argued the causes for appellee. With him on the brief were *James L. Homire, John E. McCullough, Alvin J. Baumann* and *Bernard G. Ostmann.*

Solicitor General Rankin filed a memorandum for the United States.

Mr. Chief Justice Warren delivered the opinion of the Court.

The issue here is whether the Interstate Commerce Commission has the power to modify certificates of public convenience and necessity containing inadvertent errors, and, if so, whether, in the circumstances of these cases, the Commission could modify certificates which had inadvertently authorized the performance of unrestricted motor carrier services by a wholly owned subsidiary of a railroad.

Appellee, a wholly owned subsidiary of the St. Louis-San Francisco Railway Company, is a common carrier by motor vehicle engaged primarily in the transportation of

property in interstate and intrastate commerce. The greater part of appellee's motor carrier system was acquired in 1938 and 1939 by the purchase of existing independent motor carriers. These purchases were made pursuant to the predecessor of § 5 (2)(b) of the Interstate Commerce Act, 49 U. S. C. § 5 (2)(b), which permits the acquisition by a rail carrier of the rights and properties of a motor carrier if the Interstate Commerce Commission finds that the acquisition "will be consistent with the public interest and will enable such [rail] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." [1] In 1938, appellee began seeking permission to operate as a motor carrier over substantial mileage in seven States including routes in issue here. On some of the routes eventually acquired by appellee, the Commission authorized it to carry on unrestricted operations. On others, the Commission imposed restrictions limiting service to points within ten miles of the rail stations of appellee's parent corporation or to transportation of shipments from, to, or through certain cities. In addition, on some routes the Commission imposed additional restrictions to assure that appellee's service would be "auxiliary or supplementary" to the services performed by its corporate parent.[2]

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[1] The Motor Carrier Act of 1935, § 213, 49 Stat. 556, conditioned acquisitions as follows: "*Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of Section 5 (8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

[2] The Commission has long interpreted the language of § 5 (2)(b), quoted above, to confine acquisitions of motor carriers by railroads

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This case concerns four of appellee's routes aggregating some 284 miles. Prior to appellee's purchase, each of the routes was serviced by an independent motor carrier which engaged in unrestricted motor carrier operations. During 1938 and 1939, appellee made application to the Commission for permission to purchase the properties and operating rights of these independent carriers. Finance hearings were held before a Commission examiner to determine whether the acquisitions met the applicable statutory standards. Although appellee sought to continue the acquired carriers' unrestricted operations, it represented to the Commission in each of its applications that acquisition of the carriers would enable it to establish coordinated truck service with the train service of its parent railroad along these routes. A number of motor carriers opposed appellee's applications, but the hearing examiner recommended approval of each, subject to various conditions. Among these was the recommendation that the authority granted be subject "to such further limitations, restrictions, or modifications as the Commission may hereafter find necessary to impose, in order to insure that the service shall be auxiliary or supplementary to the train service of the [parent] railroad, and shall not unduly restrain competition." The protestant motor carriers filed exceptions to the hearing examiner's report on one of the purchases and all went to Division 5 of the Commission for action. It reviewed the reports and adopted the examiner's recommendations including the above-quoted condition. Although appellee had asked for authority to operate unrestricted service, it took no exceptions to the Division reports and did not ask for review by the full Commission. Rather, it notified the Commission that it would consummate the approved pur-

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or their affiliates to operations which are auxiliary or supplementary to the train service of the railroad. See *American Trucking Assns.* v. *United States,* 355 U. S. 141, 148.

chases subject to the terms prescribed, and, within thirty days of the reports, it did consummate the transactions and commence operations.

Thereafter, in 1939, compliance orders issued to appellee in connection with the four routes in question. These informed appellee that certificates of convenience and necessity authorizing it to engage in interstate and foreign commerce as a common carrier according to specifications set forth in the orders would be issued as soon as appellee complied with applicable statutory requirements, including the filing of rate publications and evidence of security for the protection of the public. The specifications in the compliance orders did not include the condition adopted by Division 5 reserving the right to the Commission to take steps to insure that appellee's service would be "auxiliary or supplementary" to its parent's rail services.

In 1941, prior to the issuance of certificates covering the four routes, a complaint was filed by various competing motor carriers which charged that appellee was performing unauthorized motor carrier service which was independent of its parent's rail services. During the course of this proceeding, a number of certificates of convenience and necessity issued to appellee. Those concerning the four routes in question contained no reservations of authority similar to the ones stated in the finance hearing orders issued by Division 5. On August 1, 1944, Division 5 entered findings in that proceeding stating that appellee was performing unauthorized direct motor carrier service which it had not been authorized to perform by the original acquisition orders. The Division further stated that appellee's original authorization had been limited to services "auxiliary or supplementary" to the rail service of its parent. Because appellee had acquired unconditional certificates, however, the Division did not enter an order, but indicated that the acquisition pro-

ceedings would be reopened to determine what, if any, conditions should be imposed in appellee's certificates.[3] Subsequently, the Commission disapproved the Division's findings that appellee had engaged in operations unauthorized by its certificates, but it stated that the conditions, if any, which should be imposed would be considered in the reopened proceedings.[4]

The reopened proceedings commenced on motion of the Division in 1945. All parties to the proceeding were served with an examiner's proposed report based on the records of the Commission. This report stated that the Commission had approved appellee's acquisitions subject to the right to impose conditions to assure that appellee's operations would be auxiliary or supplementary to the rail service of its parent, but that such a reservation inadvertently had been omitted from the certificates issued to appellee. The report proposed specific conditions to effectuate the original purpose of the Commission—*i. e.*, to assure that appellee's services were solely "auxiliary or supplementary."

Appellee filed exceptions to the proposed report and requested hearings. Thereupon, the Division reopened the proceedings for further hearings which were held in 1946, after which the matter was referred to examiners for further appropriate proceedings. In an exhaustive report, the examiners discussed the history of appellee's operations and the circumstances surrounding the issuance of the unconditioned certificates. They concluded that the certificates could not authorize operations broader than those approved by the Commission in the finance proceedings and that the certificates inadvertently had

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[3] *Campbell Sixty-Six Express, Inc.*, v. *Frisco Transportation Co.*, 43 M. C. C. 641.

[4] *Campbell Sixty-Six Express, Inc.*, v. *Frisco Transportation Co.*, 46 M. C. C. 222.

omitted relevant restrictions. The Division, in its report, reviewed the Commission's administrative procedures and practices and pointed out how the error probably had occurred. It showed that certificates are prepared by a staff section of the Commission which, after a prescribed lapse of time from the adoption of reports or orders by the Commission authorizing the issuance of certificates, inserts on mimeographed forms containing stock paragraphs the authority described in the findings of the report. It further stated that, under the Commission rules, this staff section has no discretion to alter anything contained in the reports and is charged with the sole responsibility of transposing the Commission findings into certificate form. Different action, if any, which might be desired can only be taken by the Commission or a Division through a formal supplemental report. The certificates are reviewed by a supervisor, who is also without discretionary authority to make changes, and are then issued. The Division reasoned that as no supplemental report had issued between the conclusion of the finance hearings and the issuance of the certificates, the staff section of certificates obviously had made an inadvertent error in transposing the relevant findings.

The full Commission, after oral argument, stressed another aspect of the matter in affirming the action of the Division. In its view, the findings of the finance proceedings which specifically authorized appellee's purchases, subject to the stated limitations, could not be changed to eliminate such limitations without a formal proceeding at which opponents of the unlimited application could be heard. Each opinion within the Commission thus found that the omission from the certificates of the stated reservations had been due to clerical inadvertence which should be corrected. These corrections were ordered, and in addition specified conditions were imposed consistent with the reservations.

Appellee, dissatisfied with the Commission's final order, commenced an action before a specially convened three-judge District Court to have the order set aside. 28 U. S. C. § 2321 *et seq.* Appellee argued, and a majority of the court concluded, over a dissent of one of its members, that under *United States* v. *Watson Bros. Transportation Co.*, 350 U. S. 927, the Commission was without power to order modification of the unconditional certificates issued to appellee. Further, the court held that the record lacked substantial evidence to support the Commission finding that the relevant restrictions were omitted from the certificates due to inadvertency. 153 F. Supp. 572. We disagree with both of these conclusions.

I.

It is well settled that the Commission has the power to reserve in certificates issued to a rail-affiliated motor carrier the right to impose specific conditions to assure that the carrier's operations will be "auxiliary or supplementary" to the rail services of its affiliate. *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419.[5] In that case a certificate, which contained a reservation similar to the one at question here, was issued in 1941.

The reason for the reservation is obvious. Congress, in § 5 (2)(b) of the Interstate Commerce Act, 49 U. S. C.

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[5] The appellants in Nos. 15 and 16, American Trucking Associations, Inc., and Railway Labor Executives' Association, urge us to hold that the Commission was without power to issue unconditioned certificates to appellee because of the requirements of § 5 (2)(b) and, therefore, the certificates issued to appellee were void. We have not had occasion to rule definitively whether that Section states rigid requirements that operations of rail-affiliated motor carriers be auxiliary or supplementary to train service. Cf. *American Trucking Assns.* v. *United States*, 355 U. S. 141. As resolution of the question is unnecessary for the present decision, we intimate no position with regard to it.

§ 5 (2)(b),[6] has limited the acquisition of motor carrier franchises by rail carriers or their affiliates to situations where the acquisition will enable the rail carrier to use service by motor carrier to public advantage. The Commission has long interpreted this mandate to confine such acquisitions to "operations which are auxiliary or supplementary to train service," at least in the absence of special circumstances which might justify less restricted operations. *American Trucking Assns.* v. *United States,* 355 U. S. 141, 148, n. 8. To accomplish this congressional purpose, the Commission can either state in the certificate the conditions necessary to provide the limitation or reserve the right to impose conditions should the necessity arise. *United States* v. *Rock Island Motor Transit Co., supra.*

Here, as the record shows, appellee sought the right to carry on unrestricted operations over all the routes which it was acquiring. In some instances, the Commission approved unconditioned operations for reasons which do not appear in the record. In others, however, including the four routes here at issue, approval of only conditional service was granted. Such approval was consistent with appellee's representations that acquisition of the routes would enable it to give service which supplemented the operations of its rail-carrier parent. In fact, the limited approval did not appear inconsistent with appellee's plans, for it took no appeal from the Division report adopting the order of the Commission examiner which clearly stated that the Commission reserved the right to impose future conditions. And appellee consummated the proposed purchases within thirty days of the Division report. Undoubtedly, therefore, at the time of the finance proceedings, the Commission authorized limited operations on the routes in question, to which appellee acceded.

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[6] See Motor Carrier Act of 1935, § 213, 49 Stat. 556.

Between two and four years later, the Commission issued certificates to appellee which did not contain the reservation. The question arises, therefore, whether the omission of the restrictions from the certificates was due to a conscious policy choice on the part of the Commission or, as found by it, to error in the administrative process of fashioning the certificates. Certainly a conclusion must be based on one or the other of these alternatives because, as is obvious from the findings of Division 5 as well as the full Commission, the staff section of the Commission which prepared the certificates could not exercise discretion in changing the findings, orders and authorizations contained in the Commission reports.

The majority below concluded that the omissions resulted from a policy change, and that the subsequent reopening of the proceedings and conditioning of the certificates was an attempt to restrict appellee's operation on the basis of newly developed policies. The record does not support this conclusion. The District Court believed it significant that Division 5 only adopted the recommendations of a hearing examiner rather than authoring approval orders of its own. Additionally, the court found special meaning in the fact that one of the certificates issued to appellee contained the relevant reservation while the ones in issue did not.[7] Further, the court viewed the issuance of unrestricted certificates after the commencement of the related carrier proceedings in 1941 as especially important. Viewing these facts, the court refused to accept the majority conclusion of inadvertence.

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[7] The reopened proceedings originally involved six routes. The certificate covering one of these contained a reservation of authority, and conditions imposed in connection with that route are not at issue here. On another route, the Commission's original approval was unconditional as was the certificate issued in connection with it. The Commission has abandoned efforts to impose new conditions on this route.

In our view, however, the Commission conclusion is well supported. First, we see no special significance in the fact that Division 5 adopted, without modification, the hearing examiner's recommendations. Under the practices of the Commission, this is not unusual, see, *e. g.*, 53 M. C. C. 97; 53 M. C. C. 117; 46 M. C. C. 328; and the hearing examiner's report made it clear that appellee's operations were to be circumscribed. Second, there is nothing in the record or in the dissenting opinions of the Commission to indicate that the Commission, or a Division, or any Commissioner instructed the staff to delete the restrictions and increase the scope of appellee's operations. This factor militates strongly in favor of the Commission's conclusion that the reservations inadvertently were omitted, particularly when it would have been improper for the Commission to change its decision without notice to the protestants who had appeared before the hearing examiner in opposition at the original finance proceedings and had taken exception to at least one of the purchases. 49 U. S. C. § 5 (2)(b); 5 U. S. C. § 1004. Cf. *Federal Communications Comm'n* v. *National Broadcasting Co.* (*KOA*), 319 U. S. 239. Third, the issuance of one restricted certificate is not inconsistent with the Commission finding because, had the Commission changed its policies, it likely would have treated the route there involved similarly to the four routes in question. In fact, the issuance of this restricted certificate really supports the conclusion that the others were not issued because of a change of policy. Also, the Commission's exposition of its internal procedures shows how the error could easily have occurred. Finally, as the dissent below points out, at the time these certificates were issued, the staff sections of the Commission normally dealt with certificates authorizing unrestricted service by non-rail-affiliated motor carriers. The certificates issued here were, therefore, unusual, and it is easy to see how the restrictions were

omitted. 153 F. Supp. 572, 578–579. Under all these circumstances, the conclusion of the Commission was compelled by the record.

Appellee complains that the Commission, or at least Division 5, improperly took official notice of the internal administrative practices and procedures of the Commission. The first full exposition of these procedures appeared in the report of Division 5 in the reopened proceedings, although certain of them had been mentioned in the hearing examiners' reports. Appellee claims that the Commission had to disclose these procedures at the hearing so that it would have a chance to rebut unfavorable inferences which might be drawn from them. But we fail to see what prejudice could have accrued from taking official notice of the practices, for appellee had adequate opportunity to rebut inferences drawn from them on its argument to the full Commission. *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515. Particularly is this true where there is no showing that the procedures were misstated to appellee's prejudice. This is not a case like *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, or *United States* v. *Abilene & Southern R. Co.,* 265 U. S. 274, where the "facts" officially noticed were in doubt or controverted or were discussed for the first time in the final decision of the Commission.

II.

The remaining question is whether the Commission has the power to modify certificates issued due to inadvertence. This Court has, on one occasion, reserved this question in a case where it determined that inadvertence was not the reason for the failure to issue a proper certificate. *United States* v. *Seatrain Lines,* 329 U. S. 424. And on another occasion, in affirming the decision of a three-judge court, we ruled that the power, if any, may only be exercised after proper opportunity for notice and

hearing. *United States* v. *Watson Bros. Transportation Co.*, 350 U. S. 927.

It is axiomatic that courts have the power and the duty to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake. *Gagnon* v. *United States*, 193 U. S. 451. Rule 60 (a) of the Federal Rules of Civil Procedure recognizes this power and specifically provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." A similar power is vested in the Interstate Commerce Commission. Section 17 (3) of the Act creating the Commission, 49 U. S. C. § 17 (3), provides that: "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice." This broad enabling statute, in our opinion, authorizes the correction of inadvertent ministerial errors. To hold otherwise would be to say that once an error has occurred the Commission is powerless to take remedial steps. This would not, as Congress provided, "best conduce to the ends of justice." In fact, the presence of authority in administrative officers and tribunals to correct such errors has long been recognized—probably so well recognized that little discussion has ensued in the reported cases. *Bell* v. *Hearne*, 19 How. 252.[8]

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[8] See also Davis, Administrative Law (1951), 600. And the agencies have presumed the existence of such power. See *Kenosha Auto Transport Corporation—Interpretation of Certificate*, 53 M. C. C. 85; *Petroleum Carrier Corp.* v. *R. Q. Black, doing business as Superior Trucking Co.*, 51 M. C. C. 717; *Greyhound Corporation Extension of Operations—Slidell, La.*, 47 M. C. C. 103; *Santa Fe*

Of course, the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies. Such was the case in *United States* v. *Seatrain Lines, supra,* where it was apparent that the Commission had not reopened prior proceedings to correct a mistake in the issuance of a certificate but to execute a subsequently adopted policy. Cf. *Watson Bros. Transportation Co.* v. *United States,* 132 F. Supp. 905 (D. C. Neb.), aff'd 350 U. S. 927. To allow the reopening of proceedings in such a case under the pretext of correction would undercut the obvious purpose of § 212 of the Interstate Commerce Act, 49 U. S. C. § 312, which makes the issuance of a certificate the final step in the administrative process. But nothing in that Section prohibits the correction of inadvertent errors. Here, as we have shown, the certificates issued to appellee mistakenly omitted an intended provision, and the Commission's subsequent action was not the execution of a newly adopted policy but, as it found in a proceeding in which appellants participated after notice, merely the correction of the inadvertence.

The judgment of the District Court is *Reversed.*

Mr. Justice Whittaker, believing that the evidence does not support the Commission's finding that omission of restrictions from the four certificates of convenience and necessity involved was due to mere inadvertent clerical errors of the Commission's staff, would affirm the judgment of the District Court. 153 F. Supp. 572.

Mr. Justice Stewart took no part in the consideration or decision of these cases.

Trail Transportation Company Extension of Operations—New Mexico Points, 46 M. C. C. 775; *Pan American Airways, Inc., North Atlantic Route Amendments,* 7 C. A. B. 849.

FLAXER *v.* UNITED STATES.

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

No. 60. Argued November 19, 1958.—Decided December 15, 1958.

Petitioner, president of a labor union, was subpoenaed to appear on October 5, 1951, before the Senate Subcommittee on Internal Security and to produce certain of the union's records, including lists of its members who were employed by the Federal Government or by any state, county or municipal government. He appeared on that date and produced some of the records but not the lists of members. The Senator who conducted the hearing directed him to produce the records "according to the terms of the subpoena." Later, after a colloquy, the Senator said, "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date." Petitioner was indicted under 2 U. S. C. § 192 for willfully failing to produce the lists on October 5, 1951. *Held:* Since petitioner was not clearly apprised that he was required to produce the lists on October 5 rather than at a later time, there was no default on October 5, and the District Court should have directed an acquittal. Pp. 147–152.

103 U. S. App. D. C. 319, 258 F. 2d 413, reversed.

David Rein argued the cause for petitioner. With him on the brief was *Joseph Forer.*

William Hitz argued the cause for the United States. On the brief were *Solicitor General Rankin, Acting Assistant Attorney General Yeagley* and *Philip R. Monahan.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was found guilty, after jury trial, of failure to produce, pursuant to a subpoena *duces tecum* issued by a Subcommittee of a Senate Committee,[1] records of a

[1] Subcommittee on Internal Security of the Senate Committee on the Judiciary. The Senate voted to certify the committee report of

union [2] showing the names and addresses of members of that organization who were employed either by the United States or by any state, county, or municipal government in the country.[3] The District Court denied a motion for acquittal or new trial. 112 F. Supp. 669. The Court of Appeals, sitting *en banc,* affirmed by a divided vote. 98 U. S. App. D. C. 324, 235 F. 2d 821. On petition for a writ of certiorari we vacated and remanded for consideration in light of *Watkins* v. *United States,* 354 U. S. 178, an intervening decision. 354 U. S. 929. The Court of Appeals, sitting *en banc,* once more affirmed by a divided vote. 103 U. S. App. D. C. 319, 258 F. 2d 413. We again granted certiorari. 357 U. S. 904.

The Senate Committee on the Judiciary or a duly authorized Subcommittee was authorized [4] to investigate the administration, operation, and enforcement of the Internal Security Act of 1950.[5] The Committee created a Subcommittee which adopted a resolution to the effect that a single member would constitute a quorum for the purpose of taking testimony.

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the failure to produce the records to the United States Attorney for the purpose of initiating a contempt proceeding. S. Res. 295, 82d Cong., 2d Sess.; 98 Cong. Rec. 2500.

[2] United Public Workers of America.

[3] 2 U. S. C. § 192 provides:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

[4] S. Res. 366, 81st Cong., 2d Sess.; 96 Cong. Rec. 16872.

[5] 64 Stat. 987.

Petitioner was head of the union under investigation. The Chairman issued a subpoena *duces tecum* directing him to produce, *inter alia,* the names and addresses of the union members mentioned above. Petitioner appeared before Senator Watkins, sitting as the Subcommittee, and produced some of the records of the union; but he failed to produce the membership lists. He made several objections to disclosure of them, maintaining that they were protected by a right of privacy. He did not maintain that the lists were unavailable to him. Indeed, he responded to further interrogation, giving the approximate number of members and indicating that about 5 percent were in the employ of the Federal Government, the balance being in state, county, and municipal governments. He also named the federal agencies where the bulk of the 5 percent were employed. But he persisted in his refusal to produce the lists. At this point in the interrogation Senator Watkins said: "You are directed by the committee to produce those records according to the terms of the subpena."

Petitioner continued to state his objections.

Committee counsel asked petitioner how long it would take him to prepare the lists. Petitioner finally said, "I imagine it could be done in a week."

Committee counsel then said:

> "I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time."

Senator Watkins replied:

> "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from

this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made."

Petitioner continued to object to any order of production. Then the colloquy continued as follows:

"Senator WATKINS. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

"Mr. FLAXER. I haven't got them. I don't feel capable of producing them.

"Senator WATKINS. You said you could do it within a week.

"Mr. FLAXER. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

"Mr. ARENS. The information is available to you?

"Mr. FLAXER. Yes.

"Mr. ARENS. But you have declined to produce it; is that correct?

"Mr. FLAXER. I haven't produced them.

"Mr. ARENS. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

"Mr. FLAXER. I will have to take that under consideration.

"Senator WATKINS. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them."

These events transpired on October 5, 1951. That was the return date of the subpoena *duces tecum*. And each of the two counts of the indictment named October 5, 1951, as the date of petitioner's willful default.

We read the record as showing no default on that date. As we read the colloquy, petitioner, though adamant in his position, was given 10 days from October 5, 1951, to deliver the lists. It does not appear whether at the end of that 10-day period any additional steps were taken against him. Yet, for all we know, a witness who was adamant and defiant on October 5 might be meek and submissive on October 15.

We stated in *Watkins* v. *United States,* 354 U. S. 178, 208, in reference to prosecutions for contempt under this Act that "the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases." One of these guarantees is proof beyond a reasonable doubt that the refusal of the witness was deliberate and intentional, as *Quinn* v. *United States,* 349 U. S. 155, 165, holds. In the *Quinn* case the witness was "never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt." *Id.,* at 166. The rulings were so imprecise as to leave the witness "to guess whether or not the committee had accepted his objection." *Ibid.*

In the present case, the position of the Committee was clear in one respect: it was plain it wanted the membership lists. But, to say the least, there was ambiguity in its ruling on the time of performance. The witness could well conclude, we think, that he had 10 days more to consider the matter, 10 days to face the alternative of compliance as against contempt. Certainly we cannot say that petitioner could tell with a reasonable degree of certainty that the Committee demanded the lists this very day, not 10 days hence.

We repeat what we said in the *Quinn* case:

> "Giving a witness a fair apprisal of the committee's ruling on an objection recognizes the legitimate in-

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> terests of both the witness and the committee. Just as the witness need not use any particular form of words to present his objection, so also the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee's ruling, he has no cause to complain. And adherence to this traditional practice can neither inflict hardship upon the committee nor abridge the proper scope of legislative investigation." 349 U. S., at 170.

On this record the District Court should have directed an acquittal.

Reversed.

Syllabus.

FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *v.* FLORIDA CITRUS EXCHANGE ET AL.

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

No. 27. Argued November 17, 1958.—Decided December 15, 1958.

Under § 406 (b) of the Federal Food, Drug, and Cosmetic Act, the Food and Drug Administration in 1939 certified as "harmless and suitable for use in food" a coal-tar color which has been used for many years in coloring oranges. After new tests in 1951–1953 had shown that the color had toxic effects on animals, and after public notice and hearings, the Secretary of Health, Education, and Welfare in 1955 ordered the color removed from the certified list. Under §§ 301 and 402 (c) of the Act, this had the effect of making it unlawful to ship in interstate commerce any food bearing or containing such color. The Secretary did not determine that the color was harmful for human consumption in the amounts used in coloring oranges but only that the color itself was not "harmless and suitable for use in food" within the meaning of § 406 (b), and he took the position that he had no authority to determine whether it was "required in the production" of food within the meaning of § 406 (a) or to promulgate thereunder a safe tolerance for its use on oranges. In a review proceeding under § 701 (f), the Court of Appeals set aside the order insofar as it removed the certification of that color as harmless and suitable for use as external coloring on oranges. *Held:* The Secretary's order was lawful, and the judgment is reversed. Pp. 154–168.

1. The Secretary's order revoking certification of the color under § 406 (b) as "harmless and suitable for use in food" was in accordance with the language and intent of the Act, and it must be sustained. Pp. 160–165.

(a) In §§ 402 (c) and 406 (b), dealing specifically with coal-tar colors, Congress carefully outlined the special treatment to be given to coal-tar colors: the test of certification provided concentrates on the color substance itself; it is to be certified only if it is harmless. Pp. 160–162.

(b) This special method of dealing with coal-tar colors relieves the Secretary from showing in each case that a food containing

them raises a possibility of injury to health; and it makes no requirement that the colors be tested by experimental feeding in the proportions in which they are used in specific food products. Pp. 162–164.

(c) The evidence justified the Secretary's finding that the color here involved was poisonous. P. 164, n. 13.

(d) In forbidding the use of coal-tar colors in foods, the Secretary is not required to restrict his prohibition to specific food uses in which the color is shown to have a deleterious effect. Pp. 164–165.

2. The Secretary is not authorized by § 406 (a) to permit the use of harmful coal-tar colors in specific foods through a system of tolerances, since that section does not apply to § 402 (c)'s flat prohibition against the use of uncertified coal-tar colors. Pp. 165–167.

3. That special legislation has permitted the use of the color here involved solely in application to the skin of oranges for a temporary period ending March 1, 1959, does not render this case moot or prevent respondents from being persons "adversely affected" by the Secretary's order within the meaning of § 701 (f). Pp. 167–168.

246 F. 2d 850, reversed.

William W. Goodrich argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg.*

J. Hardin Peterson argued the cause and filed a brief for the Florida Citrus Exchange et al., respondents.

J. Lewis Hall argued the cause for Schell, respondent. With him on the brief was *Morris E. White.*

Richard W. Ervin, Attorney General, filed a brief for the State of Florida, as *amicus curiae,* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Commercially grown Florida and Texas oranges have for many years been colored with a red coal-tar color. In 1939

the Food and Drug Administration, after testing and pursuant to § 406 (b) of the Federal Food, Drug, and Cosmetic Act,[1] certified this color, FD&C Red No. 32 (hereafter Red 32), to be harmless and suitable for use in food. However, the Secretary of Health, Education, and Welfare, on November 10, 1955, ordered Red 32 and two other coal-tar colors to be removed from the certified list, after new tests in 1951–1953 cast doubt whether Red 32 was harmless, and after public hearings were held upon the matter on notice published in the Federal Register. The consequence of the Secretary's order was that under § 402 (c) of the Act [2] any food bearing or containing such colors would be deemed to be adulterated.

The validity of the Secretary's order was attacked in petitions under § 701 (f) of the Act [3] filed in several

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[1] The Act, as amended, is 52 Stat. 1040, 21 U. S. C. § 301 *et seq.* Section 406 (b), 52 Stat. 1049, 21 U. S. C. § 346 (b) provides:

"The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and suitable for use in food and for the certification of batches of such colors, with or without harmless diluents."

[2] Section 402 (c), 52 Stat. 1047, 21 U. S. C. § 342 (c), provides that a food shall be deemed to be adulterated "If it bears or contains a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 406 . . . ."

Section 301 of the Act prohibits the introduction or delivery for introduction into interstate commerce, or the receipt in interstate commerce, and the delivery thereof, of adulterated food, or the adulteration of food in interstate commerce. 52 Stat. 1042, 21 U. S. C. § 331. Sanctions for the prohibited acts, in the form of injunction proceedings, criminal prosecutions, and seizure actions, are provided in §§ 302–304, 52 Stat. 1043, 1044, 21 U. S. C. §§ 332–334.

[3] "In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. The summons and petition may be served at any place in the United

Courts of Appeals [4] by persons and organizations claiming to be adversely affected. The Court of Appeals for the Second Circuit sustained the order against a general attack. *Certified Color Industry Comm.* v. *Secretary of Health, Education and Welfare,* 236 F. 2d 866. In the instant case,[5] however, the Court of Appeals for the Fifth Circuit, by a divided vote, set aside the order [6] insofar as

States. The Secretary, promptly upon service of the summons and petition, shall certify and file in the court the transcript of the proceedings and the record on which the Secretary based his order." 52 Stat. 1055, 21 U. S. C. § 371 (f).

[4] Review was sought in three Courts of Appeals in all. In the Court of Appeals for the Seventh Circuit, a petition was dismissed before it was adjudicated.

[5] The persons and firms who are respondents here are all engaged in the growing, packing or marketing of Florida or Texas oranges. One is also interested in the patented process whereby the Red 32 color is applied to the skins of oranges.

[6] The Court of Appeals set aside the order:

". . . in so far as said order removes the coal-tar color FD&C Red No. 32 from the list of colors which may be certified for use in coloring the skin of oranges meeting minimum maturity standards prescribed in the State of Florida and Texas; provided, that nothing herein or in the judgment of this Court entered pursuant hereto shall restore said coal-tar color to the list of colors which may be certified for unrestricted use in food, drugs and cosmetics but shall operate to authorize the certification of batches of said color conforming to the specifications for the color appearing at 21 C. F. R. 135.3 (1949 ed.) for the purpose of coloring the skin of mature oranges only; provided further, that the Secretary shall be required to certify only sufficient batches of FD&C Red No. 32 as may be necessary to color the skin of mature oranges from time to time; provided further, that the certificates issued for batches of FD&C Red No. 32 may be limited by their certificate for use in coloring mature oranges only; and provided further, that nothing herein or in the judgment of this Court entered pursuant hereto shall be deemed to restrict the Secretary from making further investigations and conducting hearings for a determination of whether the use of Red 32 is required in the production of oranges and to determine the tolerances, if any, that are safe and harmless, as harmless is herein construed and defined." 246 F. 2d, at 862.

it removed the certification of Red 32 as harmless and suitable for use as external coloring on Florida and Texas oranges. 246 F. 2d 850.

The Secretary did not determine that Red 32 in the quantities used in color-added oranges was harmful for human consumption, but rather determined on the basis of the 1951–1953 tests only that Red 32 and the other suspect coal-tar colors were toxic and therefore not "harmless and suitable for use in food." The Court of Appeals held that the 1939 finding that Red 32 was harmless "should not be supplanted" by a contrary finding "unless there is evidence that, in the amounts used, and in the manner of use, oranges colored with Red 32 are unsafe for human consumption." 246 F. 2d, at 861–862. The word "harmless" was construed to be a term "of relation," preventing the Secretary from denying the continued use of Red 32 in the quantities used in color-added oranges in the absence of evidence that such quantities could not be consumed "without risk of injury or harm." *Id.*, at 858. The Court of Appeals held further that in light of its premise that "harmless" was a term of relation and because two congressional Committees had found that the practice of adding the color to oranges was an economic necessity, it would be incumbent upon the Secretary to determine whether the use of the color was "required in the production" of food within the meaning of § 406 (a),[7]

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[7] 52 Stat. 1049, 21 U. S. C. § 346 (a), which provides:
"(a) Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) of section 402 (a); but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2) of section 402 (a). While such a regulation

and if so, to promulgate a safe tolerance for Red 32 on oranges pursuant to that section. Until such a tolerance was promulgated, the court held that the Secretary was required to certify Red 32 as a safe color for use on oranges without one. *Id.*, at 860–862. We granted certiorari to determine this controversial question of construction of this important statute designed for the protection of the public health. 356 U. S. 911.

Senate and House Committees have reported that the practice of adding color is an economic necessity in the production of Florida and Texas oranges for market.[8] When mature oranges are removed from the tree, their skins, for botanical reasons unnecessary to detail here, are frequently green in color. Since the consumer would be prone incorrectly to interpret this greenness as a sign of immaturity, oranges are put through a "degreening" process which involves exposure to ethylene gas. In the case of certain California oranges, this gas process is sufficient to turn a green orange into one of the desired orange color. But the degreening process does not produce the desired color in Florida and Texas oranges; a light yellow shade results. The more desired color is therefore produced by immersing the oranges in, or spraying them with, a solution containing Red 32. The evidence at the hearings held by the Secretary was that the process infuses

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is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of clause (1) of section 402 (a). In determining the quantity of such added substance to be tolerated in or on different articles of food the Secretary shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article, and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances."

[8] S. Rep. No. 2391, 84th Cong., 2d Sess., p. 1; H. R. Rep. No. 1982, 84th Cong., 2d Sess., p. 2.

the peel of an orange with 0.0017% to 0.0034% of Red 32. Other evidence indicated that oranges taken as a whole, and candied peel, marmalade and orange juice would contain less—in many cases, much less—of the coal-tar color. It is conceded by the Secretary that there is no evidence that the level of ingestion of Red 32 involved in human consumption of color-added oranges is harmful.

However, the evidence at the Secretary's hearing did indicate that Red 32 had a poisonous effect on animals. Feeding the color to rats in quantities as small as 0.1% of their diet was deleterious and often fatal, with liver damage and enlargement of the heart in evidence. In larger quantities, 1.0% and 2.0% of the diet, ingestion of Red 32 by rats caused death within twelve days and a week, respectively. The health of dogs taking 0.2% of the color in their diets deteriorated rapidly; that of those taking 0.04% somewhat more slowly, but definitely; and ill effects were indicated at a feeding level as low as 0.01% of the diet. No safe level of administration of Red 32 to the test animals was established. These and similar tests, involving the administration of Red 32 and the other coal-tar colors involved to test animals generally as an item of diet, were the basis on which the Secretary's order rested.

The Secretary argues that the legislative history and the consistent administrative interpretation of the Act establish that his authority to list or continue the listing of coal-tar colors is confined to his authority under § 406 (b) to certify "harmless" coal-tar colors, those which are wholly innocuous and demonstrated to be without adverse physiological effect. The argument runs that a toxic coal-tar color, such as the Court of Appeals agreed that Red 32 was, was to be prohibited completely without regard to whether it might possibly be used in safe amounts on a particular food product. The Secretary argues further that since Congress made known its will

specifically and precisely in § 406 (b) that a toxic coal-tar color, that is, one not "harmless," was not to be certified under any circumstances, the tolerance provisions of § 406 (a) have no relevance to the validity of his order.

We are of the opinion that the Court of Appeals erred and that its judgment cannot stand.

First. The provisions of §§ 402 (c) and 406 (b) dealing expressly with coal-tar colors were innovations in the Federal Food, Drug, and Cosmetic Act of 1938; there were no counterpart provisions in the original 1906 food and drug legislation. By these provisions, Congress carefully distinguished the treatment to be given by the Secretary to toxic coal-tar colors. The original Act dealt generally with poisonous and other deleterious substances in food, as are now treated under § 402 (a), but it did not deal specifically with coal-tar colors. Section 7 of the original Food and Drugs Act, 34 Stat. 769, provided that an article of food should be deemed adulterated "If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health . . . ." This Court held in *United States* v. *Lexington Mill & Elevator Co.,* 232 U. S. 399, following the "plain meaning" of the statutory language, that this placed the burden upon the Government of establishing that the added substance was such as might render the food to which it was added injurious to health. This rule applied without distinction where coal-tar colors were involved. Congress was aware of the difficulties of this test which required that the questioned food product be evaluated as a whole, and of the existence in this area of an informal certification practice under the 1906 Act under which not food products but the coal-tar colors themselves were subjected to test to determine their poisonous or harmful character. Cf. S. Rep. No. 361, 74th Cong., 1st Sess., pp. 7–8. Of course, when litigation occurred, the *Lexington Mill* standard was applied.

See *W. B. Wood Manufacturing Co.* v. *United States*, 286 F. 84, 86–87.

It was against this background that the 1938 statute was proposed and enacted. It is obvious to us that an approach different from the rule in *Lexington Mill* was intended by Congress when in § 402 (c) [9] and § 406 (b) it addressed itself to the severable and narrow problem of coal-tar colors. The language involved in *Lexington Mill* survived generally in the Act's broadest and most general test of food adulteration, § 402 (a) (1).[10] Section 402 (c) provided a separate test: that a food should be deemed adulterated "If it bears or contains a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 406 . . . ." Plainly Congress banned any addition to foods of coal-tar colors not certified by the Secretary. The standard established for the Secretary was set forth in § 406 (b): "The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and suitable for use in food and for the certification of batches of such colors . . . ." There appears in Sena-

[9] The 1938 enactment contained a proviso to § 402 (c) ". . . That this paragraph shall not apply to citrus fruit bearing or containing a coal-tar color if application for listing of such color has been made under this Act and such application has not been acted on by the Secretary, if such color was commonly used prior to the enactment of this Act for the purpose of coloring citrus fruit." 52 Stat. 1047, 21 U. S. C. § 342 (c). Respondents suggest that this proviso somehow suggests a congressional intent to deal with their color more leniently under the present circumstances, but we can draw no such inference.

[10] Section 402 (a) (2), with its reference to § 406, see note 7, *supra*, revised the rule of the *Lexington Mill* case substantially in its own factual context, that of added poisonous substances in food. Section 402 (a) (2) has been the subject of subsequent revisions itself, the latest one of which is § 3 of the Food Additives Amendment of 1958, Public Law 85–929, September 6, 1958, 72 Stat. 1784. See note 12, *infra*.

tor Copeland's memorandum on the first of the bills which led to the 1938 Act, S. 1944, 73d Cong., 1st Sess., which contained new provisions on coal-tar colors similar to the ones in the Act as finally passed, a clear indication that one of the purposes of these provisions was to do away, in this area, with the *Lexington Mill* approach. 77 Cong. Rec. 5721. This had the effect of making the certification system, in which analysis concentrated on the color substances themselves, rather than an examination of the effect of the use of the colors in the context of the food products involved, the conclusive test of adulteration. Thus it is that the test of certification laid down in § 406 (b) concentrates on the color substance itself; it is to be listed only if *it* is harmless. The Secretary is to address himself to the harmless character of the substance first; once this is assured, the statutory plan is that it may be freely used in foods, subject to the provisions of the other sections of the Act. Clearly such a plan is a rational one to ascribe to Congress. It is true that the ultimate purpose here concerned of the adulteration provisions of the Act is to protect health, and that no one makes the color substances by themselves an item of diet. But it certainly was competent for Congress, in the light of what were recognized problems to health in the use of such added colors, to adopt a rule of caution in treating this recognized and definable problem area. This rule of caution is here one which relieves the Secretary from the burden of showing in each case that a food containing them raises a possibility of injury to health, and requires that the color stuffs, whose positive values are only visual and which are not naturally found in foods, not be added unless they could pass a higher standard.

The significance of such an approach is demonstrated here. No safe level for ingestion of Red 32 has been established, either in respect of humans or of animals. No one contends that it is impossible that ill effects will be experi-

enced in human beings if unrestricted use of the substance is permitted in articles of food. On the other hand, no instance of a harmful use of Red 32 in a particular food was established in the record.[11] These questions present broad inquiries, difficult of proof, and doubtless apt to be more long-drawn-out in investigation than even the ones which the Secretary pursued. Yet it has been shown that the color of itself has poisonous properties. In the light of the over-all purpose of the Act, cf. *United States* v. *Dotterweich,* 320 U. S. 277, 280, and the specific terms here involved, it seems to us that Congress did not intend that a verdict of "not proven" on the questions mentioned should preclude the Government from preventing the use of substances like the one in question when they were shown to have poisonous effects by themselves.

We are not persuaded by the respondents' argument, adopted by the Court of Appeals, that the words "harmless" and "poisonous" are relative words, referring not to the effect of a substance *in vacuo,* but to its effect, taken in a particular way and in particular quantities, on an organic system. Of course this is so, but the question before us certainly does not depend on it. This is not a case like the examples put which remind us that pure water would be deleterious if taken at the rate of four gallons an hour or common table salt at several ounces. The color substances appear to have been administered at

[11] Considerably more of the color was regularly produced before the entry of the Secretary's order than could be accounted for as actually being on the skins of oranges. Neither the Government nor the respondents account for the difference more than speculatively. The Government urges that the difference must have been used in other food products. Respondents emphasize the inevitable waste of quantities of the color during the orange-coloring process. To us this underlines the approach of the provisions in question; where a color is found to be harmless in itself, no further inquiry can be made of it; if it is harmful, none need be.

toxicologically significant levels; they played a relatively small part in the diets of the test animals, generally less, and frequently much less, than 1%.[12] Obviously if the color substances themselves are made an item of diet in the trifling percentages used on the test animals, their effect is poisonous.[13] Congress may have intended "harmless" in a relative sense, but we think it was in relation to such laboratory tests as the ones the Secretary performed that Congress was speaking when it required that coal-tar colors be "harmless." We do not believe that Congress required the Secretary first to attempt to analyze the uses being made of the colors in the market place, and then feed them experimentally only in the proportions in which they appeared in certain of the food products in which the colors were used. This appears to be the very procedure on which Congress turned its back in the 1938 Act.

The respondents contend that since the Secretary himself maintains various lists of certified colors, one containing colors harmless and suitable for all food, drug and cosmetic uses, another of colors harmless and suitable for general use in drugs and cosmetics, and a third of colors harmless and suitable for external use in drugs and cosmetics, 21 CFR §§ 9.3, 9.4, 9.5, he has recognized that "harmless," as used in the statute, does not bear the "absolute" meaning he is alleged to give it. From this it is said to follow that the Secretary must, in forbidding the use of colors in foods, restrict his prohibition to specific food uses in which the color is shown to be capable of a deleterious

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[12] A single dose of 100 milligrams of the color substance (0.0035 oz. avoirdupois, or ⅓ the weight of a standard aspirin tablet) produced a rapid diarrheic effect in test dogs.

[13] One respondent assails the validity, even within the framework of the Secretary's interpretation of the statute, of the tests performed on the experimental animals. The Court of Appeals found that the evidence justified the Secretary's finding that the color was poisonous, 246 F. 2d, at 859, and we are in agreement.

effect. We do not draw this inference. Provisions similar to those dealing with the use of coal-tar colors in foods are repeated in the portions of the Act dealing with drugs and with cosmetics. Section 501 (a)(4), 52 Stat. 1049, 21 U. S. C. § 351 (a)(4), proscribes the use of uncertified colors in drugs for the purpose of coloring, and refers to § 504, 52 Stat. 1052, 21 U. S. C. § 354, which authorizes the listing and certification of coal-tar colors which are "harmless and suitable for use in drugs." Comparable provisions are found with respect to cosmetics in §§ 601 (e) and 604, 52 Stat. 1054, 1055, 21 U. S. C. §§ 361 (e), 364. It is clear from these provisions that Congress contemplated that a color might be harmless in respect of drugs or cosmetics but not of foods. And the fact that the Secretary has established a further category, distinguishing between colors intended for external and for general use, we do not think inconsistent with our interpretation of the Act. These distinctions can be established through tests run on the color substance as such, in the way in which the Secretary has conducted the tests in the matter before us. It is a far cry from saying that the Act permits a generic distinction capable of laboratory proof, between external and internal uses of a color, to say that it commands that the colors cannot be inquired of at all except in the specific contexts of their use in food, drug and cosmetic products.

Second. But even if the Secretary's approach of viewing the harmlessness of coal-tar colors in terms of the colors themselves, rather than in their specific applications, is correct, the respondents insist, as the court below indicated, that the Secretary should establish tolerances for the use of colors in food, even though not found to be "harmless." The respondents point to § 406 (a) of the Act which allows the Secretary to establish tolerances for poisonous substances added to food where the substance is "required in the production" of the food or "cannot be

avoided by good manufacturing practice." They argue that this provision should be used by the Secretary to establish a maximum tolerance for the application of Red 32 to the skins of oranges, either because it applies by its own terms or it is applicable by analogy.[14] The Secretary contends that he is without power to permit the use of harmful coal-tar colors in specific foods through a system of tolerances. We believe he is correct.

The Federal Food, Drug, and Cosmetic Act is a detailed and thorough piece of legislation. Its treatment of many public health and food problems is quite specific, and of course it is the duty of the courts in construing it to be mindful of its approach in terms of draftsmanship. Here again, in our construction of this explicit Act, we must be sensitive to what Congress has written, and recall that "It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States,* 340 U. S. 593, 596. Section 406 (a), which provides for the system of tolerances, constitutes by its terms a definition of the term "unsafe," which appears in § 402 (a)(2), a prohibition on foods which bear or contain "any added poisonous or added deleterious substance . . . which is unsafe within the meaning of section 406." This is a prohibition entirely separate and distinct from the prohibitions of § 402 (c) on foods containing or bearing uncertified coal-tar colors. The existence of a tolerance is specifically stated in § 406 (a) only to give sanction to what would otherwise amount to adulteration within the terms of § 402 (a)(1). Accordingly, it is obvious from the language of the statute that the provisions

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[14] The Court of Appeals' judgment had the effect of staying the Secretary's order *in toto* as it affected orange coloring until he developed a tolerance. The Secretary argues here that even if he is authorized to establish a tolerance for the use of Red 32 on oranges, his order should stand until he has established it. In the view of the case that we take, we do not reach this contention.

authorizing the establishment of tolerances apply only to § 402 (a)(1) and (2) and do not apply to § 402 (c)'s flat prohibition against the use of uncertified colors. Respondents do not direct us to any substantial contrary indication in the legislative history. Nor can the tolerance provisions be applied to coal-tar colors through some form of analogy. The command of the statute is plain: where a coal-tar color is not harmless, it is not to be certified; if it is not certified, it is not to be used at all. In this regard also, an approach in terms of the toxicity of the coloring ingredient, rather than of the food product as a whole was chosen by Congress. It evidently took the view that unless coal-tar colors were harmless, the considerations of the benefits of visual appeal that might be urged in favor of their use should not prevail, in the light of the considerations of the public health. In the case of other sorts of added poisons, though only where they were required in the production of the food concerned or could not under good manufacturing practice be avoided, a different congressional policy was expressed in the 1938 enactment. It is the duty of the Secretary to give effect to this distinction; he has done so with apparent substantial uniformity and has done so here.

Third. After the promulgation of the Secretary's order, Congress afforded temporary relief to those economically interested in the coloring of oranges with Red 32. Legislation was enacted in the summer of 1956 to afford a period of approximately three years (until March 1, 1959) during which use of the color would be allowed solely in application to the skins of oranges.[15] The statute does

[15] The Act of July 9, 1956, c. 530, 70 Stat. 512, added the following proviso to § 402 (c) of the Act:
"*Provided further,* That this paragraph shall not apply to oranges meeting minimum maturity standards established by or under the laws of the States in which the oranges were grown and not intended for processing (other than oranges designated by the trade as 'packing

not, in our view, affect the situation presented to the courts for judicial review; the Secretary's order remains to be tested under the permanent provisions of the Act, insofar as they will affect respondents after March 1, 1959. The statute accordingly operates as a legislatively ordained stay of the Secretary's order insofar as it affects the present respondents and those similarly situated. See H. R. Rep. No. 1982, p. 3, and S. Rep. No. 2391, p. 3, 84th Cong., 2d Sess. In view of the very temporary nature of this legislative "stay," the automatic resumption of the status quo upon its expiration, and the effect of the order on the respondents, even during the legislative stay, we agree with the parties that the matter before us is not moot. The Secretary's order was the promulgation of a general rule, prospective in operation, and the facts of the respondents' business are such that if the order is upheld, there will be a practical effect on them even during the span of the temporary legislation. Accordingly, the respondents remain persons adversely affected by the Secretary's order, and it is proper for us now to determine the legal situation in regard to them when the temporary legislation expires. Under the permanent provisions of §§ 402 and 406 the Secretary's order was lawful, and the respondents present no grounds on which they can legally object to its application to them. The judgment of the Court of Appeals, setting the Secretary's order aside in part, must be

Reversed.

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house elimination'), the skins of which have been colored at any time prior to March 1, 1959, with the coal-tar color certified prior to the enactment of this proviso as F. D. & C. Red 32, or certified after such enactment as External D. & C. Red 14 in accordance with section 21, Code of Federal Regulations, part 9: *And provided further,* That the preceding proviso shall have no further effect if prior to March 1, 1959, another coal-tar color suitable for coloring oranges is listed under section 406."

LADNER *v.* UNITED STATES.

ON REHEARING.

No. 2. Argued November 19, 1957.—Affirmed by an equally divided Court January 6, 1958.—Rehearing granted, judgment vacated and case restored to the calendar for reargument May 26, 1958.—Reargued October 22, 1958.—Decided December 15, 1958.

Petitioner was convicted in a Federal District Court on two different counts of assaulting two federal officers with a deadly weapon in violation of 18 U. S. C. (1940 ed.) § 254 (now 18 U. S. C. § 111). He was sentenced to imprisonment for 10 years on each conviction of assault, the sentences to run consecutively. Upon completion of the first 10-year sentence, he moved in the District Court under 28 U. S. C. § 2255 to correct the second, and consecutive, sentence. He alleged that the evidence at his trial showed that he fired but one discharge from a shotgun, which wounded the two federal officers, and he contended that in these circumstances he could be guilty of but one assault. Holding that the wounding of two officers by a single discharge of a shotgun would constitute a separate offense against each officer under the statute, the District Court denied his motion and the Court of Appeals affirmed. *Held:* The single discharge of a shotgun alleged by petitioner in this case would constitute only a single violation of § 254; petitioner is entitled to an opportunity to sustain his allegation that his conviction of two assaults rested upon evidence that the wounding of the two officers resulted from the single discharge of the gun; and the judgment is reversed and the cause remanded for further proceedings. Pp. 170–179.

(a) The question of the scope of collateral attack upon criminal sentences in the circumstances of this case is not decided, since it does not appear that the Government raised the question in the courts below and it is not tendered in this Court as a question presented for decision. Pp. 172–173.

(b) It is not clear from the statute, even when read in the light of its legislative history, that Congress intended that a single act of assault affecting two officers should constitute two offenses under the statute. Pp. 173–177.

(c) To hold that there are as many assaults committed as there are officers affected would produce incongruous results. P. 177.

(d) The meaning of this criminal statute being ambiguous, the policy of lenity in the construction of criminal statutes requires that the less harsh of two possible meanings be adopted. Pp. 177–178.

(e) Since the District Court did not hold a hearing on petitioner's motion and the proceedings at petitioner's trial were not transcribed, it will be necessary at the hearing on the motion to reconstruct the trial record in order to determine whether petitioner was properly convicted of more than one offense. Pp. 178–179.

230 F. 2d 726, reversed and case remanded for further proceedings.

Harold Rosenwald, acting under appointment by the Court, 352 U. S. 959, reargued the cause and filed two briefs for petitioner.

Leonard B. Sand reargued the cause for the United States. On the brief were *Solicitor General Rankin, Warren Olney, III,* then Assistant Attorney General, *Beatrice Rosenberg* and *Julia P. Cooper.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The petitioner was convicted in the United States District Court for the Southern District of Mississippi of assaulting two federal officers with a deadly weapon in violation of former 18 U. S. C. § 254.[1] The court sentenced the petitioner to the maximum punishment of 10 years' imprisonment on each conviction of assault,

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[1] That statute provides:

"Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person . . . [if he is a federal officer designated in § 253] while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be . . . imprisoned not more than three years . . . ; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be . . . imprisoned not more than ten years . . . ." 18 U. S. C. (1940 ed.) § 254.

the sentences to run consecutively.[2] Upon completion of the first 10-year sentence, the petitioner made a motion in the District Court, under 28 U. S. C. § 2255, to correct the second, and consecutive, sentence. He supported his motion by allegations that the evidence at his trial showed that he fired a single discharge from a shotgun into the front seat of an automobile and that the pellets wounded the two federal officers, who were transporting an arrested prisoner. He contended that in this circumstance he was guilty of but one "assault" within the meaning of former § 254 and accordingly was subject to only one punishment. The District Court denied his motion and the Court of Appeals for the Fifth Circuit affirmed. 230 F. 2d 726. Both courts held that the wounding of two federal officers by the single discharge of a shotgun would constitute a separate offense against each officer under the statute. We granted certiorari, 352 U. S. 907, to consider the construction of § 254 in light of principles applied to construe the federal criminal statutes involved in *Bell* v. *United States,* 349 U. S. 81; *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218; and *Prince* v. *United States,* 352 U. S. 322. We affirmed the Court of Appeals by an equally divided Court, 355 U. S. 282, but vacated our judgment, and set the case for reargument, when a petition for rehearing was granted. 356 U. S. 969. Reargument was had this Term.

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[2] Ladner was convicted by a jury on three separate counts; one for conspiring to assault the officers, a second for assaulting one of the officers, and a third for assaulting the other officer. He was sentenced for two years on the conspiracy count, which sentence was to run concurrently with a 10-year sentence for assaulting one of the officers. A 10-year sentence imposed for the assault on the second officer was to run from and after the expiration of the first two sentences. Thus Ladner was sentenced to a total jail term of 20 years. The proceedings instituted by Ladner's co-conspirator, one Cameron, for post-conviction relief are reported in 84 F. Supp. 289.

It is suggested that the remedy under § 2255 is not available to the petitioner in the circumstances of this case. The record does not disclose that the Government raised this question in the District Court or in the Court of Appeals, and the Government does not tender it as a Question Presented for Decision in its brief in this Court. This Court has often reached the merits of a case involving questions of statutory construction similar to that presented in this case under former 18 U. S. C. § 254 in proceedings by way of collateral attack upon consecutive sentences. In *In re Snow,* 120 U. S. 274, the petitioner brought a habeas corpus proceeding after serving seven months of three consecutive six-month sentences. He claimed that the sentencing court had misinterpreted the applicable statute and that he had committed but a single offense punishable by a single six-month sentence. This Court held that "the objection may be taken on *habeas corpus,* when the sentence on more than one of the convictions is sought to be enforced." *Id.,* at 285. In *Bell* v. *United States, supra,* a case on all fours with the present case, the Court reached the question of statutory construction over objection in the Government's brief in opposition to the petition for certiorari that the question could not be raised on motion under § 2255. Other cases in which the Court reached and decided questions of statutory construction, although the questions were raised by collateral attack on consecutive sentences, include: *Tinder* v. *United States,* 345 U. S. 565 (§ 2255); *Gore* v. *United States,* 357 U. S. 386 (§ 2255); *Prince* v. *United States, supra* (Federal Rule of Criminal Procedure 35); *Ebeling* v. *Morgan,* 237 U. S. 625 (habeas corpus); *Morgan* v. *Devine,* 237 U. S. 632 (habeas corpus). The fact that the Court has so often reached the merits of the statutory construction issues in such proceedings suggests that the availability of a collateral remedy is not a jurisdictional question in the sense that, if not properly raised, this

Court should nevertheless determine it *sua sponte*. Moreover, there was only meagre argument of the question of the availability of the remedy in this case. The Government submitted only a short discussion of the question in the body of its brief and made only a passing reference to it toward the close of the oral argument. The question of the scope of collateral attack upon criminal sentences is an important and complex one, judging from the number of decisions discussing it in the District Courts and the Courts of Appeals. We think that we should have the benefit of a full argument before dealing with the question. We, therefore, proceed to construe former 18 U. S. C. § 254 without, however, intimating any view as to the availability of a collateral remedy in another case where that question is properly raised, and is adequately briefed and argued in this Court.

There is no constitutional issue presented. The question for decision is as to the construction to be given former § 254 in the circumstances alleged by the petitioner. Did Congress mean that the single discharge of a shotgun would constitute one assault, and thus only one offense, regardless of the number of officers affected, or did Congress define a separate offense for each federal officer affected by the doing of the act? The congressional meaning is plainly open to question on the face of the statute, which originated as § 2 of the Act of May 18, 1934. 48 Stat. 780. The Government does not seriously contend otherwise, but emphasizes that the legislative history shows that the statute was designed to protect federal officers from personal harm, or the threat of personal harm, in the performance of their duties, or on account of the performance of their duties. From this premise, the Government argues that there must be an offense for each officer who is put in immediate apprehension of personal injury, *i. e.*, assaulted, and that each officer thus defines the unit of prosecution. The position is summed up in

the Government's brief as follows: "The legislation was aimed at protecting federal officers, not only to promote the orderly functioning of the federal government (whose efficiency would diminish in proportion to the number of individual officers affected), but also to protect the individual officers, as 'wards' of the federal government, from personal harm. Both of these legislative objectives make the individual officers a separate unit of protection."

However, we are unable to read the legislative history as clearly illumining the statute with this meaning. The history is scant, consisting largely of an Attorney General's letter recommending the passage of the legislation,[3]

[3] The letter, of January 3, 1934, to Senator Ashurst, Chairman of the Senate Committee on the Judiciary, is as follows:

"My Dear Senator:

"I wish again to renew the recommendation of this Department that legislation be enacted making it a Federal offense forcibly to resist, impede, or interfere with, or to assault or kill, any official or employee of the United States while engaged in, or on account of, the performance of his official duties. Congress has already made it a Federal offense to assault, resist, etc., officers or employees of the Bureau of Animal Industry of the Department of Agriculture while engaged in or on account of the execution of their duties (sec. 62, C. C.; sec. 118, title 18, U. S. C.); to assault, resist, etc., officers and others of the Customs and Internal Revenue, while engaged in the execution of their duties (sec. 65, C. C.; sec. 121, title 18, U. S. C.); to assault, resist, beat, wound, etc., any officer of the United States, or other person duly authorized, while serving or attempting to serve the process of any court of the United States (sec. 140, C. C.; sec. 245, title 18, U. S. C.); and to assault, resist, etc., immigration officials or employees while engaged in the performance of their duties (sec. 16, Immigration Act of Feb. 5, 1917, c. 29, 39 Stat. 885; sec. 152, title 8, U. S. C.). Three of the statutes just cited impose an increased penalty when a deadly or dangerous weapon is used in resisting the officer or employee.

"The need for general legislation of the same character, for the protection of Federal officers and employees other than those specifically embraced in the statutes above cited, becomes increasingly apparent every day. The Federal Government should not be com-

and sheds no real light on what Congress intended to be the unit of prosecution. Although the letter mentions the need for legislation for the protection of federal officers, it also speaks of the need for legislation "to further the legitimate purposes of the Federal government." From what appears, an argument at least as plausible as the Government's may be made that the congressional

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pelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel; and Congress has recognized this fact at least to the extent indicated by the special acts above cited. This Department has found need for similar legislation for the adequate protection of the special agents of its division of investigation, several of whom have been assaulted in the course of a year, while in the performance of their official duties.

"In these cases resort must usually be had to the local police court, which affords but little relief to us, under the circumstances, in our effort to further the legitimate purposes of the Federal Government. It would seem to be preferable, however, instead of further extending the piecemeal legislation now on the statute books, to enact a broad general statute to embrace all proper cases, both within and outside the scope of existing legislation. Other cases in point are assaults on letter carriers, to cover which the Post Office Department has for several years past sought legislation; and the serious wounding, a couple of years ago, of the warden of the Federal Penitentiary at Leavenworth by escaped convicts outside the Federal jurisdiction. In the latter case it was possible to punish the escaped convicts under Federal law for their escape; but they could not be punished under any Federal law for the shooting of the warden.

"I have the honor, therefore, to enclose herewith a copy of S. 3184, which was introduced at the request of this Department in the Seventy-second Congress and to urge its reintroduction in the present Congress; and to express the hope that it may receive the prompt and serious consideration of your committee.

"Respectfully,
"HOMER CUMMINGS,
"Attorney General."

See, for the legislative history, S. Rep. No. 535, 73d Cong., 2d Sess.; H. R. Rep. No. 1455, 73d Cong., 2d Sess.; 78 Cong. Rec. 8126–8127.

aim was to prevent hindrance to the execution of official duty, and thus to assure the carrying out of federal purposes and interests, and was not to protect federal officers except as incident to that aim. Support for this meaning may be found in the fact that § 254 makes it unlawful not only to assault federal officers engaged on official duty but also forcibly to resist, oppose, impede, intimidate or interfere with such officers. Clearly one may resist, oppose, or impede the officers or interfere with the performance of their duties without placing them in personal danger. Such a congressional aim would, of course, be served by considering the act of hindrance as the unit of prosecution without regard to the number of federal officers affected by the act. For example, the locking of the door of a building to prevent the entry of officers intending to arrest a person within would be an act of hindrance denounced by the statute. We cannot find clearly from the statute, even when read in the light of its legislative history, that the Congress intended that the person locking the door might commit as many crimes as there are officers denied entry. And if we cannot find this meaning in the supposed case, we cannot find that Congress intended that a single act of assault affecting two officers constitutes two offenses under the statute. The Government frankly conceded on the oral argument that assault can be treated no differently from the other outlawed activities,[4] and that if a single act of hindrance

[4] This concession by the Government seems necessary in view of the lack of any indication that assault was to be treated differently, and in light of 18 U. S. C. § 111, the present recodification of § 254, which lumps assault in with the rest of the offensive actions. The statute now provides that "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" any designated federal officer "while engaged in or on account of the performance of his official duties" is committing a crime. The Reviser's Note indicates that this change in wording was not intended to be a substantive one.

which has an impact on two officers is only one offense when the act is not an assault, an act of assault can be only one offense even though it has an impact on two officers.

Moreover, an interpretation that there are as many assaults committed as there are officers affected would produce incongruous results. Punishments totally disproportionate to the act of assault could be imposed because it will often be the case that the number of officers affected will have little bearing upon the seriousness of the criminal act. For an assault is ordinarily held to be committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm.[5] Thus under the meaning for which the Government contends, one who shoots and seriously wounds an officer would commit one offense punishable by 10 years' imprisonment, but if he points a gun at five officers, putting all of them in apprehension of harm, he would commit five offenses punishable by 50 years' imprisonment, even though he does not fire the gun and no officer actually suffers injury. It is difficult, without a clearer indication than the materials before us provide, to find that Congress intended this result.

It is therefore apparent that § 254 may as reasonably be read to mean that the single discharge of the shotgun would constitute an "assault" without regard to the number of federal officers affected, as it may be read to mean that as many "assaults" would be committed as there were officers affected. Neither the wording of the statute nor its legislative history points clearly to either meaning. In that circumstance the Court applies a policy of lenity and adopts the less harsh meaning. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose

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[5] See Burdick, Law of Crime (1946), § 342; Clark and Marshall, Law of Crimes (1958), § 10.16; Miller on Criminal Law (1934) § 99.

the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222. And in *Bell* v. *United States*, 349 U. S. 81, 83, the Court expressed this policy as follows: "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." See also *Prince* v. *United States, supra; Gore* v. *United States*, 357 U. S. 386, 391. This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act affecting more than one federal officer, Congress can make that meaning clear. We thus hold that the single discharge of a shotgun alleged by the petitioner in this case would constitute only a single violation of § 254.

It follows that the petitioner is entitled to an opportunity to sustain his allegation that his conviction of two assaults rested upon evidence that the wounding of the two officers resulted from a single discharge of the gun.[6] The District Court did not hold a hearing on his motion because of its view that the single discharge admitted by him resulted in two assaults. But the Court of Appeals, in affirming on the same ground, correctly acknowledged that if this were an erroneous view of the law, "there is a necessity for the determination of such a factual ques-

[6] In view of the trial judge's recollection that "more than one shot was fired into the car in which the officers were riding . . ." we cannot say that it is impossible that petitioner was properly convicted of more than one offense, even under the principles which govern here.

tion [and] there must be a hearing [at which] the [petitioner] is entitled to be present." 230 F. 2d, at 728. See *United States* v. *Hayman,* 342 U. S. 205, 219–220; *Walker* v. *Johnston,* 312 U. S. 275. Because the proceedings at the petitioner's trial were not transcribed [7] it will be necessary at the hearing on the motion to reconstruct the trial record. We decide only the issue tendered by the parties and intimate no view as to whether the petitioner may be entitled to correction of the consecutive sentence under any different fact situation which the reconstructed trial record may disclose.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK, dissenting.

By what to me is a dubious route, permitting a collateral attack to be made on this old judgment under § 2255 [1] proceedings, the Court reaches the merits only to agree fully with Ladner's contentions. As I see it, this enlargement of jurisdiction under § 2255 will subject the trial court dockets to a rash of applications by prisoners and completely overturn the purpose of the Congress in adopting the § 2255 procedure in lieu of habeas corpus. Moreover, it appears that by adopting Ladner's view on the merits the Court clearly informs the criminal, if I might be permitted to borrow a phrase, that assaults on

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[7] Although 58 Stat. 5, now 28 U. S. C. § 753, which provides for the recording of all proceedings in criminal cases, was enacted on January 20, 1944, Congress had not appropriated funds for the payment of court reporters at the time of the trial in June 1944. See *Ricard* v. *United States,* 148 F. 2d 895; *Vickers* v. *United States,* 157 F. 2d 285.

[1] 28 U. S. C. § 2255 (1952).

the lives of federal officers come just "as cheap by the dozen."

Nearly fourteen years ago, two federal officers were ambushed and seriously wounded by Ladner when he shot them point-blank with a shotgun as they sat in the front seat of a vehicle transporting some prisoners arrested in a raid on an illicit distillery. He was convicted of an assault on each of the officers. Ladner contends that he fired only a single charge from the shotgun and is, therefore, guilty of only one offense, regardless of the number of officers assaulted.

The principal issue, as I see the case, is the procedural one under § 2255, namely whether the Court should allow this collateral attack on Ladner's sentence. This important question, both argued and briefed by the Government, is, I think, wrongly decided by the Court. These proceedings are by motion under § 2255 to correct the consecutive sentences of ten years imposed on each of Counts 2 and 3 of the indictment. Count 2 charges an assault on Officer James Buford Reed, while Count 3 charges one on Officer W. W. Frost. The record is unclear, as the Court points out, as to how many discharges of the shotgun Ladner fired into the vehicle. Hence a determination of that issue must be made by the trial court on remand of the case.

Clearly this is an error that should have been raised by appeal. It did not undermine the jurisdiction of the original trial court, for under the allegations of the indictment these counts clearly state separate offenses. It raises no constitutional issue. The history of § 2255 clearly reveals that such an attack was not authorized. Reference to *United States* v. *Hayman,* 342 U. S. 205 (1952), gives us a complete picture. The Judicial Conference of the United States proposed § 2255 to remedy the "practical problems that had arisen in the administration of the fed-

eral courts' *habeas corpus* jurisdiction." The Conference in submitting the measure to the Congress noted that

> "The motion remedy broadly covers all situations where the sentence is 'open to collateral attack.' As a remedy, it is intended to be as broad as habeas corpus." *Hayman, supra,* at 217.

It is clear that in enacting § 2255, Congress did not intend to enlarge the available grounds for collateral attack, but rather sought only to correct serious administrative problems that had developed in the exercise over the years of habeas corpus jurisdiction.

The Court today holds that the trial court *may* have committed an error of law which will require the reconstruction of the evidence as to the number of shots fired by Ladner. As I have indicated, this may require a retrial of this fourteen-year-old case. Here the indictment and judgment are admittedly regular on their faces. The dispute is entirely with the facts of the incident. The issue, therefore, is squarely governed by the principles of *Sunal* v. *Large,* 332 U. S. 174 (1947). That was a habeas corpus proceeding attacking a conviction admittedly obtained as a result of error of the trial court. As here, neither the jurisdiction of the trial court nor claimed constitutional violations were at issue. The Court, speaking through MR. JUSTICE DOUGLAS, said:

> "Congress . . . has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. . . . Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus,*

litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court." 332 U. S., at 181–182.

The history and language of § 2255 show that the same limitations are present in such proceedings and that they are equally jurisdictional. What was enacted by Congress to solve the practical problems created by the "great increases" in habeas corpus applications today becomes the tool by which prisoners can pry open their convictions on even broader grounds than were ever permitted theretofore. It appears entirely probable that a much greater administrative problem will result than confronted the courts before the enactment of § 2255.

The Court cites seven cases in which we decided "questions of statutory construction" although the questions were raised by "collateral attack upon consecutive sentences . . . ." But those cases only point up my position the more, *i. e.*, that a collateral attack can be made only where the error in the sentence is apparent from the facts alleged in the four corners of the indictment or admitted by the parties. In five of the cases, *i. e.*, *In re Snow*, 120 U. S. 274 (1887); *Tinder* v. *United States*, 345 U. S. 565 (1953); *Gore* v. *United States*, 357 U. S. 386 (1958); *Prince* v. *United States*, 352 U. S. 322 (1957), and *Ebeling* v. *Morgan*, 237 U. S. 625 (1915), the error in sentencing is apparent from the face of the indictment. In the remaining two cases, *Bell* v. *United States*, 349 U. S. 81 (1955),[2] and *Morgan* v. *Devine*, 237 U. S. 632 (1915), the facts were admitted. The importance of this

[2] Though the § 2255 issue was mentioned in the Government's reply to the petition for certiorari in *Bell*, the question was not briefed nor argued on the merits.

distinction is indicated by the Court in *Prince* where it goes out of its way to point out that it was admitted by respondent that the robbery charged in Count 1 was performed immediately after the entry into the bank, charged in Count 2. The majority cannot point to a single case in this Court where collateral attack on consecutive sentences has been permitted under § 2255 when the facts were in dispute. There is none. The law has long been settled, formerly under habeas corpus and now under § 2255, to the contrary.

However, even more surprising to me, as it runs counter to my understanding of efficient judicial administration, is the Court's statement that its holding today should not be considered as "intimating any view as to the availability of a collateral remedy in another case where that question is properly raised, and is adequately briefed and argued in this Court." I find no counterpart for such a handling in our precedents. Implicit therein is the suggestion that come another case where the point is "properly raised [and] adequately briefed and argued in this Court" [3] then the conclusion will be different. Meanwhile, the Court says, *Ladner* is no precedent on the question of "the availability of a collateral remedy." Despite this, the Court permits its use here. This *ad hoc* disposition is not in keeping with good business conduct so necessary in court administration.

I do not reach the merits. The Congress, however, may correct that error of the Court. But the *ad hoc* manner in which it has today disposed of the case we shall have with us always—a precedent for others to follow.

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[3] The point was raised in this Court. The Government devoted four and one-half pages of its 29-page brief to it, discussing 18 separate cases. My research of the question indicates there would be little to add to the Government's discussion.

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LEEDOM ET AL., MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, *v.* KYNE.

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

No. 14. Argued October 23, 1958.—Decided December 15, 1958.

Section 9 (b) (1) of the National Labor Relations Act provides that, in determining the unit appropriate for collective bargaining purposes, "the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." After refusing to take a vote among the professional employees of a labor organization to determine whether a majority of them would "vote for inclusion in such unit," the Board included both professional and nonprofessional employees in the bargaining unit that it found appropriate. *Held:* A Federal District Court had jurisdiction of an original suit to set aside the Board's determination because it was made in excess of the Board's powers. Pp. 184–191.

101 U. S. App. D. C. 398, 249 F. 2d 490, affirmed.

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

Jonas Silver argued the cause for respondent, *pro hac vice,* by special leave of Court. With him on the brief was *Bernard Dunau.*

Briefs of *amici curiae* urging affirmance were filed by *Milton F. Lunch* for the National Society of Professional Engineers, and *Gerard D. Reilly* and *Joseph C. Wells* for the Engineers Joint Council.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Section 9 (b)(1) of the National Labor Relations Act, 49 Stat. 453, 61 Stat. 143, 29 U. S. C. § 159 (b)(1),

provides that, in determining the unit appropriate for collective bargaining purposes, "the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." The Board, after refusing to take a vote among the professional employees to determine whether a majority of them would "vote for inclusion in such unit," included both professional and nonprofessional employees in the bargaining unit that it found appropriate. The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate that determination of the Board because made in excess of its powers.

The facts are undisputed. Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, a voluntary unincorporated labor organization, hereafter called the Association, was created for the purpose of promoting the economic and professional status of the nonsupervisory professional employees of Westinghouse Electric Corporation at its plant in Cheektowaga, New York, through collective bargaining with their employer. In October 1955, the Association petitioned the National Labor Relations Board for certification as the exclusive collective bargaining agent of all nonsupervisory professional employees, being then 233 in number, of the Westinghouse Company at its Cheektowaga plant, pursuant to the provisions of § 9 of the Act, 29 U. S. C. § 159. A hearing was held by the Board upon that petition. A competing labor organization was permitted by the Board to intervene. It asked the Board to expand the unit to include employees in five other categories who performed technical work and were thought by it to be "professional employees" within the meaning of § 2 (12) of the Act, 29 U. S. C. § 152 (12). The Board found that

they were not professional employees within the meaning of the Act. However, it found that nine employees in three of those categories should nevertheless be included in the unit because they "share a close community of employment interests with [the professional employees, and their inclusion would not] destroy the predominantly professional character of such a unit." The Board, after denying the Association's request to take a vote among the professional employees to determine whether a majority of them favored "inclusion in such unit," included the 233 professional employees and the nine nonprofessional employees in the unit and directed an election to determine whether they desired to be represented by the Association, by the other labor organization, or by neither. The Association moved the Board to stay the election and to amend its decision by excluding the nonprofessional employees from the unit. The Board denied that motion and went ahead with the election at which the Association received a majority of the valid votes cast and was thereafter certified by the Board as the collective bargaining agent for the unit.

Thereafter respondent, individually, and as president of the Association, brought this suit in the District Court against the members of the Board, alleging the foregoing facts and asserting that the Board had exceeded its statutory power in including the professional employees, without their consent, in a unit with nonprofessional employees in violation of § 9 (b)(1) which commands that the Board "shall not" do so, and praying, among other things, that the Board's action be set aside. The defendants, members of the Board, moved to dismiss for want of jurisdiction and, in the alternative, for a summary judgment. The plaintiff also moved for summary judgment. The trial court found that the Board had disobeyed the express command of § 9 (b)(1) in including nonprofessional employees and professional employees in

the same unit without the latter's consent, and in doing so had acted in excess of its powers to the injury of the professional employees, and that the court had jurisdiction to grant the relief prayed. It accordingly denied the Board's motion and granted the plaintiff's motion and entered judgment setting aside the Board's determination of the bargaining unit and also the election and the Board's certification.

On the Board's appeal it did not contest the trial court's conclusion that the Board, in commingling professional with nonprofessional employees in the unit, had acted in excess of its powers and had thereby worked injury to the statutory rights of the professional employees. Instead, it contended only that the District Court lacked jurisdiction to entertain the suit. The Court of Appeals held that the District Court did have jurisdiction and affirmed its judgment. 101 App. D. C. 398, 249 F. 2d 490. Because of the importance of the question and the fact that it has been left open in our previous decisions, we granted certiorari, 355 U. S. 922.

Petitioners, members of the Board, concede here that the District Court had jurisdiction of the suit under § 24 (8) of the Judicial Code, 28 U. S. C. § 1337, unless the review provisions of the National Labor Relations Act destroyed it. In *American Federation of Labor* v. *Labor Board,* 308 U. S. 401, this Court held that a Board order in certification proceedings under § 9 is not "a final order" and therefore is not subject to judicial review except as it may be drawn in question by a petition for enforcement or review of an order, made under § 10 (c) of the Act, restraining an unfair labor practice. But the Court was at pains to point out in that case that "[t]he question [there presented was] distinct from . . . whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because

contrary to the statute . . . ." *Id.*, at 404. The Board argued there, as it does here, that the provisions of the Act, particularly § 9 (d), have foreclosed review of its action by an original suit in a District Court. This Court said: "But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, *apart from the review provisions of the Wagner Act,* affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record." *Id.*, at 412. (Emphasis added.)

The record in this case squarely presents the question found not to have been presented by the record in *American Federation of Labor* v. *Labor Board, supra.* This case, in its posture before us, involves "unlawful action of the Board [which] has inflicted an injury on the [respondent]." Does the law, "apart from the review provisions of the . . . Act," afford a remedy? We think the answer surely must be yes. This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9 (b)(1) is clear and mandatory. It says that, in determining the unit appropriate for the purposes of collective bargaining, "the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional

employees vote for inclusion in such unit." (Emphasis added.) Yet the Board included in the unit employees whom it found were not professional employees, after refusing to determine whether a majority of the professional employees would "vote for inclusion in such unit." Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

In *Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548, it was contended that, because no remedy had been expressly given for redress of the congressionally created right in suit, the Act conferred "merely an abstract right which was not intended to be enforced by legal proceedings." *Id.,* at 558. This Court rejected that contention. It said: "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. . . . If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose . . . . The definite prohibition which Congress inserted in the Act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." *Id.,* at 568, 569. And compare *Virginian R. Co.* v. *System Federation,* 300 U. S. 515.

In *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, this Court held that the District Court did not have jurisdiction of an original suit to review an order

of the National Mediation Board determining that all yardmen of the rail lines operated by the New York Central system constituted an appropriate bargaining unit, because the Railway Labor Board had acted within its delegated powers. But in the course of that opinion the Court announced principles that are controlling here. "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, and *Virginian R. Co.* v. *System Federation,* 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose." *Id.,* at 300.

Here, differently from the *Switchmen's* case, "absence of jurisdiction of the federal courts" would mean "a sacrifice or obliteration of a right which Congress" has given professional employees, for there is no other means, within their control (*American Federation of Labor* v. *Labor Board, supra*), to protect and enforce that right. And "the inference [is] strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U. S., at 300. This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. Cf. *Harmon* v. *Brucker,* 355 U. S. 579; *Stark* v. *Wickard,* 321 U. S. 288; *School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94.

Where, as here, Congress has given a "right" to the professional employees it must be held that it intended that right to be enforced, and "the courts . . . encounter no difficulty in fulfilling its purpose." *Texas & New Orleans R. Co.* v. *Railway Clerks, supra,* at 568.

The Court of Appeals was right in holding, in the circumstances of this case, that the District Court had jurisdiction of this suit, and its judgment is

Affirmed.

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

The legislative history of the Wagner Act,[1] and of the Taft-Hartley amendments,[2] shows a considered congressional purpose to restrict judicial review of National Labor Relations Board representation certifications to review in the Courts of Appeals in the circumstances specified in § 9 (d), 29 U. S. C. § 159 (d). The question was extensively debated when both Acts were being considered, and on both occasions Congress concluded that, unless drastically limited, time-consuming court procedures would seriously threaten to frustrate the basic national policy of preventing industrial strife and achieving industrial peace by promoting collective bargaining.

The Congress had before it when considering the Wagner Act the concrete evidence that delays pending time-consuming judicial review could be a serious hindrance to the primary objective of the Act—bringing employers and employees together to resolve their differences through discussion. Congress was acutely aware of the experience of the predecessor of the present Labor Board [3] under the

[1] 49 Stat. 449.

[2] 61 Stat. 136.

[3] The first National Labor Relations Board was created by Public Resolution 44 of June 19, 1934, 48 Stat. 1183, to administer § 7 (a) of the National Industrial Recovery Act, 48 Stat. 198.

National Industrial Recovery Act, which provided that investigations and certifications by the Board could be brought directly to the courts for review. Such direct review was determined by the Congress to be "productive of a large measure of industrial strife . . . ," [4] and was specifically eliminated in the Wagner Act. Although Congress recognized that it was necessary to determine employee representatives before collective bargaining could begin, Congress concluded that the chance for industrial peace increased correlatively to how quickly collective bargaining commenced. For this reason Congress ordained that the courts should not interfere with the prompt holding of representation elections or the commencement of collective bargaining once an employee representative has been chosen.[5] Congress knew that if direct judicial review of the Board's investigation and certification of representatives was not barred, "the Government can be delayed indefinitely before it takes the first step toward industrial peace." [6] Therefore, § 9 (d) was written to provide "for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election." [7] After the Wagner Act was passed, a proposed amendment to allow judicial review after an election but before an unfair labor practice order was specifically rejected.[8] In short, Congress set itself firmly against direct judicial review of the investigation and certification of representatives, and required the prompt initiation of the collective-bargaining process after the

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[4] H. R. Rep. No. 1147, 74th Cong., 1st Sess., p. 7.

[5] See H. R. Rep. No. 1147, *supra*, p. 23.

[6] S. Rep. No. 573, 74th Cong., 1st Sess., p. 6.

[7] 79 Cong. Rec. 7658.

[8] See Hearings before Senate Committee on Education and Labor on S. 1000 et al., 76th Cong., 1st Sess., pp. 584–587.

Board's certification, because of the risk that time-consuming review might defeat the objectives of the national labor policy. See *American Federation of Labor* v. *Labor Board,* 308 U. S. 401, 409–411; *Madden* v. *Brotherhood and Union of Tr. Employees,* 147 F. 2d 439.

When the Taft-Hartley amendments were under consideration, employers complained that because § 9 (d) allowed judicial review to an employer only when unfair labor practice charges were based in whole or in part upon facts certified following an investigation of representatives, these "cumbersome proceedings" meant that the employer could have review only by committing an unfair labor practice "no matter how much in good faith he doubted the validity of the certification." [9] A House amendment therefore provided for direct review in the Courts of Appeals of Board certifications on appeal of any person interested, as from a final order of the Board.[10] Opponents revived the same arguments successfully employed in the Wagner Act debates: "Delay would be piled upon delay, during which time collective bargaining would be suspended pending determination of the status of the bargaining agent. Such delays can only result in industrial strife." [11] Both sides recognized that the House amendment would produce a fundamental change in the law.[12] The Senate rejected the House amendment; the amendments proposed by that body continued only the indirect and limited review provided

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[9] H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 43.

[10] H. R. 3020, 80th Cong., 1st Sess., § 10 (f); see H. R. Rep. No. 245, *supra,* pp. 59–60.

[11] H. R. Rep. No. 245, *supra,* p. 94 (minority report). It was conservatively estimated that one year would be the average time required for judicial review of a Board certification. *Ibid.*

[12] See, *e. g.,* H. R. Rep. No. 245, *supra,* p. 43.

in original § 9 (d). In conference, the Senate view prevailed.[13] Senator Taft reported:[14]

> "Subsection 9 (d) of the conference agreement conforms to the Senate amendment. The House bill contained a provision which would have permitted judicial review of certifications even before the entry of an unfair labor practice order. In receding on their insistence on this portion, the House yielded to the view of the Senate conferees that such provision would permit dilatory tactics in representation proceedings."

The Court today opens a gaping hole in this congressional wall against direct resort to the courts. The Court holds that a party alleging that the Board was guilty of "unlawful action" in making an investigation and certification of representatives need not await judicial review until the situation specified in § 9 (d) arises, but has a case immediately cognizable by a District Court under the "original jurisdiction" granted by 28 U. S. C. § 1337 of "any civil action or proceeding arising under any Act of Congress regulating commerce." The Court, borrowing a statement fom *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 300, finds that, in such case "the inference [is] strong that Congress intended the statutory provisions governing the general jurisdiction of those [District] courts to control."

There is nothing in the legislative history to indicate that the Congress intended any exception from the requirement that collective bargaining begin without awaiting judicial review of a Board certification or the investigation preceding it. Certainly nothing appears that an exception was intended where the attack upon the Board's action is based upon an alleged misinterpretation of the

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[13] See H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 56–57.

[14] 93 Cong. Rec. 6444.

statute. The policy behind the limitation of judicial review applies just as clearly when the challenge is made on this ground. Plainly direct judicial review of a Board's interpretation of the statute is as likely to be as drawn out, and thus as frustrative of the national policy, as is review of any other type of Board decision. That appears from the timetable in *Inland Empire District Council* v. *Millis,* 325 U. S. 697. That case also involved a challenge in a District Court to a statutory interpretation by the Board in a representation proceeding. The Court held that it was not necessary to reach the question of the District Court's jurisdiction since it had not been shown that the Board's interpretation of the pertinent statute was erroneous. But over two years elapsed while the question was being litigated. The hearing which led to the certification was held in May 1943 and this Court's decision was announced on June 11, 1945.

If there be error in the Board's statutory interpretation here, although there was none in *Inland Empire Council,* I ask, again, where even a scintilla of evidence is to be found that Congress intended an exception to permit direct judicial review for Board errors in statutory interpretation, obvious or debatable? Of course, there is none. Indeed the evidence to the contrary that Congress intended only limited review is so compelling that I can see no escape from the conclusion reached by the Fourth Circuit Court of Appeals: "It is hardly possible that Congress should have intended to permit review by District Courts of 9 (c) proceedings while so carefully limiting review of such proceedings in the Circuit Courts of Appeals to cases in which an order under 10 (c) has been entered." *Madden* v. *Brotherhood and Union of Tr. Employees,* 147 F. 2d 439, 442.

I daresay that the ingenuity of counsel will, after today's decision, be entirely adequate to the task of finding some alleged "unlawful action," whether in statutory

interpretation or otherwise, sufficient to get a foot in a District Court door under 28 U. S. C. § 1337. Even when the Board wins such a case on the merits, as in *Inland Empire Council,* while the case is dragging through the courts the threat will be ever present of the industrial strife sought to be averted by Congress in providing only drastically limited judicial review under § 9 (d). Both union and management will be able to use the tactic of litigation to delay the initiation of collective bargaining when it suits their purposes. A striking example of this was recently disclosed to the Select Committee of the Senate on Improper Activities in the Labor or Management Field.[15] A union, by challenging Board certification proceedings in the District Courts,[16] was able to extend a representation proceeding to over six months, even though only seven employees were involved and they did not support the union. By the time that the Board was able to certify a representative of the employees, the industrial strife of those six months had forced the employer out of business. Thus collective bargaining was prevented, the basic purpose of the LMRA was frustrated, and the result was serious hardship to both the employer and employees. I fear that today the Court fashions a major setback for the goals of the national labor policy, at least until the Congress enacts new language to express a will which I think is already crystal clear.

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[15] See Testimony of Boyd Leedom, Chairman of the National Labor Relations Board, before the Select Committee of the Senate on Improper Activities in the Labor or Management Field, November 20, 1958.

[16] In this general connection, the Chairman of the NLRB testified: "We are experiencing now, I think, more than any time within my experience . . . a tendency of the United States District Courts to move into the area where we think we have exclusive jurisdiction, so that in recent months we have had several District Courts interfering with our election processes."

It is no support for the Court's decision that the respondent union may suffer hardship if review under 28 U. S. C. § 1337 is not open to it. The Congress was fully aware of the disadvantages and possible unfairness which could result from the limitation on judicial review enacted in § 9 (d). The House proposal for direct review of Board certifications in the Taft-Hartley amendments was based in part upon the fact that, under the Wagner Act, the operation of § 9 (d) was "unfair to . . . the union that loses, which has no appeal at all no matter how wrong the certification may be; [and to] the employees, who also have no appeal . . . ." [17] Congress nevertheless continued the limited judicial review provided by § 9 (d) because Congress believed the disadvantages of broader review to be more serious than the difficulties which limited review posed for the parties. Furthermore, Congress felt that the Board procedures and the limited review provided in § 9 (d) were adequate to protect the parties.[18]

The Court supports its decision by stating that *Switchmen's Union* v. *National Mediation Board, supra,* "announced principles that are controlling here." This is true, but I believe that those principles lead to, indeed compel, a result contrary to that reached by the Court. In that case, the Switchmen's Union sought to challenge in a District Court the certification of an employee representative by the National Mediation Board under the Railway Labor Act. The Board certified the Brotherhood of Railroad Trainmen as representative for all the yardmen of the rail lines operated by the New York Central system. The Switchmen's Union contended that yardmen of certain designated parts of the system should be permitted to vote for separate representatives instead of being compelled to take part in a system-wide elec-

[17] H. R. Rep. No. 245, *supra,* p. 43.

[18] See notes 19, 20, *infra.*

tion. The Board rejected this contention of the Switchmen's Union upon the ground that the Railway Labor Act did not authorize the Board to determine a unit of less than the entire system. The Board's interpretation was that the "Railway Labor Act vests the Board with no discretion to split a single carrier . . . ." *Switchmen's* case, 320 U. S., at 309. This Court held that the action of the Switchmen's Union was not cognizable in a District Court. The Court held that the Railway Labor Act, read in the light of its history, disclosed a congressional intention to bar direct review in the District Courts of certifications by the Mediation Board. This was held notwithstanding the fact that the certification was based on an alleged misinterpretation of the Act.

This same reasoning has striking application in this case. The National Labor Relations Act provides that the Labor Board "shall decide in each case . . . the unit appropriate for the purposes of collective bargaining," § 9 (b), but also provides that the Board "shall not . . . decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit . . . ." § 9 (b)(1). The Board, in making the certification in dispute, has interpreted these provisions as requiring the approval of the professional employees of a mixed bargaining unit of professionals and nonprofessionals only when the professionals are a minority in the unit, since only in such a case would they need this protection against the ignoring of their particular interests. This interpretation is the basis of respondent union's complaint in its action under 28 U. S. C. § 1337 in the District Court. But an alleged error in statutory construction was also the basis of the District Court action in the *Switchmen's* case. Thus the two cases are perfectly parallel. And just as surely as in the case of the Mediation Board under the

Railway Labor Act, the Congress has barred District Court review of National Labor Relations Board certifications under the Labor Management Relations Act. The history of the controversy over direct judicial review which I have canvassed shows with a clarity perhaps not even as true of the Mediation Board that the National Labor Relations Board was the "precise machinery," 320 U. S., at 301, selected by Congress for the purpose of determining a certification and that "there was to be no dragging out of the controversy into other tribunals of law." *Id.*, at 305. Congress evidenced its will definitely and emphatically "by the highly selective manner in which Congress . . . provided for judicial review of administrative orders or determinations under the Act." *Id.*, at 305. Review is confined to review in a Court of Appeals in the circumstances specified in § 9 (d).

The Court seizes upon the language in *Switchmen's*, "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U. S., at 300. But the holding in *Switchmen's* was that in creating the Mediation Board and vesting that Board with power to decide certification controversies, Congress had provided its own tribunal for protection of the "right" it created, thus precluding any basis for an inference that Congress intended the general jurisdiction of the District Courts to control. The Court found that Congress intended protection of the "right" to be confined to the Board's exercise of power conferred for the purpose. Therefore, the Court held "review by the federal district courts of the Board's determination is not necessary to preserve or protect that 'right.' Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise ma-

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chinery and fashioned the tool which it deemed suited to that end. . . . All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." 320 U. S., at 301. The Court used the "sacrifice or obliteration" language solely to distinguish the situation where Congress created a "right" but no tribunal for its enforcement. This was the case in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, and *Virginian R. Co.* v. *System Federation,* 300 U. S. 515. In the *Texas* case, the employer was attempting to prevent the organization of its employees in violation of § 2 of the Railway Labor Act, which provided that the employees could select representatives "without interference, influence, or coercion" by the employer. There was no agency designated to enforce this policy of the Act, and unless the courts provided sanctions against the outlawed activity, there would be no official sanctions to prevent it. Similarly in the *Virginian R. Co.* case, a union asked the Court to order an employer to obey the commands of the Railway Labor Act because without such relief the employer would have been free to ignore the Act, since at that time the Railway Labor Act provided no agency for enforcement of the right. Thus when the Court in *Switchmen's* talked about "the absence of jurisdiction of the federal courts" meaning "a sacrifice or obliteration of a right which Congress had created" it referred to the situations in the *Texas* and *Virginian R. Co.* cases. See *Switchmen's* case, at p. 300.

But here, as the Congress provided the Mediation Board under the Railway Labor Act, the Congress has provided an agency, the NLRB, to protect the "right" it created under the National Labor Relations Act. Congress has in addition enacted "an appropriate safeguard and opportunity to be heard" [19] in procedures to be followed by the Board. It has indeed gone further than in the

[19] H. R. Rep. No. 1147, *supra,* p. 23.

Railway Labor Act. Whereas no judicial review of any kind was there provided, some, although limited, judicial review is provided under § 9 (d). This was considered by Congress as "a complete guarantee against arbitrary action by the Board." [20] Plainly we have here a situation where it may be said precisely as in *Switchmen's* that "Congress for reasons of its own decided upon the method for protection of the 'right' it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end."

Cases such as *Harmon* v. *Brucker,* 355 U. S. 579, and *Stark* v. *Wickard,* 321 U. S. 288, cited by the Court, merely indicate that congressionally created rights may be judicially enforced unless the Act that creates the rights indicates the contrary. Each case must turn on an interpretation of the statute that creates the right. As this Court said in *Stark* v. *Wickard* itself: "even where a complainant possesses a claim to executive action beneficial to him, created by federal statute, it does not necessarily follow that actions of administrative officials, deemed by the owner of the right to place unlawful restrictions upon his claim, are cognizable in appropriate federal courts of first instance." 321 U. S., at 306. The statutes under consideration in those cases do not have the common purposes and scheme of the National Labor Relations Act and Railway Labor Act. Furthermore, the general statutory scheme and the legislative history of those statutes simply did not demonstrate the intent to limit the judicial enforcement of the rights created, so compellingly demonstrated in this case, and in *Switchmen's Union* v. *National Mediation Board.*

I would reverse and remand the case to the District Court with instructions to dismiss the complaint for lack of jurisdiction of the subject matter.

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[20] S. Rep. No. 573, *supra,* p. 14.

EVERS ET AL. *v.* DWYER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

No. 382. Decided December 15, 1958.

A Negro resident of Memphis, Tenn., brought this class action in a Federal District Court against officials of the City of Memphis, the local street railway company, and one of that company's employees, seeking a declaratory judgment as to his claimed constitutional right, and that of others similarly situated, to travel on buses within the City without being subjected, as required by a Tennessee statute, to segregated seating arrangements on account of race. The District Court dismissed the complaint on the ground that no "actual controversy," within the meaning of the Declaratory Judgment Act, had been shown, because appellant had ridden a bus in Memphis on only one occasion, had done so for the purpose of instituting this litigation, and was not "representative of a class of colored citizens who do use the buses in Memphis as a means of transportation." *Held:* The record in this case establishes the existence of an actual controversy which should have been adjudicated by the District Court. Pp. 202–204.

Reversed and case remanded for further proceedings.

Robert L. Carter for appellants.

Walter Chandler, Allison B. Humphreys, Edward P. Russell and *Charles M. Crump* for appellees.

PER CURIAM.

Appellant, a Negro resident of Memphis, Tennessee, brought this class action in the Western Division of the United States District Court for the Western District of Tennessee, seeking a declaration as to his claimed constitutional right, and that of others similarly situated, to travel on buses within that City without being subjected, as required by Tenn. Code Ann., 1955, §§ 65–1704 through 65–1709, to segregated seating arrangements on account of race. An injunction against enforcement of this stat-

ute or any other method of state-enforced segregation on Memphis transportation facilities was also sought. Various officials and officers of the City of Memphis, the Memphis Street Railway Company, and one of that Company's employees were named as defendants. After a hearing a three-judge District Court, without reaching the merits, dismissed the complaint on the ground that no "actual controversy" within the intendment of the Declaratory Judgment Act, 28 U. S. C. § 2201, had been shown, in that appellant had ridden a bus in Memphis on only one occasion and had "boarded the bus for the purpose of instituting this litigation," and was thus not "representative of a class of colored citizens who do use the buses in Memphis as a means of transportation."

Of course, the federal courts will not grant declaratory relief in instances where the record does not disclose an "actual controversy." *Public Service Comm'n* v. *Wycoff Co.,* 344 U. S. 237. In *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U. S. 270, 273, this Court said: "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." In the present case we think that the record establishes the existence of an actual controversy which should have been adjudicated by the lower court.

The District Court found that when appellant boarded a Memphis bus on April 26, 1956, and seated himself at the front of the vehicle, the driver told him he must move to the rear, "stating that the law required it because of

[his] color"; that following appellant's refusal to comply, two police officers shortly thereafter boarded the bus and "ordered [appellant] to go to the back of the bus, get off, or be arrested"; and that thereupon appellant left the bus. The record further shows that the appellees intend to enforce this state statute until its unconstitutionality has been finally adjudicated. We do not believe that appellant, in order to demonstrate the existence of an "actual controversy" over the validity of the statute here challenged, was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers. A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability. See *Gayle* v. *Browder,* 352 U. S. 903, affirming the decision of a three-judge District Court reported at 142 F. Supp. 707. That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant. See *Young* v. *Higbee Co.,* 324 U. S. 204, 214; *Doremus* v. *Board of Education,* 342 U. S. 429, 434–435.

We hold that the court below erred in not proceeding to the merits. Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

BRIGGS, DOING BUSINESS AS WALT'S AUTO PARKS & GARAGES, *v.* CITY OF LOS ANGELES ET AL.

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

No. 453. Decided December 15, 1958.

Appeal dismissed for want of a substantial federal question. Reported below: 154 Cal. App. 2d 642, 316 P. 2d 408.

Morris Lavine for appellant.

Roger Arnebergh and *Philip E. Grey* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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

JAMES ET AL. *v.* TODD, COMMISSIONER OF AGRICULTURE AND INDUSTRIES OF ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 464. Decided December 15, 1958.

Appeal dismissed for want of a substantial federal question.
Reported below: 267 Ala. 495, 103 So. 2d 19.

Joe T. Patterson, Attorney General of Mississippi, *W. E. McIntyre, Jr.,* Special Assistant Attorney General, *Frank M. Dixon* and *Sol E. Brinsfield* for appellants.

John Patterson, Attorney General of Alabama, and *Gordon Madison* and *George O. Miller, Jr.,* Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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

Syllabus.

MITCHELL, SECRETARY OF LABOR, *v.* LUBLIN, McGAUGHY & ASSOCIATES ET AL.

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

No. 37. Argued October 21, 1958.—Decided January 12, 1959.

The Secretary of Labor brought this action under § 17 of the Fair Labor Standards Act to restrain respondent from violating the record-keeping and overtime provisions of the Act. Respondent is a firm of architects and engineers which designs public, industrial and residential projects and prepares plans and specifications for them. It has offices in Norfolk, Va., and Washington, D. C., and employs 65 or 70 persons. Many of its projects and clients are located outside of Virginia and the District of Columbia. Its fieldmen often travel across state lines, and its plans and specifications often are sent across state lines. Its draftsmen, fieldmen, clerks and stenographers all work intimately with plans and specifications prepared by respondent for the construction, repair, relocation and improvement of various interstate instrumentalities and facilities, including air bases, roads, turnpikes, bus terminals and radio and television installations. *Held:*

1. Respondent's non-professional employees are "engaged in commerce" as that term is used in §§ 6 and 7 of the Act, and they are within the coverage of the Act. Pp. 208–213.

(a) The work done on plans and specifications for instrumentalities and facilities of interstate commerce is so directly and vitally related to their functioning as to be, in practical effect, a part of such commerce. P. 212.

(b) That a portion of respondent's business pertains to military bases or new construction does not require a different result. P. 213.

(c) The controlling factor is the activities of the individual employees, and the employees here involved are clearly "engaged in commerce." P. 213.

2. In the circumstances of this case, injunctive relief would not appear to be improper as a matter of law; but it will be within the discretion of the District Court whether or not to issue an injunction after further proceedings on remand of the case. Pp. 213–215.

250 F. 2d 253, reversed and case remanded for further proceedings.

Bessie Margolin argued the cause for petitioner. With her on the brief were *Solicitor General Rankin, Stuart Rothman* and *Jacob I. Karro.*

Alan J. Hofheimer argued the cause for respondents. With him on the brief was *Robert C. Nusbaum.*

Milton F. Lunch filed a brief for the National Society of Professional Engineers, as *amicus curiae,* in support of respondents.

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

Petitioner, the Secretary of Labor, brought this action under § 17 of the Fair Labor Standards Act, 29 U. S. C. § 217,[1] to restrain respondent [2] from violating the record-keeping and overtime provisions of the Act. 29 U. S. C. §§ 206, 207, 211. The complaint was dismissed basically on the lower court's conclusion that the activities of respondent, an architectural and consulting engineering firm, were local in nature and not within the Act's coverage. 250 F. 2d 253. We granted certiorari, 356 U. S. 917, to resolve an apparent conflict with a decision of another Court of Appeals in a similar case.[3]

Respondent is hired to design public, industrial and residential projects and to prepare plans and specifica-

[1] "The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 15 of this title. . . ."

Section 15 makes it unlawful to violate, *inter alia,* any of the provisions of §§ 6, 7, 11 (c) and 11 (d), 29 U. S. C. §§ 206, 207, 211 (c) and 211 (d).

[2] The action was commenced against Lublin, McGaughy & Associates, a copartnership, Alfred M. Lublin, John B. McGaughy, William T. McMillan and William Marshall, Jr., doing business as Lublin, McGaughy & Associates, and each of those persons individually. Throughout the action, these defendants have been treated as a single business entity which we shall refer to herein as respondent.

[3] *Mitchell* v. *Brown Engineering Co.,* 224 F. 2d 359 (C. A. 8th Cir.), certiorari denied, 350 U. S. 875.

tions necessary for their construction. It has offices in both Norfolk, Virginia, and Washington, D. C., and it employs some sixty-five or seventy persons. Respondent does considerable work for the armed services. The District Court estimated that approximately 60% of the work in the Norfolk office has been done for the Army Engineers or the Navy Department while 85% of the work in Washington has been performed for similar agencies or for subdivisions of local governments in the District and nearby States. Many of respondent's projects and clients are located outside Virginia and the District of Columbia. A typical project undertaken in the past was the design of a standard mobile Army warehouse with the attendant preparation of detailed plans and specifications. In addition, respondent has designed various construction projects including the widening of streets at a naval operating base, the extension and paving of airplane taxiways and parking aprons at a naval air station, a local sewerage system in Maryland, the alteration of various hangar facilities at military air bases, the relocation of radio and television facilities, the improvement of state roads and turnpikes, and the repair of government buildings at shipyards. The balance of respondent's activity has consisted of preparing plans and specifications for the construction of private projects such as homes, commercial buildings, bus terminals, shopping centers and the like. Respondent has performed certain supervisory functions in connection with the construction of some of the private projects but almost none where governmental agencies were involved.

The government contracts required respondent to produce plans and specifications, copies of which were sent by the governmental agencies to prospective bidders, many of whom were located outside Virginia and the District of Columbia. These plans consisted of drawings and designs and were supplemented by explanatory specifi-

cations which contained the information necessary for estimating cost and guiding contractors in bidding and construction. They were prepared under the supervision of respondent's professional members and associates by draftsmen exployed by respondent. In many cases, the information necessary to prepare the plans and specifications was gathered on the site of the projects by fieldmen employed by respondent. These fieldmen included surveyors, transitmen and chainmen who often traveled across state lines to get to the projects. On one project, fieldmen from the Washington office went daily to nearby Maryland to gather data for a sewerage project. In addition to the draftsmen and fieldmen, various clerks and stenographers employed by respondent participated in the mechanical preparation of these plans and specifications.

The parties are agreed that respondent's professional employees—architects and engineers—are exempted from the coverage of the Act by § 13 (a)(1), 29 U. S. C. § 213 (a)(1).[4] Therefore, the Secretary's injunction action is directed at some fifty employees mentioned above: draftsmen, fieldmen, clerks and stenographers. The stenographers, in addition to their connection with the plans and specifications, manned respondent's private phone wire connecting the Norfolk and Washington offices, prepared and typed substantial numbers of letters concerning the described projects which were mailed to persons in places other than Virginia and the District of Columbia, and prepared payrolls in the Virginia office for employees at the Washington and Norfolk locations.

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[4] The section provides:

"The provisions of sections 206 and 207 of [this] title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator) . . . ."

The question at issue is whether these non-professional employees are "engaged in commerce" as that term is used in §§ 6 and 7 of the Act, 29 U. S. C. §§ 206, 207.[5] To determine the answer to this question, we focus on the activities of the employees and not on the business of the employer. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564; *Mitchell* v. *Vollmer & Co.,* 349 U. S. 427. We start with the premise that Congress, by excluding from the Act's coverage employees whose activities merely "affect commerce," indicated its intent not to make the scope of the Act coextensive with its power to regulate commerce.[6] *Kirschbaum Co.* v. *Walling, supra; McLeod* v. *Threlkeld,* 319 U. S. 491. However, within the tests of coverage fashioned by Congress, the Act has been construed liberally to apply to the furthest reaches consistent with congressional direction. Thus the Court stated in *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 128, ". . . the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce.' "[7]

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[5] Section 6 provides:

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates . . . ."

Section 7 provides:

"(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

[6] See also the limitations contained in § 3 (j), 29 U. S. C. § 203 (j), concerning the coverage of persons engaged in occupations related to the production of goods for commerce.

[7] See also *Mitchell* v. *Vollmer & Co., supra; Alstate Construction Co.* v. *Durkin,* 345 U. S. 13; *Walling* v. *Jacksonville Paper Co., supra,* at 567.

Where employees' activities have related to interstate instrumentalities or facilities, such as bridges, canals and roads, we have used a practical test to determine whether they are "engaged in commerce." The test is "whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity." *Mitchell* v. *Vollmer & Co., supra,* at 429.[8] Coverage in the instant case must be determined by that test for, as the parties stipulated below, the draftsmen, fieldmen, clerks and stenographers all worked intimately with the plans and specifications prepared by respondent for the repair and construction of various interstate instrumentalities and facilities including air bases, roads, turnpikes, bus terminals, and radio and television installations. In our view, such work is directly and vitally related to the functioning of these facilities because, without the preparation of plans for guidance, the construction could not be effected and the facilities could not function as planned. In our modern, technologically oriented society, the elements which combine to produce a final product are diffuse and variegated. Deciding whether any one element is so directly related to the end product as to be considered vital is sometimes a difficult problem. But plans, drawings and specifications have taken on greater importance as the complexities of design and bidding have increased. Under the circumstances present here, we have no hesitancy in concluding that the preparation of the plans and specifications was directly related to the end products and that the employees whose activities were intimately related to such preparation were "engaged in commerce."

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[8] See also *Fitzgerald Co.* v. *Pedersen,* 324 U. S. 720; *McLeod* v. *Threlkeld, supra; Walling* v. *Jacksonville Paper Co., supra; Overstreet* v. *North Shore Corp., supra.*

Respondent urges that military bases are not instrumentalities of commerce, but rather of war, and, in addition, that many of the projects involved new construction and hence cannot be considered as existing facilities or instrumentalities of interstate commerce. In answer to respondent's first point, it is sufficient to note that under the Court's reasoning in *Powell* v. *United States Cartridge Co.,* 339 U. S. 497, a facility designed for war may also be an instrumentality of commerce. See *Mitchell* v. *H. B. Zachry Co.,* 127 F. Supp. 377. Here respondent's employees admittedly worked on plans and specifications relating to construction at military air bases. And it is not disputed that these bases are used for interstate commerce, at least to the extent that interstate flights both land at and take off from them, and men, materials, and mail move through them from distant points. Respondent's second objection must be rejected also. Whatever vitality the "new construction" doctrine retains after *Mitchell* v. *Vollmer & Co., supra,* and *Southern Pacific Co.* v. *Gileo,* 351 U. S. 493, 500, it is not applicable here because, as the record shows, many projects involved the repair, extension, or relocation of existing facilities.

Respondent contends that *its* activities are essentially local in nature. But as we stated, Congress deemed the activities of the individual employees, not those of the employer, the controlling factor in determining the proper application of the Act. Here the activities of the employees show clearly that they are "engaged in commerce" and thus are eligible for the protections afforded by the Act.

Although not an issue below and not a matter of disagreement between the parties before this Court, some doubt has arisen whether injunctive relief is proper in this case. Examination of the record reveals that the controversy has been whether the admitted activities of respondent's employees during the period of the complaint

brought them within the Act's coverage. Respondent does not appear ever to have urged that an injunction would be improper if, as a matter of law, its employees were "engaged in commerce." Its position seems correct in light of the specific statutory provision, § 17, 29 U. S. C. § 217, which gives the District Courts jurisdiction to restrain violations of the Act. And the numerous suits brought by the Department of Labor under that section attest to the fact that the commencement of an injunction action, where coverage is in doubt, is not at all unusual. See, *e. g., Mitchell* v. *Vollmer & Co., supra; Walling* v. *Jacksonville Paper Co., supra; Kirschbaum Co.* v. *Walling, supra; Mitchell* v. *Raines,* 238 F. 2d 186; *Mitchell* v. *Feinberg,* 236 F. 2d 9; *Chambers Construction Co.* v. *Mitchell,* 233 F. 2d 717.

The Act sets up four means for enforcement. Section 16 (a), 29 U. S. C. § 216 (a), provides for criminal prosecution of willful violators. Section 16 (b), 29 U. S. C. § 216 (b), gives individual employees rights of actions in civil suits to recover unpaid minimum wages, overtime compensation and certain liquidated damages. Section 16 (c), 29 U. S. C. § 216 (c), allows the Secretary of Labor to bring such an action in behalf of such employees provided the suit does not involve "an issue of law which has not been settled finally by the courts." Section 17, 29 U. S. C. § 217, of course, provides for injunctions. Even a cursory examination of these provisions shows that the injunction is the only effective device available to the Secretary when coverage is in doubt and he wishes to establish the availability of the Act to employees not theretofore afforded its protections.

We fail to see what undue burden will be placed on respondent by the issuance of an injunction especially in view of the District Court's suggestion, to which both parties appear to have acquiesced, that if coverage premised on the admitted activities is established, the

parties should have no trouble in deciding which of the employees are covered. In any event, upon proceedings on remand, it will still be within the discretion of the District Court whether or not to issue an injunction. If, for instance, respondent discloses its records, enters a stipulation concerning which employees are covered, and agrees not to violate the Act in the future, the District Court might conclude that an injunction is unnecessary. Compare *Mitchell* v. *Bland,* 241 F. 2d 808, 810, with *Chambers Construction Co.* v. *Mitchell, supra,* at 725.

The judgment is reversed and the case is remanded to the District Court for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE WHITTAKER, dissenting.

While I am of the view that the evidence may be sufficient to show that some of respondents' employees at some times—namely, fieldmen when traveling interstate in gathering information needed for the preparation of architectural and engineering plans, and construction supervisors when actually supervising the repairing or remodeling of structures used in commerce—are "engaged in commerce," within the meaning of § 7 (a) of the Fair Labor Standards Act, as amended, 29 U. S. C. § 207 (a), I am nevertheless persuaded that the evidence is not sufficient, and does not show conduct sufficiently continuous as to any category of employees, to justify the entry of a general injunction against respondents from, in effect, "violating the law," thus requiring them to live under pain of contempt citation for violation of a general injunctive decree, while others live under the law of the land. I am further persuaded to this conclusion in the knowledge that such of these employees as can show that their particular work at a particular time rendered them "engaged in commerce" have a complete legal remedy

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under § 16 (b) of the Act, 29 U. S. C. § 216 (b), to recover overtime compensation plus an additional equal amount, attorneys' fees and costs. As I read its opinion, these are the factors that persuaded the Court of Appeals to affirm the District Court's denial of the prayed injunction, 250 F. 2d 253, 260–261, and for those reasons I would affirm its judgment.

MR. JUSTICE STEWART, dissenting.

With the general principles stated in the Court's opinion there can be no dispute. Their application to the facts of the present case, however, does not lead me to the conclusion reached by the Court. Believing that the Court of Appeals did not err in deciding on which side of the shadowy line between such decisions as *McLeod* v. *Threlkeld,* 319 U. S. 491, and *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, this case falls, I would affirm the judgment.

WILLIAMS ET UX. *v.* LEE, DOING BUSINESS AS GANADO TRADING POST.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 39. Argued November 20, 1958.—Decided January 12, 1959.

Respondent, who is not an Indian, operates a general store in Arizona on the Navajo Indian Reservation under a license required by federal statute. He brought this action in an Arizona state court against petitioners, a Navajo Indian and his wife who live on the Reservation, to collect for goods sold to them there on credit. They moved to dismiss on the ground that jurisdiction lay in the tribal court rather than in the state court. *Held:* The motion should have been granted, since the exercise of state jurisdiction in this case would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves, which right was recognized by Congress in the Treaty of 1868 with the Navajos and has never been taken away. Pp. 217–223.

83 Ariz. 241, 319 P. 2d 998, reversed.

Norman M. Littell argued the cause for petitioners. With him on the brief was *Frederick Bernays Wiener.*

Wm. W. Stevenson argued the cause for respondent. With him on the brief was *W. Dean Nutting.*

Solicitor General Rankin, Assistant Attorney General Morton and *Roger P. Marquis* filed a brief for the United States, as *amicus curiae,* at the invitation of the Court, 356 U. S. 930, urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondent, who is not an Indian, operates a general store in Arizona on the Navajo Indian Reservation under a license required by federal statute.[1] He brought this

[1] 31 Stat. 1066, as amended, 32 Stat. 1009, 25 U. S. C. § 262, provides: "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction

action in the Superior Court of Arizona against petitioners, a Navajo Indian and his wife who live on the Reservation, to collect for goods sold them there on credit. Over petitioners' motion to dismiss on the ground that jurisdiction lay in the tribal court rather than in the state court, judgment was entered in favor of respondent. The Supreme Court of Arizona affirmed, holding that since no Act of Congress expressly forbids their doing so Arizona courts are free to exercise jurisdiction over civil suits by non-Indians against Indians though the action arises on an Indian reservation. 83 Ariz. 241, 319 P. 2d 998. Because this was a doubtful determination of the important question of state power over Indian affairs, we granted certiorari. 356 U. S. 930.

Originally the Indian tribes were separate nations within what is now the United States. Through conquest and treaties they were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land. When the lands granted lay within States these governments sometimes sought to impose their laws and courts on the Indians. Around 1830 the Georgia Legislature extended its laws to the Cherokee Reservation despite federal treaties with the Indians which set aside this land for them.[2] The Georgia statutes forbade the Cherokees from enacting laws or holding courts and prohibited outsiders from being on the Reservation except with permission of the State Governor. The constitutionality of these laws was tested in *Worcester* v. *Georgia,* 6 Pet. 515, when the State sought to punish

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of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

[2] The Georgia laws are set out extensively in *Worcester* v. *Georgia,* 6 Pet. 515, 521–528. The principal treaties involved are found at 7 Stat. 18, 39.

a white man, licensed by the Federal Government to practice as a missionary among the Cherokees, for his refusal to leave the Reservation. Rendering one of his most courageous and eloquent opinions, Chief Justice Marshall held that Georgia's assertion of power was invalid. "The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." 6 Pet., at 561.

Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* [3] the broad principles of that decision came to be accepted as law.[4] Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained. Thus, suits by Indians against outsiders in state courts have been sanctioned. See *Felix* v. *Patrick,*

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[3] For interesting accounts of this episode in the struggle for power between state and federal governments see IV Beveridge, The Life of John Marshall, 539–552; I Warren, The Supreme Court in United States History, c. 19. See also *Cherokee Nation* v. *Georgia,* 5 Pet. 1.

[4] See *The Kansas Indians,* 5 Wall. 737; *Ex parte Crow Dog,* 109 U. S. 556; *United States* v. *Kagama,* 118 U. S. 375; *United States* v. *Forness,* 125 F. 2d 928; *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89; *Begay* v. *Miller,* 70 Ariz. 380, 222 P. 2d 624; Cohen, Federal Indian Law (Revision by the United States Interior Department 1958); 55 Decisions of the Department of the Interior 56–64.

The Federal Government's power over Indians is derived from Art. I, § 8, cl. 3, of the United States Constitution, *Perrin* v. *United States,* 232 U. S. 478, and from the necessity of giving uniform protection to a dependent people. *United States* v. *Kagama, supra.*

145 U. S. 317, 332; *United States* v. *Candelaria,* 271 U. S. 432. See also *Harrison* v. *Laveen,* 67 Ariz. 337, 196 P. 2d 456. And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. *E. g., New York ex rel. Ray* v. *Martin,* 326 U. S. 496. But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.[5] *Donnelly* v. *United States,* 228 U. S. 243, 269–272; *Williams* v. *United States,* 327 U. S. 711. Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Cf. *Utah & Northern Railway* v. *Fisher,* 116 U. S. 28.

Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs. 4 Stat. 729, 735. Not satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized. See, *e. g.,* the Wheeler-Howard Act, §§ 16, 17, 48 Stat. 987, 988, 25 U. S. C. §§ 476, 477. Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to

[5] For example, Congress has granted to the federal courts exclusive jurisdiction upon Indian reservations over 11 major crimes. And non-Indians committing crimes against Indians are now generally tried in federal courts. See 18 U. S. C. §§ 437–439, 1151–1163; Cohen, *op. cit. supra,* note 4, at 307–326.

them. See H. R. Rep. No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied.[6]

No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos. On June 1, 1868, a treaty was signed between General William T. Sherman, for the United States, and numerous chiefs and headmen of the "Navajo nation or tribe of Indians." [7] At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester* v. *Georgia,* was the understanding that the internal affairs of the Indians remained exclusively within

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[6] See, *e. g.,* 62 Stat. 1224, 64 Stat. 845, 25 U. S. C. §§ 232, 233 (1952) (granting broad civil and criminal jurisdiction to New York); 18 U. S. C. § 1162, 28 U. S. C. § 1360 (granting broad civil and criminal jurisdiction to California, Minnesota, Nebraska, Oregon, and Wisconsin). The series of statutes granting extensive jurisdiction over Oklahoma Indians to state courts are discussed in Cohen, *op. cit. supra,* note 4, at 985–1051.

[7] 15 Stat. 667. In 16 Stat. 566 (1871), Congress declared that no Indian tribe or nation within the United States should thereafter be recognized as an independent power with whom the United States could execute a treaty but provided that this should not impair the obligations of any treaty previously ratified. Thus the 1868 treaty with the Navajos survived this Act.

the jurisdiction of whatever tribal government existed. Since then, Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts. See the Navajo-Hopi Rehabilitation Act of 1950, § 6, 64 Stat. 46, 25 U. S. C. § 636; 25 CFR §§ 11.1 through 11.87NH. The Tribe itself has in recent years greatly improved its legal system through increased expenditures and better-trained personnel. Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants.[8] No Federal Act has given state courts jurisdiction over such controversies.[9] In a general statute Congress did express its willingness to have any State assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility.[10] To date, Arizona has not

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[8] Young, The Navajo Yearbook (1955), 165, 201; *id.* (1957), 107, 110.

[9] In the 1949 Navajo-Hopi Rehabilitation Bill, S. 1407, 81st Cong., 1st Sess., setting up a 10-year program of capital and other improvements on the Reservation, Congress provided for concurrent state, federal and tribal jurisdiction. President Truman vetoed the bill because he felt that subjecting the Navajo and Hopi to state jurisdiction was undesirable in view of their illiteracy, poverty and primitive social concepts. He was also impressed by the fact that the Indians vigorously opposed the bill. 95 Cong. Rec. 14784–14785. After the objectionable features of the bill were deleted it was passed again and became law. 64 Stat. 44, 25 U. S. C. §§ 631–640.

[10] Act of Aug. 15, 1953, c. 505, §§ 6, 7, 67 Stat. 590, provides as follows: "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people

accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable.[11]

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. Cf. *Donnelly* v. *United States, supra; Williams* v. *United States, supra.* The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 564–566.

Reversed.

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thereof have appropriately amended their State constitution or statutes as the case may be.

". . . The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

Arizona has an express disclaimer of jurisdiction over Indian lands in its Enabling Act, § 20, 36 Stat. 569, and in Art. XX, Fourth, of its Constitution. Cf. *Draper* v. *United States,* 164 U. S. 240.

[11] See H. R. Rep. No. 848, 83d Cong., 1st Sess. 3, 7 (1953); Secretary of Interior, Annual Report (1955), 247–248; *id.* (1956), 215–216; *id.* (1957), 253–254.

TERRITORY OF ALASKA *v.* AMERICAN CAN CO. ET AL.

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

No. 40. Argued December 9, 1958.—Decided January 12, 1959.

In 1949, while a Territory, Alaska enacted a statute which levied a tax at the rate of 1% on all real and personal property. In 1953 the tax statute was repealed; but the repeal was expressly declared not applicable to "any taxes which have been levied and assessed by any municipality, school or public utility district [under the repealed statute] or which are levied and assessed during the current fiscal year of such municipality, school or public utility district." Alaska has a general law saving rights accrued under a statute that is repealed. After repeal of the tax statute, Alaska instituted suits to collect taxes which had accrued thereunder and remained unpaid. *Held:* Liability for such taxes survived the repeal. Pp. 224–227.

(a) The exception in the repealing statute applies only to taxes payable to a municipality, a school district or a public utility district, and it does not interfere with the collection of unpaid taxes which accrued prior to repeal. Pp. 225–226.

(b) Judicial notice is taken of the legislative history of the repealing statute, including the original bill which, though not in the Journals, was in the possession of the Secretary of State and was certified by him. Pp. 226–227.

246 F. 2d 493, reversed and cause remanded for further proceedings.

J. Gerald Williams, Attorney General of Alaska, argued the cause for petitioner. With him on the brief were *David J. Pree,* Assistant Attorney General, and *Jack O'Hair Asher,* Special Assistant Attorney General.

W. C. Arnold argued the cause for respondents. With him on the brief were *H. L. Faulkner* and *R. E. Robertson.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Alaska, while a Territory, enacted a law which levied a tax at the rate of 1 percent on all real and personal prop-

erty. L. 1949, c. 10, § 3. The tax was challenged in litigation without success.[1] Some paid the tax voluntarily; others became delinquent. In 1953 the tax statute was repealed. L. 1953, c. 22. Thereafter petitioner instituted the present suits to collect taxes owing for the years 1949 to 1952, inclusive. The District Court granted a motion to dismiss, holding that no liability for these taxes had survived the repeal. 137 F. Supp. 181. The Court of Appeals affirmed. 246 F. 2d 493. The case is here by a petition for writ of certiorari which was granted in view of the fiscal importance of the question to Alaska. 356 U. S. 926.

Alaska has a general law, saving rights accrued under a statute that is repealed.[2] The lower courts, however, held that this case was governed not by that provision but by § 2 (a) of the repealing Act which reads as follows:

> "Section 1 of this Act[3] shall not be applicable to:
> "(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session

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[1] See *Mullaney* v. *Hess,* 189 F. 2d 417; *Hess* v. *Mullaney,* 213 F. 2d 635.

[2] Alaska Comp. L. Ann., 1949, § 19–1–1, reads as follows:
"The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made."

[3] Section 1 of the 1953 Act provides:
"That Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, be and it is hereby repealed."

> Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district."

It was held that this specific enactment qualifies the general repeal law and that the purpose of the 1953 Act was to wipe out any and all liabilities to pay taxes under the repealed law that had accrued prior to the date of repeal. Support for that conclusion was found in the title of the 1953 Act which includes the words "excepting from repeal certain taxes," no qualifications whatsoever being indicated.

We take a different view. Section 2 (a) of the 1953 Act, as we read it, has nothing to do with any taxes other than those payable to a municipality, a school or public utility district, none of which is here involved. If it had done no more than save all accrued taxes in those categories, the case would be in quite a different posture. Section 2 (a), however, does not do that. It was protective of municipal, school, or public utility taxes in a much broader way. It saved first, those taxes that had been "levied and assessed" and second, those to be "levied and assessed during the current fiscal year." This was to make sure, as the dissent below said, that municipalities and school and public utility districts (though not the Territory itself) would have the right to levy and collect the old taxes for the current year 1953, whether before or after the repealing Act had taken effect. So construed, § 2 (a) carves no exception from the general saving statute and does not interfere with the collection of unpaid taxes which accrued prior to repeal.

We are reinforced in this conclusion by the legislative history of the bill [4] that became the repealing Act, a his-

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[4] We refer to the Alaska House and Senate Journals and to the original bill as introduced in the House which is on file with the Secretary of Alaska, a copy being certified by him.

tory of which we take judicial notice. See *United States* v. *American Trucking Assns.*, 310 U. S. 534, 547. And see Wigmore on Evidence (3d ed. 1940) § 2577. The bill as introduced "cancelled, repealed and abrogated, and declared null and void" "all accrued and unpaid taxes" under the 1949 Act. That provision was deleted, however, by a House Committee, and it never became part of the law. The bill passed the House without it. The present § 2 (a) was added in the Senate; and the House agreed. If we adopted the construction taken below, we would be reading into the Act by implication what the Legislature seemingly rejected.

The judgment of the Court of Appeals is reversed and, as there are other questions which were raised by the appeal (246 F. 2d 493, 495) but not reached by that court, the cause is remanded to it for proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

LEE *v.* MADIGAN, WARDEN.

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

No. 42. Argued December 9–10, 1958.—Decided January 12, 1959.

Article 92 of the Articles of War provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." Petitioner was convicted by a court-martial of the crime of conspiracy to commit murder, the offense having occurred in California on June 10, 1949—after actual termination of hostilities in 1945, but before termination of the wars with Germany and Japan had been proclaimed by the President or the Congress. *Held:* The offense was committed "in time of peace" within the meaning of Article 92, and the court-martial had no jurisdiction. Pp. 229–236.

(a) The term "in time of peace" must be construed in the light of the precise facts of each case and the impact of the particular statute involved, and it may have different meanings in different contexts. *Kahn* v. *Anderson,* 255 U. S. 1, and other cases, distinguished. Pp. 230–232.

(b) In view of the attitude of a free society toward the jurisdiction of military tribunals and our reluctance to give them authority to try people for non-military offenses, any grant to them of power to try people for capital offenses should be construed strictly. Pp. 232–236.

(c) It cannot be readily assumed that Congress used the term "in time of peace" in Article 92 to deprive soldiers or civilians of the safeguards guaranteed in civil courts in capital cases, including the benefit of jury trials, four years after all hostilities had ceased. P. 236.

248 F. 2d 783, reversed.

Carl L. Rhoads and *Robert Edward Hannon* argued the cause for petitioner. With them on the brief was *Charles Upton Shreve.*

John F. Davis argued the cause for respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Article of War 92, 10 U. S. C. (1946 ed., Supp. IV) § 1564, which, prior to the adoption of the Uniform Code of Military Justice,[1] governed trials for murder or rape before courts-martial,[2] contained a proviso "That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

The question for decision concerns the meaning of the words "in time of peace" in the context of Article 92.

Petitioner, while serving with the United States Army in France, was convicted by a court-martial, dishonorably discharged, and sentenced to prison for 20 years. He was serving that sentence in the custody of the Army at Camp Cooke, California, when he was convicted by a court-martial of the crime of conspiracy to commit murder. This offense occurred on June 10, 1949, at Camp Cooke. The question is whether June 10, 1949, was "in time of peace" as the term was used in the 92d Article. The question was raised by a petition for a writ of habeas corpus challenging the jurisdiction of the court-martial. Both the District Court (148 F. Supp. 23) and the Court of

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[1] 64 Stat. 108, 10 U. S. C. (Supp. V) § 801 *et seq.*, enacted May 5, 1950. For the present provisions governing murder and rape see Articles 118, 120.

[2] Article 92 read as follows:

"Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

Appeals (248 F. 2d 783) ruled against petitioner. We granted certiorari, 356 U. S. 911.

The Germans surrendered on May 8, 1945 (59 Stat. 1857), the Japanese on September 2, 1945 (59 Stat. 1733). The President on December 31, 1946, proclaimed the cessation of hostilities, adding that "a state of war still exists." 61 Stat. 1048. In 1947, Senate Joint Resolution 123 was passed (61 Stat. 449) which terminated, *inter alia,* several provisions of the Articles of War [3] but did not mention Article 92. The war with Germany terminated October 19, 1951, by a Joint Resolution of Congress (65 Stat. 451) and a Presidential Proclamation (66 Stat. c3). And on April 28, 1952, the formal declaration of peace and termination of war with Japan was proclaimed by the President (66 Stat. c31), that being the effective date of the Japanese Peace Treaty. Since June 10, 1949—the critical date involved here—preceded these latter dates, and since no previous action by the political branches of our Government had specifically lifted Article 92 from the "state of war" category, it is argued that we were not then "in time of peace" for the purposes of Article 92. That argument gains support from a *dictum* in *Kahn* v. *Anderson,* 255 U. S. 1, 9–10, that the term "in time of peace" as used in Article 92 "signifies peace in the complete sense, officially declared." Of like tenor are generalized statements that the termination of a "state of war" is "a political act" of the other branches of Government, not the Judiciary. See *Ludecke* v. *Watkins,* 335 U. S. 160, 169. We do not think that either of those authorities is dispositive of the present controversy. A more particularized and discriminating analysis must be made. We deal with a term that must be construed in light of the precise facts

[3] See H. R. Rep. No. 2682, 79th Cong., 2d Sess.; H. R. Rep. No. 799, 80th Cong., 1st Sess.; S. Rep. No. 339, 80th Cong., 1st Sess.

of each case and the impact of the particular statute involved. Congress in drafting laws may decide that the Nation may be "at war" for one purpose, and "at peace" for another. It may use the same words broadly in one context, narrowly in another. The problem of judicial interpretation is to determine whether "in the sense of this law" peace had arrived. *United States* v. *Anderson,* 9 Wall. 56, 69. Only mischief can result if those terms are given one meaning regardless of the statutory context.

In the *Kahn* case, the offense was committed on July 29, 1918, and the trial started November 4, 1918—both dates being before the Armistice.[4] It is, therefore, clear that the offense was not committed "in time of peace." Moreover, a military tribunal whose jurisdiction over a case attaches in a time of actual war does not lose jurisdiction because hostilities cease. Once a military court acquires jurisdiction that jurisdiction continues until the end of the trial and the imposition of the sentence. See *Carter* v. *McClaughry,* 183 U. S. 365, 383. The broad comments of the Court in the *Kahn* case on the meaning of the term "in time of peace" as used in Article 92 were, therefore, quite unnecessary for the decision.

Ludecke v. *Watkins,* 335 U. S. 160, belongs in a special category of cases dealing with the power of the Executive or the Congress to deal with the aftermath of problems which a state of war brings and which a cessation of hostilities does not necessarily dispel. That case concerns the power of the President to remove an alien enemy after hostilities have ended but before the political branches have declared the state of war ended. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, involves the constitutionality under the war power of a prohibition law

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[4] In *Givens* v. *Zerbst,* 255 U. S. 11, a companion case to the *Kahn* case, the crime was committed on September 28, 1918, and the court-martial convened on October 30, 1918.

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passed in 1918 after the armistice with Germany was signed and to be operative "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." *Woods* v. *Miller Co.*, 333 U. S. 138, concerns the constitutionality of control of housing rentals promulgated after hostilities were ended and before peace was formally declared. These cases deal with the reach of the war power, as a source of regulatory authority over national affairs, in the aftermath of hostilities. The earlier case of *McElrath* v. *United States,* 102 U. S. 426, is likewise irrelevant to our problem. It was a suit for back pay by an officer, the outcome of which turned on a statute which allowed dismissal of an officer from the service "in time of peace" only by court-martial. The President had made the dismissal; and the Court held that such action, being before August 20, 1866, when the Presidential Proclamation announced the end of the rebellion and the existence of peace, was lawful, since there was extrinsic evidence that Congress did not intend the statute to be effective until the date of the Proclamation.

Our problem is not controlled by those cases. We deal with the term "in time of peace" in the setting of a grant of power to military tribunals to try people for capital offenses. Did Congress design a broad or a narrow grant of authority? Is the authority of a court-martial to try a soldier for a civil crime, such as murder or rape, to be generously or strictly construed? Cf. *Duncan* v. *Kahanamoku,* 327 U. S. 304.

We do not write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history.

We reviewed both British and American history, touching on this point, in *Reid* v. *Covert,* 354 U. S. 1, 23–30.

We pointed out the great alarms sounded when James II authorized the trial of soldiers for nonmilitary crimes and the American protests that mounted when British courts-martial impinged on the domain of civil courts in this country. The views of Blackstone on military jurisdiction became deeply imbedded in our thinking: "The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land." 1 Blackstone's Commentaries 413. And see Hale, History and Analysis of the Common Law of England (1st ed. 1713), 40–41. We spoke in that tradition in *Toth* v. *Quarles,* 350 U. S. 11, 22, "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."

The power to try soldiers for the capital crimes of murder and rape was long withheld. Not until 1863 was authority granted. 12 Stat. 736. And then it was restricted to times of "war, insurrection, or rebellion." [5] The theory was that the civil courts, being open, were wholly qualified to handle these cases. As Col. William Winthrop wrote in Military Law and Precedents (2d ed. 1920) 667, about this 1863 law:

> "Its main object evidently was to provide for the punishment of these crimes in localities where, in consequence of military occupation, or the prevalence

[5] Prior to that time only state courts could try a soldier for murder or rape. *Coleman* v. *Tennessee,* 97 U. S. 509, 514. And that Act was construed as not giving the military exclusive jurisdiction. "With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect." *Id.*

> of martial law, the action of the civil courts is suspended, or their authority can not be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government."

Civil courts were, indeed, thought to be better qualified than military tribunals to try nonmilitary offenses. They have a more deeply engrained judicial attitude, a more thorough indoctrination in the procedural safeguards necessary for a fair trial. Moreover, important constitutional guarantees come into play once the citizen—whether soldier or civilian—is charged with a capital crime such as murder or rape. The most significant of these is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed.[6] We must assume that the Congress, as well as

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[6] We said in *Toth* v. *Quarles, supra,* pp. 17–19:

". . . there is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury.

"Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field, including specialists in the military field. On many occasions, fully known to the Founders of this country, jurors—plain people—have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices. The acquittal of William Penn is an illustrious example. Unfortunately, instances could also be cited where jurors have themselves betrayed the cause of justice by

the courts, was alive to the importance of those constitutional guarantees when it gave Article 92 its particular phrasing. Statutory language is construed to conform as near as may be to traditional guarantees that protect the rights of the citizen. See *Ex parte Endo,* 323 U. S. 283, 301–304; *Rowoldt* v. *Perfetto,* 355 U. S. 115; *Kent* v. *Dulles,* 357 U. S. 116, 129. We will attribute to Congress a purpose to guard jealously against the dilution of the liberties of the citizen that would result if the jurisdiction of military tribunals were enlarged at the expense of civil courts. General Enoch H. Crowder, Judge Advocate General, in testifying in favor of the forerunner of the present proviso of Article 92, spoke of the protection it extended the officer and soldier by securing them "a trial by their peers." [7] We think the proviso should be read generously to achieve that end.

We refused in *Duncan* v. *Kahanamoku,* 327 U. S. 304, to construe "martial law," as used in an Act of Congress, broadly so as to supplant all civilian laws and to substitute military for judicial trials of civilians not charged with violations of the law of war. We imputed to Congress an attitude that was more consonant with our traditions of civil liberties. We approach the analysis of the

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verdicts based on prejudice or pressures. In such circumstances independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have power to set aside convictions."

[7] See S. Rep. No. 130, 64th Cong., 1st Sess., p. 88.

General Crowder was opposed to a proposal of the General Staff that capital crimes even when committed in this country be tried by court-martial as well as by civil courts. He said, "We never have had that law, and I doubt very much whether it is desirable to divorce the Army to that extent from accountability in the civil courts. . . . I think that here in the United States proper the Army should be under the same accountability as civilians for capital crimes." *Id.,* at 32.

term "in time of peace" as used in Article 92 in the same manner. Whatever may have been the plan of a later Congress in continuing *some* controls long after hostilities ceased,[8] we cannot readily assume that the earlier Congress used "in time of peace" in Article 92 to deny soldiers or civilians the benefit of jury trials for capital offenses four years after all hostilities had ceased. To hold otherwise would be to make substantial rights turn on a fiction. We will not presume that Congress used the words "in time of peace" in that sense. The meaning attributed to them is at war with common sense, destructive of civil rights, and unnecessary for realization of the balanced scheme promulgated by the Articles of War. We hold that June 10, 1949, was "in time of peace" as those words were used in Article 92. This conclusion makes it unnecessary for us to consider the other questions presented, including the constitutional issues which have been much mooted.

Reversed.

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

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[8] The method employed by the Executive and the Congress in terminating wartime controls was different at the end of World War II than it was when World War I terminated. In the earlier war most of the legislation dependent on the existence of a state of war was terminated at one time. See 41 Stat. 1359, H. R. Rep. No. 1111, 66th Cong., 3d Sess.; S. Rep. No. 706, 66th Cong., 3d Sess. At the end of World War II Congress acted more selectively. See H. R. Rep. No. 2682, 79th Cong., 2d Sess. Thus Congress by S. J. Res. 123, 80th Cong., 1st Sess., declared that, for the purpose of construing specified statutes (among them certain Articles of War—but not Article 92), the effective date of the Resolution should be deemed the termination date of the state of war. The fact that Article 92 was not in that list leaves the problem where it was at the time the law was enacted. The failure to repeal, alter, or amend this law plainly has no bearing on its original purpose.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

The Court today holds that on June 10, 1949, the date of this capital offense, this country was "in time of peace" within the meaning of Article of War 92, 10 U. S. C. (1946 ed., Supp. IV) § 1564, and therefore that the court-martial before which petitioner was tried was without statutory jurisdiction to entertain the proceeding. Believing that the ground upon which the Court nullifies petitioner's conviction has long been settled squarely to the contrary, and that a *de novo* examination of the question also requires the conclusion that the United States, on June 10, 1949, was not "in time of peace" within the meaning of Article 92, I respectfully dissent.

In *Kahn* v. *Anderson,* 255 U. S. 1, 10, this Court unanimously held that the term "in time of peace" in Article 92 "signifies peace in the complete sense, officially declared." See also *Givens* v. *Zerbst,* 255 U. S. 11, 21. The Court now dismisses this square holding as *"dictum"* and as "quite unnecessary for the decision," pointing out that the statement of facts in *Kahn* shows that the capital offense for which petitioner there was tried was committed before the Armistice which resulted in the termination of active hostilities in World War I, and that the court-martial which tried him was also convened before the Armistice. I think that *Kahn* can hardly be dismissed so lightly. The conclusion there as to the meaning of "in time of peace" might have been regarded as unnecessary to decision only had the Court, proceeding on a theory entirely different from that which it actually adopted, relied on the date of the offense or of the beginning of trial as dispositive. But plainly the Court did not proceed on any such basis. Rather, it accepted at least *arguendo* petitioner's contention that the court-martial which had tried him did not have jurisdiction

to continue "in time of peace" even a trial previously begun. It is thus not sound to say that the holding that "peace" in Article 92 "signifies peace in the complete sense, officially declared," was unnecessary to the decision in *Kahn*. Given the ground upon which the Court chose to decide the case it was quite indispensable. The idea that the ground on which a court actually decides a case becomes dictum because the case might have been decided on another ground is novel doctrine to me.

I think that Congress, and the military authorities charged with the implementation and enforcement of the Articles of War, should be able to rely on a construction given one of those Articles by a unanimous decision of this Court. The conclusion in *Kahn* was not reached lightly without full consideration, as is shown by the fact that nearly two pages of the summary of counsels' argument contained in the report of the case are devoted to a discussion of the question, and another two pages to the Court's expression of the reasoning underlying its decision on the point. In 1948, 27 years after *Kahn* and a single year before the prosecution here involved, Congress re-enacted Article 92 without change in the relevant language. The Court now holds that between 1921 and 1949 the meaning of the statute underwent an inexplicable change, and that the authority under the statute then confirmed must now be denied. I see no warrant for thus speculating anew as to the motives of Congress in enacting and re-enacting the phrase "in time of peace" in Article 92.[1]

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[1] The Court's heavy reliance in construing the statute here involved on its attribution to Congress of "a purpose to guard jealously against the dilution of the liberties of the citizen that would result if the jurisdiction of military tribunals were enlarged at the expense of civil courts" is rendered somewhat suspect, to say the least, by the fact that under the Uniform Code of Military Justice, 64 Stat. 108, 10 U. S. C. (Supp. V) § 801, enacted May 5, 1950, Congress

Entirely apart from *Kahn,* I think today's decision is demonstrably wrong. This Court has consistently for nearly 100 years recognized, in many contexts, that a cessation of active hostilities does not denote the end of "war" or the beginning of "peace" as those or similar terms have been used from time to time by Congress in legislation. In *McElrath* v. *United States,* 102 U. S. 426, there was before the Court a statute of Congress prohibiting summary dismissal by the President of military officers "in time of peace." Although I venture to say that almost as many reasons could be conjured up for construing the term loosely in that context as in that now before us, the Court unanimously held that July 1866 was not "in time of peace" although active hostilities between North and South had long since ceased, and that "peace, in contemplation of law" did not exist until the Presidential Proclamation of August 20, 1866. See also *United States* v. *Anderson,* 9 Wall. 56. In *Ludecke* v. *Watkins,* 335 U. S. 160, 168–169, this Court in construing a statute recognized that " 'The state of war' may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act." See also *Woods* v. *Miller Co.,* 333 U. S. 138; *Knauff* v. *Shaughnessy,* 338 U. S. 537, both expressly recognizing that the state of war between this country and the Axis powers was not terminated by either the Presidential Proclamation of 1946 or the Joint Resolution of July 1947.

The Court says that "Congress in drafting laws may decide that the Nation may be 'at war' for one purpose, and 'at peace' for another." Of course it may. But the Court points to no case, and I know of none, which has

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has apparently chosen to give courts-martial jurisdiction over capital crimes committed in this country in time of peace as well as in time of war. See 10 U. S. C. (Supp. V) §§ 918, 920.

construed statutory language similar to that found in Article 92 to mean anything but "peace in the complete sense, officially declared." Under these circumstances, and given *McElrath* and *Kahn,* the conclusion seems to me unmistakable that Congress intended that "peace" in Article 92 mean what we have always, until today, held it meant in this and other congressional legislation. When Congress has wished to define "war" or "peace" in particular statutes as meaning something else, it has explicitly done so. See, *e. g.,* War Brides Act, 59 Stat. 659: "For the purpose of this Act, the Second World War shall be deemed to have commenced on December 7, 1941, and to have ceased upon the termination of hostilities as declared by the President or by a joint resolution of Congress."

Today's decision casts a cloud upon the meaning of all federal legislation the impact of which depends upon the existence of "peace" or "war." Hitherto legislation of this sort has been construed according to well-defined principles, the Court looking to "treaty or legislation or Presidential proclamation," *Ludecke* v. *Watkins,* 335 U. S., at 168, to ascertain whether a "state of war" exists. The Court, in an effort to make a "more particularized and discriminating analysis," has apparently jettisoned these principles. It is far from clear to me just what has taken their place.[2]

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[2] The Court does not say when the "peace" which it finds to have existed in June 1949 came into being. It may be noted that the Presidential Proclamation of December 31, 1946, proclaiming the cessation of hostilities, specifically announced that "a state of war still exists," and that Senate Joint Resolution 123, 61 Stat. 449 (effective July 25, 1947), which repealed or rendered inoperative a selected group of wartime measures (not including Article 92), was obviously an expression of a conscious and deliberate decision by Congress that the time had not yet come to end the state of war. It was not until October 19, 1951, that Congress, by joint resolution, declared that "the state of war declared to exist between the United

The Court does not reach petitioner's contention that he could not constitutionally be tried by court-martial because he was not a member of the armed forces at the time this offense was committed. It is sufficient to say that this contention is also squarely foreclosed by *Kahn* v. *Anderson, supra,* and that in my opinion nothing in *Toth* v. *Quarles,* 350 U. S. 11, or in *Reid* v. *Covert,* 354 U. S. 1, impairs the authority of *Kahn* on this score.

I would affirm.

States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated," 65 Stat. 451, and not until April 28, 1952, the effective date of the Japanese Peace Treaty, that peace with Japan was proclaimed by the President, 66 Stat. c31.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 18. Argued November 13, 1958.—Decided January 12, 1959.

1. The Government's civil complaint charging appellants with a combination and conspiracy in unreasonable restraint of trade and commerce among the States in the promotion, broadcasting and televising of professional world championship boxing contests, as well as a conspiracy to monopolize and monopolization of the same, in violation of §§ 1 and 2 of the Sherman Act, was sustained by this Court as stating a cause of action, and the case was remanded for trial on the merits. 348 U. S. 236. After a trial, the District Court, in an opinion incorporating detailed findings of fact and conclusions of law based on the principles laid down by this Court, found that the allegations of the complaint had been sustained, and adjudged that appellants had violated §§ 1 and 2 of the Sherman Act. *Held:* The District Court's findings are not clearly erroneous, and its judgment on the merits is affirmed. Pp. 244–252.

   (a) The District Court's finding that the relevant market was the promotion of *championship* boxing contests, in contrast to *all* professional boxing contests, was not clearly erroneous and it is sustained. Pp. 249–252.

2. After further hearings on the nature and extent of the relief necessary to protect the public interest, the District Court entered a final judgment dissolving the two international boxing clubs, directing the individual appellants to divest themselves of their stock in Madison Square Garden and granting injunctive relief designed to open up the market in the business of promoting professional world championship boxing matches. *Held:* The relief granted was not beyond the allowable discretion of the District Court and its judgment is affirmed. Pp. 253–263.

   (a) At the time of the final decree, the Joe Louis agreements had lapsed; the exclusive-contract practice had been abandoned at least temporarily; the leases on Yankee Stadium, the Polo Grounds and St. Nicholas Arena in New York had been given up; and the appellants had no control over the new heavyweight champion;

but this Court agrees with the District Court that the additional evidence taken by it showed that appellants still possessed all of the power of monopoly and restraint. Pp. 254–255.

(b) Even if the individual appellants' stock in Madison Square Garden was lawfully acquired and was not the fruit of the conspiracy, it had been utilized to effect the purposes of the conspiracy and could be so used again, and the record supports the District Court's conclusion that they should be required to divest themselves of this stock in order to break up the unlawful combination and restore competition in championship boxing contests—without being granted the alternative options requested by them. Pp. 255–259.

(c) Since the two international boxing clubs were formed pursuant to the conspiracy and were the means used to effectuate it, the requirement that they be dissolved was justified. Pp. 259–261.

(d) The District Court having found that one of the means used in effectuating the conspiracy was the ownership and control of arenas and stadia, the requirement of the decree that Madison Square Garden and the Chicago Stadium be rented to any qualified promoter at a reasonable rental, subject to specified conditions, was justified. Pp. 261–262.

(e) Practical considerations justify the prohibition against exclusive contracts with contestants, even though they apply not only to championship bouts but to all professional boxing contests, thus going beyond the "relevant market" considered for the purposes of determining the Sherman Act violations. P. 262.

150 F. Supp. 397, affirmed.

Kenneth C. Royall argued the cause for appellants. On the brief were *Mr. Royall* and *John F. Caskey* for the Madison Square Garden Corporation et al., and *Charles Sawyer* for the International Boxing Club, Inc., of Illinois, et al.

Philip Elman argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Hansen* and *Charles H. Weston.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This civil Sherman Act [1] case was here four years ago on direct appeal from a dismissal by the District Court, which had held that the Act did not apply to the business of professional boxing. We reversed, finding that "the complaint states a cause of action [under the Act] and that the Government is entitled to an opportunity to prove its allegations," and remanded the case for trial on the merits. *United States* v. *International Boxing Club,* 348 U. S. 236 (1955). The complaint charged the appellants with a combination and conspiracy in unreasonable restraint of trade and commerce among the States in the promotion, broadcasting, and televising of professional world championship boxing contests, as well as a conspiracy to monopolize and monopolization of the same. After a trial, the District Court, in an opinion incorporating detailed findings of fact and conclusions of law based on the principles laid down in our earlier opinion, found that the allegations of the complaint had been sustained. 150 F. Supp. 397. After further hearings on the nature and extent of the relief necessary to protect the public interest, the court entered its final judgment dissolving two of the corporate appellants, directing divestiture of certain stock owned by the individual appellants and granting injunctive relief designed to open up the market in the business of promoting professional world championship boxing matches.

The appellants, while not attacking any specific finding as clearly erroneous, claim that the proof did not show that they violated either Section 1 or 2 of the Act. In this regard appellants level their strongest blows at the District Court's definition of the relevant market. Out of the entire field of professional boxing, the District Court carved a market in championship contests alone, hold-

[1] 15 U. S. C. § 1 *et seq.*

ing it to be the relevant market at which the conspiracy was aimed. In the alternative, appellants insist that the relief granted the Government was "unnecessarily punitive," even if liability is assumed. On a direct appeal to this Court we noted probable jurisdiction, 356 U. S. 910 (1958). We have concluded that the findings of the District Court are not clearly erroneous and that in view of our former holding on the sufficiency of the complaint the judgment on the merits was properly entered. As to the relief granted we find that the court did not exceed the limits of allowable discretion in framing a decree "that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88 (1950).

Our previous decision herein having decided that the promotion of professional championship boxing contests on an interstate basis constituted trade and commerce among the States, within the meaning of the Sherman Act, there is no contest here either on the findings or the law on that point. Since on that appeal we discussed in some detail the allegations of the complaint, which the trial court has now found amply proven by the evidence, we shall only summarize the findings here.

The Findings.

The conspiracy began in January 1949, when appellants Norris and Wirtz, who owned and controlled the Chicago Stadium, the Detroit Olympia Arena and the St. Louis Arena, made an agreement with Joe Louis, the then heavyweight boxing champion of the world. Wishing to retire, Louis agreed to give up his title after obtaining from each of the four leading contenders [2] exclusive promotion rights including rights to radio, television and

[2] Ezzard Charles, Joe Walcott, Lee Savold, and Gus Lesnevich.

movie revenues. Upon securing these exclusive contracts Louis assigned them to the appellant International Boxing Club, Illinois, which was organized by Norris and Wirtz for the purpose of promoting boxing for the combination in Illinois. They paid Louis $150,000 cash plus an employment contract and a 20% stock interest in I. B. C., Illinois.

In March 1949 Norris and Wirtz approached appellant Madison Square Garden, in which they had for many years owned 50,000 shares of stock. It was the "foremost sports arena in New York City and is the best known arena of its kind in the United States, if not the world." [3] However, its facilities were tied up by an exclusive lease it had granted to Mike Jacobs' interests—the leading professional boxing promoter in the field at that time. Norris and Wirtz proposed that they should all "work together now and keep the events for our buildings and not create a competitive situation that would be harmful to all." In order to effectuate this program, appellant Madison Square Garden bought out Mike Jacobs' interests, including, in addition to his lease on Madison Square Garden, his exclusive leases to Yankee Stadium and the St. Nicholas Arena and his contract with the then welterweight champion Sugar Ray Robinson. These contracts were assigned to International Boxing Club, New York, organized for the purpose of promoting boxing for the combination in New York.

Once Jacobs' interests had been acquired, there remained only one substantial competitor in the field of

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[3] The importance of Madison Square Garden in the present context is shown by the fact that of all the championship contests staged during the 12 years immediately preceding 1949, 45% were held in New York City, of which 75% were in Madison Square Garden. The balance of the New York championship bouts, with one exception, were held in Yankee Stadium, the Polo Grounds, or St. Nicholas Arena.

promoting championship boxing matches. That was Tournament of Champions, Inc., owned in part by the Columbia Broadcasting System. It owned an exclusive lease on the Polo Grounds as well as an exclusive promotion contract covering the next two fights of the then middleweight champion of the world. In May 1949 Madison Square Garden bought all of the stock of Tournament of Champions at a cost of $100,000 plus 25% of the net profits on the next two middleweight championship matches. The assets thus acquired were likewise assigned to I. B. C., New York. By a simultaneous separate agreement, Columbia Broadcasting System agreed for a five-year period not to invest in or promote any professional boxing matches in return for a first refusal right to the broadcasting of certain boxing matches staged for a like period in Madison Square Garden.

This series of agreements, consummated within four months' time, gave appellants exclusive control of the promotion of boxing matches in three championship divisions, *i. e.*, heavyweight, middleweight, and welterweight. Not satisfied with this temporary control, however, appellants perpetuated their hold on championship bouts by requiring each contender for the title to grant to them an exclusive promotion contract to his championship fights, including film and broadcasting, for a period of from three to five years. Over the facilities for the staging of contests appellants exercised like control, owning or managing the "key" arenas and stadia in the Nation.[4]

Tightening the ropes around the ring thus built, Norris and Wirtz increased their stockholdings in Madison Square Garden to where they controlled it and were able

[4] Between 1937 and 1948, 50% of all championship contests were staged in either Madison Square Garden, Yankee Stadium, the Polo Grounds, St. Nicholas Arena, Chicago Stadium, Detroit Olympia Arena, or the St. Louis Arena.

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to "dictate its policies and boxing activities." This has continued their control over I. B. C., New York, the stock of which is now wholly owned by Madison Square Garden.[5] They are the sole stockholders of Chicago Stadium Corporation which in turn is the sole stockholder of I. B. C., Illinois. Their control over this boxing empire is revealed by the fact that Norris is president of each of the four top corporations, *i. e.*, Madison Square Garden, I. B. C., New York, Chicago Stadium Corporation, and I. B. C., Illinois. He and Wirtz are directors in all four, while I. B. C., Illinois and I. B. C., New York, which have owned all of the promotion contracts with the contenders, have a joint board of directors.

The effect of the conspiracy is obvious. Using the facilities of I. B. C., Illinois, and I. B. C., New York, appellants entered into exclusive promotion contracts with title aspirants, requiring exclusive handling agreements in the event the contender became champion. In amassing their empire, appellants obtained control of champions in three divisions. The choice given a contender thereafter was clear, *i. e.*, to sign with appellants or not to fight. With appellants in control of the key arenas and stadia of the country through Madison Square Garden, Chicago Stadium Corporation, and others, an event could not be successfully staged in any of these areas, the most fruitful in the Nation, without their

[5] At the time the I. B. C.'s were formed, Joe Louis owned 20% of the stock of each and the other 80% was split evenly between Norris and Wirtz on one hand and Madison Square Garden on the other. At some point thereafter, Louis ceased to be a stockholder and his share was split evenly between Norris-Wirtz and Madison Square Garden. At the time of the final decree, apparently as the result of an effort to make a showing of separateness of control, the Norris-Wirtz interests owned all of the stock in I. B. C., Illinois, and Madison Square Garden owned all of the stock in I. B. C., New York. The trial court found that the two interests nevertheless still shared equally in the combined profits of both I. B. C.'s.

consent. The exercise of this power brought immediate results. From June 1949, when appellants staged their first championship fight, until May 15, 1953, the date of the amended complaint, they staged or controlled the promotion of 36 of the 44 championship battles held in this country, giving them approximately 81% of that field. In two of the classifications, heavyweight and middleweight, the combine staged all of the contests. The power of the combine to exclude competitors in the championship field is graphically shown by their promotion of 25 out of 27 fights in all divisions, a total of 93%, during the two-and-a-half-year period ending with the filing of the amended complaint. This power extended to the sale of film and broadcasting rights—most valuable adjuncts to successful promotion in the business.

Appellants launch a vigorous attack on the finding that the relevant market was the promotion of *championship* boxing contests in contrast to *all* professional boxing events. They rely primarily on *United States* v. *du Pont & Co.*, 351 U. S. 377 (1956). That case, involving an alleged monopoly of the market in cellophane, held that the relevant market was not cellophane alone but the entire field of flexible packaging materials. In testing for the relevant market in Sherman Act cases, the Court said:

> ". . . no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." *Du Pont, supra,* at 395.

The appellants argue that the "physical identity of the products here would seem necessarily to put them in one and the same market." They say that any boxing contest, whether championship or not, always includes one ring, two boxers and one referee, fighting under the same rules before a greater or lesser number of spectators

either present at ringside or through the facilities of television, radio, or moving pictures.

We do not feel that this conclusion follows. As was also said in *du Pont, supra,* at 404:

> "The 'market' . . . will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered."

With this in mind, the lower court in the instant case found that there exists a "separate, identifiable market" for championship boxing contests. This general finding is supported by detailed findings to the effect that the average revenue from all sources for appellants' championship bouts was $154,000, compared to $40,000 for their nonchampionship programs; that television rights to one championship fight brought $100,000, in contrast to $45,000 for a nontitle fight seven months later between the same two fighters; that the average "Nielsen" ratings [6] over a two-and-one-half-year period were 74.9% for appellants' championship contests, and 57.7% for their nonchampionship programs (reflecting a difference of several million viewers between the two types of fights); that although the revenues from movie rights for six of appellants' championship bouts totaled over $600,000, no full-length motion picture rights were sold for a nonchampionship contest; and that spectators pay "substantially more" for tickets to championship fights than for

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[6] According to the District Court, the "Nielsen Average Audience rating is a percentage which purports to show the number of residential television sets that were tuned in to the program expressed as a percentage of the total residential television sets, whether turned off or on, which were in areas into which the program was telecast."

nontitle fights. In addition, numerous representatives of the broadcasting, motion picture and advertising industries testified to the general effect that a "particular and special demand exists among radio broadcasting and telecasting [and motion picture] companies for the rights to broadcast and telecast [and make and distribute films of] championship contests in contradistinction to similar rights to non-championship contests." [7]

In view of these findings, we cannot say that the lower court was "clearly erroneous" in concluding that nonchampionship fights are not "reasonably interchangeable for the same purpose" as championship contests. A determination of the "part of the trade or commerce" encompassed by the Sherman Act involves distinctions in degree as well as distinctions in kind. One prime example of this is the application of the Act to trade or commerce in a localized geographical area. See, *e. g., Schine Theatres* v. *United States,* 334 U. S. 110 (1948); *United States* v. *Griffith,* 334 U. S. 100 (1948); cf. *Times-Picayune* v. *United States,* 345 U. S. 594 (1953); *United States* v. *Columbia Steel Co.,* 334 U. S. 495 (1948). The case which most squarely governs this case is *United States* v. *Paramount Pictures,* 334 U. S. 131 (1948). There, the charge involved, *inter alia,* extensive motion picture theatre holdings. The District Court had refused to order a divestiture of such holdings on the grounds that no "national monopoly" had been intended or obtained. This Court felt that such a finding was not dispositive of the issue, saying:

> "First, there is no finding as to the presence or absence of monopoly on the part of the five majors

[7] Approximately 25% of the revenue produced by the appellants' championship fights during the period covered by the complaint was derived through the sale of radio, television and motion picture rights.

> [defendants] in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities. Yet the *first-run* field, which constitutes the cream of the exhibition business, is the core of the present cases. Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224, 225, n. 59), and § 2 condemns monopoly of 'any part' of trade or commerce." *Paramount, supra,* at 172–173. (Emphasis in the original.)

Similarly, championship boxing is the "cream" of the boxing business, and, as has been shown above, is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes.[8]

We have also examined the remainder of this characteristically lengthy record. When the case was here previously appellants did not deny that the allegations of the complaint stated a cause of action against them, provided their activity came within the meaning of the Sherman Act. We held that the complaint stated a cause of action. The District Court has now found these allegations to have been proven. With the case in this posture, appellants have an almost insurmountable burden. They must show that the findings, or at least the basic ones, are "clearly erroneous." Rule 52 (a), Rules of Civil Procedure. This they have not been able to do. It follows that the decree entered on the merits adjudging the appellants to have violated both §§ 1 and 2 of the Sherman Act must be affirmed.

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[8] By analogy, it bears those sufficiently "peculiar characteristics" found in automobile fabrics and finishes such as to bring them within the Clayton Act's "line of commerce." *United States* v. *du Pont & Co.*, 353 U. S. 586, 593–595 (1957).

THE RELIEF.

In approaching the question of relief we must remember that our function is not to sit as a trial court. *Besser Mfg. Co.* v. *United States,* 343 U. S. 444, 449–450 (1952); *United States* v. *National Lead Co.,* 332 U. S. 319 (1947); cf. *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 185 (1944). As was said in *International Salt Co.* v. *United States,* 332 U. S. 392, 400–401 (1947):

> "The framing of [antitrust] decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case."

The yardstick which the trial court should apply in monopolization cases is well stated by the Court in *Schine Theatres* v. *United States,* 334 U. S. 110, 128–129 (1948). The decree should (1) put "an end to the combination or conspiracy when that is itself the violation"; (2) deprive "the antitrust defendants of the benefits of their conspiracy"; and (3) "break up or render impotent the monopoly power which violates the Act."

The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court. Though the records are usually most voluminous and their review exceedingly burdensome, we have painstakingly undertaken it to make certain that justice has been done. See, *e. g., United States* v. *Paramount Pictures, supra; Schine Theatres* v. *United States, supra; United States* v. *National Lead Co., supra.* That we have done here. We have finally concluded that the relief granted was not beyond the allowable discretion of the District Court.

The Bounds of the Relief Ordered.

At the time of the final decree the Joe Louis agreements had elapsed; the exclusive-contract practice had been at least temporarily abandoned; the leases on Yankee Stadium, the Polo Grounds and St. Nicholas Arena in New York had been given up and the appellants had no control over the new heavyweight champion, Floyd Patterson. Nevertheless, the additional evidence taken by the District Court showed that they still possessed all of the power of monopoly and restraint. In this we agree. The appellants had exercised a strangle hold on the industry for a long period. It was evident at the time of the decree that, statistically, they still dominated the staging of championship bouts and completely controlled the filming and broadcasting of those contests. They had gained this leadership through the elimination by purchase of all of their major competitors in the field; by the control of contending boxers through exclusive agreements; and by the staging of events through the ownership or lease of key stadia and arenas. This illegal activity gave appellants an odorous monopoly background which was known and still feared in the boxing world. In addition, Norris and Wirtz still possessed the major tools, so well used previously, necessary to continue their control. They owned or controlled the key arena and stadium in New York and Chicago, the most lucrative communities in boxing; they continued to control all of the championship bouts staged there; they commanded the filming and broadcasting of all championship fights—the cream of the business—wherever staged; and though on the surface they owned no stock directly in the two I. B. C. corporations, each was the wholly owned subsidiary of corporations which Norris and Wirtz did control and manage.

In this setting the District Court ordered Norris and Wirtz to divest themselves, within a five-year period, of

all stock which they owned "directly or indirectly" in Madison Square Garden. In addition, both of the International Boxing Clubs, Illinois and New York, were ordered dissolved. The Chicago Stadium and Madison Square Garden were each enjoined from staging more than two championship bouts annually. All exclusive agreements for the promotion of boxing events, including nonchampionship, were banned. Madison Square Garden was ordered for a period of five years to lease its premises when available at a "fair and reasonable" rental to any duly qualified promoter applying in writing therefor. Failure to agree on terms would require submission to the courts for determination. Like requirement was imposed on Chicago Stadium Corporation, provided Norris-and-Wirtz control continued.

The District Judge concluded that it was necessary to include each of these provisions in the decree in order to put an end to the combination, deprive the appellants of the benefit of their conspiracy and break up their monopoly power. At the conclusion of the final hearing on relief he observed that prior to 1949 the Norris-Wirtz group was in Chicago while the Madison Square Garden enterprise was in New York. They were "two separate entities," one promoting contests in the mid-West and the other in New York. He declared that "in order to destroy this monopoly we have to return the situation as nearly as possible to the economic conditions as they existed in 1949" and, further, "I can see no way in this case . . . that a proper decree can be formulated unless that power that Wirtz and Norris have in Madison Square Garden is curtailed. They have to get out of the control."

The Order of Divestiture.

Appellants contend that since the stock owned by Norris and Wirtz was not acquired pursuant to the conspiracy, was not the fruit of illegal activity and was not

proven to be the lever by which Madison Square Garden was persuaded to join the conspiracy, divestiture was but punishment rather than a necessary corrective remedy. They further say that the sale, even though made in the manner outlined in the decree,[9] would result in great loss to Norris and Wirtz. They contend that it was arbitrary for the District Court not to permit them to exercise an option, as proposed by them, of a choice between Madison Square Garden and the Chicago Stadium, both of which they still control.

It may be that the stock in Madison Square Garden was not the fruit of the conspiracy; but even if lawfully acquired it may be utilized as part of the conspiracy to effect its ends. See *United States* v. *Paramount Pictures, supra,* at 152. Moreover, since the inception of the conspiracy Norris and Wirtz have increased their holdings to over 219,000 shares. It was this stock ownership and their control of stock voting power that the trial court found dictated the election of the officers and directors of Madison Square Garden and gave to Norris and Wirtz the unquestioned control and management of its activities. Although reluctant at first to require a divestiture of this stock, the trial judge ultimately became convinced that it was the *sine qua non* of the relief. During the hearing he said:

> "The great evil I found was the combination that Wirtz and Norris caused and created by joining up with Madison Square Garden. I regard Wirtz and Norris as one and Madison Square Garden as another, a separate entity and business interest. *The evil*

[9] Norris and Wirtz were given five years to sell their stock in Madison Square Garden, which stock is listed on the New York Stock Exchange. During this time, the stock is to be held by two trustees named by the court. If the stock is not sold within five years, the trustees are ordered to sell it within the next two years.

primarily sprung from their combination, their concerted efforts and action. That has to be broken up." (Emphasis supplied.)

What is perhaps equally significant is that through the exercise of this power Norris and Wirtz elected the officers and board of directors of I. B. C., New York—a joint board with I. B. C., Illinois, which they also controlled through the Chicago Stadium Corporation. This joint board was the bridge over which the conspiracy was made effective. Over it the control of the promotion of championship boxing contests was secured. That this control remained effective up to the very date of the final hearing, June 24, 1957, is shown by the following statement by the court on that date:

"The unlawful combination of the defendants still possesses and exercises its monopolistic control in the field of championship contests. It appears that since May 15, 1953 there have been held in the United States 37 championship contests, excluding one bantamweight contest. The defendants admit that they had promotional control over 24 of the 37 championship contests which were held or of 65 per cent of the market, but we find that the defendants were not financial strangers to the other 13 championship contests which were held in cities other than New York and Chicago. Because the defendants are licensed by state authorities to promote only in New York and Illinois, they could not be the persons actually designated as the promoter of the 13 championship contests, but all five of the championship contests which originated in cities other than Chicago or New York on Friday nights were televised on IBC's-New York Friday night television series.

"We find, too, that all of the 37 championship contests in this period from May 15, 1953, save

only the five outdoor contests, were televised on either the defendants' Wednesday or Friday night television series, and that the profits of the sale of the telecasting rights inured to the benefit of the defendants."

As this was some two and a half years after our opinion in the former appeal on January 31, 1955, it appears that appellants had continued exercising their unlawful control long after they well knew that this activity was within the coverage of the Sherman Act. In view of the fact that no denial was made on that appeal of the sufficiency of the Government's complaint it is reasonable to assume that appellants, subsequent to our opinion, knew that their conduct violated the Sherman Act, obedience to which is so important to our free enterprise system. Still they continued their illegal activity. In fact from all appearances it is continuing to this day. Such conduct, in addition to the interlocking nature of the ownership at the time of the final decree, fully justified the District Court's conclusion that the "dissolution of the combination can only be accomplished by an immediate and complete severance of the interlocking ownership of Norris and Wirtz in Madison Square Garden. . . . [T]here must be a complete divestiture of the stockholdings of Norris and Wirtz in the Garden. The Government has established Norris and Wirtz control the Garden Corporation." Moreover, this was the only effective means at hand by which competition in championship events might be restored. It was intended to return the parties as near as possible to the *status quo* existing prior to the conspiracy.

For these reasons, we do not see why it was incumbent upon the court to give Norris and Wirtz certain options requested at the time of the decree. We shall mention only two. The first was that they have the right to exercise a choice of retaining either Madison Square Gar-

den or the Chicago Stadium. But this would not be conducive to the re-establishment of competition *between* the two interests, which the District Court considered a necessity. Nor would it eliminate the "great evil" the trial court found in the Norris-Wirtz-Garden combination. Another requested option was that Norris and Wirtz be permitted to retain their control of Madison Square Garden and the latter be enjoined from promoting championship boxing events. But this would have eliminated the world's principal boxing center—"the premier sports arena in the world," as appellants characterized it—from promoting such events in competition with Norris and Wirtz.

In short, the Government in its effort to free the professional boxing business of monopoly and unreasonable restraints would have won the battle but lost the war under either of the proffered alternatives. As this Court said in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189–190 (1944):

> "Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity . . . to act in combination . . . . The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future."

The Dissolution of the Two International Boxing Clubs.

Admittedly these corporations were formed pursuant to and were the means used to effectuate the conspiracy. As the trial judge said:

> "These corporations are the promotional arms of the defendants, conceived and used to enable defendants

> to restrain and monopolize promotion of championship boxing contests. Their assets are of but nominal value except for the goodwill attaching to their names by virtue of the conspiracy."

The conditions existing here even subsequent to our former opinion confirm the need for such dissolution. Both corporations continued to share equally the profits the combination reaped from the staging of championship boxing contests. This also included revenues from championship contests promoted by others but televised by the combination. They continue even now as the bridge between the choice arenas Norris and Wirtz own or control and the boxers with whom they have exclusive promotion contracts. Through interlocking officers and directorates the two I. B. C.'s thus effectively hold the combination together. It is antitrust policy to decree dissolution "where the creation of the combination is itself the violation." *United States* v. *Crescent Amusement Co., supra,* at 189, and cases there cited. This is one of those situations where the injunctive process affords too little relief too late.

Appellants argue that this is punitive; that the parent companies, under the decree, are left free to organize new corporations to handle their respective boxing promotions and, hence, dissolution is a useless act. The trial court felt, however, and we agree, that continued operation under the old I. B. C. charters might lead to a situation *nominis umbra* not conducive to the elimination of the old illegal practices. New corporations, if formed, would start off with clean slates free from numerous written and oral agreements and understandings now existent and known throughout the industry. Hence dissolution might well have the salutary effect of completely clearing new horizons that the trial judge was attempting to create in the boxing world, especially when effected in conjunc-

tion with the stock divestiture provision. Moreover, there would be little inconvenience and nominal expense even if, as appellants contend, they "as a practical matter must [form new corporations] if they are to promote any boxing at all." This we think a poor excuse for not completely eliminating, by dissolution, these old trappings of monopoly and restraint.

The Compulsory Leasing Provisions.

The District Court, having found that one of the means used in effectuating the conspiracy was the ownership and control of arenas and stadia, entered a compulsory leasing provision in the decree as to Madison Square Garden and the Chicago Stadium Corporation.[10]

The appellants' main concern with this provision of the decree is the requirement that in the event the terms of a lease cannot be agreed upon the matter will be submitted to the District Court. Appellants fear that this is not only an undesirable but an impractical activity for a District Court. But they have suggested no alternative to relieve the court of this burden. Obviously, such a provision may result in some disputes which must be settled. Until experience in the enforcement of the provision proves the reference to be too burdensome we see no reason to disturb it. If experience proves it unworkable the parties, under the decree, may apply to the court for

[10] This provision of the decree, applying only to championship contests, ordered appellants to lease their respective buildings upon seasonable written request by a qualified promoter, if the proposed rent is reasonable, if the applicant furnishes adequate security, and if at the time of the application the building is neither already under lease to another for the specified day nor in conflict at that time with "any well-established event" which has been regularly conducted therein. If the parties cannot agree on what constitutes adequate security or a reasonable rental, either party may apply to the court for a determination thereof.

appropriate relief. See *Lorain Journal Co.* v. *United States,* 342 U. S. 143, 156–157 (1951); *International Salt Co.* v. *United States, supra,* at 401.

Exclusive Contracts With Contestants.

Appellants object to the prohibition against exclusive contracts applying to all professional boxing contests. They question the Government's enlarging its base from championship bouts to all professional boxing. But human nature being what it is there is sound reason to say that exclusive contracts with boxers in nontitle contests would surely affect those same boxers when and if they arrive at the title. Such arrangements would give appellants, so experienced in the boxing field, a decided advantage over the independent promoter. Such a prohibition is fully justified at least until the effects of the conspiracy are fully dissipated. For the same reason we see no fault in the five-year prohibition against exclusive rights to a return bout.

The trial court recognized that these restrictions went beyond the "relevant market" which has been considered for purposes of determining the Sherman Act violations, but felt that "[t]he relief here must be broader than the championship field because the evil to be remedied is broader." This Court has recognized that sometimes "relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co., supra,* 340 U. S., at p. 90; *Timken Co.* v. *United States,* 341 U. S. 593, 600 (1951). When this sort of relief is granted, we must of course be especially wary lest the trial court overstep the correspondingly narrower limits of its discretion, but, for the reasons set out above, we feel that no such misuse of the trial court's power is present here.

We have considered the other objections of appellants to the decree and find them unsubstantial as presently

posed. In the event experience proves that some of the provisions are so severe as to require modification or amendment, the parties may apply to the District Court as provided in paragraph 25 of the decree. The judgment should be affirmed.

It is so ordered.

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

MR. JUSTICE FRANKFURTER, dissenting in part.

While I have heretofore expressed views in favor of the almost controlling deference to be paid to a District Court's considered formulation of the provisions appropriate to a decree designed to remedy adjudicated violations of the antitrust laws, those views have not prevailed, see the opinions in *United States* v. *Paramount Pictures*, 334 U. S. 131, and this Court has felt free to modify and eliminate provisions of an antitrust decree, particularly when a single judge has imposed an unconventional and drastic remedy. The main issue dealt with in MR. JUSTICE HARLAN'S dissent, while a narrow one, is, in my view, important. While divestiture has been decreed by the district judge, the mandatory disposition of the stock has been delayed for five years, and the stock placed in trusteeship. During this five-year period a series of detailed controls have been imposed, under the supervision of the District Court, in order to prevent appellants Norris and Wirtz from exercising the power their stock ownership has given them over the operations of Madison Square Garden. The ownership itself has been sterilized. I think it not an unreasonable forecast that, even were we to postpone for five years the decision whether to order the divestiture or continue the trusteeship, appellants Norris and Wirtz would not find it profitable to continue their sterilized ownership of the Garden stock. How-

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ever, there is no compelling reason to order them to do what sound business judgment may compel. One has the right to assume that, in view of this Court's unanimous affirmance of the findings below that appellants were in violation of the Sherman Law, they will scrupulously obey the decree and not even by the subtlest indirection seek to avoid our decision. Therefore I think it is needless now to determine that divestiture must take place five years hence, rather than wait upon the event in order to determine whether divestiture should then be ordered.

Accordingly, I join MR. JUSTICE HARLAN'S opinion.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, dissenting in part.

I am unable to subscribe to the Court's approval of those parts of the decree below which ordered (1) the divestiture of the stockholdings of Norris and Wirtz in Madison Square Garden Corporation and (2) the dissolution of the New York and Illinois International Boxing Clubs. On the other aspects of the case I agree with the results the Court has reached.

DIVESTITURE.

As a starting point I accept the conclusion of the District Court that competition in the promotion and exhibition of professional championship boxing could not be effectively restored so long as Norris and Wirtz remained in control of Madison Square Garden's activities in this field. Because of the pre-eminence of the Garden as a site for boxing contests, the District Court found that its control by Norris and Wirtz constituted the fulcrum of the antitrust violations which were adjudged. That finding is supported by the evidence, and in turn justifies the court's conclusion that the elimination of their

influence in the Garden was prerequisite to restoring competition.

It by no means follows, however, that the order divesting Norris and Wirtz of their Garden stockholdings was an appropriate method of accomplishing that objective in the circumstances of this case. Unless past pronouncements of this Court cautioning against the indiscriminate use of divestiture as a remedy in antitrust cases, see *Timken Co.* v. *United States,* 341 U. S. 593, are to be taken less seriously than they should be, it seems to me that the Court has too lightly given approval to the use of that drastic measure here.

First. It is not at all clear to me just why the District Court, which in the early stages of the hearings on relief expressed itself strongly against divestiture, ultimately reached the conclusion that such a course was necessary. Indeed the record can be read as indicating the court's belief that the five-year trusteeship of the stock, though designed to alleviate some of the hardships of a forced sale, would at the same time effectively remove Norris and Wirtz from control over the Garden's affairs and therefore in conjunction with the other provisions of the decree result in restoring competitive conditions, whether or not the correlative requirement of sale was carried out within the five-year period.[1] The decree itself supports this

[1] Apart from its divestiture and dissolution provisions, the decree imposes wide-ranging and pervasive restrictions on appellants' activities in boxing promotion and exhibition. It renders void all exclusive contracts which they may presently have with boxers. It prohibits the making of new exclusive contracts, with the exception that, after five years, exclusive provision may be made for return bouts. Similarly, exclusive leases with stadia not owned by appellants are proscribed. So, too, are such arrangements with television and radio broadcasters. Further, appellants are restrained, for a period of five years, from promoting more than four championship boxing programs annually, two by Madison Square Garden and two, cumulatively, by Norris and Wirtz. During that five-year period also, the com-

reading. For despite the evident realization that the stock might not be sold within five years, the provisions of the decree especially aimed at opening up competition for the use of the Garden are all geared to this period. If in fact the District Court thought this five-year insulation of Norris and Wirtz from managerial and policy-making activities at the Garden would combine with the other restrictions to restore competition, justification for divestiture must then be found in a purpose to prevent a relapse into noncompetitive conditions after the five years have elapsed, something which the District Court quite properly considered to be a function of the decree. On this premise I am at a loss to see why continuance of the trusteeship, and, if necessary, the concomitant restrictions on the Garden's activities, should not have been considered adequate to serve that end.

Second. If I am mistaken in thus divining the thinking of the District Court, I still consider that in the circumstances of this case divestiture was at least ordered prematurely. Determination whether that drastic remedy was required should have been postponed until the expiration of the trusteeship period so that the necessity for its application could then be judged in light of the effectiveness of the other sanctions of the decree. I recognize that various contingencies can be conjured up to support the view that divestiture, rather than trusteeship, holds the more solid promise of assuring the preservation of competition. Nevertheless I think that rejection of a continuance of the trusteeship in favor of divestiture should, in the peculiar setting of this case, be based on experience rather than speculative apprehension.

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pulsory leasing provisions discussed in the Court's opinion are to be in effect. Finally, the decree removes Norris and Wirtz as officers and directors of Madison Square Garden, and enjoins them from holding such positions in the future.

Three factors seem to me especially compelling toward such a course. In the first place, this cannot properly be considered a case of reprehensible immoral conduct or willful lawbreaking.[2] Not until January 31, 1955, when this Court handed down its opinion in *United States* v. *International Boxing Club,* 348 U. S. 236, did it become known that professional boxing was even subject to the federal antitrust laws. In view of this Court's earlier decisions in the baseball cases, *Federal Baseball Club* v. *National League,* 259 U. S. 200, and *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356, I think it reasonable to say that in 1949 when this alleged conspiracy began most well-informed lawyers believed that professional boxing, like professional baseball, was beyond antitrust stricture. Hence the appellants had every reason to believe their actions were innocent when taken. Putting the matter somewhat differently, we should be slow in lending approval to the use of such a drastic remedy as this in a case where the appellants have never had the opportunity to demonstrate their willingness to comply with the law once they have learned that it applies to their activities. In my opinion, the thrust of this factor is not blunted by arguing, as the Court does, that appellants should voluntarily have done something to unscramble their relationships during the two and a half years that elapsed between the Court's decision in the original *International Boxing* case and the entry of the present decree. That sort of squeeze play should not be expected of those already involved in a lawsuit.

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[2] The District Court put the matter in this way: "I don't charge them [Norris and Wirtz] with malicious intentional and moral wrongdoing, nor do I proceed to formulate the decree on such a basis. They are guilty, if anything, of a moral, prohibitive wrong which was in doubt as to whether it was even prohibitive at the time some of these acts were done, and serious doubt, but most people held it was not."

Further, divestiture here is brought to bear upon a large investment much of which was acquired long before the conduct charged in this case began, and the balance of which was obtained prior to the announcement of the *International Boxing* decision. The "unlawful fruits" doctrine accordingly offers no justification for this divestiture. Although recognizing this to be true, the Court states that the Garden stock was nonetheless utilized as means of accomplishing the antitrust violations. But this is just another way of saying that divestiture is a necessary element of effective relief; it affords no independent justification for the employment of that remedy.

Lastly, the divestiture order reaches far beyond the subject matter of the action. It permanently removes Norris and Wirtz from all interest in the Garden, over 90% of whose activities are entirely unrelated to professional boxing.

Third. It is true, of course, that the trial court's considered judgment on what is necessary to dissipate the effects and prevent recurrence of an adjudged antitrust violation is entitled to much deference from this Court. But by the same token this Court, before it is asked to put its stamp of approval on such a drastic remedy as divestiture, is entitled to have a clear and unambiguous expression of the district court's reasoning in choosing such a course. Especially is this so where, as here, this Court is the sole reviewing authority and in consequence has not had the benefit of an intermediate review of the issues by a Court of Appeals. In my opinion this record leaves much to be desired in this regard. The most I can make of it, taking the case for divestiture most favorably to the Government, is that the District Court would have been justified in reserving that issue for consideration at the time the five-year trusteeship of the Norris and Wirtz stock expired. Certainly no adequate case for a present order of divestiture has been made out. In this view of

the matter it becomes unnecessary to discuss at this time the various "options" alternative to divestiture which were rejected by the District Court.

DISSOLUTION.

I can find no adequate basis for the order dissolving the two International Boxing Clubs. My difficulty with this aspect of the relief is sufficiently shown by the fact that, as I read the record, it would be permissible for Madison Square Garden and the Norris and Wirtz interests in Chicago to create new corporations carrying exactly the same name as the two present organizations. The only justification offered by the Government for this aspect of the decree is that the two clubs were instrumentalities of the antitrust conspiracy and that their dissolution was but an expedient for insuring that all of their illegal agreements had been put to an end. But since all such agreements, both written and oral, are already canceled by other provisions of the decree, and since there is no suggestion that the sweeping relief granted by the District Court has any loopholes which would permit these organizations to function improperly, this justification is hardly convincing. In these circumstances dissolution appears to me to be not only punitive but futile, something not promotive of sound antitrust law enforcement.

I would remand the case to the District Court with instructions to modify its decree by striking the provisions for compulsory sale of the Norris and Wirtz stock in the Madison Square Garden Corporation, reserving the issue of divestiture for further proceedings at the end of the five-year trusteeship period, and eliminating the requirement of dissolution of the two International Boxing Clubs.

HOTEL EMPLOYEES UNION, LOCAL NO. 255, ET AL. *v.* SAX ENTERPRISES, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 5. Argued November 10, 1958.—Decided January 12, 1959.†

There being no violence involved, the Florida state courts were without jurisdiction to enjoin the organizational picketing of the Florida resort hotels here involved, whether it was activity protected by § 7 of the National Labor Relations Act or prohibited by § 8 (b) (4)—even though the National Labor Relations Board refused to take jurisdiction. Pp. 270–271.

93 So. 2d 591, 598, reversed.

Arthur J. Goldberg and *David E. Feller* argued the causes and filed a brief for petitioners.

Marion E. Sibley and *Thomas H. Anderson* argued the causes for respondents. With them on the brief were *Thomas H. Barkdull, Jr.* and *Samuel J. Kanner.*

PER CURIAM.

The judgments of the Supreme Court of Florida in these twelve consolidated cases must be reversed. They all concern the power of the courts of Florida to enjoin organizational picketing at twelve Florida resort hotels. After a series of decisions in regard to these and related cases,* the Florida Supreme Court, in identical *per curiam* opinions, affirmed the issuance of permanent injunctions against the picketing.

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†Together with No. 6, *Hotel Employees Union, Local No. 255, et al.* v. *Levy et al., doing business as Sherry Frontenac Hotel, et al.,* also on certiorari to the same Court.

**Sax Enterprises, Inc.,* v. *Hotel Employees Union,* 80 So. 2d 602; *Boca Raton Club, Inc.,* v. *Hotel Employees Union,* 83 So. 2d 11; and *Fontainebleau Hotel Corp.* v. *Hotel Employees Union,* 92 So. 2d 415.

The Florida courts were without jurisdiction to enjoin this organizational picketing, whether it was activity protected by § 7 of the National Labor Relations Act, as amended, 29 U. S. C. § 157, *Hill* v. *Florida ex rel. Watson,* 325 U. S. 538, or prohibited by § 8 (b)(4) of the Act, 29 U. S. C. § 158 (b)(4), *Garner* v. *Teamsters Union,* 346 U. S. 485. See *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, at 481. This follows even though the National Labor Relations Board refused to take jurisdiction, *Amalgamated Meat Cutters* v. *Fairlawn Meats,* 353 U. S. 20. The record does not disclose violence sufficient to give the State jurisdiction under *United Automobile Workers* v. *Wisconsin Board,* 351 U. S. 266. In none of the twelve cases did the Florida trial courts make any finding of violence, and in some an affirmative finding of no violence was made.

Since it was stipulated below that a witness would testify that interstate commerce was involved in the Florida resort hotel industry, and since the parties asked that "Final Decree be entered by the Chancellor upon the record as now made in the light of this Stipulation," we find it unnecessary to remand for consideration of that question. See *Hotel Employees Local No. 255* v. *Leedom,* 358 U. S. 99. Other questions raised by respondents are either without merit or irrelevant to this disposition of the cases.

Reversed.

HAHN *v.* ROSS ISLAND SAND & GRAVEL CO.

CERTIORARI TO THE SUPREME COURT OF OREGON.

No. 52. Argued December 11, 1958.—Decided January 12, 1959.

Petitioner was injured while working on a barge used in connection with the dredging of sand and gravel in a lagoon opening into a navigable river. His employer had rejected the State Workmen's Compensation Act, which provides that, in such cases, an injured employee may maintain in the courts a negligence action for damages. Petitioner brought such an action in a state court. *Held:* Though his employer had accepted its coverage, nothing in the Longshoremen's and Harbor Workers' Compensation Act prevents petitioner from recovering in the state court. Pp. 272–273.

214 Ore. 1, 320 P. 2d 668, reversed and cause remanded.

Dwight L. Schwab argued the cause for petitioner. With him on the brief was *Herbert C. Hardy.*

Ray H. Lafky, Assistant Attorney General, argued the cause for the State of Oregon, as *amicus curiae,* urging reversal. With him on the brief was *Robert Y. Thornton,* Attorney General.

Arno H. Denecke argued the cause for respondent. With him on the brief was *Robert T. Mautz.*

PER CURIAM.

By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply "if recovery for the disability or death through workmen's compensation proceedings *may . . . validly be provided by State law.*" § 3, 44 Stat. 1426, 33 U. S. C. § 903 (a) (emphasis supplied). In *Davis* v. *Department of Labor,* 317 U. S. 249, we recognized that in some cases it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so "local" as to allow state compensation laws validly to apply under the limitations of *Southern Pacific Co.* v.

Jensen, 244 U. S. 205. As to cases within this "twilight zone," *Davis*, in effect, gave an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State in which the injury occurred. It seems plain enough that petitioner's injury occurred in the "twilight zone," and that recovery for it "through workmen's compensation proceedings," could have been, and in fact was, validly "provided by State law"—the Oregon Workmen's Compensation Act. Ore. Rev. Stat. §§ 656.002–656.990. Therefore, the Longshoremen's Act did not bar petitioner's claim under state law. But since his employer had elected to reject them the automatic compensation provisions of the Oregon Workmen's Compensation Act did not apply to the claim. Section 656.024 of that law provides, however, that when an employer has elected to reject the Act's automatic compensation provisions his injured employee may maintain in the courts a negligence action for damages. Of course, the employee could not do this if the case were not within the "twilight zone," for then the Longshoremen's Act would provide the exclusive remedy. Since this case is within the "twilight zone," it follows from what we held in *Davis* that nothing in the Longshoremen's Act or the United States Constitution prevents recovery.

The judgment is reversed and the cause is remanded to the Supreme Court of Oregon for proceedings not inconsistent with this opinion.

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

MR. JUSTICE STEWART, whom MR. JUSTICE HARLAN joins, dissenting.

This case poses a difficult and important issue of first impression. The Court decides it, I think, incorrectly.

The petitioner was injured while working on a barge in navigable waters within the State of Oregon. The respondent employer had secured payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, but had elected not to be covered by the Oregon Workmen's Compensation Law, Ore. Rev. Stat. § 656.002 *et seq.* Compensation benefits under the federal statute were clearly available at all times to the petitioner. Instead of accepting these benefits, however, he brought an action for personal injuries in an Oregon state court, the Oregon statute permitting such an action against an employer not participating in the state workmen's compensation plan.[1]

The trial court entered judgment for the employer, notwithstanding a jury award in the petitioner's favor, and the judgment was affirmed by the Oregon Supreme Court, which held that the petitioner's sole remedy was under the federal statute. 214 Ore. 1, 320 P. 2d 668. It is that decision which is today reversed.

The creation in *Davis* v. *Department of Labor* of a "twilight zone" was a practical solution to a practical problem, a problem stemming from *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and one which 25 years of post-*Jensen* history had failed to solve. The problem was how to assure to injured waterfront employees the simple, prompt, and certain protection of workmen's compensation which Congress had clearly intended to give in enacting the federal statute. See 317 U. S., at 254. The *Davis* decision in effect told the injured employee that in a doubtful case he would be assured of workmen's compensation whether he proceeded under a state workmen's compensation act or the federal statute. See *Moores's*

[1] The employer in such a case is deprived of the traditional common-law defenses. Ore. Rev. Stat. § 656.024.

Case, 323 Mass. 162, 80 N. E. 2d 478, aff'd *per curiam, sub nom. Bethlehem Steel Co.* v. *Moores,* 335 U. S. 874.

Even accepting the premise that the circumstances surrounding Hahn's accident brought it within the twilight zone, no one had supposed until today that either *Davis* or the federal statute allowed an employee to spurn federal compensation and submit his claim to a state court jury.[2] *Chappell* v. *C. D. Johnson Lumber Corp.,* 112 F. Supp. 625, reversed on other grounds, 216 F. 2d 873.

In the interest of a clear legislative purpose to provide the certainty and security of workmen's compensation, the "illogic" of a twilight zone was permitted.[3] Such illogic should not be utilized to frustrate that very purpose. I would affirm the judgment.

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[2] The pertinent provision of 33 U. S. C. § 903 (a) is as follows: "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death *through workmen's compensation proceedings* may not validly be provided by State law." (Emphasis added.)

[3] The twilight zone and its background have been much criticized and discussed. For summaries, see Gilmore and Black, The Law of Admiralty (1957), § 6–48; 2 Larson, The Law of Workmen's Compensation (1952), § 89.00 *et seq.;* Rodes, Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone, 68 Harv. L. Rev. 637 (1955).

UNITED STATES EX REL. JENNINGS *v.* RAGEN, WARDEN.

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

No. 185, Misc. Decided January 12, 1959.

While confined under sentence of an Illinois court following his conviction of armed robbery, petitioner sought a writ of habeas corpus from a Federal District Court, claiming that a confession coerced by physical mistreatment by police officers had been introduced into evidence at his trial. Relying on facts and conclusions stated in an opinion of the State Supreme Court and without making an examination of the record of the proceedings in the state courts, the District Court dismissed the application without a hearing. *Held:* It erred in doing so. Pp. 276–277.

Judgment vacated and cause remanded to District Court for further proceedings.

Petitioner *pro se.*

Latham Castle, Attorney General of Illinois, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted.

Petitioner, confined under sentence of an Illinois court following his conviction of armed robbery, sought a writ of habeas corpus from the Federal District Court. His petition contained allegations, primarily concerning the introduction into evidence at his trial of a confession coerced by physical mistreatment by police officers, which if true would entitle him to relief. Appended to the petition were various documents, including an opinion of the Supreme Court of Illinois affirming his conviction and simultaneously affirming the denial to him of post-conviction remedies which he had sought in the trial court while

his appeal from the conviction was pending. See *People* v. *Jennings,* 11 Ill. 2d 610, 144 N. E. 2d 612. In that opinion, the state court held that the evidence before it warranted the trial court's finding that petitioner's confession had been voluntary.

The State responded to petitioner's application and urged dismissal. The District Court, on a record limited to the aforementioned documents augmented by a "report" prepared by an *amicus curiae* appointed by it, dismissed the application without a hearing. The Court of Appeals, in turn, denied petitioner's motion for a certificate of probable cause, 28 U. S. C. § 2253, and dismissed his appeal.

It appears from the record before us that the District Court dismissed petitioner's application without making any examination of the record of proceedings in the state courts, and instead simply relied on the facts and conclusions stated in the opinion of the Supreme Court of Illinois. We think that the District Court erred in dismissing this petition without first satisfying itself, by an appropriate examination of the state court record, that this was a proper case for the dismissal of petitioner's application without a hearing, in accordance with the principles set forth in *Brown* v. *Allen,* 344 U. S. 443, 463–465, 506. See also *Rogers* v. *Richmond,* 357 U. S. 220. It follows that the judgment of the Court of Appeals must be vacated and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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

SOMERVILLE MILLING CO. ET AL. *v.* WORCESTER NORTH SAVINGS INSTITUTION.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 495. Decided January 12, 1959.

Appeal dismissed and certiorari denied.
Reported below: 101 N. H. 307, 141 A. 2d 885.

Angus M. MacNeil for appellants.

Stanley M. Burns for appellee.

PER CURIAM.

The motion to strike the motion to dismiss is denied. 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.

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

TERRITO ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 454. Decided January 12, 1959.

Appeal dismissed because notice thereof was not timely filed.

Reported below: 170 F. Supp. 855.

Francis J. Ortman for appellants.

Solicitor General Rankin, Assistant Attorney General Hansen, Robert W. Ginnane and *James A. Murray* for the United States and the Interstate Commerce Commission, appellees.

PER CURIAM.

The appeal is dismissed for the reason that the notice thereof was not filed within the time provided by law.

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

FEDERAL POWER COMMISSION *v.* MIDWESTERN GAS TRANSMISSION CO. ET AL.

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

No. 515. Decided January 12, 1959.

Certiorari granted; judgment vacated; and case remanded with instructions to dismiss respondent's petition for review as moot.

Reported below: 103 U. S. App. D. C. 360, 258 F. 2d 660.

Solicitor General Rankin, Assistant Attorney General Doub, Leonard B. Sand, Samuel D. Slade, Willard W. Gatchell and *Howard E. Wahrenbrock* for petitioner.

Harry S. Littman for the Midwestern Gas Transmission Co. et al., and *Clarence H. Ross* for the Natural Gas Pipeline Co. et al., respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to dismiss respondent's petition for review as moot.

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

SMITH *v.* UNITED STATES.

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

No. 192, Misc. Decided January 12, 1959.

Certiorari granted; judgment vacated; and case remanded to District Court with directions to allow the appeal *in forma pauperis*.

Petitioner *pro se*.

Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg and *J. F. Bishop* 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 Court of Appeals is vacated and the case is remanded to the District Court with directions to allow the appeal *in forma pauperis*. *Ellis* v. *United States*, 356 U. S. 674.

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

F. & M. SCHAEFER BREWING CO. *v.* GEROSA, COMPTROLLER OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 526. Decided January 12, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 4 N. Y. 2d 423, 151 N. E. 2d 845.

Russell D. Morrill and *Francis L. Casey* for appellant.

Stanley Buchsbaum and *Morris L. Heath* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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

McDANIEL *v.* CALIFORNIA.

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

No. 283, Misc. Decided January 12, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 157 Cal. App. 2d 492, 321 P. 2d 497.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

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

LOCAL 24, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO, ET AL. *v.* OLIVER ET AL.

CERTIORARI TO THE SUPREME COURT OF OHIO AND THE COURT OF APPEALS OF OHIO, NINTH JUDICIAL DISTRICT.

No. 49. Argued December 10–11, 1958.—Decided January 19, 1959.

A collective bargaining agreement between a group of local labor unions and a group of interstate motor carriers prescribed a wage scale for truck drivers and, in order to prevent evasion thereof, provided that drivers who own and drive their own vehicles should be paid, in addition to the prescribed wage, not less than a prescribed minimum rental for the use of their vehicles. A suit was brought in a state court to enjoin certain carriers and a local union from carrying out the minimum rental provision on the ground that it violated a state antitrust law. *Held:* Since that provision was part of an agreement resulting from the exercise of collective bargaining rights under the National Labor Relations Act, the state court was precluded from applying the state antitrust law to prohibit the parties from carrying out its terms. Pp. 284–297.

(1) In the light of its history and its purpose to protect the negotiated wage scale against evasion through payment to owner-drivers of rentals insufficient to cover their operating costs, the minimum rental provision was within the scope of collective bargaining required of the parties under §§ 7 and 8 of the National Labor Relations Act. Pp. 292–295.

(2) The state antitrust law may not be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain. Pp. 295–297.

167 Ohio St. 299, 147 N. E. 2d 856, reversed.

David Previant argued the cause for petitioners. With him on the brief were *Robert C. Knee* and *Bruce Laybourne.*

Stanley Denlinger argued the cause and filed a brief for Oliver, respondent.

Charles R. Iden argued the cause for the A. C. E. Transportation Co., Inc., et al., respondents. With him on the brief was *E. W. Brouse.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

As the result of multiemployer, multistate collective bargaining with the Central States Drivers Council, comprising local unions of truck drivers affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, a collective bargaining agreement, the "Central States Area Over-the-Road Motor Freight Agreement," effective February 1, 1955, and expiring January 31, 1961, was entered into by the locals and motor carriers in interstate commerce who operate under the authority of the Interstate Commerce Commission [1] in 12 midwestern States, including Ohio.[2] Article XXXII of this collective bargaining agreement [3] prescribes terms and conditions which regulate the minimum rental and certain other terms of lease when a

[1] Certificates of convenience and necessity are issued to common carriers pursuant to §§ 206–208 of the Interstate Commerce Act, 49 Stat. 551, 552, as amended, 49 U. S. C. §§ 306–308; permits are issued to contract carriers pursuant to § 209, 49 Stat. 552, as amended, 49 U. S. C. § 309.

[2] The agreement covers between 3,000 and 3,500 employers and between 45,000 and 50,000 truck drivers. Those covered in Ohio consist of approximately 500 employers and 6,000 drivers. Upwards of 90% of the Ohio drivers drive equipment owned by carriers who operate under I. C. C. certificates or permits. The rest of the covered drivers own their own equipment, usually one vehicle, but since they are not holders of I. C. C. certificates or permits, they lease their equipment to, and drive it for, certificated or permitted carriers.

[3] For the text of Article XXXII, see Appendix, *post*, p. 298.

motor vehicle is leased to a carrier by an owner who drives his vehicle in the carrier's service.[4] The Ohio courts enjoined the petitioner, Ohio's Teamsters Local 24 and its president, and the respondent carriers, A. C. E. Transportation Company, Inc., and Interstate Truck Service, Inc., Ohio employers, from giving effect to the provisions of Article XXXII. The Ohio courts held that the Article violates the Ohio antitrust law, known as the Valentine Act.[5] The question is whether the fact that the Article

[4] For details of I. C. C. regulations governing the relationship between certificated carriers and the lessors of motor vehicle equipment, see the discussion in *American Trucking Assns., Inc.*, v. *United States*, 344 U. S. 298.

[5] The specific provision involved, Ohio Rev. Code Ann. § 1331.01, provides as follows:

"As used in sections 1331.01 to 1331.14, inclusive, of the Revised Code:

"(A) 'Person' includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States, or a foreign country.

"(B) 'Trust' is a combination of capital, skill, or acts by two or more persons for any of the following purposes:

"(1) To create or carry out restrictions in trade or commerce;

"(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;

"(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;

"(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;

"(5) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, com-

was contained in an agreement which was the fruit of the exercise of collective bargaining rights under the National Labor Relations Act[6] precluded the Ohio courts from applying the Ohio antitrust law to prohibit the parties from carrying out the terms of the Article they had agreed upon in bargaining. No claim is made that Article XXXII violates any provision of federal law.

The Article is in express terms made applicable only to a lessor-driver when he himself drives his vehicle in the

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modity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected.

"A trust as defined in division (B) of this section is unlawful and void."

[6] Involved are §§ 7 and 8 of the National Labor Relations Act, as amended and re-enacted by the Labor Management Relations Act, 61 Stat. 140, 29 U. S. C. §§ 157, 158. Section 7 is as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Sections 8 (a) (5) and 8 (b) (3) require employers and labor organizations to bargain collectively. Section 8 (d), in pertinent part, provides:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . ."

business of the lessee-carrier. § 1. The Article, at least in words, constitutes the lessor-driver an employee of the carrier at such times: "The employer [the carrier] expressly reserves the right to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished." § 4. His wages, hours and working conditions are then to be those applied to the carrier's drivers of carrier-owned vehicles, and he has "seniority as a driver only." § 2. He must operate his vehicle at such times "exclusively in . . . [the carrier's] service and for no other interests." § 1. The carrier "agrees to pay . . . social security tax, compensation insurance, public liability and property damage insurance, bridge tolls" and various other fees imposed on motor freight transportation, except "that the owner-driver shall pay license fees in the state in which title is registered." § 10. The lessor-driver must be compensated by "separate checks . . . for driver's wages and equipment rental." § 6. The wage payment must be in the amount of "the full wage rate and supplementary allowances" payable to carrier drivers similarly circumstanced who drive carrier-owned vehicles. § 12 (a). The equipment rental payment must be in an amount not less than "the minimum rates" specified by the Article which "result from the joint determination of the parties that such rates represent only the actual cost of operating such [leased] equipment. The parties have not attempted to negotiate a profit for the owner-driver." § 12 (b). All leases by union members who drive their vehicles for carriers in effect on the operative date of the collective bargaining agreement are to "be dissolved or modified within thirty (30) days" to conform to the terms and conditions of the Article. § 15. The parties declare that "the intent of this clause [the Article] . . . is to assure the payment of the Union scale of wages . . . and to prohibit [a carrier from] the making

and carrying out of any plan, scheme or device to circumvent or defeat the payment of wage scales provided in this Agreement. . . . [and] to prevent the continuation of or formation of combinations or corporations or so-called lease of fleet arrangements whereby the driver [of his own vehicle] is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of the running of his equipment, thus, in fact, reducing his scale of pay." § 16.

The respondent, Revel Oliver, a member of the union, is the owner of motor equipment [7] which, at the time the collective bargaining agreement was negotiated, was subject to written lease agreements with the carrier respondents, A. C. E. Transportation Company, Inc., and Interstate Truck Service, Inc. The terms and conditions of the leases, particularly in regard to rental compensation, differ substantially from those provided in Article XXXII.[8]

Oliver brought this action on January 20, 1955, in the Court of Common Pleas, Summit County, Ohio, for an injunction restraining the petitioners and the respondent carriers from carrying out the terms of Article XXXII.

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[7] Oliver is rather unusual among Ohio owner-drivers because he owns not one vehicle but a fleet, six trucks and four trailers, each of which is under a lease agreement with one or the other of the carrier respondents. Oliver drove only occasionally, "every month or so for A. C. E. and every eight months or so for Interstate," and Article XXXII applied to his leases only as to the vehicle he drove on those occasions.

[8] Accordingly, § 15 of Art. XXXII required the carriers to take steps to modify both agreements. The Interstate Truck Service lease with Oliver was for a fixed term, but contained a five-day cancellation clause. The agreement between A. C. E. and Oliver was not for any fixed term and was brought into effect by the issuance of individual waybills and manifests for particular hauls.

He obtained a temporary restraining order upon sworn allegations. At the trial the respondent carriers joined with Oliver in making the attack on the Article. The petitioners defended on the ground that the State could not lawfully exercise power to apply its antitrust law to cause a forfeiture of the product of the exercise of federally sanctioned collective bargaining rights. The union justified the Article as necessary to prevent undermining of the negotiated drivers' wage scale said to result from a practice of carriers of leasing a vehicle from an owner-driver at a rental which returned to the owner-driver less than his actual costs of operation, so that the driver's wage received by him, although nominally the negotiated wage, was actually a wage reduced by the excess of his operating expenses over the rental he received. The Court of Common Pleas held in an unreported opinion that the National Labor Relations Act could not "be reasonably construed to permit this remote and indirect approach to the subject of wages," and that Article XXXII was in violation of the State's antitrust law because "there are restrictions and restraints imposed upon articles [the leased vehicles] that are widely used in trade and commerce. . . . [and] preclude an owner of property from reasonable freedom of action in dealing with it." On the petitioners' appeal to Ohio's Ninth Judicial District Court of Appeals that court heard the case *de novo* and affirmed the judgment of the Court of Common Pleas, adopting its opinion. The Court of Appeals entered a permanent injunction perpetually restraining the petitioners and the respondent carriers (1) "from entering into any agreements . . . or carrying out the . . . requirements . . . of any such agreement, which will require the alteration" of Revel Oliver's "existing lease or leasing agreement"; (2) "from entering into any . . . agreement or stipulation in the future, or

the negotiation therefor, the . . . tendency of which is to . . . determine in any manner the rate to be charged for the use of" Revel Oliver's equipment; (3) "from giving force and effect to Section 32 [*sic*] of the Contract . . . or any modification . . . thereof, the . . . tendency of which shall attempt to fix the rates" for the use of Revel Oliver's equipment.[9] Petitioners' appeal

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[9] The restraints entered by the judgment and order of the Court of Appeals filed September 30, 1957, are:

"(a) That the defendants-appellees, A. C. E. Transportation Co., Inc., Interstate Truck Service, Inc., and defendants-appellants, Local No. 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and each of them, their agents, representatives and successors or persons, acting, by, through or for them, or in concert with each other, are hereby perpetually restrained and enjoined from entering into any agreements one with the other or carrying out the effects, requirements or terms of any such agreement, which will require the alteration, cancellation or violation of plaintiff-appellee's [Revel Oliver's] existing lease or leasing agreement or any such agreement hereafter renewed or renegotiated and entered into, and

"(b) That the defendants-appellees, A. C. E. Transportation Co., Inc., Interstate Truck Service, Inc., and defendants-appellants, Local No. 24 of The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and Kenneth Burke, President and Business Agent of said Local and each of them and the successor of each and those acting in concert with said defendants-appellees and appellants are hereby perpetually enjoined and restrained from entering into any combination, arrangement, agreement or stipulation in the future, or the negotiation therefor, the purpose, intent or tendency of which is to fix or determine in any manner the rate to be charged for the use of plaintiff's equipment, leased by said plaintiff-appellee to the defendants-appellees, A. C. E. Transportation Co., Inc., and Interstate Truck Service, Inc., and

"(c) That the said defendants-appellees, A. C. E. Transportation Co., Inc., Interstate Truck Service, Inc., and defendants-appellants, Local No. 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and Kenneth Burke, President and Business Agent of said Local and each of them and the successors

to the Ohio Supreme Court was dismissed for want of a debatable constitutional question. 167 Ohio St. 299, 147 N. E. 2d 856. We granted certiorari to consider the important question raised of the interaction of state and federal power arising from the petitioners' claim that the Ohio regulation abridges rights protected by federal statute. 356 U. S. 966.

Article XXXII did not originate with the 1955 agreement. The carriers and the union have disputed since 1938 the terms of a carrier's hire of a lessor's driving services with his leased vehicle. The usual lease is by the owner of a single vehicle who hires out his services as driver with his vehicle. A carrier's representative who has participated in all contract negotiations since those leading to the 1938 agreement testified to the history. According to him, the nub of the union's position over the two decades has been that the carriers abuse the leasing practice, particularly by paying inadequate rentals for the use of leased vehicles, with the result "that part of the men's wages for driving was being used for the upkeep of their vehicles . . . . They [the union] claimed that the leased people were breaking down the rate structure . . . ." The union's demands for contract provisions to safeguard against the alleged abuse were designed also to "secure a living wage [for the lessor] plus an adequate rental for his equipment." A minimum rental clause first appeared in the 1938 agreement which also contained provisions comparable to §§ 8, 10 and 14 of present Article XXXII.

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of each are hereby perpetually enjoined from giving force and effect to Section 32 [*sic*] of the Contract between them as is fully set forth in this Court's finding, or any modification or alteration thereof, the import, effect or tendency of which shall attempt to fix the rates and the use of plaintiff-appellee's equipment or to fix or determine the return for plaintiff-appellee's capital investment in said equipment."

In 1939, after the union claimed that "there was a lot of people that was transferring their title into other people's name to avoid the conditions of the contract," § 3 was added to provide that "certificate and title to the equipment must be in the name of the actual owner." When the dispute brought the parties to the verge of a strike in 1941, the note to § 1 and §§ 13, 15, 16, 17 and 18 came into the agreement. But by 1946 the controversy reached a pitch where the union demanded agreement from the carriers to abolish the leasing practice: "The unions were going to refuse the addition of any individual owners, and the unions also desired to make certain restrictions on the use of owner-operators, again claiming that the . . . company operators were taking advantage of certain provisions of the contract." This demand was compromised by the addition of § 19 restricting leasing to carriers "who will agree to submit all grievances pertaining to owner-operators to joint Employer-Union grievance committees in each respective state"; the section "represented the compromise between the union position that it should abolish all owner-operators and the companies' contention there should be no limitation."

First. The Ohio courts rejected the petitioners' contention that the evidence conclusively established that Article XXXII dealt with subject matter within the scope of "collective bargaining" in which federal law gave petitioners the right to engage. The state courts rested their judgments principally on the minimum rental regulations of § 12 of the Article. The principal discussion occurs in the opinion of the Court of Common Pleas. These regulations were held to constitute the Article a price-fixing arrangement violating the Ohio antitrust law in that they evidenced "concerted action of the Union combining with a non-labor third party in a formal contract. . . . [the] effect [of which] is to oppress and

destroy competition. . . . [and] preclude an owner of property from reasonable freedom of action in dealing with it."

It seems to us that in considering whether the Article deals with a subject matter within the scope of collective bargaining as defined by federal law the Ohio courts did not give proper significance to the Article's narrowly restricted application to the times when the owner drives his leased vehicle for the carrier, and to the adverse effects upon the negotiated wage scale which might result when the rental for the use of the leased vehicle was unregulated at these times. Since no claim was presented to the Ohio courts that the petitioners sought to apply these regulations to Revel Oliver's arrangements with the respondent carriers except on the very infrequent and irregular occasions when Oliver drove one of his vehicles for a carrier, we take it that the Ohio courts' opinions and judgments relate only to the validity of the Article as applied at such times. This would necessarily be the case as the text of the Article, and that text as illumined by its history, conclusively establish that the regulations in no wise apply to the terms of lease of a vehicle when driven by a driver not the owner of the vehicle; the wages, hours and working conditions to be observed by contracting employers of non-owner drivers are governed by the general provisions in that regard found in other articles of the collective bargaining agreement.

In the light of the Article's history and purpose, we cannot agree with the Court of Common Pleas that its regulations constitute a "remote and indirect approach to the subject of wages," outside the range of matters on which the federal law requires the parties to bargain. The text of the Article and its unchallenged history show that its objective is to protect the negotiated wage scale against the possible undermining through diminution of

the owner's wages for driving which might result from a rental which did not cover his operating costs. This is thus but an instance, as this Court said of a somewhat similar union demand in another case, in which a union seeks to protect lawful employee interests against what is believed, rightly or wrongly, to be "a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards." *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 98–99. Looked at in this light, as on the evidence it must be, to determine its relevance to the collective bargaining rights under the Federal Act, the point of the Article is obviously not price fixing but wages. The regulations embody not the "remote and indirect approach to the subject of wages" perceived by the Court of Common Pleas but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. Cf. *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, 771. It is not necessary to attempt to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining, cf. *Labor Board* v. *Borg-Warner Corp.*, 356 U. S. 342, to hold, as we do, that the obligation under § 8 (d) on the carriers and their employees to bargain collectively "with respect to wages, hours, and other terms and conditions of employment" and to embody their understanding in "a

written contract incorporating any agreement reached," found an expression in the subject matter of Article XXXII. See *Timken Roller Bearing Co.*, 70 N. L. R. B. 500, 518, reversed on other grounds, 161 F. 2d 949. And certainly bargaining on this subject through their representatives was a right of the employees protected by § 7 of the Act.

Second. We must decide whether Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain. Little extended discussion is necessary to show that Ohio law cannot be so applied. We need not concern ourselves today with a contractual provision dealing with a subject matter that the parties were under no obligation to discuss; the carriers as employers were under a duty to bargain collectively with the union as to the subject matter of the Article, as we have shown. The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45; *Labor Board* v. *American National Ins. Co.*, 343 U. S. 395, 401–402. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. Cf. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves. To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congres-

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sional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, see *Allen Bradley Co.* v. *Local Union,* 325 U. S. 797; cf. *United States* v. *Employing Plasterers Assn.,* 347 U. S. 186, 190. We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Cf. *California* v. *Taylor,* 353 U. S. 553, 566–567. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. *Hill* v. *Florida,* 325 U. S. 538, 542–544. Cf. *International Union* v. *O'Brien,* 339 U. S. 454, 457; *Amalgamated Assn.* v. *Wisconsin Employment Relations Board,* 340 U. S. 383; *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board,* 338 U. S. 953. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. Cf. *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301, 307–312.[10] Of course, the paramount force of the federal

[10] In *Algoma,* state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of

law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225, 232. Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law. ". . . Congress has sufficiently expressed its purpose to . . . exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 481. We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE STEWART took no part in the consideration or decision of this case.

MR. JUSTICE WHITTAKER, believing that respondent Oliver, while driving his own tractor in the performance of his independent contract with the respondent carriers,

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the legality of maintenance of membership clauses up to the States through § 8 (3) of that Act, 49 Stat. 452. Questions of the nature that we consider today were expressly left open. 336 U. S., at 312.

was not an employee of those carriers, but was an independent contractor, *United States* v. *Silk,* 331 U. S. 704, and that, as such, he was expressly excluded from the coverage of the National Labor Relations Act by 61 Stat. 137, 29 U. S. C. § 152 (3), would affirm the judgment of the Court of Appeals for the Ninth Judicial District of Ohio.

APPENDIX TO OPINION OF THE COURT.

Article XXXII of the Central States Area Over-the-Road Motor Freight Agreement.

Owner-Operators.

Section 1. Owner-operators (See Note), other than certificated or permitted carriers, shall not be covered by this Agreement unless affiliated by lease with a certificated or permitted carrier which is required to operate in full compliance with all the provisions of this Agreement and holding proper ICC and state certificates and permits. Such owner-operators shall operate exclusively in such service and for no other interests.

(NOTE: Whenever "owner-operator" is used in this article, it means owner-driver only, and nothing in this article shall apply to any equipment leased except where owner is also employed as a driver.)

Section 2. This type of operator's compensation for wages and working conditions shall be in full accordance with all the provisions of this Agreement. The owner-operator shall have seniority as a driver only.

Section 3. Certificate and title to the equipment must be in the name of the actual owner.

Section 4. In all cases, hired or leased equipment shall be operated by an employee of the certificated or permitted carrier. The employer expressly reserves the right

to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished.

Section 5. Certificated or permitted carriers shall use their own available equipment, together with all leased equipment under minimum thirty-day bona fide lease arrangements, on a rotating board, before hiring any extra equipment.

Section 6. Separate checks shall be issued by the certificated or permitted carriers for driver's wages and equipment rental. At no time shall the equipment check be for less than actual miles operated. Separate checks for drivers shall not be deducted from the minimum truck rental revenue. The driver shall turn in time direct to the certificated or permitted carrier. All monies due the owner-operator may be held no longer than two weeks, except where the lease of equipment agreement is terminated and in such cases all monies due the operator may be held no longer than thirty (30) days from the date of the termination of the operation of the equipment.

Section 7. Payment for equipment service shall be handled by the issuance of a check for the full mileage operated, tonnage or percentage, less any agreed advances. A statement of any charges by the certificated or permitted carrier shall be issued at the same time, but shall not be deducted in advance.

Section 8. The owner-operator shall have complete freedom to purchase gasoline, oil, grease, tires, tubes, etc., including repair work, at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

Section 9. There shall be no deduction pertaining to equipment operation for any reason whatsoever.

Section 10. The Employer or certificated or permitted carrier hereby agrees to pay road or mile tax, social security

tax, compensation insurance, public liability and property damage insurance, bridge tolls, fees for certificates, permits and travel orders, fines and penalties for inadequate certificates, license fees, weight tax and wheel tax, and for loss of driving time due to waiting at state lines, and also cargo insurance. It is expressly understood that the owner-driver shall pay the license fees in the state in which title is registered.

All tolls, no matter how computed, must be paid by the Employer regardless of any agreement to the contrary.

All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named, shall be paid by the Carrier, excepting only vehicle licensing as such, in the state where title is registered.

Section 11. There shall be no interest or handling charge on earned money advanced prior to the regular pay day.

Section 12. (a) All certificated or permitted carriers hiring or leasing equipment owned and driven by the owner-driver shall file a true copy of the lease agreement covering the owner-driven equipment with the Joint State Committees. The terms of the lease shall cover only the equipment owned and driven by the owner-driver and shall be in complete accord with the minimum rates and conditions provided herein, plus the full wage rate and supplementary allowances for drivers as embodied elsewhere in this Agreement.

(b) The minimum rate for leased equipment owned and driven by the owner-driver shall be:

	Per Mile
Single axle, tractor only	9½¢
Tandem axle, tractor only	10¢
Single axle, trailer only	3¢
Tandem axle, trailer only	4¢

75% of the above rates to apply for deadheading, if and when ordered, provided, however, that the 75% rate will apply only on first empty dispatch away from the home terminal; thereafter the full equipment rental rate to apply until driver is redispatched from home terminal; the above rates to be based on 23,000-pound load limit. On load limits over 23,000 pounds, there shall be one-half (½) cent additional per mile for each 1,000 pounds or fraction thereof in excess of 23,000 pounds. There shall be a minimum guarantee of 24,000 pounds for leased equipment owned and driven by the owner-driver. Nothing herein shall apply to leased equipment not owned by a driver.

The minimum rates set forth above result from the joint determination of the parties that such rates represent only the actual cost of operating such equipment. The parties have not attempted to negotiate a profit for the owner-driver.

Section 13. Driver-owner mileage scale does not include use of equipment for pickup or delivery at point of origin terminal or at point of destination terminal, but shall be subject to negotiations between the Local Union and Company. Failure to agree shall be submitted to the grievance procedure.

Section 14. There shall be no reductions where the present basis of payment is higher than the minimums established herein for this type of operation. Where owner-operator is paid on a percentage or tonnage basis and the operating company reduces its tariff, the percentage or tonnage basis of payment shall be automatically adjusted so that the owner-operator suffers no reduction in equipment rental or wages, or both.

Section 15. It is further understood and agreed that any arrangements which have heretofore been entered into between members of this Union, either among themselves or with the Employer or with the aid of the Em-

ployer, applicable to owner-driver equipment contrary to the terms hereof, shall be dissolved or modified within thirty (30) days after the signing of this Agreement so that such arrangements shall apply only to equipment of the owner-driver while being driven by such owner-driver. In the event that the parties cannot agree on a method of dissolution or modification of such arrangement to make the same conform to this Agreement, the question of dissolution or modification shall be submitted to arbitration, each party to select one member of the arbitration board, and the two so selected to choose a third member of said board. If the two cannot agree upon the third within five (5) days, he shall be appointed by the Joint State Committee. The decision of said board to be final and binding.

Section 16. It is further agreed that the intent of this clause and this entire Agreement is to assure the payment of the Union scale of wages as provided in this Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wage scales provided in this Agreement. This clause is intended to prevent the continuation of or formation of combinations or corporations or so-called lease of fleet arrangements whereby the driver is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of the running of his equipment, thus, in fact, reducing his scale of pay.

Section 17. It is further agreed that if the Employer or certificated or permitted carrier requires that the "driver-owner-operator" sell his equipment to the Employer or certificated or permitted carrier, directly or indirectly, the "driver-owner-operator" shall be paid the fair true value of such equipment. Copies of the instruments of sale shall be filed with the Union and unless objected to within ten (10) days shall be deemed satisfactory. If any

question is raised by the Union as to such value, the same shall be submitted to arbitration, as above set forth, for determination. The decision of the arbitration board shall be final and binding.

Section 18. It is further agreed that the Employer or certificated or permitted carrier will not devise or put into operation any scheme, whether herein enumerated or not, to defeat the terms of this Agreement, wherein the provisions as to compensation for services on and for use of equipment owned by owner-driver shall be lessened, nor shall any owner-driver lease be cancelled for the purpose of depriving Union employees of employment, and any such complaint that should arise pertaining to such cancellation of lease or violation under this section shall be subject to ARTICLE X.

Section 19. (a) The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint Employer-Union grievance committees in each respective state. It is understood and agreed that all such grievances will be promptly heard and decided with the specific purpose in mind of

(1) protecting provisions of the Union contract;

(2) prohibiting any and all violations directly or indirectly of contract provisions relating to the proper use of individual owners;

(3) prohibiting any attempts by any certificated or permitted carrier in changing his operation which will affect the rights of drivers under the terms of the contract, and generally the certificated or permitted carriers agree to assume responsibility in policing and doing everything within their power to eliminate all alleged abuses in the use of owner-drivers which resulted in the insertion of Section 19 (Article XXXIII) in the original 1945–47 Over-the-Road contract;

(4) owner-driver operations to be terminal to terminal, except where no local employees to make such deliveries or otherwise agreed to in this contract;

(5) the certificated or permitted carriers agree that they will, with a joint meeting of the Unions, set up uniform rules and practices under which all such cases will be heard;

(6) it shall be considered a violation of the contract should any operator deduct from rental of equipment the increases provided for by the 1955 Amendments or put into effect any means of evasion to circumvent actual payment of increases agreed upon effective for the period starting February 1, 1955, and ending January 31, 1961.

(b) No owner-operator shall be permitted to drive or hold seniority where he owns three or more pieces of leased equipment. This provision shall not apply to present owner-operators having three or more pieces of equipment under lease agreement, but such owner-operator shall not be permitted to put additional equipment in service so long as he engages in work covered by this Agreement or holds seniority. Where owner-operator drives, he can hold seniority where he works sixty (60) per cent or more of time.

SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND *v.* BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 537. Decided January 19, 1959.

Appeal dismissed and certiorari denied.

Reported below: 168 Ohio St. 65, 151 N. E. 2d 223.

Robert G. Day for appellant.

William Saxbe, Attorney General of Ohio, and *John M. Tobin,* Assistant Attorney General, for appellee.

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.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted.

CUDD *v.* MATHERS, JUDGE, NINTH JUDICIAL CIRCUIT OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 520. Decided January 19, 1959.

Appeal dismissed and certiorari denied.

Charles S. Rhyne for appellant.

Latham Castle, Attorney General of Illinois, and *Raymond S. Sarnow,* Assistant Attorney General, for appellee.

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.

LANCASTER SECURITY INVESTMENT CORP. *v.* KESSLER ET AL.

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

No. 521. Decided January 19, 1959.

Appeal dismissed and certiorari denied.

Reported below: 159 Cal. App. 2d 649, 324 P. 2d 634.

Morris Lavine for appellant.

Gilbert E. Harris for Kessler et al., 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.

DRAPER *v.* UNITED STATES.

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

No. 136. Argued December 11, 1958.—Decided January 26, 1959.

An experienced federal narcotics agent was told by an informer, whose information the agent had always found to be accurate and reliable, that petitioner, whom the agent did not know but who was described by the informer, was peddling narcotics, had gone to Chicago to obtain a supply, and would return on a certain train on a certain day or the day after. The agent met the train, easily recognized petitioner from the informer's description, and, without a warrant, arrested him, searched him and seized narcotics and a hypodermic syringe found in his possession. These were later admitted in evidence over petitioner's objection at the trial at which he was convicted of violating a federal narcotics law. *Held:* The arrest, search and seizure were lawful and the articles seized were properly admitted in evidence at petitioner's trial. Pp. 308–314.

(a) Even if the information received by the agent from the informer was "hearsay," the agent was legally entitled to consider it in determining whether he had "probable cause," within the meaning of the Fourth Amendment, and "reasonable grounds," within the meaning of 26 U. S. C. § 7607, to believe that petitioner had committed or was committing a violation of the narcotics laws. Pp. 310–312.

(b) The information in the possession of the narcotics agent was sufficient to show probable cause and reasonable grounds to believe that petitioner had violated or was violating the narcotics laws and to justify his arrest without a warrant. Pp. 312–313.

(c) The arrest was lawful, and the subsequent search and seizure, having been made incident to a lawful arrest, were likewise valid. Pp. 310–311, 314.

248 F. 2d 295, affirmed.

Osmond K. Fraenkel 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, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Petitioner was convicted of knowingly concealing and transporting narcotic drugs in Denver, Colorado, in violation of 35 Stat. 614, as amended, 21 U. S. C. § 174. His conviction was based in part on the use in evidence against him of two "envelopes containing [865 grains of] heroin" and a hypodermic syringe that had been taken from his person, following his arrest, by the arresting officer. Before the trial, he moved to suppress that evidence as having been secured through an unlawful search and seizure. After hearing, the District Court found that the arresting officer had probable cause to arrest petitioner without a warrant and that the subsequent search and seizure were therefore incident to a lawful arrest, and overruled the motion to suppress. 146 F. Supp. 689. At the subsequent trial, that evidence was offered and, over petitioner's renewed objection, was received in evidence, and the trial resulted, as we have said, in petitioner's conviction. The Court of Appeals affirmed the conviction, 248 F. 2d 295, and certiorari was sought on the sole ground that the search and seizure violated the Fourth Amendment [1] and therefore the use of the heroin in evidence vitiated the conviction. We granted the writ to determine that question. 357 U. S. 935.

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[1] The Fourth Amendment of the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The evidence offered at the hearing on the motion to suppress was not substantially disputed. It established that one Marsh, a federal narcotic agent with 29 years' experience, was stationed at Denver; that one Hereford had been engaged as a "special employee" of the Bureau of Narcotics at Denver for about six months, and from time to time gave information to Marsh regarding violations of the narcotic laws, for which Hereford was paid small sums of money, and that Marsh had always found the information given by Hereford to be accurate and reliable. On September 3, 1956, Hereford told Marsh that James Draper (petitioner) recently had taken up abode at a stated address in Denver and "was peddling narcotics to several addicts" in that city. Four days later, on September 7, Hereford told Marsh "that Draper had gone to Chicago the day before [September 6] by train [and] that he was going to bring back three ounces of heroin [and] that he would return to Denver either on the morning of the 8th of September or the morning of the 9th of September also by train." Hereford also gave Marsh a detailed physical description of Draper and of the clothing he was wearing,[2] and said that he would be carrying "a tan zipper bag," and that he habitually "walked real fast."

On the morning of September 8, Marsh and a Denver police officer went to the Denver Union Station and kept watch over all incoming trains from Chicago, but they did not see anyone fitting the description that Hereford had given. Repeating the process on the morning of September 9, they saw a person, having the exact physical attributes and wearing the precise clothing described by Hereford, alight from an incoming Chicago train and

[2] Hereford told Marsh that Draper was a Negro of light brown complexion, 27 years of age, 5 feet 8 inches tall, weighed about 160 pounds, and that he was wearing a light colored raincoat, brown slacks and black shoes.

start walking "fast" toward the exit. He was carrying a tan zipper bag in his right hand and the left was thrust in his raincoat pocket. Marsh, accompanied by the police officer, overtook, stopped and arrested him. They then searched him and found the two "envelopes containing heroin" clutched in his left hand in his raincoat pocket, and found the syringe in the tan zipper bag. Marsh then took him (petitioner) into custody. Hereford died four days after the arrest and therefore did not testify at the hearing on the motion.

26 U. S. C. (Supp. V) § 7607, added by § 104 (a) of the Narcotic Control Act of 1956, 70 Stat. 570, provides, in pertinent part:

> "The Commissioner . . . and agents, of the Bureau of Narcotics . . . may—
>
> . . . . .
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The crucial question for us then is whether knowledge of the related facts and circumstances gave Marsh "probable cause" within the meaning of the Fourth Amendment, and "reasonable grounds" within the meaning of § 104 (a), *supra*,[3] to believe that petitioner had committed or was committing a violation of the narcotic laws. If it did, the arrest, though without a warrant, was lawful

[3] The terms "probable cause" as used in the Fourth Amendment and "reasonable grounds" as used in § 104 (a) of the Narcotic Control Act, 70 Stat. 570, are substantial equivalents of the same meaning. *United States* v. *Walker*, 246 F. 2d 519, 526 (C. A. 7th Cir.); cf. *United States* v. *Bianco*, 189 F. 2d 716, 720 (C. A. 3d Cir.).

and the subsequent search of petitioner's person and the seizure of the found heroin were validly made incident to a lawful arrest, and therefore the motion to suppress was properly overruled and the heroin was competently received in evidence at the trial. *Weeks* v. *United States,* 232 U. S. 383, 392; *Carroll* v. *United States,* 267 U. S. 132, 158; *Agnello* v. *United States,* 269 U. S. 20, 30; *Giordenello* v. *United States,* 357 U. S. 480, 483.

Petitioner does not dispute this analysis of the question for decision. Rather, he contends (1) that the information given by Hereford to Marsh was "hearsay" and, because hearsay is not legally competent evidence in a criminal trial, could not legally have been considered, but should have been put out of mind, by Marsh in assessing whether he had "probable cause" and "reasonable grounds" to arrest petitioner without a warrant, and (2) that, even if hearsay could lawfully have been considered, Marsh's information should be held insufficient to show "probable cause" and "reasonable grounds" to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant.

Considering the first contention, we find petitioner entirely in error. *Brinegar* v. *United States,* 338 U. S. 160, 172–173, has settled the question the other way. There, in a similar situation, the convict contended "that the factors relating to inadmissibility of the evidence [for] *purposes of proving guilt at the trial,* deprive[d] the evidence as a whole of sufficiency to show probable cause for the search . . . ." *Id.,* at 172. (Emphasis added.) But this Court, rejecting that contention, said: "[T]he so-called distinction places a wholly unwarranted emphasis upon the criterion of admissibility in evidence, to prove the accused's guilt, of the facts relied upon to show probable cause. That emphasis, we think, goes much too far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is

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required to show probable cause for arrest or search. It approaches requiring (if it does not in practical effect require) proof sufficient to establish guilt in order to substantiate the existence of probable cause. There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." [4] 338 U. S., at 172–173.

Nor can we agree with petitioner's second contention that Marsh's information was insufficient to show probable cause and reasonable grounds to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant. The information given to narcotic agent Marsh by "special em-

[4] In *United States* v. *Heitner*, 149 F. 2d 105, 106 (C. A. 2d Cir.), Judge Learned Hand said "It is well settled that an arrest may be made upon hearsay evidence; and indeed, the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties."

Grau v. *United States*, 287 U. S. 124, 128, contains a *dictum* that "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles* v. *United States*, 284 Fed. 208; *Wagner* v. *United States*, 8 F. (2d) 581) . . . ." But the principles underlying that proposition were thoroughly discredited and rejected in *Brinegar* v. *United States*, *supra*, 338 U. S., at 172–174, and notes 12 and 13. There are several cases in the federal courts that followed the now discredited *dictum* in the *Grau* case, *Simmons* v. *United States*, 18 F. 2d 85, 88; *Worthington* v. *United States*, 166 F. 2d 557, 564–565; cf. *Reeve* v. *Howe*, 33 F. Supp. 619, 622; *United States* v. *Novero*, 58 F. Supp. 275, 279, but the great weight of authority is the other way. See, *e. g.*, *Wrightson* v. *United States*, 236 F. 2d 672 (C. A. D. C. Cir.); *United States* v. *Heitner*, *supra* (C. A. 2d Cir.); *United States* v. *Bianco*, 189 F. 2d 716 (C. A. 3d Cir.); *Wisniewski* v. *United States*, 47 F. 2d 825 (C. A. 6th Cir.); *United States* v. *Walker*, 246 F. 2d 519 (C. A. 7th Cir.); *Mueller* v. *Powell*, 203 F. 2d 797 (C. A. 8th Cir.). And see Note, 46 Harv. L. Rev. 1307, 1310–1311, criticizing the *Grau dictum*.

ployee" Hereford may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duties had he not pursued it. And when, in pursuing that information, he saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described, alight from one of the very trains from the very place stated by Hereford and start to walk at a "fast" pace toward the station exit, Marsh had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true.

"In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States, supra,* at 175. Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States,* 267 U. S. 132, 162.[5]

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[5] To the same effect are: *Husty* v. *United States,* 282 U. S. 694, 700–701; *Dumbra* v. *United States,* 268 U. S. 435, 441; *Steele* v. *United States No. 1,* 267 U. S. 498, 504–505; *Stacey* v. *Emery,* 97 U. S. 642, 645; *Brinegar* v. *United States, supra,* at 175, 176.

We believe that, under the facts and circumstances here, Marsh had probable cause and reasonable grounds to believe that petitioner was committing a violation of the laws of the United States relating to narcotic drugs at the time he arrested him. The arrest was therefore lawful, and the subsequent search and seizure, having been made incident to that lawful arrest, were likewise valid.[6] It follows that petitioner's motion to suppress was properly denied and that the seized heroin was competent evidence lawfully received at the trial.

Affirmed.

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

MR. JUSTICE DOUGLAS, dissenting.

Decisions under the Fourth Amendment,[1] taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike. If the word of the informer

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[6] *Weeks* v. *United States*, 232 U. S. 383, 392; *Carroll* v. *United States*, 267 U. S. 132, 158; *Agnello* v. *United States*, 269 U. S. 20, 30; *Giordenello* v. *United States*, 357 U. S. 480, 483.

[1] The Fourth Amendment provides:

"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." (Italics added.)

on which the present arrest was made is sufficient to make the arrest legal, his word would also protect the police who, acting on it, hauled the innocent citizen off to jail.

Of course, the education we receive from mystery stories and television shows teaches that what happened in this case is efficient police work. The police are tipped off that a man carrying narcotics will step off the morning train. A man meeting the precise description does alight from the train. No warrant for his arrest has been—or, as I see it, could then be—obtained. Yet he is arrested; and narcotics are found in his pocket and a syringe in the bag he carried. This is the familiar pattern of crime detection which has been dinned into public consciousness as the correct and efficient one. It is, however, a distorted reflection of the constitutional system under which we are supposed to live.

With all due deference, the arrest made here on the mere word of an informer violated the spirit of the Fourth Amendment and the requirement of the law, 26 U. S. C. (Supp. V) § 7607, governing arrests in narcotics cases. If an arrest is made without a warrant, the offense must be committed in the presence of the officer or the officer must have "reasonable grounds to believe that the person to be arrested has committed or is committing" a violation of the narcotics law. The arresting officers did not have a bit of evidence, known to them and as to which they could take an oath had they gone to a magistrate for a warrant, that petitioner had committed any crime. The arresting officers did not know the grounds on which the informer based his conclusion; nor did they seek to find out what they were. They acted solely on the informer's word. In my view that was not enough.

The rule which permits arrest for felonies, as distinguished from misdemeanors, if there are reasonable grounds for believing a crime has been or is being committed (*Carroll* v. *United States,* 267 U. S. 132, 157),

grew out of the need to protect the public safety by making prompt arrests. *Id.* Yet, apart from those cases where the crime is committed in the presence of the officer, arrests without warrants, like searches without warrants, are the exception, not the rule in our society. Lord Chief Justice Pratt in *Wilkes* v. *Wood,* 19 How. St. Tr. 1153, condemned not only the odious general warrant,[2] in which the name of the citizen to be arrested was left blank, but the whole scheme of seizures and searches [3] under "a discretionary power" of law officers to act "wherever their suspicions may chance to fall"—a practice which he denounced as "totally subversive of the liberty of the subject." *Id.,* at 1167. See III May, Constitutional History of England, c. XI. Wilkes had written in 1762, "To take any man into custody, and deprive him of his liberty, without having some seeming foundation at least, on which to justify such a step, is inconsistent with wisdom and sound policy." The Life and Political Writings of John Wilkes, p. 372.

George III in 1777 pressed for a bill which would allow arrests on suspicion of treason committed in America. The words were "suspected of" treason and it was to these words that Wilkes addressed himself in Parliament. "There is not a syllable in the Bill of the degree of probability attending the *suspicion.* . . . Is it possible, Sir, to give more despotic powers to a bashaw of the Turkish

[2] The general warrant was declared illegal by the House of Commons in 1766. See 16 Hansard, Parl. Hist. Eng., 207.

[3] The nameless general warrant was not the only vehicle for intruding on the privacy of the subjects without a valid basis for believing them guilty of offenses. In declaring illegal a warrant to search a plaintiff's house for evidence of libel, issued by the Secretary of State without any proof that the named accused was the author of the alleged libels, Lord Camden said, "we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society." *Entick* v. *Carrington,* 2 Wils. K. B. 275, 291.

empire? What security is left for the devoted objects of this Bill against the malice of a prejudiced individual, a wicked magistrate . . . ?" The Speeches of Mr. Wilkes, p. 102.

These words and the complaints against which they were directed were well known on this side of the water. Hamilton wrote about "the practice of arbitrary imprisonments" which he denounced as "the favorite and most formidable instruments of tyranny." The Federalist No. 84. The writs of assistance, against which James Otis proclaimed,[4] were vicious in the same way as the general warrants, since they required no showing of "probable cause" before a magistrate, and since they allowed the police to search on suspicion and without "reasonable grounds" for believing that a crime had been or was being committed. Otis' protest was eloquent; but he lost the case. His speech, however, rallied public opinion. "Then and there," wrote John Adams, "the child Independence was born." 10 Life and Works of John Adams (1856), p. 248.

The attitude of Americans to arrests and searches on suspicion was also greatly influenced by the *lettres de cachet* extensively used in France.[5] This was an order emanating from the King and countersigned by a minister directing the seizure of a person for purposes of immediate imprisonment or exile. The ministers issued the *lettres* in an arbitrary manner, often at the request of the head of a noble family to punish a deviant son or relative. See Mirabeau, A Victim of the Lettres de Cachet, 3 Am. Hist. Rev. 19. One who was so arrested

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[4] See Quincy's Mass. Rep., 1761–1772, Appendix I, p. 469.

[5] "Experience . . . has taught us that the power [to make arrests, searches and seizures] is one open to abuse. The most notable historical instance of it is that of lettres de cachet. Our Constitution was framed during the seethings of the French Revolution. The thought was to make lettres de cachet impossible with us." *United States* v. *Innelli*, 286 F. 731.

might remain incarcerated indefinitely, as no legal process was available by which he could seek release. "Since the action of the government was secret, his friends might not know whither he had vanished, and he might even be ignorant of the cause of his arrest." 8 The Camb. Mod. Hist. 50. In the Eighteenth Century the practice arose of issuing the *lettres* in blank, the name to be filled in by the local mandatory. Thus the King could be told in 1770 "that no citizen of your realm is guaranteed against having his liberty sacrificed to revenge. For no one is great enough to be beyond the hate of some minister, nor small enough to be beyond the hate of some clerk." III Encyc. Soc. Sci. 138. As Blackstone wrote, ". . . if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown,) there would soon be an end of all other rights and immunities." I Commentaries (4th ed. Cooley) *135.

The Virginia Declaration of Rights, adopted June 12, 1776, included the forerunner of the Fourth Amendment: [6]

> "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and *supported by evidence,* are grievous and oppressive, and ought not to be granted." (Italics added.)

The requirement that a warrant of arrest be "supported by evidence" was by then deeply rooted in history. And it is inconceivable that in those days, when the right of

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[6] See also Maryland Declaration of Rights (1776), Art. XXIII; Massachusetts Constitution (1780), Part First, Art. XIV; New Hampshire Constitution (1784), Part I, Art. XIX; North Carolina Declaration of Rights (1776), Art. XI; Pennsylvania Constitution (1776), Art. X.

privacy was so greatly cherished, the mere word of an informer—such as we have in the present case—would be enough. For whispered charges and accusations, used in lieu of evidence of unlawful acts, were the main complaint of the age. *Frisbie* v. *Butler,* Kirby's Rep. (Conn.) 1785–1788, p. 213, decided in 1787, illustrates, I think, the mood of the day in the matter of arrests on suspicion. A warrant of arrest and search was issued by a justice of the peace on the oath of a citizen who had lost some pork from a cellar, the warrant stating, "said Butler suspects one Benjamin Frisbie, of Harwinton, to be the person that hath taken said pork." The court on appeal reversed the judgment of conviction, holding *inter alia* that the complaint "contained no direct charge of the theft, but only an averment that the defendant was suspected to be guilty." *Id.,* at 215. Nothing but suspicion is shown in the instant case—suspicion of an informer, not that of the arresting officers. Nor did they seek to obtain from the informer any information on which he based his belief. The arresting officers did not have a bit of *evidence* that the petitioner had committed or was committing a crime before the arrest. The only *evidence* of guilt was provided by the arrest itself.

When the Constitution was up for adoption, objections were made that it contained no Bill of Rights. And Patrick Henry was one who complained in particular that it contained no provision against arbitrary searches and seizures:

> ". . . general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred

> may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here than they have in England, because there, if a person be confined, liberty may be quickly obtained by the writ of *habeas corpus*. But here a man living many hundred miles from the judges may get in prison before he can get that writ." I Elliot's Debates 588.

The determination that arrests and searches on mere suspicion would find no place in American law enforcement did not abate following the adoption of a Bill of Rights applicable to the Federal Government. In *Conner* v. *Commonwealth,* 3 Binn. (Pa.) 38, an arrest warrant issued by a magistrate stating his "strong reason to suspect" that the accused had committed a crime because of "common rumor and report" was held illegal under a constitutional provision identical in relevant part to the Fourth Amendment. "It is true, that by insisting on an oath, felons may sometimes escape. This must have been very well known to the framers of our constitution; but they thought it better that the guilty should sometimes escape, than that every individual should be subject to vexation and oppression." *Id.,* at 43–44. In *Grumon* v. *Raymond,* 1 Conn. 40, the warrant stated that "several persons are suspected" of stealing some flour which is concealed in Hyatt's house or somewhere else, and ordered the constable to search Hyatt's house or other places and arrest the suspected persons if found with the flour. The court held the warrant void, stating it knew of "no such process as one to arrest all suspected persons, and bring them before a court for trial. It is an idea not to be endured for a moment." *Id.,* at 44. See also *Fisher* v. *McGirr,* 1 Gray (Mass.) 1; *Lippman* v. *People,* 175 Ill. 101, 51 N. E. 872; *Somerville* v. *Richards,* 37 Mich. 299; *Commonwealth* v. *Dana,* 2 Metc. (Mass.) 329, 335–336.

It was against this long background that Professors Hogan and Snee of Georgetown University recently wrote:

> ". . . it must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by the law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more efficiently, much more economically, and with much more dispatch. It is equally true, however, that society cannot confer such power on the police without ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny." 47 Geo. L. J. 1, 22.

Down to this day our decisions have closely heeded that warning. So far as I can ascertain the mere word of an informer, not bolstered by some evidence [7] that a

[7] Hale, who traced the evolution of arrests without warrants in The History of the Pleas of the Crown (1st Am. ed. 1847), states that while officers need at times to act on information from others, they must make that information, so far as they can, their own. He puts a case where A, suspecting B "on reasonable grounds" of being a felon,

crime had been or was being committed, has never been approved by this Court as "reasonable grounds" for making an arrest without a warrant. Whether the act complained of be seizure of goods, search of premises, or the arrest of the citizen, the judicial inquiry has been directed toward the reasonableness of inferences to be drawn from suspicious circumstances attending the action thought to be unlawful. Evidence required to prove guilt is not necessary. But the attendant circumstances must be sufficient to give rise in the mind of the arresting officer at least to inferences of guilt. *Locke* v. *United States,* 7 Cranch 339; *The Thompson,* 3 Wall. 155; *Stacey* v. *Emery,* 97 U. S. 642; *Director General* v. *Kastenbaum,* 263 U. S. 25; *Carroll* v. *United States,* 267 U. S. 132, 159–162; *United States* v. *Di Re,* 332 U. S. 581, 591–592; *Brinegar* v. *United States,* 338 U. S. 160, 165–171.

The requirement that the arresting officer know some facts suggestive of guilt has been variously stated:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient." *Stacey* v. *Emery, supra,* at 645.
>
> ". . . good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the . . . agent, which in the judgment of the court would make his faith reasonable." *Director General* v. *Kastenbaum, supra,* at 28.

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asks an officer to arrest B. The duty of the officer was stated as follows:

"He ought to inquire and examine the circumstances and causes of the suspicion of *A.* which tho he cannot do it upon oath, yet such an information may carry over the suspicion even to the constable, whereby it may become his suspicion as well as the suspicion of *A.*" *Id.,* at 91.

Even when officers had information far more suggestive of guilt than the word of the informer used here, we have not sustained arrests without a warrant. In *Johnson* v. *United States,* 333 U. S. 10, 16, the arresting officer not only had an informer's tip but he actually smelled opium coming out of a room; and on breaking in found the accused. That arrest was held unlawful. Yet the smell of opium is far more tangible direct evidence than an unverified report that someone is going to commit a crime. And in *United States* v. *Di Re, supra,* an arrest without a warrant of a man sitting in a car, where counterfeit coupons had been found passing between two men, was not justified in absence of any shred of evidence implicating the defendant, a third person. And see *Giacona* v. *State,* 164 Tex. Cr. R. 325, 298 S. W. 2d 587. Yet the evidence before those officers was more potent than the mere word of the informer involved in the present case.

The Court is quite correct in saying that proof of "reasonable grounds" for believing a crime was being committed need not be proof admissible at the trial. It could be inferences from suspicious acts, *e. g.,* consort with known peddlers, the surreptitious passing of a package, an intercepted message suggesting criminal activities, or any number of such events coming to the knowledge of the officer. See *People* v. *Rios,* 46 Cal. 2d 297, 294 P. 2d 39. But, if he takes the law into his own hands and does not seek the protection of a warrant, he must act on some evidence known to him.[8] The law goes far to pro-

[8] *United States* v. *Heitner,* 149 F. 2d 105, 106, that says an arrest may be made "upon hearsay evidence" was a case where the arrest was made after the defendant on seeing the officers tried to get away. Our cases cited by that court in support of the use of hearsay were *Carroll* v. *United States,* 267 U. S. 132; *Dumbra* v. *United States,* 268 U. S. 435; and *Husty* v. *United States,* 282 U. S. 694. But each of them was a case where the information on which the arrest was made, though perhaps not competent at the trial, was known to the arresting officer.

tect the citizen. Even suspicious acts observed by the officers may be as consistent with innocence as with guilt. That is not enough, for even the guilty may not be implicated on suspicion alone. *Baumboy* v. *United States,* 24 F. 2d 512. The reason is, as I have said, that the standard set by the Constitution and by the statute is one that will protect both the officer and the citizen. For if the officer acts with "probable cause" or on "reasonable grounds," he is protected even though the citizen is innocent.[9] This important requirement should be strictly enforced, lest the whole process of arrest revert once more to whispered accusations by people. When we lower the guards as we do today, we risk making the role of the informer—odious in our history—once more supreme. I think the correct rule was stated in *Poldo* v. *United States,* 55 F. 2d 866, 869. "Mere suspicion is not enough; there must be circumstances represented to the officers through the testimony of their senses sufficient to justify them in a good-faith belief that the defendant had violated the law."

Here the officers had no evidence—apart from the mere word of an informer—that petitioner was committing a crime. The fact that petitioner walked fast and carried a tan zipper bag was not evidence of any crime. The officers knew nothing except what they had been told by the informer. If they went to a magistrate to get a warrant of arrest and relied solely on the report of the informer, it is not conceivable to me that one would be granted. See *Giordenello* v. *United States,* 357 U. S. 480, 486. For they could not present to the magistrate any of the facts which the informer may have had. They could swear only to the fact that the informer had made the accusation. They could swear to no evidence that lay in their own knowledge. They could

[9] *Maghan* v. *Jerome,* 67 App. D. C. 9, 88 F. 2d 1001; *Pritchett* v. *Sullivan,* 182 F. 480. See *Ravenscroft* v. *Casey,* 139 F. 2d 776.

present, on information and belief, no facts which the informer disclosed. No magistrate could issue a warrant on the mere word of an officer, without more.[10] See *Giordenello* v. *United States, supra.* We are not justified in lowering the standard when an arrest is made without a warrant and allowing the officers more leeway than we grant the magistrate.

With all deference I think we break with tradition when we sustain this arrest. We said in *United States* v. *Di Re, supra,* at 595, ". . . 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." In this case it was only after the arrest and search were made that there was a shred of evidence known to the officers that a crime was in the process of being committed.[11]

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[10] See *State* v. *Gleason,* 32 Kan. 245, 4 P. 363; *State* v. *Smith,* 262 S. W. 65 (Mo. App.), arising under state constitutions having provisions comparable to our Fourth Amendment.

[11] The Supreme Court of South Carolina has said:

"Some things are to be more deplored than the unlawful transportation of whiskey; one is the loss of liberty. Common as the event may be, it is a serious thing to arrest a citizen, and it is a more serious thing to search his person; and he who accomplishes it, must do so in conformity to the laws of the land. There are two reasons for this: one to avoid bloodshed, and the other to preserve the liberty of the citizen. Obedience to law is the bond of society, and the officers set to enforce the law are not exempt from its mandates.

"In the instant case the possession of the liquor was the body of the offense; that fact was proven by a forcible and unlawful search of the defendant's person to secure the veritable key to the offense. It is fundamental that a citizen may not be arrested and have his person searched by force and without process in order to secure testimony against him. . . . It is better that the guilty shall escape, rather than another offense shall be committed in the proof of guilt." *Town of Blacksburg* v. *Beam,* 104 S. C. 146, 148, 88 S. E. 441.

GREENE *v.* UNITED STATES.

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

No. 134. Argued January 13, 1959.—Decided January 26, 1959.

Petitioner was convicted in a Federal District Court on each of 15 counts of an indictment for violations of the narcotic laws and was sentenced to consecutive sentences of 20 months to 5 years on each of Counts 2, 4 and 7 and to sentences of 20 months to 5 years on each of the other 12 counts, to run concurrently with each other and "with the sentences imposed on Counts Two, Four and Seven." On petitioner's appeal challenging the validity of his conviction and sentence on each count, the Court of Appeals held that, "The record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it supports the 'consecutive' sentences themselves," and it affirmed. *Held:* The Court of Appeals should have passed upon the validity of the consecutive sentences. Pp. 327–330.

(a) The 15 sentences here involved may not be treated as one "gross sentence" to imprisonment for a period of 5 to 15 years, because the recorded judgment explicitly imposed a separate sentence of from 20 months to the then permissible maximum of 5 years on each of the 15 counts. Pp. 328–329.

(b) Because of the way the judgment is worded, imprisonment for an aggregate period of 5 to 15 years can be sustained in this case only if each of the consecutive sentences on Counts 2, 4 and 7 is valid. Pp. 329–330.

100 U. S. App. D. C. 396, 246 F. 2d 677, judgment vacated and cause remanded for further proceedings.

James H. Heller 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.*

PER CURIAM.

Petitioner was convicted in the United States District Court for the District of Columbia on each of 15 counts of an indictment for violations of the narcotic laws,[1] and as recited in the formal judgment was sentenced to imprisonment as follows:

> "Twenty (20) Months to Five (5) Years . . . on Count Two; Twenty (20) Months to Five (5) Years . . . on Count Four, said sentence on Count Four to take effect [at] the expiration of sentence imposed on Count Two; Twenty (20) Months to Five (5) Years . . . on Count Seven, said sentence on Count Seven to take effect at the expiration of sentence imposed on Count Four; Twenty (20) Months to Five (5) Years . . . on each of Counts One, Three, Five, Six, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen and Fifteen, said sentences by the Counts to run concurrently and to run concurrently with the sentences imposed on Counts Two, Four and Seven."

On his appeal, petitioner sought reversal of the conviction and sentence on each count upon the grounds of prejudicial procedural errors at the trial, insufficiency of the evidence to support the convictions and sentences, and invalid multiple punishments for single offenses. In a *per curiam* opinion the Court of Appeals held that "The record supports at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences. It therefore supports the aggregate sentence. We need not decide whether it supports the 'consecutive' sentences

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[1] The Narcotic Drugs Import and Export Act, § 2 (c), 65 Stat. 767, 21 U. S. C. § 174; the Internal Revenue Code of 1954, §§ 4704 (a), 4705 (a), and 7237 (a), 68A. Stat. 550–551, 860, as amended, 69 Stat. 3, 26 U. S. C. (Supp. III) §§ 4704 (a), 4705 (a), 7237 (a).

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themselves. *Hirabayashi* v. *United States,* 320 U. S. 81, 85; *Wanzer* v. *United States,* 93 U. S. App. D. C. 412, 208 F. 2d 45." It thereupon affirmed, one judge dissenting, 100 U. S. App. D. C. 396, 246 F. 2d 677. Petitioner sought certiorari on the grounds that the sentences invalidly multiply punishments for single offenses, and that the Court of Appeals erred in failing to determine the validity of the several sentences and in holding that imprisonment for an aggregate period of 5 to 15 years is authorized by its finding that "at least 5 of the sentences that were to run 'concurrently with' the 3 consecutive sentences [are valid]." We granted the writ to determine those questions. 357 U. S. 934.

The Government contends here that the several sentences are in reality but one "gross sentence" to imprisonment for a period of 5 to 15 years, and that the holding of the Court of Appeals that at least 5 of the "concurrent" sentences are valid supports the judgment,[2] but it concedes that "If the sentence [may] not be considered as a gross sentence, at least as to the 12 counts which were to be concurrent with 2, 4, and 7, . . . the case would have to be remanded to the Court of Appeals to pass on the validity of counts 2, 4, and 7 [and if] it found any one of them invalid, that court would then have to remand to the District Court for resentencing, since, assuming that

[2] In support of its stated position the Government relies on its understanding of this Court's opinions in *In re De Bara,* 179 U. S. 316, and *In re Henry,* 123 U. S. 372. It also relies upon *Phillips* v. *United States,* 212 F. 2d 327, 335 (C. A. 8th Cir.); *Barnes* v. *United States,* 197 F. 2d 271, 273 (C. A. 8th Cir.); *Levine* v. *Hudspeth,* 127 F. 2d 982, 984 (C. A. 10th Cir.); *McKee* v. *Johnston,* 109 F. 2d 273, 275 (C. A. 9th Cir.); *Jackson* v. *Hudspeth,* 111 F. 2d 128, 129 (C. A. 10th Cir.); *Ross* v. *Hudspeth,* 108 F. 2d 628, 629 (C. A. 10th Cir.); *Hawkins* v. *United States,* 14 F. 2d 596, 597–598 (C. A. 7th Cir.); *Klein* v. *United States,* 14 F. 2d 35, 37 (C. A. 1st Cir.); *Neely* v. *United States,* 2 F. 2d 849, 852 (C. A. 4th Cir.).

the other counts cannot be considered in gross, it is not clear which of them, taken individually, were to be concurrent with 2, which with 4, and which with 7."

The question whether, in these circumstances, the law permits the imposition of a single "gross sentence" upon several counts exceeding the maximum sentence that may lawfully be imposed upon any one of such counts is not presented here, for we think the Government's contention that these 15 sentences were, or may be treated as, one "gross sentence" to imprisonment for a period of 5 to 15 years is unsupportable and is contradicted by the plain words of the recorded judgment. "The only sentence known to the law is the sentence or judgment entered upon the records of the court." *Hill* v. *United States,* 298 U. S. 460, 464. The judgment entered on the records of the court in this case explicitly imposed a separate sentence of from 20 months to the then permissible maximum of 5 years [3] on each of the 15 counts. It is therefore plain that the court did not impose one "gross sentence" to imprisonment for a period of 5 to 15 years.

The judgment makes the separate sentences on Counts Two, Four, and Seven to run consecutively. Thus, if each is valid, they in sequence authorize imprisonment for an aggregate period of 5 to 15 years. But the judgment makes the separate sentences on the other 12 counts to run concurrently with each other (hence for a total period of 20 months to 5 years) *and* "with the sentences imposed on Counts Two, Four and Seven," without saying whether

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[3] At the time of these alleged offenses, and prior to the enactment of the Narcotic Control Act of 1956, 70 Stat. 567, 570, § 2 (c) of the Narcotic Drugs Import and Export Act (65 Stat. 767, 21 U. S. C. § 174) provided for imprisonment for its violation of "not less than two or more than five years," and § 7237 (a) of the Internal Revenue Code of 1954 (68A. Stat. 860) provided for imprisonment for the violation or conspiracy to violate §§ 4704 (a) or 4705 (a) of that Code of "not less than 2 or more than 5 years."

those "concurrent" sentences are to run with the sentence on Count Two, with the consecutive sentence on Count Four, or with the consecutive sentence on Count Seven. It is therefore evident that the Court of Appeals was in error in concluding that the 5 "concurrent" sentences which it thought were valid alone support an aggregate period of imprisonment of 5 to 15 years.

The rule that reversal is not required if any one of several concurrent sentences is valid and alone supports the sentence and judgment, *Hirabayashi* v. *United States,* 320 U. S. 81, 85, and cases cited; *Pinkerton* v. *United States,* 328 U. S. 640, 642, n. 1; *United States* v. *Sheridan,* 329 U. S. 379, 381; *Roviaro* v. *United States,* 353 U. S. 53, 59, n. 6; *Lawn* v. *United States,* 355 U. S. 339, 359, does not aid the Government, for no one of the "concurrent" sentences, or even all of them together, could, even if geared to a particular (though invalid) consecutive sentence, support imprisonment for more than 20 months to 5 years. If any one of the consecutive sentences on Counts Two, Four or Seven be invalid it cannot be said that such of the "concurrent" sentences as are valid will run with such invalid consecutive sentence, and thus support that much of the aggregate term of imprisonment, because the trial judge did not make the concurrent sentences to run with any particular one of the consecutive sentences. It is therefore clear, under the present sentences, that imprisonment for an aggregate period of 5 to 15 years can be sustained only if each of the consecutive sentences on Counts Two, Four, and Seven is valid. Hence it is necessary for the Court of Appeals to pass upon the validity of the consecutive sentences. The judgment of the Court of Appeals is vacated and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

ROGERS, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* CALUMET NATIONAL BANK OF HAMMOND, SUBSTITUTED TRUSTEE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA.

No. 468. Decided January 26, 1959.

Certiorari granted.

A state court is without power to review the discretion exercised by the Attorney General of the United States under federal law in connection with the issuance of a vesting order under the Trading with the Enemy Act.

128 Ind. App. 628, 149 N. E. 2d 214, reversed and cause remanded.

Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls and *Irwin A. Seibel* for petitioner.

Charles Levin and *Curt C. Silberman* for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. We are of the view that under *Silesian-American Corp.* v. *Markham,* 156 F. 2d 793, 796, affirmed, 332 U. S. 469, a state court is without power to review the discretion exercised by the Attorney General of the United States under federal law. The judgment is therefore reversed and the cause remanded to the Appellate Court of Indiana. On remand the Indiana courts are of course free to consider other questions presented by this record in light of General License 94, 12 Fed. Reg. 1457, as it may have affected the definition of "national" in Executive Order 9095, 7 Fed. Reg. 1971, as amended, and Executive Order 8389, 5 Fed. Reg. 1400. See *GMO. Niehaus & Co.* v. *United States,* 139 Ct. Cl. 605, 153 F. Supp. 428.

HERRMANN, TRUSTEE, *v.* ROGERS, ATTORNEY GENERAL.

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

No. 572. Decided January 26, 1959.

Certiorari granted.

Judgment vacated and cause remanded for reconsideration in light of Idaho property law.

Reported below: 256 F. 2d 871.

Burton K. Wheeler and *Robert G. Seaks* for petitioner.

Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls and *Irwin A. Seibel* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated, and the cause is remanded to it, to consider whether, under the law of property of Idaho, it was possible, after the time of the making of the conveyance, for any person other than the named beneficiaries of the trust to acquire a property interest in it (other than through a named beneficiary), and, in the light of its determination as to this, to reconsider its holding that respondent was entitled to all the trust funds remaining in the hands of the trustee.

BASS *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 528. Decided January 26, 1959.

163 F. Supp. 1, affirmed.

Wilbert G. Burnette for appellant.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, W. Louise Florencourt, Robert W. Ginnane and *Carroll T. Prince, Jr.* for the United States and the Interstate Commerce Commission, appellees.

Linwood C. Major, Jr. for the Atlantic Greyhound Corporation et al., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

LANZA *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 532. Decided January 26, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 27 N. J. 516, 143 A. 2d 571.

Vito F. Lanza for appellant.

David D. Furman, Attorney General of New Jersey, and *Bernard Hellring* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

UNITED STATES *v.* RADIO CORPORATION OF AMERICA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 54. Argued December 8, 1958.—Decided February 24, 1959.

Approval by the Federal Communications Commission of appellees' agreement to exchange their television station in Cleveland for one in Philadelphia, which has since been consummated, does not bar this independent civil action by the Government under § 4 of the Sherman Act attacking the exchange as being in furtherance of a conspiracy to violate § 1 of that Act. Pp. 335–353.

1. The legislative history of the Communications Act of 1934, as amended, reveals that the Commission was not given the power to decide antitrust issues as such and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts. Pp. 339–346.

(a) A different result is not required by the fact that the 1952 amendments to the Act repealed the last sentence of § 311, which specifically provided that the granting of a license should not estop the United States or any aggrieved person from proceeding against the licensee under the antitrust laws. Pp. 344–345.

(b) The last sentence of § 311 prior to its repeal in 1952 should not be construed narrowly as being intended to insure only that the granting of a license would not estop the Government from prosecuting antitrust violations subsequent to the transaction giving rise to the license proceeding, or of which the transaction was merely a small part. P. 345.

2. There being no pervasive regulatory scheme or rate structure involved, the scheme of the Act does not require application of the doctrine of primary jurisdiction so as to permit the Government to attack the exchange transaction as violative of the Sherman Act only by intervention in the proceedings before the Commission or by judicial review of the Commission's decision. Pp. 346–352.

3. Since the Commission has no power to decide antitrust questions, this independent antitrust suit is not barred by collateral estoppel, *res judicata* or laches. P. 352.

158 F. Supp. 333, judgment vacated and case remanded for further proceedings.

Solicitor General Rankin argued the cause for the United States. With him on the brief were *Assistant Attorney General Hansen, Daniel M. Friedman, Bernard M. Hollander* and *Raymond M. Carlson.*

Bernard G. Segal argued the cause for appellees. With him on the brief were *Edward W. Mullinix, Josephine H. Klein* and *Lawrence J. McKay.*

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

Appellees, Radio Corporation of America and National Broadcasting Company, are defendants in this civil antitrust action brought by the Government under § 4 of the Sherman Act, 15 U. S. C. § 4. After holding a preliminary hearing on three of appellees' affirmative defenses to that action, the federal district judge dismissed the complaint. 158 F. Supp. 333. The Government appealed directly to this Court under the Expediting Act, 15 U. S. C. § 29. The principal question presented is whether approval by the Federal Communications Commission of appellees' agreement to exchange their Cleveland television station for one in Philadelphia bars this independent action by the Government which attacks the exchange as being in furtherance of a conspiracy to violate the federal antitrust laws.

The Government's complaint generally alleged the following facts. In 1954, National Broadcasting Company (NBC), a wholly owned subsidiary of Radio Corporation of America (RCA), owned five very high frequency (VHF) television stations. The stations were located in the following market areas: New York, which is the country's largest market; Chicago, second; Los Angeles, third; Cleveland, tenth; and Washington D. C., eleventh. According to the Government's allegations, in March 1954, NBC and RCA originated a continuing conspiracy

to acquire stations in five of the eight largest market areas in the country. Since Philadelphia is the country's fourth largest market area, acquisition of a Philadelphia station in exchange for appellees' Cleveland or Washington station would achieve one goal of the conspiracy.[1]

One Philadelphia station, WPTZ, was owned by Westinghouse Broadcasting Company. This station and a Westinghouse-owned station in Boston were affiliated with the NBC network. In addition, Westinghouse desired NBC affiliation for a station to be acquired in Pittsburgh. In order to force Westinghouse to exchange its Philadelphia station for NBC's Cleveland station, it is alleged that NBC threatened Westinghouse with loss of the network affiliation of its Boston and Philadelphia stations, and threatened to withhold affiliation from its Pittsburgh station to be acquired. NBC also threatened to withhold network affiliation from any new VHF or UHF (ultra high frequency) stations which Westinghouse might acquire. By thus using its leverage as a network, NBC is alleged to have forced Westinghouse to agree to the exchange contract under consideration. Under the terms of that contract NBC was to acquire the Philadelphia station, while Westinghouse was to acquire NBC's Cleveland station plus three million dollars.

The Government asked that the conspiracy be declared violative of § 1 of the Sherman Act, 15 U. S. C. § 1, that the appellees be divested of such assets as the District Court deemed appropriate, that "such other and additional relief as may be proper" be awarded, and that the Government recover costs of the suit.

Appellees' affirmative defenses arose out of the fact that the exchange had been approved by the Federal Com-

[1] Under present FCC regulations, NBC can own no more than five stations, 47 CFR, 1958, § 3.636, so that acquisition of a new station would require that an existing one be relinquished.

munications Commission.[2] FCC approval was required under § 310 (b) of the Communications Act of 1934, 48 Stat. 1086, as amended, 66 Stat. 716, 47 U. S. C. § 310 (b). Under that Section, appellees filed applications setting forth the terms of the transaction and the reasons for requesting the exchange. The Commission instituted proceedings to determine whether the exchange met the statutory requirements of § 310, that the "public interest, convenience, and necessity" would be served. They were not adversary proceedings. After extensive investigation of the transaction, the Commission was still not satisfied that the exchange would meet the statutory standards, and, over three dissents, issued letters seeking additional information on various subjects, including antitrust problems, under § 309 (b) of the Act. After receiving answers to the letters, the Commission, without holding a hearing, on December 21, 1955, granted the application to exchange stations.[3]

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[2] Federal Communications Commission Report No. 2793, Public Notice 27067, December 28, 1955.

[3] Commissioner Bartley dissented from the action, urging that hearings should have been held because the facts theretofore revealed by the investigation had raised "serious questions as to the desirability and possible legality of the competitive practices followed by the network in obtaining dominance of major broadcast markets." He suggested that there was "a substantial question whether, once the Commission grants its approval to these transfers, certain provisions of the Clayton Act (viz. 15 U. S. C. Section 18) might prevent Federal Trade Commission and Justice Department from taking any *effective* action in the event they concluded that possible violations of the anti-trust laws were involved." (Emphasis by the Commissioner.) Commissioner Doerfer, joined by Commissioner Mack, responded that it was unnecessary to hold a hearing because the investigation had fully revealed the facts. He concluded, however: "It is difficult to see how approval of this exchange may effectively preclude other governmental agencies from examining into this or any other transaction of the network companies."

It was stipulated below that in passing upon the application, the Commission had all the information before it which has now been made the basis of the Government's complaint. It further appears that during the FCC proceedings the Justice Department was informed as to the evidence in the FCC's possession. It was further stipulated, and we assume, that the FCC decided all issues relative to the antitrust laws that were before it, and that the Justice Department had the right to request a hearing under § 309 (b), to file a protest under § 309 (c), to seek a rehearing under § 405, and to seek judicial review of the decision under § 402 (b). See *Far East Conference* v. *United States,* 342 U. S. 570, 576; *U. S. ex rel. Chapman* v. *Federal Power Comm'n,* 345 U. S. 153, 155, 156. The Department of Justice took none of these actions. Accordingly, on January 22, 1956, after the period in which the Department could have sought review had expired, NBC and Westinghouse consummated the exchange transaction according to their contract. The Department did not file the present complaint until December 4, 1956, over ten months later.

Against this background, appellees assert that the FCC had authority to pass on the antitrust questions presented, and, in any case, that the regulatory scheme of the Communications Act has so displaced that of the Sherman Act that the FCC had primary jurisdiction to license the exchange transaction, with the result that any attack for antitrust reasons on the exchange transaction must have been by direct review of the license grant. Relying on this premise, they then contend that the only method available to the Government for redressing its antitrust grievances was to intervene in the FCC proceedings; that since it did not, the antitrust issues were determined adversely to it when the exchange was approved, so that it is barred by principles of collateral estoppel and *res*

judicata; and that in any case the long delay between approval of the exchange and filing of this suit bars the suit because of laches.

I.

Whether these contentions are to prevail depends substantially upon the extent to which Congress authorized the FCC to pass on antitrust questions, and this in turn requires examination of the relevant legislative history. Two sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.*, deal specifically with antitrust considerations, Sections 311 and 313:

> "SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313.
>
> . . . . . .
>
> "SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found

guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

These provisions were taken from the Radio Act of 1927.[4] They appear to have originated in a bill drafted by Congressman White of Maine, H. R. 5589, 69th Cong., 1st Sess. What is now § 311 appeared as the third paragraph of § 2 (C)[5] of that bill, while what is now § 313 appeared as § 2 (G).[6] In the hearings on the bill before

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[4] 44 Stat. 1162. See H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 47, 49.

[5] "The Secretary of Commerce is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person, firm, company, or corporation, or any subsidiary thereof, which has been found guilty by any Federal court of unlawfully monopolizing or attempting to unlawfully monopolize radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means. The granting of a license shall not estop the United States or any person aggrieved from prosecuting such person, firm, company, or corporation for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade."

[6] "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or

the House Committee, Congressman Reid of Illinois asked Judge Davis, Department of Commerce representative, whether the Secretary of Commerce [7] had any discretion to refuse a license under § 2 (C) (now § 311) to a party which the Secretary believed to be violating the antitrust laws. The following colloquy ensued: [8]

> Judge DAVIS. "He has no discretion under this act."
>
> Congressman REID. "They have to be found guilty first; is that the idea?"
>
> Congressman WHITE. "Yes. In other words, I tried to get away from placing upon the secretary the determination of a judicial question of that character. That involves, of course, a determination as to the facts; it requires a knowledge of the law and it requires an application of the law to the facts, and then it requires the exercise of judicial powers, if you leave that in his discretion, and I tried to lift it away from the secretary."

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proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

[7] As then phrased, the Act was to be administered primarily by the Secretary of Commerce.

[8] Hearings before the House Committee on the Merchant Marine and Fisheries on H. R. 5589, 69th Cong., 1st Sess. 27.

Later on, the question arose as to what grounds were available to the Secretary to revoke licenses under § 2 (F) (now § 312). After Congressman White mentioned one statutory ground, Congressman Reid observed: [9]

> "Yes; but you do not include unlawful combinations and monopolies and contracts or agreements in restraint of trade. That is not covered."
>
> Congressman WHITE. "No; not in that section."
>
> Congressman DAVIS of Tennessee. "Those are covered in 'G' [now § 313]."
>
> Congressman WHITE. "That is a judicial question and we have left it to the courts to pass on that."

This failure to include a provision permitting refusal of a license for antitrust violations in the absence of a judicial determination caused Congressman Davis to insert a lengthy Minority Report on H. R. 9108, which was old H. R. 5589 reintroduced by Congressman White.[10] Consequently, when the bill (then numbered H. R. 9971) reached the floor of the House, Congressman Davis attempted to insert a number of amendments which would have strengthened the antitrust aspects of the bill. See 67 Cong. Rec. 5484, 5485. All were defeated, including an amendment to § 2 (C) (now § 311) which would have required refusal of a license to any company "found by any Federal court *or the commission* to have been unlawfully monopolizing" radio communication. (Emphasis supplied.) See 67 Cong. Rec. 5501–5504, 5555.

Thus, in the Senate consideration of a version of the bill, when asked whether there was "anything in the bill providing in case the applicant for a permit is found to be acting in violation of the Sherman antitrust law or controls a monopoly that the commission may pass upon

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[9] *Id.*, at 29.

[10] See H. R. Rep. No. 404, 69th Cong., 1st Sess. 6, 16, 23.

the question," Senator Dill of Washington, who was in charge of the bill in the Senate, replied: [11]

> "The bill provides that in case anybody has been convicted under the Sherman antitrust law or any other law relating to monopoly he shall be denied a license; but the bill does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court."

Congress adjourned before any action could be taken on the bill at that session. At the next session, a Conference Committee reported out the version of the bills which became the Radio Act of 1927, with now § 311 being § 13 of the Act and now § 313 being § 15 of the Act, despite the vigorous but unsuccessful opposition of Congressman Davis in the House, see, *e. g.,* 68 Cong. Rec. 2577, and Senator Pittman of Nevada in the Senate. See, *e. g.,* 68 Cong. Rec. 3032, 3034.

Only one change was made in those two Sections when they were incorporated into the Communications Act. Section 311 was modified merely to authorize rather than to require the revocation of a license by the Commission after a court had found a radio broadcaster in violation of the antitrust laws, but had not ordered its license revoked, 48 Stat. 1086. In all other respects §§ 13 and 15 of the Radio Act were identical with, and had the same purpose as, §§ 311 and 313 of the Communications Act.[12]

While this history compels the conclusion that the FCC was not intended to have any authority to pass on antitrust violations as such, it is equally clear that courts retained jurisdiction to pass on alleged antitrust viola-

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[11] 67 Cong. Rec. 12507.

[12] H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 47, 49.

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tions irrespective of Commission action. Thus § 311, as originally enacted in 1934, 48 Stat. 1086, read as follows:

> "The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. *The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.*" (Emphasis supplied.)

Appellees attempt to avoid the force of the italicized sentence in two ways. First, they point to its repeal in the 1952 amendments to the Act, 66 Stat. 716. That repeal was occasioned by objections from the industry that it was unfair for radio broadcasters who had been found in violation of the antitrust laws to be subject to license refusals by the Commission, even when the court as a part of its decree did not see fit to order the license revoked under § 313. See S. Rep. No. 142, 82d Cong.,

1st Sess. 9. Congress accordingly repealed all of the Section following the first comma, including the italicized sentence. It apparently considered that inherent in the scheme of the Act was the right to challenge under the antitrust laws even transactions approved by the Commission, for the Conference Committee carefully noted that repeal of the italicized sentence would not curtail such a right: [13]

> "To the extent that this section of the conference substitute will eliminate from section 311 of the present law the last sentence, which is quoted above, the committee of conference does not feel that this is of any legal significance. It is the view of the members of the conference committee that the last sentence of the present section 311 is surplusage and that by omitting it from the present law the power of the United States or of any private person to proceed under the antitrust laws would not be curtailed or affected in any way."

Thus, appellees' reliance on repeal of the last sentence of § 311 is clearly misplaced.

Second, appellees urge that the italicized sentence as originally enacted had a very narrow scope; that it was intended to insure only that the granting of a license would not estop the Government from prosecuting antitrust violations subsequent to the transaction giving rise to the license proceeding, or of which the transaction was merely a small part. They argue that the sentence was intended to permit only actions such as in *Packaged Programs* v. *Westinghouse Broadcasting Co.*, 255 F. 2d 708. But the language of the sentence cannot be naturally read in such a narrow manner, and it would take persuasive legislative history so to restrict its application. Appellees point to no such history, nor to any cases so holding.

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[13] H. R. Conf. Rep. No. 2426, 82d Cong., 2d Sess. 19.

Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts.

II.

We now reach the question whether, despite the legislative history, the over-all regulatory scheme of the Act requires invocation of a primary jurisdiction doctrine. The doctrine originated with Mr. Justice (later Chief Justice) White in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. It was grounded on the necessity for administrative uniformity, and, in that particular case, for maintenance of uniform rates to all shippers.[14] A second reason for the doctrine was suggested by Mr. Justice Brandeis in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, where he pointed to the need for administrative skill "commonly to be found only in a body of experts" in handling the "intricate facts" of, in that case, the transportation industry.

Thus, when questions arose as to the applicability of the doctrine to transactions allegedly violative of the an-

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[14] We recently explained the nature of the doctrine in *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 63–64:

"The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

titrust laws, particularly involving fully regulated industries whose members were forced to charge only reasonable rates approved by the appropriate commission, this Court found the doctrine applicable.[15] *United States* v. *Pacific & Arctic R. Co.*, 228 U. S. 87; *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156; *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439; *Far East Conference* v. *United States*, 342 U. S. 570. At the same time, this Court carefully noted that the doctrine did not apply when the action was only for the purpose of dissolving the conspiracy through which the allegedly invalid rates were set, for in such a case there would be no interference with rate structures or a regulatory scheme.[16] *United States* v. *Pacific & Arctic R. Co., supra; Georgia* v. *Pennsylvania R. Co., supra.* The decisions sometimes emphasized the need for administrative uniformity and uniform rates,

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[15] See, generally, 3 Davis, Administrative Law Treatise, §§ 19.05, 19.06; Jaffe, Primary Jurisdiction Reconsidered: The Anti-Trust Laws, 102 U. of Pa. L. Rev. 577; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436; von Mehren, The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929.

[16] This followed because, in the words of Mr. Justice Brandeis in *Keogh* v. *Chicago & N. W. R. Co., supra,* at 161, ". . . a combination of carriers to fix reasonable and non-discriminatory rates may be illegal." This Court in *Georgia* v. *Pennsylvania R. Co., supra,* took the position that shippers were entitled to have rates filed by carriers who were not parties to a conspiracy, even though the rates filed were the lowest which would be found to be reasonable. The risk that future filings would be at the uppermost limits of the zone of reasonableness was too great, and damage from the conspiratorial filings was presumed to flow. Of course, when the agency is permitted to exempt from antitrust coverage rates filed cooperatively, the doctrine equally applies to an attack on the alleged conspiracy. *United States Navigation Co.* v. *Cunard S. S. Co., supra; Far East Conference* v. *United States, supra.*

Keogh v. *Chicago & N. W. R. Co., supra,* while at other times they emphasized the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action. *United States Navigation Co.* v. *Cunard S. S. Co., supra,* and *Far East Conference* v. *United States, supra,* as explained in *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U. S. 481, 497–499.

The cases all involved, however, common carriers by rail and water. These carriers could charge only the published tariff, and that tariff must have been found by the appropriate agency to have been reasonable. Free rate competition was modified by federal controls. The Court's concern was that the agency which was expert in, and responsible for, administering those controls should be given the opportunity to determine questions within its special competence as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive whole. That some resolution is necessary when the antitrust policy of free competition is placed beside a regulatory scheme involving fixed rates is obvious. Cf. *McLean Trucking Co.* v. *United States,* 321 U. S. 67. Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance.

While the television industry is also a regulated industry, it is regulated in a very different way. That difference is controlling. Radio broadcasters, including television broadcasters, see *Allen B. Dumont Laboratories*

v. *Carroll,* 184 F. 2d 153, are not included in the definition of common carriers in § 3 (h) of the Communications Act, 47 U. S. C. § 153 (h), as are telephone and telegraph companies. Thus the extensive controls, including rate regulation, of Title II of the Communications Act, 47 U. S. C. §§ 201–222, do not apply.[17] Television broadcasters remain free to set their own advertising rates. As this Court said in *Federal Communications Comm'n* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 474:

> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition as it has done in the case of railroads . . . ."

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[17] Under Title II, common carriers are required to furnish communications service on reasonable request and may charge only just and reasonable rates, § 201. Such carriers must file rates with the FCC, and can charge only the rates as filed, § 203. The Commission may hold hearings on the lawfulness of filed rates, § 204, and after hearings may itself set the applicable rate, § 205. Cf. 49 U. S. C. § 15 *et seq.*, 46 U. S. C. § 817. In view of this extensive regulation, Congress has provided that certain actions of telephone and telegraph companies may be exempted from the antitrust laws by the Commission, § 221 (a) and § 222 (c) (1). Cf. 49 U. S. C. §§ 5 (11), 5b (9) and 46 U. S. C. § 814. Such exemptions are, however, subject to review, see *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U. S. 481.

Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears.[18]

The facts of this case illustrate that analysis. Appellees, like unregulated business concerns, made a business judgment as to the desirability of the exchange. Like unregulated concerns, they had to make this judgment with knowledge that the exchange might run afoul of the antitrust laws. Their decision varied from that of an

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[18] This conclusion is re-enforced by the Commission's disavowal of either the power or the desire to foreclose the Government from antitrust actions aimed at transactions which the Commission has licensed. This position was taken both before the district judge below, and in a Supplemental Memorandum filed in this Court, page 8:

"Concurrent with the jurisdiction of the Department of Justice to enforce the Sherman Act, the Commission, of course, has jurisdiction to designate license applications for hearing on public interest questions arising out of facts which might also constitute violations of the antitrust laws. This does not mean, however, that its action on these public interest questions of communications policy is a determination of the antitrust issues as such. Thus, while the Commission may deny applications as not in the public interest where violations of the Sherman Act have been determined to exist, its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall the United States from subsequently bringing an antitrust suit challenging those transactions."

Nor was this position taken merely for the purposes of this litigation, for it has been the view of the Commission over a period of years. See Report on Uniform Policy as to Violation by Applicants of Laws of United States, FCC Docket No. 9572 (1950), 1 Pike and Fischer, Radio Regulation, Part III, 91:495; *National Broadcasting Co.* v. *United States,* 319 U. S. 190. Since, as Mr. Justice Brandeis observed, the doctrine of primary jurisdiction rests in part upon the need for the skill of a "body of experts," it would be odd to impose the doctrine when the experts deny the relevance of their skill.

unregulated concern only in that they also had to obtain the approval of a federal agency. But scope of that approval in the case of the FCC was limited to the statutory standard, "public interest, convenience, and necessity." See, generally, *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.,* 309 U. S. 134; *Federal Communications Comm'n* v. *Sanders Bros. Radio Station, supra; Federal Communications Comm'n* v. *RCA Communications,* 346 U. S. 86. The monetary terms of the exchange were set by the parties, and were of concern to the Commission only as they might have affected the ability of the parties to serve the public. Even after approval, the parties were free to complete or not to complete the exchange as their sound business judgment dictated. In every sense, the question faced by the parties was solely one of business judgment (as opposed to regulatory coercion), save only that the Commission must have found that the "public interest" would be served by their decision to make the exchange. No pervasive regulatory scheme was involved.

This is not to imply that federal antitrust policy may not be considered in determining whether the "public interest, convenience, and necessity" will be served by proposed action of a broadcaster, for this Court has held the contrary.[19] *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 222–224. Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and tele-

[19] See also Report on Uniform Policy as to Violation by Applicants of Laws of United States, FCC Docket No. 9572, 1 Pike and Fischer, Radio Regulation, Part III, 91:495.

vision facilities, which, if granted, would give him a monopoly of that area's major media of mass communication. See 98 Cong. Rec. 7399; *Mansfield Journal Co.* v. *Federal Communications Comm'n,* 86 U. S. App. D. C. 102, 107, 108, 180 F. 2d 28, 33, 34.

III.

The other contentions of appellees fall of their own weight if the FCC has no power to decide antitrust questions. Thus, before we can find the Government collaterally estopped by the FCC licensing, we must find "whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication *of the issue in controversy.*" *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 403. (Emphasis supplied.) But the issue in controversy before the Commission was whether the exchange would serve the public interest, not whether § 1 of the Sherman Act had been violated. Consequently, there could be no estoppel. *Res judicata* principles are even more inapposite.

Similarly, there could be no laches unless the Government was under some sort of a duty to go forward in the FCC proceedings. But unless the FCC had power to decide the antitrust issues, and we have held that it did not, the Government had no duty either to enter the FCC proceedings or to seek review of the license grant.[20]

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[20] It is relevant to note that the Commission is not expressly required to give the Government notice that antitrust issues have been raised in a § 310 (b) proceeding. Compare § 222 (c) (1) of the Act relating to common carriers, which expressly makes consolidations and mergers exempt from antitrust coverage if approved by the Commission, but which also expressly requires that notice be given to the Attorney General of the United States prior to approval.

Accordingly, the judgment of the District Court dismissing the action is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN concurs in the result, believing, as he understands part "I" of the Court's opinion to hold, that a Commission determination of "public interest, convenience, and necessity" cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee *pro tanto* from the antitrust laws, and that these considerations alone are dispositive of this appeal.

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

ROMERO *v.* INTERNATIONAL TERMINAL OPERATING CO. ET AL.

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

No. 3. Argued March 13, 1958.—Restored to the calendar for reargument May 19, 1958.—Reargued October 22–23, 1958.—Decided February 24, 1959.

Petitioner, a Spanish subject, was employed on board a ship of Spanish flag and registry, owned by a Spanish corporation, for a voyage beginning and ending in Spain. He was injured while the ship was in American territorial waters, and he filed suit on the law side of a Federal District Court in New York. He claimed damages under the Jones Act and under the general maritime law for unseaworthiness, maintenance and cure and negligence against his Spanish employer and a New York corporation which acted as its husbanding agent in New York. Damages for negligence under the general maritime law were claimed against two other American corporations engaged in operations related to loading freight in New Jersey. The District Court dismissed the complaint and the Court of Appeals affirmed. *Held:*

1. Jurisdiction under the Jones Act was adequately alleged. P. 359.

2. Jurisdiction on the law side of claims based on the general maritime law is not granted by 28 U. S. C. § 1331. Pp. 359–380.

3. There was jurisdiction, "pendent" to jurisdiction under the Jones Act, to determine whether the claims against the Spanish corporation based on general maritime law stated a cause of action. Pp. 380–381.

4. There was jurisdiction under 28 U. S. C. § 1332 over the claims under the general maritime law against the three American corporations. P. 381.

5. Neither the Jones Act nor the general maritime law of the United States is applicable to the claims against the foreign shipowner. Pp. 381–384.

6. The claims for unseaworthiness and maintenance and cure against the husbanding agent were properly dismissed in light of the District Court's findings of fact. Pp. 384–385.

7. The case must be remanded for consideration of the claims against the three American corporations based on negligence. P. 385.

244 F. 2d 409, judgment vacated and cause remanded to the District Court for further proceedings.

Narciso Puente, Jr. and *Silas B. Axtell* argued the cause for petitioner. With them on the brief was *Charles A. Ellis.*

John L. Quinlan argued the cause for Compania Trasatlantica and Garcia & Diaz, Inc., respondents. With him on a brief for Compania Trasatlantica (also known as the Spanish Line) was *John M. Aherne.*

Sidney A. Schwartz argued the cause for the Quin Lumber Co., Inc., respondent. With him on the brief was *William J. Kenney.*

John P. Smith submitted on brief for the International Terminal Operating Co., respondent.

Briefs of *amici curiae* urging affirmance were filed by *Lawrence Hunt* and *Daniel L. Stonebridge* for the Government of the United Kingdom of Great Britain and Northern Ireland, and for the Government of Denmark.

James M. Estabrook and *David P. H. Watson* filed a brief for Skibsfartens Arbeidsgiverforening (Norwegian Shipping Federation) and Sveriges Redareforening (Swedish Shipowner's Association), as *amici curiae,* urging that the dismissal of the complaint as to the Spanish Line be affirmed.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner Francisco Romero, a Spanish subject, signed on as a member of the crew of the S. S. *Guadalupe* for a voyage beginning about October 10, 1953. The *Guadalupe* was of Spanish registry, sailed under the Spanish

flag and was owned by respondent Compania Trasatlantica (also known as Spanish Line), a Spanish corporation. At the completion of the voyage for which he signed, Romero continued uninterruptedly to work on the *Guadalupe*. Thereby, under the law of Spain, the terms and conditions of the original contract of hire remained in force. Subsequently the S. S. *Guadalupe* departed from the port of Bilbao in northern Spain, touched briefly at other Spanish ports, and sailed to the port of New York at Hoboken. From here the ship made a brief trip to the ports of Vera Cruz and Havana returning to Hoboken where, on May 12, 1954, Romero was seriously injured when struck by a cable on the deck of the *Guadalupe*. Thereupon petitioner filed suit on the law side of the District Court for the Southern District of New York.

The amended complaint claimed damages from four separate corporate defendants. Liability of Compania Trasatlantica and Garcia & Diaz, Inc., a New York corporation which acted as the husbanding agent for Compania's vessels while in the port of New York, was asserted under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, and under the general maritime law of the United States for unseaworthiness of the ship, maintenance and cure [1] and a maritime tort. Liability for a maritime tort was alleged against respondents International Terminal Operating Co. and Quin Lumber Co. These two companies were working on board the S. S. *Guadalupe* at the time of the injury pursuant to oral contracts with Garcia & Diaz, Inc. Quin, a New York corporation, was engaged in carpentry work preparatory to the receipt of a cargo

[1] The claim for maintenance and cure under the general maritime law included an amount for wages to the end of the voyage. We have not before us an independent claim for wages due and therefore need express no opinion on such a claim by one in petitioner's position.

of grain. International Terminal, incorporated in Delaware, was employed as stevedore to load the cargo. The jurisdiction of the District Court was invoked under the Jones Act and §§ 1331 [2] and 1332 [3] of the Judicial Code, 28 U. S. C.

Following a pre-trial hearing the District Court dismissed the complaint. 142 F. Supp. 570.[4] The court

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[2] "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States."

[3] "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy . . . is between:

. . . . . .

"(2) Citizens of a State, and foreign states or citizens or subjects thereof;"

[4] Prior to the commencement of the trial respondents moved to dismiss the complaint on the ground that the District Court lacked "jurisdiction" over the subject matter. The answers of some of the respondents also contained motions to dismiss for failure to state a claim upon which relief can be granted. A pre-trial hearing on the issue of "jurisdiction" was held and the complaint was dismissed. Although the trial court viewed the issues as jurisdictional in the correct sense, the procedure followed was precisely that provided for a preliminary hearing to determine whether a claim was stated upon which relief can be granted. Fed. Rules Civ. Proc., 12 (d). Although the court considered evidence outside the pleadings, Federal Rule 12 (c) allows such evidence to be admitted, requiring the court then to treat the motion as one for summary judgment under Rule 56. Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. Rules Civ. Proc., 56 (c). The determinations made by the District Court, in the course of its hearing on jurisdiction, insofar as they are relevant to our disposition, were within the properly conceived scope of Rule 56. Since all the requirements of Rule 12 (c), relating to a hearing on a motion for judgment on the pleadings, were satisfied and the findings made were properly relevant to such a hearing, we need not restrict our disposition to the issue of "jurisdiction" merely because the proceedings below were inartistically labeled.

held that the action under the Jones Act against Compania Trasatlantica must be dismissed for lack of jurisdiction since that Act provided no right of action for an alien seaman against a foreign shipowner under the circumstances detailed above. The claims under the general maritime law against Compania also were dismissed since the parties were not of diverse citizenship and 28 U. S. C. § 1331 did not confer jurisdiction on the federal law courts over claims rooted in federal maritime law. The District Court dismissed the Jones Act claim against Garcia & Diaz, Inc., pursuant to its finding that Garcia was not the employer of Romero nor, as a husbanding agent for Compania, did it have the operation and control of the vessel. The remaining claims, including those against the other respondents, were dismissed because of lack of the requisite complete diversity under the rule of *Strawbridge* v. *Curtiss,* 3 Cranch 267. Upon examination of the Spanish law the district judge also declined jurisdiction "even in admiralty as a matter of discretion." 142 F. Supp., at 574. The Spanish law provides Romero with a lifetime pension of 35% to 55% of his seaman's wages which may be increased by one-half if the negligence of the shipowner is established; it also allows the recovery of the Spanish counterpart of maintenance and cure. These rights under the Spanish law may be enforced through the Spanish consul in New York.

The Court of Appeals affirmed the dismissal of the complaint, 244 F. 2d 409. We granted certiorari, 355 U. S. 807, because of the conflict among Courts of Appeals as to the proper construction of the relevant provision of the Judiciary Act of 1875 (now 28 U. S. C. § 1331) and because of questions raised regarding the applicability of *Lauritzen* v. *Larsen,* 345 U. S. 571, to the situation before us. The case was argued during the last Term and restored to the calendar for reargument during the present Term. 356 U. S. 955.

I. JURISDICTION.

(a) *Jurisdiction under the Jones Act.*—The District Court dismissed petitioner's Jones Act claims for lack of jurisdiction. "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 249. Petitioner asserts a substantial claim that the Jones Act affords him a right of recovery for the negligence of his employer. Such assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights. "A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." *Lauritzen* v. *Larsen*, 345 U. S. 571, 575.

(b) *Jurisdiction under 28 U. S. C. § 1331.*—Petitioner, a Spanish subject, asserts claims under the general maritime law against Compania Trasatlantica, a Spanish corporation. The jurisdiction of the Federal District Court, sitting as a court of law, was invoked under the provisions of the Judiciary Act of 1875 which granted jurisdiction to the lower federal courts "of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, ..." (now 28 U. S. C. § 1331).[5] Whether the Act of 1875 permits maritime claims rooted in federal law to be brought on

[5] Act of March 3, 1875, § 1, 18 Stat. 470. The modifications of language to be found in the present version of this Act, 28 U. S. C. § 1331, were not intended to change in any way the meaning or content of the Act of 1875. See Reviser's Note to 28 U. S. C. § 1331. The recent amendments to this Act, 72 Stat. 415, affected only jurisdictional amount and are not relevant here. See 1958 U. S. Code Cong. & Admin. News 2333, 85th Cong., 2d Sess.

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the law side of the lower federal courts has recently been raised in litigation and has become the subject of conflicting decisions among Courts of Appeals. Jurisdiction has been sustained in the First Circuit, *Doucette* v. *Vincent,* 194 F. 2d 834, and denied in the Second and Third, *Jordine* v. *Walling,* 185 F. 2d 662; *Paduano* v. *Yamashita Kisen Kabushiki Kaisha,* 221 F. 2d 615. See also *Jenkins* v. *Roderick,* 156 F. Supp. 299. Such conflict in the construction of an old and important statute calls for a full exposition of the problem.

Abstractly stated, the problem is the ordinary task of a court to apply the words of a statute according to their proper construction. But "proper construction" is not satisfied by taking the words as if they were self-contained phrases. So considered, the words do not yield the meaning of the statute. The words we have to construe are not only words with a history. They express an enactment that is part of a serial, and a serial that must be related to Article III of the Constitution, the watershed of all judiciary legislation, and to the enactments which have derived from that Article. Moreover, Article III itself has its sources in history. These give content and meaning to its pithy phrases. Rationally construed, the Act of 1875 must be considered part of an organic growth—part of the evolutionary process of judiciary legislation that began September 24, 1789, and projects into the future.

Article III, § 2, cl. 1 (3d provision) of the Constitution and section 9 of the Act of September 24, 1789, have from the beginning been the sources of jurisdiction in litigation based upon federal maritime law. Article III impliedly contained three grants. (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty

and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," *Crowell* v. *Benson,* 285 U. S. 22, 55, and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution. See *Crowell* v. *Benson, supra,* at 55.

Section 9 of the First Judiciary Act [6] granted the District Courts maritime jurisdiction. This jurisdiction has remained unchanged in substance to the present day.[7] Indeed it was recognition of the need for federal tribunals to exercise admiralty jurisdiction that was one of the controlling considerations for the establishment of a system of lower federal courts.[8] Such a system is not an inherent requirement of a federal government. There was strong opposition in the Constitutional Convention to any such inferior federal tribunals.[9] No comprehensive system of lower federal courts has

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[6] 1 Stat. 76.

[7] The present version of § 9 is in 28 U. S. C. § 1333.

[8] See 1 Farrand, Records of the Federal Convention (1911), 124; 2 *id.,* at 46. The "Court of Appeals in Cases of Capture" was the first national court under the Articles of Confederation. See Appendix, 131 U. S. XIX–XXXV. In The Federalist, No. 80, Hamilton wrote: "The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction." The Federalist, No. 80 (Lodge ed. 1908), at 497–498.

[9] The original clause calling for the establishment of inferior tribunals was defeated in the Convention. 1 Farrand, Records of the Federal Convention (1911), 125. A compromise vesting power in Congress to establish such tribunals was agreed to. *Ibid.* See also *id.,* at 124.

been established in Canada or Australia. Congress could leave the enforcement of federal rights to state courts,[10] and indeed the state courts, in large measure, now exercise concurrent jurisdiction over a wide field of matters of federal concern, subject to review of federal issues by the Supreme Court.[11]

Section 9 not only established federal courts for the administration of maritime law; it recognized that some remedies in matters maritime had been traditionally administered by common-law courts of the original States.[12] This role of the States in the administration of maritime law was preserved in the famous "saving clause"—"saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." [13] Since the original Judiciary Act also endowed the federal courts with diversity jurisdiction, common-law remedies for maritime causes could be enforced by the then Circuit Courts when the proper diversity of parties afforded access.

Up to the passage of the Judiciary Act of 1875 [14] these jurisdictional bases provided the only claim for jurisdic-

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[10] Thus Rutledge argued against the establishment of inferior federal tribunals saying "that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts." 1 Farrand, Records of the Federal Convention (1911), 124. See *Claflin* v. *Houseman*, 93 U. S. 130; *Testa* v. *Katt*, 330 U. S. 386.

[11] *Murdock* v. *City of Memphis*, 20 Wall. 590.

[12] See *New Jersey Steam Navigation Co.* v. *Merchants' Bank of Boston*, 6 How. 344, 390; *The Hamilton*, 207 U. S. 398, 404; 2 Story, Commentaries on the Constitution of the United States, § 1672. See also Dodd, The New Doctrine of the Supremacy of Admiralty Over the Common Law, 21 Col. L. Rev. 647 (1921); Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Col. L. Rev. 259 (1950).

[13] Act of Sept. 24, 1789, § 9, 1 Stat. 76.

[14] Act of Mar. 3, 1875, 18 Stat. 470.

tion in the federal courts in maritime matters.[15] The District Courts, endowed with "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," sat to enforce the comprehensive federal interest in the law of the sea which had been a major reason for their creation. This jurisdiction was exercised according to the historic procedure in admiralty, by a judge without a jury. In addition, common-law remedies were, under the saving clause, enforcible in the courts of the States and on the common-law side of the lower federal courts when the diverse citizenship of the parties permitted. Except in diversity cases, maritime litigation brought in state courts could not be removed to the federal courts.[16]

The Judiciary Act of 1875 effected an extensive enlargement of the jurisdiction of the lower federal courts. For the first time their doors were opened to "all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . ." [17] From 1875 to 1950 there is not to be found a hint or suggestion to cast doubt on the conviction that the language of that statute was taken straight from Art. III, § 2, cl. 1, extending the judicial power of the United States "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Indeed what little legislative history there is

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[15] *The Belfast*, 7 Wall. 624, 644; *Leon* v. *Galceran*, 11 Wall. 185, 188.

[16] The removal provisions of the original Judiciary Act of 1789, 1 Stat. 79, conferred a limited removal jurisdiction, not including cases of admiralty and maritime jurisdiction. In none of the statutes enacted since that time have saving-clause cases been made removable.

[17] Of course federal question jurisdiction was granted in the abortive Act of Feb. 13, 1801, § 11, 2 Stat. 92, repealed by Act of March 8, 1802, 2 Stat. 132.

affirmatively indicates that this was the source.[18] Thus the Act of 1875 drew on the scope of this provision of Clause 1, just as the Judiciary Act of 1789 reflected the constitutional authorization of Clause 1 of Section 2, which extended the judicial power "to all Cases of admiralty and maritime Jurisdiction."

These provisions of Article III are two of the nine separately enumerated classes of cases to which "judicial power" was extended by the Constitution and which thereby authorized grants by Congress of "judicial Power" to the "inferior" federal courts. The vast stream of litigation which has flowed through these courts from the beginning has done so on the assumption that, in dealing with a subject as technical as the jurisdiction of the courts, the Framers, predominantly lawyers, used precise, differentiating and not redundant language. This assumption, reflected in The Federalist Papers,[19] was authoritatively confirmed by Mr. Chief Justice Marshall in *American Ins. Co.* v. *Canter*, 1 Pet. 511, 544:

> "We are therefore to inquire, whether cases in admiralty, and cases arising under the laws and Constitution of the United States, are identical.
>
> "If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and

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[18] See 2 Cong. Rec. 4986–4987; Frankfurter and Landis, The Business of the Supreme Court (1928), 65–69.

[19] See The Federalist, No. 80 (Hamilton), note 8, *supra*.

consuls; to all cases of admiralty and maritime jurisdiction.'

"The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity." See also *The Sarah,* 8 Wheat. 391.

This lucid principle of constitutional construction, embodied in one of Marshall's frequently quoted opinions, was never brought into question until 1952.[20] It

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[20] See treatises cited in Appendix, *post,* p. 385. Lack of clarity in Marshall's opinion was suggested in *Doucette* v. *Vincent,* 194 F. 2d 834, 843–844, n. 8.

The City of Panama, 101 U. S. 453, decided in 1879, four years after the passage of the Act of 1875, does not countenance the notion that Chief Justice Marshall's strict differentiation between the two provisions of § 2 of Art. III had been disapproved. That case only held that the Organic Act for the Territory of Washington granted the courts of that Territory the combined jurisdiction of the District and Circuit Courts of the United States, thereby including, of course, admiralty jurisdiction. See *In re Cooper,* 143 U. S. 472, 494. This holding merely recognized the settled practice in the Territory of Washington since the Act of 1853, as well as the practice in other territories with similar Acts. The Court's statement in *The City of Panama* that "Select passages of the opinion in that case [*Canter*], when detached from the context, may appear to support the theory of the respondents, but the actual decision of the court is explicitly and undeniably the other way" merely indicated that *Canter,* like *The City of Panama,* interpreted a congressional statute to grant admiralty jurisdiction to territorial courts in light of the purposes of a particular statute. *The City of Panama* did not reject the principle of constitutional construction which Marshall used by way of reaching his "actual decision." It did not question the conclusion in *Canter* that the two clauses of Article III are distinct grants of jurisdiction and that this truth is to be observed whenever it becomes relevant as it does here. *The City of Panama,* like other decisions,

had been treated as black-letter law in leading treatises.[21] It was part of the realm of legal ideas in which the authors of the Act of 1875 moved. Certainly the accomplished lawyers who drafted the Act of 1875 [22] drew on

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serves to illustrate that jurisdictional statutes are not to be read literally, and are not to be construed as abstract collections of words, but derive their meaning from their setting in history and practice, with due regard to the consequences of the construction given them. See *American Security & Trust Co.* v. *Commissioners of the District of Columbia,* 224 U. S. 491; *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41.

[21] *E. g.,* Abbott in his treatise on the United States Courts and their Practice (3d ed. 1877), 60, discusses the Marshall formulation:

"The several cases to which the judicial power extends are to be regarded as independent, in the sense that any one clause is sufficient to sustain jurisdiction in a case to which it applies, and that it is neither restrained nor enlarged by the other clauses, with the exception of the restraint imposed by amendment XI. . . ." The author then discusses the classes of cases in Article III, concluding "The grant of jurisdiction over one of these classes does not confer jurisdiction over either of the others; the discrimination is conclusive against their identity. A case of admiralty and maritime jurisdiction is not to be regarded as one 'arising under the Constitution and laws of the United States,' merely because the exercise of judicial power in maritime cases is provided for in the Constitution and laws." (Citing *American Ins. Co.* v. *Canter.*)

See also Spear, The Law of the Federal Judiciary (1883), 46. Discussing the admiralty and maritime jurisdiction as granted by the Constitution, the author says:

"The cases coming within this jurisdiction, as referred to in the Constitution, are not identical with, or embraced in, the cases of law and equity referred to in the same instrument, as arising under the Constitution, laws, or treaties of the United States. They belong to a different category, and are provided for by a distinct and specific grant of judicial power." He then quotes from Marshall's opinion in *Canter.*

[22] The provision of the Act of 1875 under scrutiny originated in the Senate. The bill was sponsored and managed by Senator Matthew Hale Carpenter of Wisconsin. Its authorship has been attributed to him. 7 Reports of the Wisconsin State Bar Association 155,

the language of the constitutional grant on the assumption that they were dealing with a distinct class of cases, that the language incorporated in their enactment precluded "identity" with any other class of cases contained in Article III. Thus the grant of jurisdiction over "suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States . . . ," in the Act of 1875, as derived from Article III, could not reasonably be thought of as comprehending an entirely separate and distinct class of cases—"Cases of admiralty and maritime Jurisdiction." [23]

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186. On his death the bar journal of his state wrote that "his love of and devotion to legal studies and pursuits—not as objects but as subjects—were the controlling passions of his life. . . .

". . . Such, however, was the devotion of Mr. Carpenter to his profession that his election to the United States senate seemed to be a matter of gratification principally for the broader field of professional labors which it enabled him to cultivate. . . ." 1 Reports of Wisconsin State Bar Association 227.

Among Senator Carpenter's collaborators on the Senate Judiciary Committee were men with outstanding professional experience as lawyers, professors of law and judges: George G. Wright of Iowa (a professor of law and a member of his State's Supreme Court), Allen G. Thurman (Chief Justice of the Ohio Supreme Court), John W. Stevenson (a professor of law, codifier of the law of Kentucky, President of the American Bar Association), and Frederic T. Frelinghuysen (eminent practitioner, Attorney General of New Jersey, subsequently Secretary of State).

After leaving the Senate the bill went to conference and was reported out on the floor of the House by Luke Poland of Vermont, an esteemed Chief Justice of the Vermont Supreme Court.

Such men would not have made a revolutionary change in maritime jurisdiction *sub silentio*.

[23] All suits involving maritime claims, regardless of the remedy sought, are cases of admiralty and maritime jurisdiction within the meaning of Article III whether they are asserted in the federal courts or, under the saving clause, in the state courts. Romero's claims for damages under the general maritime law are a case of admiralty and maritime jurisdiction. The substantive law on which

Of course all cases to which "judicial power" extends "arise," in a comprehensive, non-jurisdictional sense of the term, "under this Constitution." It is the Constitution that is the ultimate source of all "judicial Power"—defines grants and implies limits—and so "all Cases of admiralty and maritime Jurisdiction" arise under the Constitution in the sense that they have constitutional sanction. But they are not "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . ."

Not only does language and construction point to the rejection of any infusion of general maritime jurisdiction into the Act of 1875, but history and reason powerfully support that rejection. The far-reaching extension of national power resulting from the victory of the North, and the concomitant utilization of federal courts for the vindication of that power in the Reconstruction Era, naturally led to enlarged jurisdiction of the federal courts over federal rights. But neither the aim of the Act of 1875 to provide a forum for the vindication of new federally created rights, nor the pressures which led to its enactment, suggest, even remotely, the inclusion of maritime claims within the scope of that statute. The provision of the Act of 1875 with which we are concerned was designed to give a new content of jurisdiction to the federal courts, not to reaffirm one long-established, smoothly functioning since 1789.[24] We have uncovered no basis for finding the additional design of changing the method by which federal courts had administered admiralty law from the

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these claims are based derives from the third provision of Art. III, § 2, cl. 1. Without that constitutional grant Romero would have no federal claim to assert. Cf. 2 Story, Commentaries on the Constitution of the United States, § 1672.

[24] See Frankfurter and Landis, The Business of the Supreme Court (1928), 64–65; Chadbourn and Levin, Original Jurisdiction of Federal Questions, 90 U. of Pa. L. Rev. 639, 644–645 (1942).

beginning. The federal admiralty courts had been completely adequate to the task of protecting maritime rights rooted in federal law. There is not the slightest indication of any intention, or of any professional or lay demands for a change in the time-sanctioned mode of trying suits in admiralty without a jury, from which it can be inferred that by the new grant of jurisdiction of cases "arising under the Constitution or laws" a drastic innovation was impliedly introduced in admiralty procedure, whereby Congress changed the method by which federal courts had administered admiralty law for almost a century. To draw such an inference is to find that a revolutionary procedural change had undesignedly come to pass. If we are now to attribute such a result to Congress the sole remaining justification for the federal admiralty courts which have played such a vital role in our federal judicial system for 169 years will be to provide a federal forum for the small number of maritime claims which derive from state law, and to afford the ancient remedy of a libel *in rem* in those limited instances when an *in personam* judgment would not suffice to satisfy a claim.[25]

Indeed, until 1950, in a dictum in *Jansson* v. *Swedish American Line,* 185 F. 2d 212, 217–218 (C. A. 1st Cir.), followed by an opinion in *Doucette* v. *Vincent,* 194 F. 2d 834, judges, scholars and lawyers alike made the unquestioned assumption that the original maritime jurisdiction of the federal courts had, for all practical purposes, been left unchanged since the Act of 1789. Thus Mr. Justice Clifford, an experienced admiralty judge, in 1876, one year after the passage of the Act here in question, could reiterate the classic formulation without the faintest indication of doubt as to its continued vitality.

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[25] Of course, in a few instances, Congress has provided the federal admiralty courts with a specific statutory jurisdiction. *E. g.,* Death on the High Seas Act, 41 Stat. 537 (1920), 46 U. S. C. §§ 761–767.

"Parties in maritime cases are not . . . compelled to proceed in the admiralty at all, as they may resort to their common-law remedy in the State courts, or in the Circuit Court, if the party seeking redress and the other party are citizens of different States." [26] On the basis of an examination of sixty-six treatises on federal jurisdiction and on admiralty, and of a search of the reports it can be confidently asserted that for the seventy-four years following Mr. Justice Clifford's opinion there is not a single professional utterance of legal opinion—by judges, lawyers, or commentators—disagreeing with his formulation.[27] Negative testimony is often as compelling as bits of affirmative evidence. It is especially compelling when it comes from those whose scholarly or professional specialty was the jurisdiction of the federal courts and the practice of maritime law. Petitioner now asks us to hold that no student of the jurisdiction of the federal courts or of admiralty, no judge, and none of the learned and alert members of the admiralty bar were able, for seventy-five years, to discern the drastic change now asserted to have been contrived in admiralty jurisdiction by the Act of 1875. In light of such impressive testimony from the past the claim of a sudden discovery of a hidden latent meaning in an old technical phrase is surely suspect.

The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment.[27a] The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by

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[26] *Norton* v. *Switzer*, 93 U. S. 355, 356.

[27] See Appendix, *post*, p. 385.

[27a] For reasons that would take us too far afield to discuss, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is no exception.

judges, lawyers or scholars for seventy-five years because it is not there.

It is also significant that in the entire history of federal maritime legislation, whether before the passage of the Act of 1875 (*e. g.*, the Great Lakes Act—also a general jurisdictional statute and one often termed an anomaly in the maritime law because of its jury trial provision), or after (the Jones Act), Congress has not once left the availability of a trial on the law side to inference. It has made specific provision.[28] It is difficult to accept that in 1875, and in 1875 alone, a most far-reaching change was made subterraneously.

Not only would the infusion of general maritime jurisdiction into the Act of 1875 disregard the obvious construction of that statute. Important difficulties of judicial policy would flow from such an interpretation, an interpretation which would have a disruptive effect on the traditional allocation of power over maritime affairs in our federal system.

Thus the historic option of a maritime suitor pursuing a common-law remedy to select his forum, state or federal, would be taken away by an expanded view of § 1331,[29] since saving-clause actions would then be freely

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[28] Such provisions are in the Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688, and in the Great Lakes Act, 5 Stat. 726 (1845), 28 U. S. C. § 1873. Neither the Suits in Admiralty Act of 1920, 41 Stat. 525, 46 U. S. C. § 741–752, nor the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U. S. C. §§ 761–767, allows a jury trial in personal injury cases. When the Death on the High Seas Act was being debated it was stated that "That question was thrashed out and it was decided best not to incorporate into this bill a jury trial because of the difficulties in admiralty proceedings." Congressman Igoe, speaking for the Judiciary Committee, 59 Cong. Rec. 4482, 60th Cong., 2d Sess. (1920).

[29] The policy of unremovability of maritime claims brought in the state courts was incorporated by Congress into the Jones Act. See *Pate* v. *Standard Dredging Corp.*, 193 F. 2d 498 (C. A. 5th Cir. 1952).

removable under § 1441 of Title 28.[30] The interpretation of the Act of 1875 contended for would have consequences more deeply felt than the elimination of a suitor's traditional choice of forum. By making maritime cases removable to the federal courts it would make considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters—a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve. This disruption of principle is emphasized by the few cases actually involved.[31] This small number of cases is only important in that it negatives the pressure of any practical consideration for the subversion of a principle so long-established and so deeply rooted. The role of the States in the development of maritime law is a role whose significance is rooted in the Judiciary Act of 1789 and the decisions of this Court.[32] Recognition of the part the States have played from the beginning has a dual significance. It indicates the extent to which an expanded view of the Act of 1875 would eviscerate the postulates of the saving clause, and it undermines the theoretical basis for giving the Act of 1875 a brand new meaning.

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[30] 28 U. S. C. § 1441 (b): "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

[31] See the compilation of state court cases in Seventh 5-Year Index-Digest of American Maritime Cases, 1953–1957 (1957), XLIII–XLVIII.

[32] See, *e. g.*, *Madruga* v. *Superior Court of California*, 346 U. S. 556, 560–561: "[T]he jurisdictional act [the Act of 1789] does leave state courts 'competent' to adjudicate maritime causes of action in proceedings *'in personam'* . . . . [T]his Court has said that a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.' *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109."

Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system.[33] But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty.[34] State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty,[35] have been upheld when applied to maritime causes of action.[36] Federal courts have enforced these statutes.[37] State rules for the partition and sale of ships,[38] state laws governing the specific performance of arbitration agreements,[39] state laws regulating the effect of a breach of warranty under contracts of maritime insurance[40]—all these laws and others have been accepted as rules of

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[33] *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239; *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406. See *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409.

[34] *Vancouver S. S. Co., Ltd.,* v. *Rice,* 288 U. S. 445; *Peyroux* v. *Howard,* 7 Pet. 324. See also *Edwards* v. *Elliott,* 21 Wall. 532.

[35] *The Harrisburg,* 119 U. S. 199. "Death is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land." Cardozo, J., in *Cortes* v. *Baltimore Insular Line, Inc.,* 287 U. S. 367, 371.

[36] *The Hamilton,* 207 U. S. 398; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Just* v. *Chambers,* 312 U. S. 383.

[37] *The Hamilton, supra; Just* v. *Chambers, supra; Western Fuel Co.* v. *Garcia, supra.*

[38] *Madruga* v. *Superior Court of California,* 346 U. S. 556.

[39] *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109.

[40] *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.,* 348 U. S. 310.

decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity. "In the field of maritime contracts," this Court has said, "as in that of maritime torts, the National Government has left much regulatory power in the States." [41] Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.[42] This sharing of competence in one aspect of our federalism has been traditionally embodied in the saving clause of the Act of 1789. Here, as is so often true in our

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[41] *Id.*, at 313.

[42] "The grounds of objection to the admiralty jurisdiction in enforcing liability for wrongful death were similar to those urged here; that is, that the Constitution presupposes a body of maritime law, that this law, as a matter of interstate and international concern, requires harmony in its administration and cannot be subject to defeat or impairment by the diverse legislation of the States, and hence that Congress alone can make any needed changes in the general rules of the maritime law. But these contentions proved unavailing and the principle was maintained that a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' It was decided that the state legislation encountered none of these objections. The many instances in which state action had created new rights, recognized and enforced in admiralty, were set forth in *The City of Norwalk,* and reference was also made to the numerous local regulations under state authority concerning the navigation of rivers and harbors. There was the further pertinent observation that the maritime law was not a complete and perfect system and that in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration. These views find abundant sup-

federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy. To give a novel sweep to the Act would disrupt traditional maritime policies and quite gratuitously disturb a complementary, historic interacting federal-state relationship.

An infusion of general maritime jurisdiction into the "federal question" grant would not occasion merely an isolated change; it would generate many new complicated problems. If jurisdiction of maritime claims were allowed to be invoked under § 1331, it would become necessary for courts to decide whether the action "arises under federal law," and this jurisdictional decision would largely depend on whether the governing law is state or federal. Determinations of this nature are among the most difficult and subtle that federal courts are called upon to make.[43] Last Term's decision in *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, illustrates the difficulties raised by the attempted application of a state statute of limitations to maritime personal injury actions. These problems result from the effort to fit state laws into the scheme of federal maritime law.

These difficulties, while nourishing academic speculation, have rarely confronted the courts. This Court has been able to wait until an actual conflict between state and federal standards has arisen, and only then proceed to resolve the problem of whether the State was free to

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port in the history of the maritime law and in the decisions of this Court." *Just* v. *Chambers*, 312 U. S. 383, 389–390.

"It is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Id.*, at 391.

Thus Congress was careful to make the Death on the High Seas Act applicable only outside state territorial waters so as not to intrude on state legislative competence. 59 Cong. Rec. 4482–4486.

[43] See, *e. g.*, *Caldarola* v. *Eckert*, 332 U. S. 155.

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regulate or federal law must govern. For example, if a State allowed the survival of a cause of action based on unseaworthiness as defined in the maritime law it was immaterial whether the standard was federal and governed by decisions of this Court, or was subject to state variations.[44] Thus we have been able to deal with such conceptual problems in the context of a specific conflict and a specific application of policy, as is so well illustrated by the *McAllister* case. However, such practical considerations for adjudication would be unavailable under an expanded view of § 1331. Federal courts would be forced to determine the respective spheres of state and federal legislative competence, the source of the governing law, as a preliminary question of jurisdiction; for only if the applicable law is "federal" law would jurisdiction be proper under § 1331. The necessity for jurisdictional determinations couched in terms of "state" or "federal law" would destroy that salutary flexibility which enables the courts to deal with source-of-law problems in light of the necessities illuminated by the particular question to be answered. Certainly sound judicial policy does not encourage a situation which necessitates constant adjudication of the boundaries of state and federal competence.

Typical also of the consequences that are implicit in this proposed modification of maritime jurisdiction, is the restriction of venue that would result from this novel interpretation of § 1331 of the Act of 1875. Liti-

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[44] Illustrative of this process is the recent case of *Allen* v. *Matson Navigation Co.*, 255 F. 2d 273 (C. A. 9th Cir. 1958). The court remarked that "In discussing the question of the duty which the defendant owed to its passengers, all of the parties agreed that the law of California is to be applied. The trial court made a like assumption. We find it unnecessary to indicate any view as to whether in this the parties were correct for as we see it, no matter which law applies, the rule is the same, whether that of California, or that of the maritime law." *Id.*, at 277.

gants of diverse citizenship are now able to invoke the federal law forum for the trial of saving-clause cases. Such litigants are aided in their search for a federal forum by the liberality of the venue provisions applicable to actions based on diversity of citizenship. These provisions allow the action to be brought either "where all plaintiffs or all defendants reside." [45] If saving-clause actions were to be brought within the scope of § 1331, this choice could be no longer made. Plaintiffs would be subject to the rigid requirement that suit must be "brought only in the judicial district where all defendants reside . . . ," [46] and this would be so even where there is, in fact, diversity of citizenship.[47]

In the face of the consistent and compelling inferences to be drawn from history and policy against a break with a long past in the application of the Act of 1875, what justification is offered for this novel view of the statute? Support is ultimately reduced, one is compelled to say, to empty logic, reflecting a formal syllogism. The argument may thus be fairly summarized. It was not until recently, in a line of decision culminating in *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406, that it became apparent that the source of admiralty rights was a controlling body of federal admiralty law. This development led to a deepened consideration of the jurisdictional consequences of the federal source of maritime law. And so one turns to the Act of 1875. The Act of 1875 gave orig-

[45] 28 U. S. C. § 1391 (a).

[46] 28 U. S. C. § 1391 (b).

[47] *Macon Grocery Co.* v. *Atlantic Coast Line R. Co.,* 215 U. S. 501. The more restrictive provisions apply in any action "wherein jurisdiction is not founded solely on diversity of citizenship . . . ." 28 U. S. C. § 1391 (b).

There may also well be situations in which the venue provisions prevent the joinder of defendants in a Federal District Court and the state court rules of procedure do not allow their joinder, thus precluding suit altogether.

inal jurisdiction to the federal courts over all cases arising under the Constitution and laws of the United States. Maritime law was federal law based on a constitutional grant of jurisdiction. Thus maritime cases arose under the Constitution or federal laws. By this mode of reasoning the words of the jurisdictional statute are found to "fit like a glove." [48]

Although it is true that the supremacy of federal maritime law over conflicting state law has recently been greatly extended, the federal nature of the maritime law administered in the federal courts has long been an accepted part of admiralty jurisprudence. The classic statement of Mr. Justice Holmes in *The Western Maid,* 257 U. S. 419, 432, summed up the accepted view that maritime law derived its force from the National Government and was part of the laws of the United States; and this was merely a restatement of a view which was clearly set forth in 1874 in *The Lottawanna,* 21 Wall. 558.[49] Thus the theory which underlies the effort to infuse general maritime jurisdiction into the Act of 1875 rests on no novel development in maritime law, but on premises as available in 1875 as they are today.

The simple language of the Act of 1875 conceals complexities of construction and policy which have been already examined. When we apply to the statute, and to the clause of Article III from which it is derived, commonsensical and lawyer-like modes of construction, and the evidence of history and logic, it becomes clear that the words of that statute do not extend, and could not reasonably be interpreted to extend, to cases of admiralty and maritime jurisdiction. The statute is phrased in

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[48] *Jenkins* v. *Roderick,* 156 F. Supp. 299, 301 (U. S. D. C. Mass. 1957).

[49] In *The Lottawanna,* the Court clearly recognized that maritime law was a body of uniform federal law drawing its authority from the Constitution and laws of the United States.

terms which, as a matter of inert language, lifeless words detached from the interpretive setting of history, legal lore, and due regard for the interests of our federal system, may be used as playthings with which to reconstruct the Act to include cases of admiralty and maritime jurisdiction. If the history of the interpretation of judiciary legislation teaches anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words—a failing to which the Court has not been subject since the *Pacific Railroad Removal Cases.*[50] The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding.[51]

The considerations of history and policy which investigation has illuminated are powerfully reinforced by the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes. A reluctance which must be even more forcefully felt when the expansion is proposed, for the first time, eighty-three years after the jurisdiction has been conferred. Mr. Justice Stone, speaking of the Act of 1875, pointed out that "[t]he policy

[50] 115 U. S. 1. Congress, with an exception having its own justification, has wiped out this unfortunate decision. Act of February 13, 1925, § 12, 43 Stat. 941, now 28 U. S. C. § 1349.

[51] Of course the many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts. See *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505; *Louisville & Nashville R. Co.* v. *Mottley,* 211 U. S. 149; *Gully* v. *First National Bank,* 299 U. S. 109; *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667; see Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 160–163 (1953).

of the statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." [52] Certainly this wise counsel is deeply persuasive when we are asked to accept a doctrine which would cut into a jurisdiction exercised by the States since Colonial days. Of course if compelling reasons can be found for redefining the statute, if an ancient error cries out for rectification, we should not be deterred from applying new illuminations to the interpretation of past enactments. However, in our examination of the manifold considerations of history, of construction, of the policy which underlies the allocation of competence over maritime matters in our federal system, and the considerations of judicial administration and procedure called into question—all of which direct us to the rejection of the proposed infusion of general maritime jurisdiction into the Act of 1875—we are pointed to no considerations which lead us to overturn the existing maritime jurisdictional system—a system which is as old, and as justified by the experience of history, as the federal courts themselves.

(c) *"Pendent" and Diversity Jurisdiction.*—Rejection of the proposed new reading of § 1331 does not preclude consideration of petitioner's claims under the general maritime law. These claims cannot, we have seen, be justified under § 1331. However, the District Court may have jurisdiction of them "pendent" to its jurisdiction under the Jones Act. Of course the considerations which call for the exercise of pendent jurisdiction of a state claim related to a pending federal cause of action within the appropriate scope of the doctrine of *Hurn* v. *Oursler,* 289 U. S. 238, are not the same when, as here, what is involved

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[52] *Healy* v. *Ratta,* 292 U. S. 263, 270.

are related claims based on the federal maritime law. We perceive no barrier to the exercise of "pendent jurisdiction" in the very limited circumstances before us. Here we merely decide that a district judge has jurisdiction to determine whether a cause of action has been stated if that jurisdiction has been invoked by a complaint at law rather than by a libel in admiralty, as long as the complaint also properly alleges a claim under the Jones Act. We are not called upon to decide whether the District Court may submit to the jury the "pendent" claims under the general maritime law in the event that a cause of action be found to exist.

Respondents Garcia & Diaz and Quin Lumber Company, New York corporations, and International Terminal Operating Company, a Delaware corporation, are of diverse citizenship from the petitioner, a Spanish subject. Since the Jones Act provides an independent basis of federal jurisdiction over the non-diverse respondent, Compania Trasatlantica, the rule of *Strawbridge* v. *Curtiss,* 3 Cranch 267, does not require dismissal of the claims against the diverse respondents. Accordingly, the dismissal of these claims for lack of jurisdiction was erroneous.

II. The Claims Against Compania Trasatlantica—The Choice-of-Law Problem.

We now turn to the claims against Compania Trasatlantica under the Jones Act and the general maritime law. In light of our recent decision in *Lauritzen* v. *Larsen,* 345 U. S. 571, these claims present the narrow issue, whether the maritime law of the United States may be applied in an action involving an injury sustained in an American port by a foreign seaman on board a foreign vessel in the course of a voyage beginning and ending in a foreign country.

While *Lauritzen* v. *Larsen* involved claims asserted under the Jones Act, the principles on which it was decided did not derive from the terms of that statute. We pointed out that the Jones Act had been written "not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations." 345 U. S., at 577. Thus the Jones Act was applied "to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law." 345 U. S., at 581. The broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally. Of course, due regard must be had for the differing interests advanced by varied aspects of maritime law. But the similarity in purpose and function of the Jones Act and the general maritime principles of compensation for personal injury, admit of no rational differentiation of treatment for choice of law purposes. Thus the reasoning of *Lauritzen* v. *Larsen* governs all claims here.[53]

We are not here dealing with the sovereign power of the United States to apply its law to situations involving one or more foreign contacts.[54] But in the absence of a contrary congressional direction, we must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due

[53] The District Court adjudicated only the Jones Act claim on the merits, dismissing for lack of jurisdiction the claims under the general maritime law. However, since the considerations are identical, we here dispose of all the claims against Compania Trasatlantica.

[54] See *Wildenhus's Case,* 120 U. S. 1.

recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community. These principles do not depend upon a mechanical application of a doctrine like that of *lex loci delicti commissi.* The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations. We need not repeat the exposition of the problem which we gave in *Lauritzen* v. *Larsen.* Due regard for the relevant factors we there enumerated, and the weight we indicated to be given to each, preclude application of American law to the claims here asserted.

In this case, as in *Lauritzen* v. *Larsen,* the ship is of foreign registry and sails under a foreign flag. Both the injured seaman and the owner of the ship have a Spanish status: Romero is a Spanish subject and Compania Trasatlantica a Spanish corporation. Unlike the contract in *Lauritzen,* Romero's agreement of hire was entered into in Spain. By noting this fact, we do not mean to qualify our earlier view that the place of contracting is largely fortuitous and of little importance in determining the applicable law in an action of marine tort. Here, as in *Lauritzen,* the foreign law provides a remedy for the injury, and claims under that law may be conveniently asserted before the Spanish consul in New York.[55]

In *Lauritzen* v. *Larsen* the injury occurred in the port of Havana and the action was brought in New York. Romero was injured while temporarily in American territorial waters. This difference does not call for a difference in result. Discussing the significance of the place of the

[55] 142 F. Supp. 570, 573–574.

wrongful act, we pointed out in *Lauritzen* that "[t]he test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate. . . . the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag." 345 U. S., at 583–584. Although the place of injury has often been deemed determinative of the choice of law in municipal conflict of laws, such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations. To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country. The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury.

Thus we hold that the considerations found in *Lauritzen* v. *Larsen* to preclude the assertion of a claim under the Jones Act apply equally here, and affirm the dismissal of petitioner's claims against Compania Trasatlantica.

III. The Claims Against the Other Respondents.

(a) Petitioner made claims based both on the Jones Act and the general maritime law against Garcia & Diaz, Inc. At the pre-trial hearing the District Court concluded that Garcia & Diaz was not Romero's employer and did not operate and control the vessel at the time of

the injury. These issues were properly adjudicated, and thus the claims for unseaworthiness and maintenance and cure were properly dismissed. However, the District Court did not consider, and its disposition of the case did not require it to consider, whether petitioner was asserting a claim based upon the negligence of Garcia & Diaz; a claim independent of the employment relationship or operation and control. Thus it is necessary to remand the case for further proceedings as to this respondent.

(b) The claims against International Terminal Operating Co., and Quin Lumber Co., for a maritime tort, were dismissed for lack of jurisdiction. Our decision on the jurisdictional issues necessitates the return of the claims against these respondents for further adjudication.

The judgment of the Court of Appeals is vacated and the cause remanded to the District Court for further proceedings not inconsistent with this opinion.

Vacated and remanded.

APPENDIX TO OPINION OF THE COURT.

The following is the list of treatises on federal procedure and jurisdiction and admiralty law which were examined to determine if any commentator gave any intimation that the Act of 1875 had swept admiralty jurisdiction within its scope. No such intimation is found in a single treatise. On the contrary, all those which dealt with the subject specifically assumed that the federal courts on the law side had jurisdiction over a maritime cause after the Act of 1875 as before only when the parties were of diverse citizenship.

Boyce, Manual of the Practice in the Circuit Courts (1869).

Abbott, The United States Courts and Their Practice (1877).

Phillips, Statutory Jurisdiction and Practice of the Supreme Court of the United States (1878).

DESTY, Manual of the Law Relating to Shipping and Admiralty (1879).

CURTIS, Jurisdiction, Practice and Peculiar Jurisprudence of the Courts in the United States (1880).

BUMP, Federal Procedure (1881).

MILLER and FIELD, Federal Practice (1881).

COHEN, Admiralty—Jurisdiction, Law and Practice (1883).

FIELD, Constitution and Jurisdiction of the Courts of the United States (1883).

SPEAR, Law of the Federal Judiciary (1883).

THATCHER (Thatcher's Practice)—A Digest of Statutes, Equity Rules and Decisions upon the Jurisdiction, Pleadings and Practice of the Circuit Courts of the United States (1883).

THATCHER (Thatcher's Practice)—A Digest of Statutes, Admiralty Rules and Decisions upon the Jurisdiction, Pleadings and Practice of the District Courts of the United States (1884).

HENRY, Jurisdiction and Procedure of the Admiralty Courts (1885).

HOLT, The Concurrent Jurisdiction of the Federal and State Courts (1888).

CURTIS, Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States (rev. ed. 1896).

BENEDICT, The American Admiralty (3d ed. 1898).

GARLAND and RALSTON, Constitution and Jurisdiction of the U. S. Courts (1898).

SIMONTON, CHARLES H. (U. S. Circuit Judge), The Federal Courts, Their Organization, Jurisdiction and Procedure (2d ed. 1898).

CARTER, The Jurisdiction of Federal Courts as Limited by the Citizenship and Residence of the Parties (1899).

DESTY, Manual of Practice in the Courts of the United States (9th ed. 1899).

MAY, Practice and Procedure of the U. S. Supreme Court (1899).

DWYER, The Law and Procedure of United States Courts (1901).

HUGHES, Handbook of Admiralty Law (1901).

TAYLOR, Jurisdiction and Procedure of the Supreme Court of the U. S. (1905).

ROSE, Code of Federal Procedure (1907).

BATES, Federal Procedure at Law (1908).

ENCYCLOPEDIA OF UNITED STATES SUPREME COURT REPORTS (1908).

BENEDICT, The American Admiralty (4th ed. 1910).

LOVELAND, Appellate Jurisdiction of the Federal Courts (1911).

HUGHES, Handbook of Jurisdiction and Procedure in United States Courts (2d ed. 1913).

BUNN, Jurisdiction and Practice of the Courts of the United States (1914) (also 3d ed. 1927; 4th ed. 1939; 5th ed. 1949).

THAYER, Jurisdiction of the Federal Courts (1914).

CHAPLIN, Principles of the Federal Law (1917).

LONG, Outline of the Jurisdiction and Procedure of the Federal Courts (3d ed. 1917).

FOSTER, Federal Practice (6th ed. 1920).

HUGHES, Handbook of Admiralty Law (2d ed. 1920).

LOVELAND, Annotated Forms of Federal Procedure (3d ed. 1922).

ROSE, Jurisdiction and Procedure of the Federal Courts (2d ed. 1922).

MONTGOMERY, Manual of Federal Jurisdiction and Procedure (3d ed. 1927).

WILLIAMS, Federal Practice (2d ed. 1927).

DOBIE, Handbook of Federal Jurisdiction and Procedure (1928).

LONGSDORF, Cyclopedia of Federal Procedure (1928).

ZOLINE, Federal Appellate Jurisdiction and Procedure (3d ed. 1928).

HUGHES, Federal Practice, Jurisdiction and Procedure (1931).

ROSE, Jurisdiction and Procedure of the Federal Courts (4th ed. 1931).

BROWNE, Federal Appellate Practice and Procedure (1932).

BROWN, Guide to Federal and Bankruptcy Practice (1933).

HOPKINS, Federal Judicial Code and the Judiciary (4th ed. 1934).

MARKER, Federal Appellate Jurisdiction and Procedure (1935).

ROSE, Jurisdiction and Procedure of the Federal Courts (5th ed. 1938).

SIMKINS, Federal Practice (3d ed. 1938) (also 1942 Supplement).

ROBINSON, Handbook of Admiralty Law in the United States (1939).

BENEDICT, Law of American Admiralty (Knauth ed. 1940).

POUND, Organization of Courts (1940).

KIRSHBAUM, Outline of Federal Practice and Procedure (1941).

O'BRIEN, Manual of Federal Appellate Procedure (3d ed. 1941).

MONTGOMERY, Manual of Federal Jurisdiction and Procedure (4th ed. 1942).

FEDERAL REDBOOK AND PRACTICE ANNUAL (Schweitzer ed. 2d ed. 1943).

BENDER, Federal Practice Manual (1948).

SUNDERLAND, Judicial Administration (1948).

GUANDOLO, Federal Procedure Forms (1949).

MOORE, A Commentary on the Judicial Code (1949).

WENDELL, Relations Between the Federal and State Courts (1949).

BARRON and HOLTZOFF, Federal Practice and Procedure (1950).

FINS, Federal Practice Guide (1950).

OHLINGER, Federal Practice (rev. ed. 1950), Replacement Vol. One–A.

MR. JUSTICE BLACK, dissenting.

Although this case has aroused much discussion about the scope of jurisdiction under 28 U. S. C. § 1331, I cannot feel that the issue is either complex or earth-shaking. The real core of the jurisdictional controversy is whether a few more seamen can have their suits for damages passed on by federal juries instead of judges. For the reasons stated by MR. JUSTICE BRENNAN here and by Judge Magruder in *Doucette* v. *Vincent,* 194 F. 2d 834, 839, I believe that federal jurisdiction under 28 U. S. C. § 1331 lies and a federal jury trial is proper. In particular I feel that technical or esoteric readings should not be given to congressional language which is perfectly understandable in ordinary English.

Much the same reason leads me also to dissent from Part II of the Court's opinion. By its terms the Jones Act applies to "*any seaman* who shall suffer personal injury in the course of his employment." 41 Stat. 1007, 46 U. S. C. § 688. (Italics added.) This Court in *Lauritzen* v. *Larsen,* 345 U. S. 571, held that the words "any seaman" did not include foreign seamen sailing foreign ships and injured in foreign waters. I dissented from that holding. It was based, I thought, on the Court's concepts of what would be good or bad for the country

internationally rather than on an actual interpretation of the language of the Jones Act. Thus, it seemed to me that the *Lauritzen* holding rested on notions of what Congress should have said, not on what it did say. Such notions, weak enough in *Lauritzen,* seem much weaker still in this case where the tort involved occurred in our own waters. I cannot but feel that, at least as to torts occurring within the United States, Congress knew what it was doing when it said "any seaman" and I must dissent from today's further and, I believe, unjustifiable reduction in the scope of the Jones Act. Moreover since the tort occurred in the navigable waters of the United States, I think the complaint against Compania Trasatlantica stated a good cause of action under general maritime law whether jurisdiction of the cause is based, as I believe, on 28 U. S. C. § 1331, or, as the Court assumes, on some theory of "pendent jurisdiction."

MR. JUSTICE DOUGLAS joins in the first paragraph of this opinion. He believes that *Lauritzen* v. *Larsen,* 345 U. S. 571, is inapposite to the present case, because of the numerous incidents connecting this transaction with the United States. He therefore agrees with MR. JUSTICE BLACK that the District Court should take jurisdiction over petitioner's claim against Compania Trasatlantica.

MR. JUSTICE BRENNAN, dissenting in part and concurring in part.

I.

I regret that I cannot agree with the Court's holding that § 1331 of the Judicial Code does not give jurisdiction to a Federal District Court, sitting at law, over a seaman's claims against his employer for maintenance and cure and for indemnity damages for injury caused by unseaworthiness, where the claims are asserted in the manner of a

suit at common law and the requisite jurisdictional amount is in controversy. I believe that the jurisdictional statute and the logic of the principles of this Court's decisions construing it compel a contrary result. I think the Court's opinion attempts to turn aside the statutory language and the thrust of this Court's decisions with reasoning that is altogether too insubstantial.

The point on which the Court and I are at issue is one which has been much mooted in the Courts of Appeals, and I agree that it is appropriate that a thorough expression of views on it be presented. I propose first to explain why jurisdiction should be sustained under § 1331, and then to offer some reply to specific arguments set forth by the Court which apparently proceed from supposed practical inconveniences that are thought to arise from sustaining the jurisdiction.

The petitioner brought this suit in a Federal District Court. The element in his action with which I am dealing is his claim for money damages from Compania Trasatlantica, his employer, for breach of the shipowner's duty to maintain a seaworthy ship and for maintenance and cure. Since there was no diversity of citizenship between petitioner and Compania Trasatlantica,[1] jurisdiction was predicated on the grant in 28 U. S. C. § 1331 of jurisdiction in "civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States." [2] Jurisdiction of such claims

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[1] The grant of diversity of citizenship jurisdiction contained in 28 U. S. C. § 1332 contains no language which would include a suit by one alien against another, even where there might also be citizen defendants. For the constitutionality of a broader statute, at least under Art. III, § 2, cl. 1, subclause 8, see *Hodgson* v. *Bowerbank*, 5 Cranch 303.

[2] At the time of the commencement of petitioner's suit, § 1331 read:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value

could have been established on the admiralty side of the District Court since 28 U. S. C. § 1333 specifically grants jurisdiction in the District Courts in "case[s] of admiralty or maritime jurisdiction." The question is whether petitioner can bring this part of his action on the law side of a Federal District Court.

First. In a long series of decisions tracing from *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, this Court has made it clear that, in a seaman's action to recover damages for a maritime tort from his employer, the substantive law to be applied is federal maritime law made applicable as part of the laws of the United States by the Constitution itself, and that the right of recovery, if any, is a federally created right.[3] *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239; *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406. Cf. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 124–125.

It is true that early in our history maritime law was thought to be an international law merchant which was impartially administered by the several maritime nations of the world. This concept was expressed by Chief Justice Marshall's language in *American Ins. Co.* v. *Canter,*

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of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Section 1, Act of July 25, 1958, 72 Stat. 415, increased the requisite jurisdictional amount to $10,000.

[3] It is true that to a certain extent state law may be consulted in this area, at least where it does not work "material prejudice to the characteristic features of the general maritime law" or interfere with "the proper harmony and uniformity of that law. . . ." *Southern Pacific Co.* v. *Jensen, supra,* at 216. For example, recovery has made use of state wrongful death acts, *The Hamilton,* 207 U. S. 398; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Levinson* v. *Deupree,* 345 U. S. 648, and of state survival statutes, *Just* v. *Chambers,* 312 U. S. 383.

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1 Pet. 511, 545–546: "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise." But that this did not mean that there was some supranational law, by which American courts were bound, was made clear by Mr. Justice Bradley in *The Lottawanna,* 21 Wall. 558, 572, where he said for the Court: "[I]t is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. . . ." This teaching was emphasized in *The Western Maid,* 257 U. S. 419, 432, where Mr. Justice Holmes, speaking for the Court, said: "[W]e must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow."

The sovereign power which determines the rules of substantive law governing maritime claims of the sort which petitioner asserts here is federal power, speaking through Congress as in the case of the Jones Act, or through this Court in the case of judicially defined causes of action. *Southern Pacific Co.* v. *Jensen, supra.* This is an area where the federal courts have defined substantive rules themselves, and have not applied state law. Indeed, it is federal substantive law so created which the States must enforce in such actions brought in state courts, *Garrett* v. *Moore-McCormack Co., supra,* and which the federal courts have applied in actions at law in which diversity of citizenship has been relied upon as a jurisdictional basis, *Pope & Talbot, Inc.,* v. *Hawn, supra.* The causes of action asserted against his employer by petitioner here present "no claim created by or arising out

of [state] law. His right of recovery . . . is rooted in federal maritime law." *Id.*, at 409.

Second. Since petitioner's causes of action for unseaworthiness and for maintenance and cure are created by federal law, his case arises under "the laws . . . of the United States" within the meaning of § 1331, for it is clear that "a suit arises under the law that creates the cause of action." Holmes, J., in *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260.[4] The contention cannot be accepted that since petitioner's rights are judicially defined, *The Osceola*, 189 U. S. 158, they are not created by "the laws . . . of the United States" within the meaning of § 1331; or, in other words, that only maritime rights created by Act of Congress are created by "the laws . . . of the United States." In another context, that of state law, this Court has recognized that the statutory word "laws" includes court decisions. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. The converse situation is presented here in that federal courts have an extensive responsibility of fashioning rules of substantive law in maritime cases. See *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 314. These rules are as fully "laws" of the United States as if they had been enacted by Congress. Cf. *Garrett* v. *Moore-McCormack Co., supra; Warren* v. *United States*, 340 U. S. 523, 526–528; and see *Mater* v. *Holley*, 200 F. 2d 123.[5]

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[4] There is not presented here the problem of interpreting, in its periphery where state and federal elements are blended, the scope of the arising-under provisions of § 1331. See *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180; *Gully* v. *First National Bank*, 299 U. S. 109; *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667.

[5] Since § 1331 is derived from § 1 of the Judiciary Act of 1875, 18 Stat. 470, and since the language of the jurisdictional grant in that Act is taken from Art. III, § 2, it is worthy of note that the earlier draft forms of Article III had provided that the judicial power should extend to "cases arising under laws passed by the legislature of the

Third. Notwithstanding these conclusions, jurisdiction under § 1331 would, of course, not lie if it were beyond the constitutional power of Congress to vest jurisdiction over this action of a seaman against his employer, a matter falling admittedly within the "admiralty or maritime jurisdiction," in a federal court sitting at law. But it is too late to make such an argument. The jurisdictional treatment of the rights of seamen under the Jones Act, a cause of action bound up with the cause of action in question here, is preclusive on the issue. The Jones Act was held in *Panama R. Co.* v. *Johnson,* 264 U. S. 375, to be authorized by the legislative power residing in the Admiralty Clause of Article III. The right of action granted was, however, specifically stated by Congress to be exercisable "at law, with the right of trial by jury" and in the Federal District Courts. This treatment was upheld, against constitutional challenge, by the Court, which held that jurisdiction properly lay, at the option of the plaintiff, either in admiralty or on the law side of the District Court. "[T]he constitutional provision interposes no obstacle to permitting rights founded on the maritime law or an admissible modification of it to be enforced as such through appropriate actions on the common-law side of the courts . . . ." *Id.,* at 388. And the unchallenged maintenance of the very cause of action in question here at law in the District Courts under 28 U. S. C. § 1332, where diversity of citizenship is present, is further proof that no constitutional inhibition to the maintenance of such an action at law under § 1331 exists. Cf. *The Belfast,* 7 Wall. 624, 644.

United States." See Madison's Diary, for July 26, August 6, and August 27, 1787 (II Elliot's Debates (2d ed. 1941) 368, 376, 380); Warren, The Making of the Constitution (1937 ed.), 538–539; *United States* v. *Flores,* 289 U. S. 137, 148.

But despite the constitutional power of Congress, jurisdiction under § 1331 may still be defeated if that power has not there been exercised; in other words, if that jurisdictional grant is to be read as containing an implied exception as to cases falling within the "admiralty or maritime jurisdiction." See *Paduano* v. *Yamashita Kisen Kabushiki Kaisha,* 221 F. 2d 615; *Jenkins* v. *Roderick,* 156 F. Supp. 299, 302. This I take to be the net effect of the Court's reasoning. The gist of the argument, as it has been developed in the Courts of Appeals, is that § 1331 was enacted "to insure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights . . . ." *Paduano* v. *Yamashita Kisen Kabushiki Kaisha, supra,* at 618. Continuously since 1789 Congress has provided specially for admiralty courts in which rights under the federal maritime law could be asserted. The argument runs that it follows that claims under the maritime law were not intended to fall within the scope of § 1331. And here, the Court's conclusion rests primarily on an analysis of the terms and background of the 1875 Act which was the ancestor of § 1331, and on various inferences drawn from silence after that Act's passage.

The members of the First Congress, in agreement that national courts of admiralty were an imperative necessity of the times, 1 Annals of Cong. 797–798 (1789), gave to the District Courts in § 9 of the First Judiciary Act original jurisdiction over "all civil causes of admiralty and maritime jurisdiction . . . ." 1 Stat. 76, 77. Under § 21 the Circuit Courts were given appellate jurisdiction "in causes of admiralty and maritime jurisdiction . . . ." 1 Stat. 83. These phrases followed almost literally the wording of Art. III, § 2, of the Constitution, extending the federal judicial power "to all Cases of admiralty and maritime Jurisdiction . . . ." Significantly, the First

Judiciary Act granted to the District and Circuit Courts no general federal-question jurisdiction.

Section 9 of the First Judiciary Act, however, contained the clause ". . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ." The Saving Clause survives in 28 U. S. C. § 1333, phrased ". . . saving to suitors in all cases all other remedies to which they are otherwise entitled. . . ." This provision, plainly, was a recognition that there were, prior to 1789, maritime claims within the concurrent jurisdiction of courts of admiralty and law, 1 Benedict, American Admiralty (6th ed. 1940), § 20; *Schoonmaker* v. *Gilmore,* 102 U. S. 118, 119, and it was clearly the intention of Congress to perpetuate this duality of remedy. It is true that certain classes of cases, such as the traditional *in rem,* prize, and seizure cases, lay within the exclusive jurisdiction of the admiralty, 1 Benedict, American Admiralty, § 23; *The Moses Taylor,* 4 Wall. 411; *The Hine* v. *Trevor,* 4 Wall. 555; *The Glide,* 167 U. S. 606, but all other suits under the maritime law of an *in personam* nature might be brought as well in the state courts or, under the diversity jurisdiction, in the Federal Circuit Courts. § 11, 1 Stat. 78.

It is thus clear that any argument that § 1333 is an exclusive grant of jurisdiction would be false to the history of enactments allocating the judicial power of the United States. The fact that, in a diversity case under § 1332, the claimant is free to proceed on the law side of the federal court to enforce rights created by the federal maritime law, *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 88–89, clearly runs counter to any theory that the federal courts, because of § 9 of the Judiciary Act of 1789, can adjudicate maritime claims only while sitting in admiralty. There is no compelling reason why § 1333, which does not exclude maritime actions from being brought at law in a federal court under § 1332, should exclude them

from being so brought under § 1331.[6] Indeed, I find it a gross anomaly to hold, as the Court holds today, that an action rooted in federal law can be brought on the law side of a federal court only if the diversity jurisdiction, usually a vehicle for the enforcement of state-created rights, can be invoked.

Plainly there is nothing in the language of § 1331 which would exclude jurisdiction of maritime claims of the nature asserted by petitioner. Rather, in more than a manner of speaking, the language of that section fits the cause of action in question here "like a glove," *Jenkins* v. *Roderick,* 156 F. Supp. 299, 301. But the Court reasons that the section must be read restrictively because the corresponding jurisdictional grant in the Constitution speaks of "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . ." This specification of "law and equity," reflected in the 1875 ancestor[7] of present § 1331 as "suits of a civil nature at common law or in equity . . . arising under the Constitution or laws . . . ," is said to indicate that a suit arising under the substantive maritime law is not comprehended under the section. But the argument mistakes the nature of a Saving Clause action. An action brought under the Saving Clause is maintained "at law" or "in

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[6] It is argued that the policy of § 1331 "to insure the availability of a forum designed to minimize . . . hostility . . . to the vindication of federally created rights," has no application here because of the availability of a federal forum under § 1333. Substantially the same argument could be made in a diversity case under § 1332 since it would be assumed that the admiralty would be impartial in treatment of out-of-state parties. Cf. *Paduano* v. *Yamashita Kisen Kabushiki Kaisha, supra,* at 618.

[7] § 1, Act of March 3, 1875, c. 137, 18 Stat. 470. This was the first permanent statute vesting original "arising under" jurisdiction in the federal courts. Section 11 of the Act of February 13, 1801, c. 4, 2 Stat. 92, extended such jurisdiction, but it was shortly repealed by § 1 of the Act of March 8, 1802, c. 8, 2 Stat. 132.

equity," and the very action that Romero would assert here he would assert "at law." The mere fact that the substantive claim a court enforces in a particular Saving Clause action is rooted in the general maritime law does not transform the proceedings from a suit "at law' to one "in admiralty"; the state courts can hardly be said to sit "in admiralty" when they try actions under the Saving Clause. Cf. *The Hamilton,* 207 U. S. 398, 404. The Saving Clause itself, in its 1789 form, stated that what it was "saving" was "a common law remedy" to be available in maritime fact situations. It can readily be admitted that a suit "in admiralty" is not the same thing as a suit "at law." But this is not to say that a suit involving a maritime cause of action cannot be the subject of a suit "at law" in the federal courts. Obviously Saving Clause actions brought on the law side of the federal court, with diversity of citizenship present, are actions "at law." In fact, the grant of diversity jurisdiction in the 1875 Act was in the very same terms as the grant of the "arising under" jurisdiction; the same introductory phrase, "suits of a civil nature at common law or in equity," governed both grants. It seems to me very odd to say that this phrase, introducing two grants of jurisdiction, had the effect of excluding maritime causes of action entirely from the one but not at all from the other.

The legislative history of § 1331 does not indicate any intent on the part of Congress to exclude claims asserted under federal maritime law from its ambit. The present section is but the latest recodification of the provisions of the Judiciary Act of 1875, 18 Stat. 470, alluded to above, which for the first time with any permanence vested in the federal courts an original general federal-question jurisdiction over any claim which "arises under the Constitution, laws or treaties of the United States." The congressional debates focused so largely on proposed

changes in the diversity jurisdiction that no considered scrutiny was given to the provisions which have become § 1331. See 2 Cong. Rec. 4978–4988; Frankfurter and Landis, The Business of the Supreme Court (1927 ed.), 65–69. Nothing appears which would indicate a congressional intent to modify, by implication or otherwise, the sweep of the language of this Act, embodying as it does substantially the words of the constitutional grant.[8] And nothing appears which would indicate any intention that the Act's coverage be "frozen" to exclude federal causes of action which were not fully developed in 1875.

The Court argues, however, that Congress, aware of Chief Justice Marshall's statement that Article III created the admiralty jurisdiction as "distinct" from the "arising under" jurisdiction,[9] *American Ins. Co.* v. *Canter,*

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[8] I might say that I do not think impressive the Court's argument that because the members of the Senate Judiciary Committee and other Congressmen in 1875 were men of large legal attainments and learning they could not have intended a result contrary to the Court's when they participated in the enactment of the Judiciary Act. The Court states that men of such esteem would not "silently" have made such a "revolutionary" change in the maritime jurisdiction as a holding contrary to that of the Court's herein is supposed to be. But cf. Frankfurter and Landis, *op. cit., supra,* at 65: "This development in the federal judiciary ["arising-under" jurisdiction], which in retrospect seems revolutionary, received hardly a contemporary comment." At any rate, the Court's argument, to me, combines an unwarranted historical "cult of the personality" with an attribution of one's own views to prior generations. What is not involved here is some sort of conspiratorially silent change in federal jurisdiction, but the question whether a tacit exception should be engrafted on a thoroughgoing and explicit new jurisdictional grant; whether we should "read out" of the statute "what as a matter of ordinary English speech is in." *United States* v. *Hood,* 343 U. S. 148, 151.

[9] Marshall's statement in full is as follows:

"The Constitution and laws of the United States, give jurisdiction to the District Courts over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. We are therefore

supra, at 545, intended that the jurisdictional statutes be mutually exclusive. The manager of the 1875 legislation in the Senate declared of the bill generally that it conferred "precisely the power which the Constitution confers—nothing more, nothing less." 2 Cong. Rec. 4987. It is difficult to infer that Congress meant to crystallize any particular interpretation of the Constitution in the statute. But even if it were proper, in the absence of concrete indication, speculatively to breathe into our construction of § 1331 views of the Constitution [10] which might have served as a silent premise of congressional

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to inquire, whether cases in admiralty, and cases arising under the laws and Constitution of the United States, are identical.

"If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.'

"The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise." 1 Pet., at 545–546.

[10] I advert to these constitutional views only for such light as they may shed on Congress' probable intent at the time the Act of 1875 was under consideration. Marshall's statement may be thought to have been made in constitutional terms. As I have developed above, there can be no constitutional argument against the power of Congress to allocate this type of action, at least concurrently, to the law side of a federal court.

action, I do not think that the Court here is called on to do so. Marshall's statement is not, when understood in its context, contrary to my position, and in fact its proper scope was recognized before 1875.

Before discussing the *Canter* case, I think it wise to restate the precise nature of the issue before the Court. This is so because I fear the Court, in an expansive reading of *Canter* not justified either by what was decided there or by what was said there considered in the light of what was decided, has blurred the issue for decision today. The issue before us is not whether all cases "of admiralty and maritime jurisdiction" are *per se* encompassed in the statutory "arising under" jurisdiction. A suit seeking the sort of remedy that the common law is not competent to give could not be fairly contended to lie under § 1331; it would clearly be the sort of suit in which the jurisdictional grant of § 1333 was intended to be exclusive. The issue before us concerns only actions maintainable in some forum "at law" under the Saving Clause. And again, the issue is not even the narrower one whether Saving Clause actions are *per se* cognizable under § 1331. The tests of jurisdiction under § 1331 must still be met, and there is no contention that they are met merely by a showing that an action is one maintainable under the Saving Clause and involving the requisite jurisdictional amount. The plaintiff's right to recovery must still be one rooted in federal substantive law, and it has quite recently been made clear that there are Saving Clause actions that do not meet that test. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310. The issue before us is only whether the fact that an action is a Saving Clause action excludes it from § 1331 where it would otherwise be maintainable thereunder.

At issue in *American Ins. Co.* v. *Canter* was the power of a territorial court to make a decree selling cargo to satisfy a maritime lien *in rem* existing in favor of its

salvors. A state court, even under the Saving Clause, could not pass such a decree at all; it is the enforcement of the classic admiralty remedy, and a matter solely within the competence of the federal admiralty courts. *The Hine* v. *Trevor,* 4 Wall. 555. In the passage from Marshall's opinion relied upon, the Chief Justice was saying only that the Act of Congress which conferred on certain territorial courts jurisdiction in "cases arising under the laws and constitution of the United States," § 8, 3 Stat. 752, did not by that token alone grant them power to enforce a remedy peculiarly within the competence of admiralty courts.[11] In its broadest permissible interpretation, the dictum only means that the fact that the Constitution creates admiralty *jurisdiction* does not make all admiralty cases cases arising under the Constitution.[12] But Marshall's opinion does not say that an action seeking remedial relief of a sort which the common law is competent to give, and in which the plaintiff's right to recover is rooted in federal law, ceases to be a suit arising under the laws of the United States merely because it is of a maritime nature.[13] No one is contending here,

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[11] The power to enforce the remedy was in fact found in another section of the territorial organic act, § 7, 3 Stat. 752, under which jurisdiction could be vested in the court in question, rather than in the territorial Superior Court, to which § 8 related. Cf. note 14, *infra.*

[12] This seems to be the import of the first sentence from the Marshall dictum quoted in note 9, *supra.* And see note 13, *infra.*

[13] The opinion of Justice Johnson in the *Canter* case, rendering the judgment in the Circuit Court which Marshall's opinion affirmed on appeal, makes this very distinction. Johnson rejected the idea that the constitutional grant of admiralty jurisdiction made all admiralty cases cases arising under the Constitution. He did not believe that the cause of action for salvage arose under the Constitution or the laws of the United States. Yet he recognized, and enumerated, cases of a maritime nature where the substantive rights were rooted in federal law, and to which the grant of "arising under"

of course, that § 1331 is a grant of power to enforce remedies peculiar to the admiralty; the contention is solely that that section, which empowers a federal court to administer common-law remedies in vindication of rights of plaintiffs which take their origin from federal law, is not subject to an exception for rights taking their origin in federal *maritime* law. Marshall's opinion simply is not addressed to this question or dispositive of it.

Much is made by the Court of Marshall's language that the categories of actions he mentions are "distinct" and not "identical." Of course this is so, in a real sense and the only sense in which Marshall meant it. A matter affecting an ambassador or a consul is not *per se* an action "arising under," just as it is not *per se* a maritime action. But could not a case involving a consul be also a case of admiralty jurisdiction, under certain fact situations? And could not a suit by or against a consul happen, perchance, to be also one "arising under"? The fact that the jurisdictional categories are separate and distinct, as Marshall demonstrates, does not mean that a particular action could not come under the heading of more than one of them. Everyone recognizes that this is the case in a maritime matter in which the parties are of diverse citizenship. I see no reason why it should not be true here of Romero's general maritime law claims against his employer.

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jurisdiction would extend. *American Ins. Co.* v. *Canter,* 1 Fed. Cas. No. 302a, at 662. Johnson sat in the Supreme Court on the appeal, and did not express any indication that Marshall's opinion was contrary to what he had said at circuit. In fact, Marshall's language that "jurisdiction over the case, does not constitute the case itself," note 9, *supra,* appears to recognize Johnson's distinction; the constitutional grant of admiralty jurisdiction does not mean that all admiralty cases are "arising under" cases; the substantive law governing the case is determinative. Cf. *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476, 483.

It appears also to be clear that even before 1875 Marshall's opinion was not thought of as creating a situation in which it was impossible to say that there were maritime cases that could be also attributed to other categories of federal jurisdiction. Long before Congress contemplated the jurisdictional grant of 1875, this Court in *Taylor* v. *Carryl*, 20 How. 583, made it clear that there were fact situations which were of maritime cognizance, giving rise to rights for which the admiralty could supply a remedy, or for which alternatively proceedings at the course of common law lay. Maritime torts were specifically conceived of as within this category. The Court in that case followed the view of Mr. Justice Story expressed in his Commentaries on the Constitution, which were quoted with approval:

> "'Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the Constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of common law and admiralty are concurrent, (as in cases of possessory suits, mariners' wages, and marine torts,) there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, upon general reasoning, to contend for it. The reasonable interpretation . . . would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was con-

> current, it remained so. Hence the States could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction.' (3 Story's Com., sec. 1666, note.)" 20 How., at 598.

And it was understood before 1875 that this concurrent jurisdiction at law was not one merely existent in the state courts, but one available to suitors in the federal courts. See *The Belfast,* 7 Wall. 624, 644, *infra,* pp. 406–407.

Accordingly, I cannot see how it can be concluded that Congress in 1875 read Marshall's opinion as creating some sort of gulf that would make it impossible for any maritime case to be also one "arising under the Constitution or laws of the United States." [14]

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[14] Only four years after the passage of the 1875 Act, the Court rejected Marshall's dictum in the very narrow application that it had at the time it was originally delivered. In *The City of Panama,* 101 U. S. 453, the Court again was considering the power of a territorial court to enforce remedies peculiarly within the competence of a court of admiralty. A counterpart to the section on which Marshall finally predicated the jurisdiction in *Canter* was not presented by the case, and the Court based jurisdiction on a section of the territorial organic act similar to the one Marshall had rejected, *i. e.,* on § 9, 10 Stat. 175, 176, which extended jurisdiction in certain "cases arising under the constitution and laws of the United States." In holding that this "arising under" language granted admiralty jurisdiction, the Court referred to *Canter:* "Select passages of the opinion in that case, when detached from the context, may appear to support the theory of the respondents, but the actual decision of the court is explicitly and undeniably the other way." 101 U. S., at 458.

Of course, the question whether "arising under" language in an organic act for a territory should be taken as vesting the entire

Of course, one cannot rely, to prove the Court's thesis, on dicta in cases decided before 1875 to the effect that Saving Clause actions could be brought on the law side of a federal court only when there is diversity of citizenship, and the Court does not so rely. *The Belfast,* 7 Wall. 624, 643–644; *Leon* v. *Galceran,* 11 Wall. 185, 188; *Steamboat Co.* v. *Chase,* 16 Wall. 522, 533. The 1875 Act for the first time with any permanence granted general federal-question jurisdiction to the federal courts of first instance. It can hardly be denied that these statements were correct when made, but it is equally plain that they are no authority for limiting the law-side jurisdiction to diversity cases once the 1875 Act had been passed. Moreover, I cannot seriously attach any significance, as the Court does, to the repetition, *obiter,* of their formulation in a case decided shortly after the Act's passage, where the effect of the new statute was not at all presented or discussed. *Norton* v. *Switzer,* 93 U. S. 355, 356. In fact, the approach this Court followed in the interpretation of the Saving Clause during this period supports, rather than detracts from, my conclusion here. It was observed in 1869 that the remedies saved by the Saving Clause were saved "to suitors, and not to the State courts, nor to the Circuit Courts [15] of the United States. . . . Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any

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admiralty jurisdiction, the subject of the *Canter* and *Panama* decisions, in itself has no relation to the issue here. It is not contended that § 1331 somehow entitles the federal district courts to exercise all the admiralty power "at law." The issue is whether that section grants them a jurisdiction at law over federally based claims that remains unaffected by the circumstance that particular claims may be of a maritime nature.

[15] The original repositories of the diversity jurisdiction, § 11, Act of September 24, 1789, c. 20, 1 Stat. 78.

case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the State courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case." *The Belfast,* 7 Wall. 624, 644. It is clear from the Court's language that the common-law remedies saved to suitors could properly be enforced in any tribunal otherwise having jurisdiction; the remedies saved were saved generally to suitors without discrimination as to any tribunal.

Nor can I consider it sound to place the reliance the Court has placed on the fact that the arguments we are considering today were not raised until 1950. Till then no court ever considered the problem that we discuss here at great length. None of the assortment of commentators listed in the Court's Appendix ever discussed it. The Court's argument, in fact, claims to draw force from the fact that it was not discussed at all. From the fact that the issue was never explored or tried at all till 1950, when Judge Magruder, in a dictum in *Jansson* v. *Swedish American Line,*[16] 185 F. 2d 212, 216–218, took a point of view similar to the one expressed here, we are asked to infer that the argument for jurisdiction should not succeed when finally raised. I cannot accept this as a convincing argument in the construction of a broadly written statute which was intended, at least in some aspects, to be as broad and dynamic as the Constitution itself, and which has served as the basic jurisdictional entitlement for the vindication of the numerous and increasing types of federally created rights in the lower federal courts ever since its

[16] Judge Magruder thoroughly developed his views in *Doucette* v. *Vincent,* 194 F. 2d 834.

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enactment. It is a modern development in legal science in this country's federal system that increasing concern is taken with the source of the substantive law administered by the courts. *Southern Pacific Co.* v. *Jensen, supra,* and notably *Erie R. Co.* v. *Tompkins, supra,* are indications of this trend. When lawyers and judges in our federal system came to concentrate more and more on the source of the substantive law administered in the courts, and when this Court's opinions made it increasingly clear that there were kinds of maritime actions where the underlying right to recover was rooted in federally created law, inadmissible of significant modification by the States, it was an inevitable consequence that the relation of § 1331 to maritime matters would come for the first time to be examined, as Judge Magruder examined it in the *Jansson* and *Doucette* cases. If one views the history of the common-law system of adjudication as the history of a process, one must conclude that the "historical" material relied upon by the Court has nothing to do with this sort of history at all, except to illustrate its antithesis.

It is, finally, true that this Court has adhered to a policy of construing jurisdictional statutes narrowly. *Healy* v. *Ratta,* 292 U. S. 263, 270; *Thomson* v. *Gaskill,* 315 U. S. 442, 446. In regard to the grant of federal-question jurisdiction to the District Courts, this Court has insisted that a claim created under federal law be a necessary part of the plaintiff's case, *Louisville & Nashville R. Co.* v. *Mottley,* 211 U. S. 149, and that this claim be truly federal in nature, *Gully* v. *First National Bank,* 299 U. S. 109. But the present problem is apart from this line of cases, for here it is clear that petitioner is presenting to a federal court a claim created by federal law, and the objection is that somehow Congress intended to exclude claims of this particular sort from the grant in § 1331. But the arguments presented for such a narrow construction appear to me too insubstantial to withstand the logic of petitioner's

position. However willing one might be to resolve doubtful language against jurisdiction, exceptions to statutory language cannot be manufactured in a manner unwarranted by the words themselves and derived from the pertinent history only by a process of futile speculation. I am compelled to the conclusion that it is the effect of the 1875 Act and its intent, judged by the lights by which the courts must discern legislative intent, that the federal courts possess original jurisdiction, at law, to determine claims arising under federal substantive maritime law, where the common law is competent to afford the remedy sought by the plaintiff.

Fourth. The Court envisions various unfortunate results, from a practical standpoint, that would ensue from a holding on the jurisdictional issue under § 1331 contrary to its own. I shall comment briefly on its arguments.

It is first argued that the recognition of jurisdiction under § 1331 would, combined with the removal provisions of § 1441 (b) of the Judicial Code, operate to destroy the competence of the States in maritime matters altogether. A source cited by the Court itself [17] indicates that in the five-year period 1953 to 1957 inclusive only about 150 decisions in Saving Clause actions have been rendered in all of the state courts of the country. As I have developed, resolution of the jurisdictional issue contrary to the majority's view would not mean that all these cases would be assertable originally in the federal court or removable there, even present $10,000 in controversy. It is apparent then that the removability point addresses itself to a situation nearly *de minimis*. Saving Clause suitors seem long ago to have deserted the state courts. I therefore cannot share the concern that

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[17] The Seventh 5-Year Index-Digest of American Maritime Cases, 1953–1957 (1957), xliii–xlviii. This source reports all state court decisions, including those not published otherwise.

state judiciaries will be deprived of their historic active roles in the development of maritime law. Of the few actions that are left in the state courts, many may stay, for aught that can be predicted now. What sort of role do the state judiciaries now have in the development of the maritime law, with thirty-odd Saving Clause actions a year among them? Will the doctrine really put an end to this role, whatever it is? And it must be noted that such legislative competence as they possess remains to the States regardless of what may happen to the number of maritime cases in their courts; the view I have urged does not subtract one iota from the legislative competence of the States. And it is only because of an enlargement of removal that it affects their judicial competence; it does not take away their original jurisdiction at all, if suitors are content with it.

In further elaboration of the inroads on state competence which rejection of the Court's view is supposed to entail, it is stated that it is a destructive oversimplification to claim that all enforced rights pertaining to maritime matters are rooted in federal law. So it is; and no one is so claiming. The point is not that all Saving Clause actions meet the "arising under" test of § 1331.[18] It is, however, perfectly evident from the past holdings of this Court that the seaman's action for unseaworthiness and maintenance and cure is rooted in federal law, and it is only this claim that need present the issue of the case as

[18] The Court later, however, recognizes that no one is arguing that all Saving Clause actions *per se* are encompassed by § 1331. But the argument then progresses that it will be unfortunate if the courts are forced to determine *in limine* whether various Saving Clause actions do or do not "arise under" for § 1331 purposes. Is it really an obstacle to the efficient administration of justice if a trial court, at the first stage of litigation, is called upon precisely to determine what is the legal system that has created the cause of action on which the plaintiff is suing?

to § 1331. I agree perfectly with the Court's observation that in our federal system allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy. I think that § 1331 embodies this approach by vesting in the federal courts, in civil actions, jurisdiction, at the option of the suitors, over all suits seeking a legal or equitable remedy, arising under federal law and involving a specified amount, and that this is so whether they involve maritime matters or not. I cannot see how it fits with the "realities of power and interest and national policy" to say that there is federal jurisdiction at common law over federally defined maritime causes of action only if there is diversity of citizenship among the parties involved in them.

The Court next argues that a holding to the contrary of its own will produce venue problems, and will in fact be unduly restrictive toward plaintiffs in their choice of forums. Where the District Courts have jurisdiction under § 1331 (even though diversity may also be present) § 1391 (b) of the Judicial Code rather than § 1391 (a) governs, and the suit must be brought in the defendants' residence district, and may not be brought in the plaintiffs' residence district, unless of course it also happens to be the defendants'. But one reading the discussion of the consequences this will have for plaintiffs is apt to forget (for the Court does not inform him) that defendants in maritime actions are most likely to be corporations (particularly in personal injury litigation, the sort of case we have at bar) and that § 1391 (c) declares that the residence of a corporation for venue purposes is any district where it is incorporated or any district in which it is licensed to do, or actually doing business. With corporate venue so widely defined, it will be a rare plaintiff (and a rarer personal injury plaintiff, for seamen and longshoremen are apt to live near where their employers carry on business, or where the vessel owners their employers

serve do business) who can take much advantage from the fact that he can sue in the district of his own residence in an action based solely on diversity and not otherwise. And of course, the existence of proper venue at his own residence does not mean the plaintiff can sue the defendants there; he must still serve them with process. Except that process can be run throughout the limits of the State, while venue speaks in terms of the district, this means that the broader diversity venue only is of assistance where there is a defendant who, while not "doing business" in an area, is nonetheless amenable to process there. Of course there are some such, but I think by now the dimensions of this "practical" reason for the Court's holding are patent.

II.

The Court, though it rejects Romero's assertion of jurisdiction over his general maritime law claims against his employer under § 1331, proceeds to adjudicate them on the merits. It reaches them through a "pendent" jurisdiction theory analogous to *Hurn* v. *Oursler*, 289 U. S. 238. The Court's action appears unprecedented, as it appears to recognize. The prior applications of the doctrine recognized here have been limited to cases where claims arising under state law, over which there was no independent jurisdiction in the federal court, have been intertwined with federal claims. The theory has not been here applied to cases where there have been two types of claims, both admittedly within the District Court's jurisdiction, one of which was admittedly cognizable according to the forms of the common law and the other, except for the theory, not. Here a plaintiff comes into court desiring that his claims be adjudicated strictly according to the common law and disclaiming federal jurisdiction in admiralty. In short, he desires that a common-law jury pass upon his claims. If the federal

courts do not have such jurisdiction over all his claims, there are state courts which do, and he may well prefer them in that event. The Court today tells him that though it is doubtful whether there is enough common-law jurisdiction in the federal courts to proceed to a plenary adjudication of his claim, there is enough certainly to award summary judgment against him on the merits. I must say I cannot understand a sort of jurisdiction that allows the federal courts to make a preliminary exploration of the merits of the case, and a binding adjudication upon them, but which may not allow them to go further.

Obviously what we have here, once the Court's view of § 1331 is accepted, and as claims are presented which can survive summary judgment, is not a problem in pendent jurisdiction but a glaring problem in judicial administration and in the separation of functions between judge and jury. Crew members' maritime tort suits almost invariably urge claims under the Jones Act and under the general maritime law for breach of the duty to maintain a seaworthy vessel. These claims are legally, and generally factually, completely bound up with each other. *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316. It would be productive of extraordinary problems if the two elements of the claim are presented to different triers of fact at the same time, as would be one consequence of holding that there was no jurisdiction at law of any sort over unseaworthiness claims where diversity of citizenship was absent. Cf. *Jenkins* v. *Roderick*, 156 F. Supp. 299, 304–306. Should an advisory jury (with the same membership, doubtless, as the "mandatory" one hearing the Jones Act claim) hear the unseaworthiness claim? To what extent would its verdict bind the judge? If the judge passes on the issues himself, how to avoid overlapping damages, or contradictory findings? And what would be

the effect of a finding of facts common to both claims made by the judge before the rendition of the jury's verdict, or vice versa? Would the doctrine of collateral estoppel apply? These problems arise in the wake of the Court's rejection of jurisdiction under § 1331 and its restricted holding on any other jurisdictional basis (apart from § 1333) of Romero's claims under the general maritime law against his employer. I cannot consider that the Court's solution of the controversy among the lower courts that has prevailed since the *Jansson* dictum has shed much light on them.

III.

Since under my view there would be jurisdiction at law (the only jurisdiction Romero invoked) to consider all his claims, I arrive at the merits of his claims against his employer, Compania Trasatlantica. As to them, I concur in the result set forth in Part II of the Court's opinion. I also agree with the Court's disposition of the claims against the other respondents, as set forth in Part III of its opinion.

THE CHIEF JUSTICE joins in this opinion, and MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join in it except to the extent indicated in their dissents.

HEFLIN *v.* UNITED STATES.

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

No. 137. Argued January 14–15, 1959.—Decided February 24, 1959.

Petitioner was indicted and convicted on three counts charging violations of the Federal Bank Robbery Act, 18 U. S. C. § 2113, by taking property by force and violence and assaulting and jeopardizing the lives of several persons in the course of the taking, in violation of § 2113 (d), receiving the stolen property, in violation of § 2113 (c), and conspiring to violate the Act. He was sentenced to 10 years' imprisonment on the first of these counts, three years on the conspiracy count and a year and a day on the count charging receipt of the stolen property, the three sentences to run consecutively. While still in custody under the admittedly valid 10-year sentence, he moved for correction of the sentence, claiming that he could not be lawfully convicted under both subsection (c) and (d) of § 2113 for feloniously receiving and feloniously taking the same property. *Held:*

1. Relief under 28 U. S. C. § 2255 is available only to attack a sentence under which the prisoner is in custody; but relief was available to petitioner under Rule 35 of the Federal Rules of Criminal Procedure, which authorizes the correction of an illegal sentence "at any time." Pp. 417–418.

2. The separate sentence under 18 U. S. C. § 2113 (c) for receiving the stolen property was invalid, since that subsection was not designed to increase the punishment for one who robs a bank but only to provide punishment for those who receive the loot from the robber. *Prince* v. *United States,* 352 U. S. 322. Pp. 419–420.

251 F. 2d 69, reversed.

Jerome A. Cooper, acting under appointment by the Court, 358 U. S. 803, argued the cause and filed a brief for petitioner.

Theodore George Gilinsky argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner and two others were indicted and convicted under three counts charging violations of the Federal Bank Robbery Act, 18 U. S. C. § 2113. One count charged taking the property by force and violence, and assaulting and jeopardizing the lives of several persons in the course of the taking, in violation of § 2113 (d).[1] Another count charged that they did "receive, possess, conceal, store, and dispose" of the stolen money in violation of § 2113 (c).[2] A third count charged a conspiracy. The sentence imposed [3] was 10 years on the first count mentioned above, 3 years on the conspiracy count to begin to run on expiration of the first, and 1 year and 1 day on the count charging receipt of the stolen property, this sentence to begin to run on expiration of the sentence on the conspiracy count.

All these events took place before our decision in *Prince* v. *United States*, 352 U. S. 322. Shortly thereafter petitioner instituted this proceeding under 28 U. S. C. § 2255,[4]

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[1] This subsection provides:

"Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

[2] This subsection states:

"Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker."

[3] This was a corrected sentence imposed after the appeal, as reported in *Heflin* v. *United States*, 223 F. 2d 371.

[4] Section 2255 reads in relevant part as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground

complaining that he could not be lawfully convicted under both subsections (c) and (d) of § 2113, *i. e.*, of feloniously receiving and feloniously taking the same property. The District Court denied the motion. The Court of Appeals affirmed. 251 F. 2d 69. We granted certiorari (357 U. S. 935) because of an apparent conflict between that decision and the *Prince* case.

I. There is a preliminary question of jurisdiction. Petitioner is now in custody under the 10-year sentence which admittedly is valid. Since he has not completed that sentence nor the consecutive conspiracy sentence, it is argued that relief by way of § 2255 may not be had.

We reviewed in *United States* v. *Hayman,* 342 U. S. 205, the history of § 2255 and emphasized that its purpose was to minimize some of the difficulties involved in the use of habeas corpus. It is now argued that when con-

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that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. . . ." 62 Stat. 967, amended 63 Stat. 105.

secutive sentences are imposed, § 2255, no more than habeas corpus (*McNally* v. *Hill*, 293 U. S. 131, 138), can be used to question a sentence which the prisoner has not begun to serve. The Court is divided on that issue. Some think that when § 2255 says "A motion for such relief may be made at any time," it means what it says. To them the correction of sentence, if made, will affect "the right to be released," protected by § 2255, even though that right will not be immediately realized. A majority, however, are of the view, shared by several Courts of Appeals,[5] that § 2255 is available only to attack a sentence under which a prisoner is in custody. Yet in their view relief under Rule 35 of the Federal Rules of Criminal Procedure [6] is available (at least where matters *dehors* the record are not involved), the only question here being whether the sentence imposed was illegal on its face.[7]

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[5] *United States* v. *Bradford*, 194 F. 2d 197; *United States* v. *McGann*, 245 F. 2d 670; *United States ex rel. Bogish* v. *Tees*, 211 F. 2d 69, 71; *Fooshee* v. *United States*, 203 F. 2d 247; *Duggins* v. *United States*, 240 F. 2d 479; *Crow* v. *United States*, 186 F. 2d 704; *Oughton* v. *United States*, 215 F. 2d 578; *Hoffman* v. *United States*, 244 F. 2d 378; *Miller* v. *United States*, 256 F. 2d 501.

[6] Rule 35 provides in part:

"The court may correct an illegal sentence at any time."

[7] Since the motion under Rule 35 is made in the original case, the time within which review by certiorari of the Court of Appeals decision should be sought is 30 days. Supreme Court Rule 22 (2). The petition for writ of certiorari in this case was not filed until after the passage of 30 days from the judgment below. Nevertheless, because successive motions may be made under Rule 35 and because no jurisdictional statute is involved, the majority agrees to dispense with the requirements of our Rule in order to avoid wasteful circuity. To those of us who deem that § 2255 is available, there is no question but that the petition was in time. It was filed within the 90-day period provided by 28 U. S. C. § 2101 (c) governing this type of suit. For a motion under § 2255, like a petition for a writ of habeas corpus (*Riddle* v. *Dyche*, 262 U. S. 333, 336), is not a proceeding in the original criminal prosecution but an independent civil suit.

II. We held in *Prince* v. *United States, supra,* that the crime of entry into a bank with intent to rob was not intended by Congress to be a separate offense from the consummated robbery. We ruled that entering with intent to steal, which is "the heart of the crime," *id.,* at 328, "merges into the completed crime if the robbery is consummated." *Ibid.* We gave the Act that construction because we resolve an ambiguity in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act.

Subsection (c) of § 2113, with which we are now primarily concerned, came into the law in 1940. The legislative history is meagre. The Senate Report (S. Rep. No. 1801, 76th Cong., 3d Sess.) is captioned "Punishment for Receivers of Loot From Bank Robbers." The Report states, "This bill would add another subsection to further make it a crime, with less severe penalties (maximum $5,000 fine and 10 years imprisonment, or both) to willfully become a receiver or possessor of property taken in violation of the statute," p. 1. Similarly the House Report states "Present law does not make it a separate substantive offense knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act, and this bill is designed to cover the omission." H. R. Rep. No. 1668, 76th Cong., 3d Sess., p. 1.

This clue to the purpose of Congress argues strongly against the position of the Government. From these Reports it seems clear that subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. It may be true that in logic those who divide up the loot following a robbery receive from robbers and thus multiply the offense. But in view of the legislative his-

tory of subsection (c) we think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves.

Reversed.

MR. JUSTICE STEWART, whom MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER join, concurring.

While joining the Court's opinion, I think it clear that a motion for relief under 28 U. S. C. § 2255 is available only to attack a sentence under which a prisoner is in custody. That is what the statute says. That is what the legislative history shows. That is what federal courts, faced almost daily with the statute's application, have unanimously concluded. Personal notions as to the kind of a post-conviction statute that Congress might have enacted or should enact are, of course, entirely irrelevant to the inquiry.

First. The words which Congress has used are not ambiguous. Section 2255 provides that: "A prisoner in custody under sentence . . . *claiming the right to be released* . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." The statute further provides: "A motion for *such relief* may be made at any time." This latter provision simply means that, as in habeas corpus, there is no statute of limitations, no *res judicata,* and that the doctrine of laches is inapplicable.

Second. The legislative history of § 2255 is reviewed at length in the opinion which Mr. Chief Justice Vinson wrote for the Court in *United States* v. *Hayman,* 342 U. S. 205. No chronicle of the genesis and purpose of a legislative enactment could be more authentic, because almost the entire legislative history is to be found in the deliberations and recommendations of the Judicial Con-

ference of the United States, over which Mr. Chief Justice Vinson then presided. The opinion in *Hayman* clearly shows that "the sole purpose" of the statute "was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum." 342 U. S., at 219. Those difficulties are detailed in the opinion. There is not one word to indicate any intent to alter the basic principle of habeas corpus that relief is available only to one entitled to be released from custody.

The very office of the Great Writ, its only function, is to inquire into the legality of the detention of one in custody. It is unnecessary to paraphrase here Mr. Justice Stone's penetrating discussion in *McNally* v. *Hill,* 293 U. S. 131, or to incorporate the thorough review of legal history there contained. It will suffice to note only the Court's conclusion: "Without restraint of liberty, the writ will not issue. Equally, without restraint which is unlawful, the writ may not be used. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry." (Citations omitted.) 293 U. S., at 138.

Third. It is something of an understatement simply to say that these views are "shared by several Courts of Appeals." So far as I have been able to find, these courts, at least since the *Hayman* decision, have been unanimous in holding that a motion under § 2255 may be filed only by a prisoner claiming the right to be released. These are the courts continually faced with problems arising under § 2255, and many of them have given careful consideration to this very issue. *United States* v. *Bradford,* 194 F. 2d 197 (C. A. 2d Cir.); *United States* v. *McGann,* 245 F. 2d 670 (C. A. 2d Cir.); *United States ex rel. Bogish* v. *Tees,* 211 F. 2d 69, 71 (C. A. 3d Cir.); *Fooshee* v. *United States,* 203 F. 2d 247 (C. A. 5th Cir.); *Duggins* v. *United*

States, 240 F. 2d 479 (C. A. 6th Cir.); *Juelich* v. *United States,* 257 F. 2d 424 (C. A. 6th Cir.); *Oughton* v. *United States,* 215 F. 2d 578 (C. A. 9th Cir.); *Williams* v. *United States,* 236 F. 2d 894 (C. A. 9th Cir.); *Hoffman* v. *United States,* 244 F. 2d 378 (C. A. 9th Cir.); *Toliver* v. *United States,* 249 F. 2d 804 (C. A. 9th Cir.); *Miller* v. *United States,* 256 F. 2d 501 (C. A. 9th Cir.); *Smith* v. *United States,* 259 F. 2d 125 (C. A. 9th Cir.).

Although believing that relief in this case was not available under § 2255, I think, and indeed the Government concedes, that relief was available to the petitioner by virtue of Rule 35 of the Fed. Rules Crim. Proc. That rule provides: "The court may correct an illegal sentence at any time." The rule became effective more than two years before the enactment of § 2255 and has an entirely different history. It was a codification of existing law and was intended to remove any doubt created by the decision in *United States* v. *Mayer,* 235 U. S. 55, 67, as to the jurisdiction of a District Court to correct an illegal sentence after the expiration of the term at which it was entered.*

Whether Rule 35 covers the broader field of collateral attack where a hearing to consider matters *dehors* the record is necessary, we need not here determine. The Rule certainly covers a case like the present one where the claim is that the sentence imposed was illegal on its face. For this reason, and because I agree with the Court's construction of the Federal Bank Robbery Act, I concur in the opinion and the judgment.

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*See Judge Shackelford Miller's discussion of the relationship between § 2255 and Rule 35 in *Duggins* v. *United States,* 240 F. 2d 479 (C. A. 6th Cir.).

CRUMADY *v.* THE JOACHIM HENDRIK FISSER ET AL.

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

No. 61. Argued January 12–13, 1959.—Decided February 24, 1959.†

Petitioner was injured while working for a stevedoring company engaged in unloading a ship in an American port under contract with a third party to whom the ship had been chartered. Petitioner brought this admiralty suit by libel *in rem* against the ship, which impleaded the stevedoring company. The District Court found that the ship was unseaworthy and therefore liable to petitioner; but it also found that the primary cause of the accident was negligence of the stevedoring company which brought into play the unseaworthy condition of the ship, and it directed the stevedoring company to indemnify the ship for the damages to petitioner. *Held:* The judgment of the District Court is sustained. Pp. 424–429.

1. The District Court correctly applied the concept of unseaworthiness, and its findings of fact were not clearly erroneous. Pp. 426–428.

2. Since the negligence of the stevedoring company which brought the unseaworthiness of the ship into play amounted to a breach of the warranty of workmanlike service and that warranty was for the benefit of the ship, the ship is entitled to indemnity from the stevedoring company. Pp. 428–429.

249 F. 2d 818, reversed and judgment of the District Court reinstated.

Abraham E. Freedman argued the cause and filed a brief for petitioner in No. 61.

Victor S. Cichanowicz argued the causes for petitioner in No. 62 and The Joachim Hendrik Fisser et al., respondents in No. 61. With him on the briefs was *John H. Dougherty.*

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†Together with No. 62, *The Joachim Hendrik Fisser* v. *Nacirema Operating Co., Inc.*, also on certiorari to the same Court.

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John J. Monigan, Jr. argued the causes and filed a brief for the Nacirema Operating Co., Inc., respondent in both cases.

Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Leavenworth Colby and *Seymour Farber* filed a brief in No. 62 for the United States, as *amicus curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, Crumady, was an employee of a stevedoring company engaged in transferring a cargo of lumber from the ship *Joachim Hendrik Fisser* of German registry to a pier at Newark, New Jersey. While so engaged, he was injured and brought this admiralty suit by libel *in rem* against the vessel. The vessel impleaded the stevedoring contractor.

When the accident happened the stevedores were trying to lift two timbers through a hatch. The manner of the accident was described as follows by the District Court:

> ". . . libellant and his fellow-employees had placed a double-eyed wire rope sling, provided with a sliding hook movable between the eyes thereof, around the two timbers at a location two or three feet from their after ends. The two eyes of the sling were then placed upon the cargo hook of the up-and-down boom runner and a signal given by the stevedore gangwayman to the winchman to 'take up the slack.' The winchman complied with the signal, and during this operation libellant stood clear upon other timbers forming a part of the cargo, within the open square of the hatch. There was some testimony that when the slack was taken up by the winchman, the two timbers slid toward each other in the sling, the timber

which had been under the lower edge of the hatch coaming moving or commencing to move toward the timber which lay within the open hatch square. After the slack had been taken up by the winchman, the same signaller called for the 'taking of a strain' upon the cargo runner. The winchman again responded, the two-part topping-lift broke and the head of the up-and-down boom, with its attached cargo and topping-lift blocks, fell to the top of the cargo within the hatch square.

"The topping-lift had been rigged in a double purchase and had been supporting the head of the boom. The wire rope constituting the topping-lift extended from a shackle on the topping-lift block at the cross-tree of the mast, through a block at the boom head, back through the mast block, down the mast, through a block welded to the mast table, and thence around a drum of the winch. When the boom fell, libellant was knocked down, either by the boom itself or its appurtenant tackle, and thus sustained numerous serious and permanently disabling orthopedic and neurological injuries." 142 F. Supp. 389, 391.

The safe working load of the boom and cargo runner and topping-lift handling the load at the time of the accident was three tons each. This equipment, which was part of the unloading and loading gear of the vessel, was in good condition. The winch, which served the boom, had a "cut off" device or circuit breaker. It was set to shut off the current on the application of a load of about six tons, which was twice the safe working load of the unloading gear. The circuit breaker operated perfectly, cutting off current at the point of stress for which it was set. It had been set to operate at a load slightly more than twice

the safe working load of the unloading gear* by employees of the ship before the winch was turned over to petitioner's fellow employees for operation.

The District Court accordingly found the vessel unseaworthy and therefore liable to petitioner. It also found that the stevedores moved the head of the boom in an effort to clear the cargo from the sides of the hatch and that this "created a load on the topping-lift greatly in excess of its safe working load." This act was found to be "the primary cause of the parting of the topping-lift and consequent fall of the boom." Since the stevedoring company was found to be negligent in bringing "into play the unseaworthy condition of the vessel," the District Court directed the stevedoring company to indemnify the vessel for the damages to petitioner. 142 F. Supp. 389. The Court of Appeals reversed, holding that the vessel was not unseaworthy and that the sole cause of the injury was the negligence of the stevedores. 249 F. 2d 818. A petition for rehearing was denied *en banc,* Judge Biggs dissenting. 249 F. 2d 821. The cases are here on petitions for certiorari. 357 U. S. 903.

I. We held in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 95, that stevedores, though intermediately employed, are, when performing "the ship's service," entitled to the same protection against unseaworthiness which members

*One expert, Robert A. Simons, testified:
"I said that it is not safe practice to have a rig that was designed for three tons working load and of the winch with a cut-off set at six tons so that you could apply six tons load to the hoist before the winch would cut off because that would be doubling the load for which the rig was designed for."
Another expert, Walter J. Byrne, testified:
". . . if you have three-ton gear and a three-ton winch and due to cut-offs in back, you allow, let us say, a hundred per cent overload to be developed, then I think from my point of view as a safety man you are taking away a governor. You are taking away something which is built in for the protection of the gear and personnel."

of the crew doing the same work would receive. And see *Pope & Talbot* v. *Hawn,* 346 U. S. 406. The work of loading and unloading is historically "the work of the ship's service." *Seas Shipping Co.* v. *Sieracki, supra,* at 96.

This protection against unseaworthiness imposes a duty which the owner of the vessel cannot delegate. *Seas Shipping Co.* v. *Sieracki, supra,* at 100. Unseaworthiness extends not only to the vessel but to the crew (*Boudoin* v. *Lykes Bros. Steamship Co.,* 348 U. S. 336) and to appliances that are appurtenant to the ship. *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96. And as to appliances the duty of the shipowner does not end with supplying them; he must keep them in order. *Id.,* at 104; *The Osceola,* 189 U. S. 158, 175. The shipowner is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedoring company. It was held in *Grillea* v. *United States,* 232 F. 2d 919, that stevedores themselves could render a ship *pro tanto* unseaworthy and make the vessel owner liable for injuries to one of them. And see *Rogers* v. *United States Lines,* 347 U. S. 984; *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396. We need not go so far to sustain the District Court here. For there is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch—an appurtenance of the vessel—was not inherently defective as was the rope in the *Mahnich* case. But it was adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work at hand. While the rigging would take only three tons of stress, the cut-off of the winch—its safety device—was set at twice that limit. This was rigging that went with the vessel and was safe for use within known limits. Yet those limits were disregarded by the vessel owner when the winch was adjusted. The case is no different in principle from

loading or unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved. In that case the cable or rope, in this case the winch, makes the vessel *pro tanto* unseaworthy. That was the theory of the District Court; it correctly applied the concept of unseaworthiness; and its findings of fact were not clearly erroneous. *McAllister* v. *United States*, 348 U. S. 19, 20.

II. A majority of the Court ruled in *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, that where a shipowner and stevedoring company entered into a service agreement, the former was entitled to indemnification for all damages it sustained as a result of the stevedoring company's breach of its warranty of workmanlike service. And see *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563. The facts here are different from those in the *Ryan* case, in that this vessel had been chartered by its owners to Ovido Compania Naviera S. A. Panama, which company entered into the service agreement with this stevedoring company. The contract, however, mentioned the name of the vessel on which the work was to be done and contained an agreement on the part of the stevedoring company "to faithfully furnish such stevedoring services."

We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case, "competency and safety of stowage are inescapable elements of the service undertaken." 350 U. S., at 133. They are part of the stevedore's "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured

product." *Id.*, at 133–134. See *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050.

We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over.

The judgment of the Court of Appeals is reversed and the judgment of the District Court is reinstated.

It is so ordered.

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

It should be said at the outset that neither of these cases should have been taken for review. No. 61, although of course important to the unfortunate victim of this accident, satisfies none of the criteria for certiorari set forth generally in Rule 19. The case involves merely factual issues of consequence only in this particular litigation, and being in admiralty lacks even that feature, the right to jury trial, which some of my Brethren have found to justify the Court's reviewing the sufficiency of the evidence in FELA and Jones Act cases. No. 62, dependent as it is on No. 61, likewise does not belong here.

When this Court reverses a Court of Appeals, particularly on issues of fact, I think the lower court is at least due an understandable explication of the reasons. In No. 61 the Court holds the vessel liable on the ground that its setting of the circuit breaker to cut off at a strain of more than 3 tons rendered the lifting gear unseaworthy, and further finds that the stevedores "did no more than bring into play" this unseaworthy condition. The Court overturns the findings of a unanimous Court of Appeals that the setting of the circuit breaker at a strain of 6 tons did not make the lifting gear unseaworthy, and that the accident was caused not by this setting but by the steve-

dores' improper positioning of the head of the boom.* 249 F. 2d 818. In my opinion the action of the Court lacks any solid basis. My views can best be pointed up by briefly recounting what was held by the court below in reversing the District Court.

The Court of Appeals first found that Crumady's claim of unseaworthiness in the District Court was predicated on the alleged defective condition of the topping-lift, and not on the setting of the circuit breaker. *Id.*, at 819. It then concluded that the District Court, "with adequate basis in the record," had correctly rejected this claim. *Ibid.*

The court then went on to hold that the District Court had properly found the accident primarily attributable to the negligent handling of the lifting operation by the stevedores, in that they had permitted a long and heavy timber to become wedged under the coaming of the hatch from which it was being removed, as well as having changed, contrary to instructions, the position of the head of the boom. *Ibid.* This "incorrect procedure," the Court of Appeals held, caused the topping-lift cable to be subjected to "excessive and abnormal strain," which in turn caused the cable to break and the boom to fall on Crumady. *Id.*, at 819, 820–821.

Next, the Court of Appeals turned to the setting of the circuit breaker, "a new theory of the ship's unseaworthiness" which the court found had been "adopted" by the trial court on its own initiative. *Id.*, at 819. In rejecting this basis for holding the vessel liable the Court of Appeals analyzed the situation as follows: (1) hoisting gear is "rated" in terms of supporting a load of not more than

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*Chief Judge Biggs, dissenting from the refusal of the Court of Appeals to grant rehearing *en banc*, did not disagree with these findings. 249 F. 2d, at 821.

one-fifth of the strength of the lifting cable; (2) the gear here involved was rated to lift 3 tons; (3) the cable it was intended to and did utilize, for both the topping-lift and cargo runner, was strong enough to withstand a strain of 15 tons; (4) the setting of the circuit breaker to cut off the power from the winch controlling the lifting operation at a strain of 6 tons was proper; (5) the circuit breaker functioned properly, but the stevedores' improper positioning of the boom subjected the topping-lift to "an enormous, abnormal and unanticipated" additional strain. *Id.*, at 820.

In light of its analysis of the record the Court of Appeals concluded (*id.*, at 820–821):

> "It was a proper finding that the negligence of the stevedores was 'the sole active or primary cause' of the parting of the gear. But we think it is equally clear that the court erred in the next step of its reasoning, that this negligence of Nacirema 'brought into play the unseaworthy condition of the vessel.' The concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose. [Footnote omitted.] Applied to the present facts, this means that the setting of the electrical circuit breaker could make the gear unseaworthy only if there was reason to fear that a strain of about six tons on the running gear, which would activate the cut off, would subject cable of fifteen ton capacity in the topping-lift to a dangerous strain. There is nothing in this record which suggests that such an eventuality was reasonably to be feared or anticipated. Thus, the gear was not proved to have been unseaworthy, neither was the setting of the cut off device established as a legal cause of the accident which occurred."

What answer does this Court now make to the Court of Appeals' convincingly reasoned opinion? Simply the assertion that because the lifting gear was "rated" for only 3 tons, it was not clearly erroneous for the District Court to conclude that it was wrong to set the circuit breaker to cut off at 6 tons, "twice that limit." What support does the Court muster for this assertion? Nothing but a footnote reference to the testimony of two witnesses, without so much as a word about the Court of Appeals' rejection of the probative value of such testimony in the face of, among other things, "a Coast Guard standard for the setting of such a control, indicating that the setting [at 6 tons] of the cut off device was entirely safe and proper." *Id.*, at 820.

Perhaps I should add that I believe unavailing Chief Judge Biggs' suggestion on petition for rehearing that liability might be predicated on the stevedores' improper positioning of the head of the boom and the theory of unseaworthiness enunciated by Judge Learned Hand in *Grillea* v. *United States,* 232 F. 2d 919. 249 F. 2d, at 821. The record contains no indication that the positioning of the boom was other than "an incident in a continuous operation" beyond the compass of that theory. *Grillea* v. *United States, supra,* at 922.

In view of the foregoing I think the Court's action overriding the Court of Appeals entirely unjustified. I would affirm the judgment below in No. 61, and not reach, as the Court of Appeals found it unnecessary to do, the indemnity issue put to us in No. 62.

Since my views have not prevailed, however, I am bound to consider the indemnity issue in light of the Court's reasoning in the action for unseaworthiness. In this light I must again dissent. As I read *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.,* 350 U. S. 124, the ship is entitled to indemnity only if the liability-inducing unseaworthiness or hazardous working condition is created

by the stevedore. Here, on the Court's premises, Nacirema merely brought into play an unseaworthy condition created by the vessel itself. And on the Court's further premise that this condition was the cause of the injuries sustained by Crumady I think neither the decision nor the underlying principles in *Ryan* justifies the award of indemnity. Cf. *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 568.

RAILWAY EXPRESS AGENCY, INC., *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 38. Argued October 15, 1958.—Decided February 24, 1959.

1. A Virginia statute provides a separate system of taxation for express companies. In lieu of all taxes on their other intangible property and rolling stock, it levies on express companies a "franchise tax" measured by gross receipts from their operations within Virginia, including receipts derived from transportation within the State of express transported through, into or out of the State. *Held:* As applied to appellant, a foreign corporation doing an exclusively interstate business in Virginia and owning property there, this tax does not violate the Commerce Clause of the Federal Constitution. Pp. 435–443.

(a) *Railway Express Agency* v. *Virginia,* 347 U. S. 359, distinguished. Pp. 438–439.

(b) The descriptive words used by a state legislature in labelling a tax statute have no magic effect upon its validity or invalidity; but, where the plain language of the statute shows that the legislature intended to levy the tax upon intangible property and "going concern" value and that interpretation is buttressed by a unanimity of opinion of all state agencies, including the State's highest court, great weight must be given to the descriptive words so used in determining the natural and reasonable effect of the statute. Pp. 440–441.

(c) When measuring "going concern" value, the State has the right to use any fair formula which would give effect to the intangible factors which influence real values, and that is exactly what the State has done here. Pp. 441–442.

(d) The exclusive express privileges enjoyed by appellant on the railroads, admittedly valuable contract rights, cannot be said to have no value because all of appellant's net income is paid over to the railroads for the specific purpose of precluding it from having any net taxable income, thus frustrating the collection of an otherwise fair tax. P. 442.

(e) The fact that Virginia could not prevent appellant from engaging in its exclusively interstate business does not prevent Virginia from taxing the "good will" or "going concern" value built up by such interstate business. Pp. 442–443.

2. In its tax return, appellant failed to furnish information showing its gross receipts allocated to Virginia, which was called for under the statute and requested by the tax authorities. This prevented the tax authorities from obtaining the correct amount except by some method of approximation, and they used a formula which, in effect, ascribed to Virginia such proportion of appellant's gross receipts as the mileage of carriers within Virginia bore to the total national mileage of the same carriers. *Held:* In these circumstances, this method of calculating the tax was not so palpably unreasonable as to deprive appellant of its property without due process of law in violation of the Fourteenth Amendment. Pp. 443–445.

199 Va. 589, 100 S. E. 785, affirmed.

Thomas B. Gay argued the cause for appellant. With him on the brief were *Robert J. Fletcher, William H. Waldrop, Jr.* and *H. Merrill Pasco.*

Frederick T. Gray, Special Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief was *Albertis S. Harrison, Jr.,* Attorney General.

Mr. Justice Clark delivered the opinion of the Court.

Once again the effort of the Commonwealth of Virginia to levy a tax against express agencies is before us for decision. Nearly five years ago this Court struck down as a "privilege tax" violative of the Commerce Clause of the Federal Constitution its tax statute under which was laid an assessment on appellant's "privilege of doing business" in Virginia.[1] *Railway Express Agency* v. *Virginia,* 347 U. S. 359 (1954). Subsequently the Virginia General Assembly enacted the Act here involved levying a "franchise tax" on express companies, measured by gross receipts from operations within Virginia, in lieu of all other property taxes on intangibles and rolling stock. In due course an assessment against appellant was made thereunder for 1956. Both the State Corporation Com-

[1] Va. Code, 1950, § 58–547.

mission, which has jurisdiction of such levies in Virginia, and the Commonwealth's highest court have upheld the validity of the new law as well as the assessment made thereunder, *Railway Express Agency* v. *Virginia,* 199 Va. 589, 100 S. E. 2d 785. Appellant levels a dual attack, the first being that the statute is a "privilege tax" and like the former one violates the Commerce Clause; or, secondly, that in any event the assessment under it is calculated in such a manner as to deprive appellant of its property without due process of law in violation of the Fourteenth Amendment. On appeal we noted probable jurisdiction, 356 U. S. 929 (1958). We believe that Virginia has eliminated the Commerce Clause objections sustained against its former tax law. While the tax is in lieu of other property taxes which Virginia can legally assess and should be their just equivalent in amount, *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 696 (1895), we will not inquire into the exactitudes of the formula where appellant has not shown it to be so baseless as to violate due process. *Nashville, C. & St. L. R.* v. *Browning,* 310 U. S. 362 (1940). The failure of the appellant to furnish, in its return, certain necessary information showing its gross receipts allocated to Virginia, called for under the statute and requested by the Commonwealth, has left the correct amount unobtainable by the latter except by some method of approximation and places the burden on appellant to come forward with affirmative evidence of extraterritorial assessment.

BACKGROUND AND ACTIVITY OF APPELLANT IN VIRGINIA.

Since the opinion in the former appeal, *supra,* at pp. 360–361, relates the factual details concerning appellant's operations in Virginia, we believe it sufficient to say here that it is a Delaware corporation, owned by 68 of the railroads of the United States. It is engaged in both an inter-

state and intrastate express business throughout the Nation, save in Virginia, where a constitutional provision bars foreign corporations from possessing or exercising any of the powers or functions of public service corporations. There it operates a wholly owned subsidiary, a Virginia corporation, which carries on its intrastate functions within the Commonwealth. Appellant's Virginia business is thus of an exclusively interstate nature. Through exclusive contract arrangements with 177 of the railroads of the Nation appellant is the sole operator of express facilities on their lines, including Virginia. It pays therefor all of its net income, thus achieving one of the stated purposes of the agreement—that appellant ". . . shall have no net taxable income." In turn, appellant's Virginia subsidiary pays all of its net income over to it for the privilege of exercising appellant's exclusive contracts in intrastate business in the Commonwealth. Appellant owns property within Virginia, its return filed with the Commonwealth for tax purposes showing $120,110.70 in cash on deposit; automotive equipment and trucks $262,719.63; real estate of the value of $32,850; and office equipment listed at $42,884.83.

Virginia's General Taxing System.

The Commonwealth has a comprehensive tax structure covering public service corporations.[2] It empowers local governments to levy ad valorem taxes on the "dead" value of all real property and tangible personal property, except rolling stock, located within their respective jurisdictions. This leaves free for state purposes taxes on rolling stock, money and other intangibles, and the "live" or "going-concern" value of the business in Virginia. We are concerned only with the state tax which is levied on

[2] See Va. Const., § 170; and Va. Code, 1950, §§ 58–9, 58–10.

the franchises of express companies. It provides[3] in pertinent part that

> "[e]ach express company . . . shall . . . pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

The franchise tax is measured by "the gross receipts derived from operations within" Virginia which is deemed

> "to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State."

The State Corporation Commission is directed, after notice, to assess the franchise tax on the basis of a report to be filed by the company involved or, in case of its failure to file such report, the Commission is to base the assessment "upon the best and most reliable information that it can procure."

The Issues Under the Statute.

First, let us clear away the dead underbrush of the old law. The new tax is not denominated a license tax laid on the "privilege of doing business in Virginia"; nor is it "in addition to the property tax" levied against appellant, nor a condition precedent to its engaging in interstate commerce in the Commonwealth. The General Assembly has made crystal-clear that the tax is now a franchise tax laid on the intangible property of appellant, and is levied "in lieu of taxes upon all of its other intangible property and . . . rolling stock." The measure of the tax is on gross receipts, fairly apportioned, and, as to appellant, is laid only on those "derived from the transportation

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[3] Va. Code, 1950, § 58–546, *et seq.*, as amended by Va. Acts 1956, c. 612.

within this State of express transported through, into, or out of this State."

Appellant concedes that the Commerce Clause does not prohibit the States from levying a tax on property owned by a concern doing an interstate business. It agrees that it has rolling stock and money in the Commonwealth, as well as intangibles, including its exclusive express privileges with the railroads. It readily admits that the latter agreements are "valuable contract rights" and contribute a principal element to the "going concern value" of its business in the Commonwealth. Subsuming that a valid tax levy might be levied on such intangibles, it argues, however, that the incidence of the tax is on appellant's privilege to carry on an exclusively interstate business in Virginia rather than on intangible property. Our sole question under the Commerce Clause is whether the tax in practical operation is on property or on privilege.

The due process issue is entangled with appellant's failure to file, in its report, data covering its gross receipts allocated to Virginia.[4] Failing to do this the State Cor-

[4] In its return, appellant stated that it was "unable" to ascertain its gross receipts from express transported "through, into or out of" the Commonwealth. The record contains testimony to this effect by one of appellant's officers. The record also shows, from one of appellant's own exhibits, that since 1931 the tax year in question is the only year in which appellant has been "unable" to report this information. From 1931 to 1953, appellant managed to find a way of compiling or computing and reporting such data, and in only 7 of these 23 years did the Commonwealth disagree with appellant's figures. Due to the downfall of the old tax in *Railway Express Agency* v. *Virginia, supra,* there was no reporting requirement for 1954 and 1955. Under the new tax, for 1956, appellant made no attempt to present evidence to show what reductions should be made in the Commission's figures, nor did it explore the possibility of an agreement about it as it apparently had in prior years. Cf. *Cohan* v. *Commissioner of Internal Revenue* (C. A. 2d Cir. 1930), 39 F. 2d 540, 543–544. Instead, it relied completely upon its claim that the tax was unconstitutional.

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poration Commission used a formula which in effect ascribed to Virginia the proportion of such receipts as the mileage of carriers within Virginia bore to the total national mileage of the same lines.[5] Appellant contends that the assessment made in this manner is violative of due process and that the resulting amount of tax levied was confiscatory.

In any event, appellant argues, the "in lieu" provisions of the law, as applied to it, are invalid. Admitting that it had cash, intangibles and rolling stock that were subject to a state tax but which suffered none because of the "in lieu" provisions of this law, it contends that the tax assessed under the latter was no just equivalent of the "in lieu" taxes but was greatly in excess thereof and violative of due process.

VALIDITY OF THE LAW UNDER THE COMMERCE CLAUSE.

As we have pointed out, the statute levies a franchise tax in lieu of all taxes on "*other* intangible property" and rolling stock. (Emphasis added.) This leaves no room for doubt that the General Assembly intended to levy a tax upon appellant's intangibles. Moreover, supporting this interpretation, both the State Commission and the Supreme Court of Appeals have construed it as a tax on appellant's intangible property and "going concern" value. This trinity of agreement by three state agencies, though not conclusive, has great weight in our determination of the natural and reasonable effect of the statute. *Railway Express* v. *Virginia, supra; Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951); *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450 (1918); *United States Express*

[5] Actually, the amounts paid to such carriers for Virginia traffic were ascertained by that method. Since the carrier payments represent only net receipts, the Virginia gross receipts were determined by applying to the Virginia carrier payments the ratio that its total gross receipts bore to its total carrier payments.

Co. v. *Minnesota,* 223 U. S. 335, 346 (1912). This is not to say that a legislature may effect a validation of a tax, otherwise unconstitutional, by merely changing its descriptive words. *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 280 (1932); *Galveston, H. & San Antonio R. Co.* v. *Texas,* 210 U. S. 217, 227 (1908). One must comprehend, however, the difference between the use of magic words or labels validating an otherwise invalid tax and their use to disable an otherwise constitutional levy. The latter this Court has said may sometimes be done. *Railway Express Agency* v. *Virginia, supra,* at 364; *Spector Motor Service* v. *O'Connor, supra,* at 607; *McLeod* v. *Dilworth Co.,* 322 U. S. 327, 330 (1944).

Appellant buttresses its argument with reasoning that a tax on "going concern" value just cannot be measured by fairly apportioned gross receipts. While it may be true that gross receipts are not the best measure, it is too late now to question its constitutionality. *Illinois Cent. R. Co.* v. *Minnesota,* 309 U. S. 157 (1940); *Great Northern R. Co.* v. *Minnesota,* 278 U. S. 503 (1929); *Pullman Co.* v. *Richardson,* 261 U. S. 330 (1923); *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450 (1918); *United States Express Co.* v. *Minnesota,* 223 U. S. 335 (1912); *Wisconsin & M. R. Co.* v. *Powers,* 191 U. S. 379 (1903). These decisions are still in good standing on our books. Even on the former appeal this Court used the following language:

> "Of course, we have held, and it is but common sense to hold, that a physical asset may fluctuate in value according to the income it can be made to produce. A live horse is worth more than a dead one, though the physical object may be the same, and a smooth-going automobile is worth more than an unassembled collection of all its parts. The physical facilities used in carrying on a prosperous business are worth more than the same assets in

> bankruptcy liquidation or on sale by the sheriff. No one denies the right of the State, when assessing tangible property, to use any fair formula which will give effect to the intangible factors which influence real values. *Adams Express Co.* v. *Ohio State Auditor*,[6] 166 U. S. 185. But Virginia has not done this." 347 U. S., at 364.

We feel that Virginia has now done just that.

We are not convinced by appellant's "boot strap" argument that the express privileges it enjoys have no value to it because all of its net income by agreement with the railroads is paid over to them. We believe it more accurate to rely on its admission that "No one would question the fact that Appellant's exclusive express privileges on the railroads are valuable contract rights." This concession, when taken in the light of the expressed purpose of appellant that the payment of its net income for the use of the express privileges was solely to make certain "that the Express Company shall have no net taxable income," exposes the frivolous nature of this contention. We are not so blinded to business realities as to permit such a manipulation of the finances of appellant, the railroads' wholly owned subsidiary, to frustrate the Commonwealth in its effort to collect an otherwise fair tax.

Nor is there any substance to the contention that since Virginia could not prohibit appellant from engaging in its exclusively interstate business, it therefore may not tax "good will" or "going concern" value which is built up thereby. We need only cite some of the cases of this Court holding to the contrary: *Great Northern R. Co.* v. *Minnesota*, 278 U. S. 503 (1929); *Pullman Co.* v. *Richardson*, 261 U. S. 330 (1923); *Cudahy Packing Co.* v. *Min-*

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[6] Parenthetically, it might be noted that the *Adams* case involved a "going concern" valuation of $488,265 as compared to a "dead" valuation of property in the amount of $28,438. 165 U. S. 194, 237.

nesota, 246 U. S. 450 (1918); *United States Express Co.* v. *Minnesota,* 223 U. S. 335 (1912); *Adams Express Co.* v. *Ohio,* 165 U. S. 194 (rehearing 166 U. S. 185 (1897)); *Western Union Telegraph Co.* v. *Taggart,* 163 U. S. 1 (1896); *Cleveland, C., C. & St. L. R. Co.* v. *Backus,* 154 U. S. 439 (1894).

VALIDITY OF THE TAX UNDER THE DUE PROCESS CLAUSE.

In view of the fact that appellant failed to file the required information as to its gross receipts, thus placing an almost insurmountable burden on the Commonwealth to ascertain them, it is necessary that appellant make an affirmative showing that the mileage method used by Virginia is so palpably unreasonable that it violates due process. This it has failed to do. Appellant rests its argument not on facts and figures covering its actual gross income in Virginia but on comparative statistics based on tangible assets. It points out that during the taxable year the value of its tangible assets in Virginia ($475,065) was only 0.6% of its total assets ($79,700,426), while the amount of gross receipts apportioned to Virginia by the State Corporation Commission was 1.7% ($6,499,519) of its total gross receipts ($387,241,764).

The difference in the two percentages, appellant contends, must represent intangible values on which Virginia cannot operate because located outside of its jurisdiction. This syllogism does not take into account the facts of business life. Tangible assets in Virginia may produce much more income than like assets elsewhere. Death Valley Scotty generated much less gross from his desert sightseeing wagon than did his counterpart in Central Park. The utter fallacy of using tangible assets as the test of going-concern value here is demonstrated by the fact that appellant's tangible assets in Virginia depend entirely on whether it elects to retain title to tangible property or place it in the name of its subsidiary,

the Virginia company. By placing them in the Virginia company it could thus, on a tangible asset formula, escape all tax on its intangibles.

There is nothing in the record even to indicate that the tangible assets that appellant carries in its own name in Virginia did not actually generate the amount of gross receipts attributed to it by the State Corporation Commission. In this connection, we note that 1.9% of appellant's total contract mileage was located there. Even where taxpayers have attempted to show through evidence, as this appellant has not, that a given apportionment formula effected an appropriation of more than that to which the State was entitled, this Court has required " 'clear and cogent evidence' that it results in extraterritorial values being taxed." *Butler Bros.* v. *McColgan,* 315 U. S. 501, 507 (1942); *Norfolk & Western R. Co.* v. *North Carolina,* 297 U. S. 682, 688 (1936); cf. *Bass, Ratcliff & Gretton, Ltd.,* v. *Tax Comm'n,* 266 U. S. 271, 282–284 (1924). As this Court said in *Nashville, C. & St. L. R.* v. *Browning,* 310 U. S. 362, 365–366 (1940):

> "In basing its apportionment on mileage, the Tennessee Commission adopted a familiar and frequently sanctioned formula. *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 421; *Branson* v. *Bush,* 251 U. S. 182. See 2 Cooley on Taxation, pp. 1660–64. Its asserted inapplicability to the particular situation is rested on petitioner's evidence as to the comparative revenue-producing capacity of its lines in and out of Tennessee. But both the Commission and the Supreme Court of the state thought that this evidence, however weighty, was insufficient to displace the relevance of the formula. *In a matter where exactness is concededly unobtainable and the feel of judgment so important a factor, we must be on guard lest*

> *unwittingly we displace the tax officials' judgment with our own.* Certainly we cannot say that the combined judgment of Commission, Board, and state courts is baseless." (Emphasis added.)

Appellant's final argument is to the effect that the tax in question, in the amount of $139,739.66, is "no just equivalent" of the tax "in lieu of which" it was levied, and therefore violates the Due Process Clause. This argument is based upon a false premise which can be quickly disposed of. Appellant states that under Virginia's system of segregation of property for state and local taxation the only property which the Commonwealth had the power to tax was cash on hand and on deposit and appellant's rolling stock, which, under the old rates, would have yielded a tax of $679.77. Appellant is clearly in error. As we read the Virginia statutes, and as they were construed below, the Commonwealth (as contrasted with the local) government also had the power to tax the "going concern" value of *all* of appellant's Virginia property, as well as its other intangible property rights such as its valuable express privileges. Thus, the new tax is not only in lieu of the previous tax on rolling stock and cash on hand, but also reaches intangible rights of great value which since *Railway Express, supra,* had escaped taxation altogether.

It follows from what we have said that the tax is valid, and the judgment below is therefore

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE HARLAN, concurring.

I share the reservations of MR. JUSTICE BRENNAN as to the propriety of considering the tax described in the opinion of the Court as a property tax. I find myself unable, however, to distinguish in any constitutional

sense the "in lieu" tax here involved from similar levies the validity of which has been sustained as applied to interstate enterprises in the line of cases cited in the Court's opinion, and therefore join the opinion.

MR. JUSTICE BRENNAN, concurring.

While I join the opinion and judgment of the Court, I must admit to some reservations whether the tax at bar can fairly be thought of as a property tax. The discussion of the Court in this case's predecessor, *Railway Express Agency, Inc.*, v. *Virginia*, 347 U. S. 359, 364–367, cast serious doubt on the propriety of viewing Virginia's former tax as a property tax, and I share that doubt. The only modification in the mathematical demonstration of the prior decision necessitated by the revision of the tax statute is brought about by the new statute's provision that the tax is in lieu of other taxes on the appellant's intangible property and rolling stock. In practical effect, this means that payment of this $139,739.66 tax is "in lieu" of a 1/5% tax on $120,110.70 of cash, amounting to $240.22; a tax, amounting to $427.56, on the value, apportioned to the State, of the appellant's refrigerator cars; and a 2½% tax on its trucks,* valued at $262,719, amounting to $6,567.98. These taxes, in lieu of which the $139,739.66 tax at bar is payable, aggregate $7,235.76. It seems to me doubtful whether this makes a significant

*The State informs us that the appellant's trucks have been ruled to be "rolling stock" and therefore shielded by the "in lieu" provision of the new statute. While the Virginia Code does not in terms set forth a rate of taxation for the rolling stock of express companies, the rates provided for the rolling stock of railway and of freight car companies are 2½% ad valorem. Va. Code §§ 58–515, 58–560. This rate would appear appropriate for exploring the equivalence of this "in lieu" tax to a corresponding property tax, and in fact the rate, as established by the latter section, has been used before the "in lieu" provision as a basis for the taxation of appellant's refrigerator cars.

alteration in the demonstration the Court made on the prior appeal with respect to the status as a property tax of the gross receipts tax on express companies. While the tax may be a rough equivalent of some sort of property tax that Virginia might conceivably levy on express companies, I do not see that it has been made clear that it bears any equivalence to any sort of property tax that she in fact levies on other sorts of businesses or has in fact previously levied on express companies. Cf. *Pullman Co.* v. *Richardson,* 261 U. S. 330, 339. On the other hand, I cannot deny that this Court has, in decisions cited by the Court's opinion, frequently admitted gross receipts taxes to the characterization of "property taxes" in situations where their equivalence with any actual property tax was somewhat tenuous. See, *e. g., Illinois Central R. Co.* v. *Minnesota,* 309 U. S. 157.

To me, the more realistic way of viewing the tax and evaluating its constitutional validity is to take it as what it is in substance, a levy on gross receipts fairly apportionable to the taxing State. Virginia has a comprehensive scheme of state income and gross receipts taxes on business corporations, with net income taxes the standard in the case of ordinary businesses and gross receipts taxes in the case of most categories of utility or "public service" corporations. The gross receipts taxing structure does not single out this interstate transportation company, or discriminate against it, but rather requires it only to pay its share, at a tax rate comparable to the rates on the gross receipts of other categories of public service corporations, and in fact lower than those on many important ones. To restrict the gross receipts subject to the tax to an amount representing that part of appellant's interstate movements which takes place within the State, the State has employed an apportionment formula. That formula is not on its face unfair or discriminatory toward interstate commerce or indicative of an imposition on out-of-state

activities, and the opinion of the Court amply demonstrates that this appellant cannot maintain a challenge to the details of its application here. The label of the tax as a "privilege" or "license" tax, proscribed by this case's predecessor, has been eliminated, as the Court's opinion shows. This Court's decisions sustain the application of a fairly apportioned general gross receipts tax to an interstate transportation company. *Canton R. Co.* v. *Rogan,* 340 U. S. 511, 515–516; *Central Greyhound Lines, Inc.,* v. *Mealey,* 334 U. S. 653, 663–664. Cf. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 256. In my view, the most compelling reason for affirming the judgment of the Supreme Court of Appeals of Virginia is the application of the principles of these cases here.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE STEWART joins, dissenting.

I cannot agree. Let me very briefly put the case in perspective, as I see it. Taxation of the property of appellant's Virginia subsidiary, which does an intrastate business in Virginia, is not at all involved here. The Court properly observes the fact that "Appellant's Virginia business is . . . of an exclusively interstate nature." In the year involved it owned in Virginia tangible real and personal property which was taxed by Virginia under other statutes and is not involved in this case. Virginia also claims that appellant had intangible property in Virginia. It is upon those intangibles, so claimed to have been present in the State, that Virginia sought to lay its "franchise tax," said by it to be a "property tax" *measured* by appellant's gross receipts, allocable to Virginia, from "exclusively" interstate commerce. Admittedly appellant had a bank account and some "rolling stock" in Virginia, upon which, doubtless, Virginia validly could lay an ad valorem tax. But the dispute is over the following. Virginia claims that appellant should be deemed to have

had in Virginia, and subject to the taxing statute here involved, substantially that percentage of the value of its national "good will," and of its exclusive express carriage contract with the railroads, which the ratio of the mileage of carriers which it uses in interstate commerce in Virginia bears to the total mileage of the same carriers which it uses everywhere in such commerce. Appellant contends that Virginia's claim in these respects is unconstitutional. Which of them is right? I think it is appellant. I think so for two reasons. First, the exclusive carriage contract which appellant has with the railroads requires it, as the Court observes, to pay "all of its net income" to the railroads. Therefore, as a matter of both fact and law, that *contract* can have no dollar value to *appellant,* distinguished from the railroads, to be taxed to it anywhere. Second, appellant's "good will," if any, does not consist of anything localized in Virginia, but inheres solely in its "exclusively" interstate business—a business that Virginia cannot reach or regulate, by direct taxation or otherwise, because it is prohibited from doing so by the Commerce Clause of the Constitution, Art. I, § 8, cl. 3. My views on that subject are fully stated in my dissenting opinion in No. 12, *Northwestern States Portland Cement Co.* v. *Minnesota,* and No. 33, *Williams* v. *Stockham Valves & Fittings, Inc., post,* at p. 477. I would therefore reverse the judgment of the Supreme Court of Appeals of Virginia.

NORTHWESTERN STATES PORTLAND CEMENT CO. *v.* MINNESOTA.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 12. Argued October 14, 1958.—Decided February 24, 1959.*

1. Net income from the exclusively interstate operations of a foreign corporation may be subjected to state taxation, provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same. Pp. 452–465.

2. In each of these two cases a State imposed on a foreign corporation an income tax computed at a non-discriminatory rate on that portion of the net income from the corporation's interstate business which was reasonably attributable to its business activities within the State. In each case the corporation had within the taxing State an office and one or more salesmen who actively solicited within the State orders for the purchase of the corporation's products, which orders were accepted at, and filled from, the corporation's head office in another State. In neither case was any question raised as to the reasonableness of the apportionment of net income nor as to the amount of the final assessment made. *Held:* These taxes did not violate either the Commerce Clause or the Due Process Clause of the Federal Constitution. Pp. 452–465.

   (a) The entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs. Pp. 459–461.

   (b) The state taxes here involved are not regulations of interstate commerce in any sense of that term; they do not discriminate against or subject interstate commerce to an undue burden; and they are not levied on the privilege of engaging in interstate commerce. Pp. 461–462.

   (c) There is no showing here that the formula applied by the State in determining the portion of the taxpayer's total income attributable to activities within the State will subject interstate

*Together with No. 33, *Williams, State Revenue Commissioner,* v. *Stockham Valves & Fittings, Inc.*, on certiorari to the Supreme Court of Georgia, argued October 14–15, 1958.

commerce to multiple taxation or require it to bear more than its fair share of the tax burden. Pp. 462–463.

(d) Since each of the taxes here involved is based only upon the net profits earned within the taxing State, the State has utilized a valid "constitutional channel" to "make interstate commerce pay its way." *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, distinguished. Pp. 463–464.

(e) The taxes here involved do not violate the Due Process Clause, since they are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State and those activities form a sufficient "nexus" to satisfy due process requirements. Pp. 464–465.

250 Minn. 32, 84 N. W. 2d 373, affirmed.
213 Ga. 713, 101 S. E. 2d 197, reversed.

Joseph A. Maun argued the cause for appellant in No. 12. With him on the brief was *Earl Smith.*

Ben F. Johnson, Deputy Assistant Attorney General of Georgia, argued the cause for petitioner in No. 33. With him on the brief were *Eugene Cook,* Attorney General, *Broadus B. Zellars, Hugh Gibert* and *Robert H. Walling,* Deputy Assistant Attorneys General.

Perry Voldness, Assistant Attorney General of Minnesota, argued the cause for appellee in No. 12. With him on the brief were *Miles Lord,* Attorney General, and *Arthur C. Roemer,* Special Assistant Attorney General.

John Izard, Jr. argued the cause for respondent in No. 33. With him on the brief were *William K. Meadow* and *Joseph H. Johnson, Jr.*

Edmund G. Brown, Attorney General, and *James E. Sabine,* Assistant Attorney General, filed a brief for the State of California, as *amicus curiae,* in support of appellee in No. 12. *Thomas D. McBride,* Attorney General, and *Edward Friedman,* Deputy Attorney General, filed a brief for the State of Pennsylvania, as *amicus curiae,* in No. 12.

Lambert H. Miller and *Alan M. Nedry* filed a brief for the National Association of Manufacturers of the United States of America, as *amicus curiae,* in support of respondent in No. 33.

MR. JUSTICE CLARK delivered the opinion of the Court.

These cases concern the constitutionality of state net income tax laws levying taxes on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing State when those activities are exclusively in furtherance of interstate commerce. No question is raised in either case as to the reasonableness of the apportionment of net income under the State's formulas nor to the amount of the final assessment made. The Minnesota tax was upheld by its Supreme Court, 250 Minn. 32, 84 N. W. 2d 373, while the Supreme Court of Georgia invalidated its statute as being violative of "both the commerce and due-process clauses of the Federal Constitution . . . ." 213 Ga. 713, 721, 101 S. E. 2d 197, 202. The importance of the question in the field of state taxation is indicated by the fact that thirty-five States impose direct net income taxes on corporations. Therefore, we noted jurisdiction of the appeal in the *Minnesota* case, 355 U. S. 911 (1958), and granted certiorari in the other, 356 U. S. 911 (1958). Although the cases were separately briefed, argued, and submitted, we have, because of the similarity of the tax in each case, consolidated them for the purposes of decision. It is contended that each of the state statutes, as applied, violates both the Due Process and the Commerce Clauses of the United States Constitution. We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.

No. 12.—*Northwestern States Portland Cement Co.* v. *State of Minnesota.*

This is an appeal from judgments of Minnesota's courts upholding the assessment by the State of income taxes for the years 1933 through 1948 against appellant, an Iowa corporation engaged in the manufacture and sale of cement at its plant in Mason City, Iowa, some forty miles from the Minnesota border. The tax was levied under § 290.03 [1] of the Minnesota Statutes which imposes an annual tax upon the taxable net income of residents and nonresidents alike. One of four classes taxed by the statute is that of "domestic and foreign corporations . . . whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both." Minnesota has utilized three ratios in determining the portion of net income taxable under its law.[2] The first is that of the taxpayer's sales assignable to Minnesota during the year to its total sales during that period made everywhere; the second, that of the taxpayer's total tangible property in Minnesota for the year to its total tangible property used in the business that year wherever situated. The third is the tax-

[1] § 290.03:

"Classes of taxpayers. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party; . . . ." Minn. Stat., 1945, § 290.03.

[2] Minn. Stat. (1945), § 290.19.

payer's total payroll in Minnesota for the year to its total payroll for its entire business in the like period. As we have noted, appellant takes no issue with the fairness of this formula nor of the accuracy of its application here.

Appellant's activities in Minnesota consisted of a regular and systematic course of solicitation of orders for the sale of its products, each order being subject to acceptance, filling and delivery by it from its plant at Mason City. It sold only to eligible dealers, who were lumber and building material supply houses, contractors and ready-mix companies. A list of these eligible dealers was maintained and sales would not be made to those not included thereon. Forty-eight percent of appellant's entire sales were made in this manner to such dealers in Minnesota. For efficient handling of its activity in that State, appellant maintained in Minneapolis a leased sales office equipped with its own furniture and fixtures and under the supervision of an employee-salesman known as "district manager." Two salesmen, including this district manager, and a secretary occupied this three-room office. Two additional salesmen used it as a clearing house. Each employee was paid a straight salary by the appellant direct from Mason City and two cars were furnished by it for the salesmen. Appellant maintained no bank account in Minnesota, owned no real estate there, and warehoused no merchandise in the State. All sales were made on a delivered price basis fixed by the appellant in Mason City and no "pick ups" were permitted at its plant there. The salesmen, however, were authorized to quote Minnesota customers a delivered price. Orders received by the salesmen or at the Minneapolis office were transmitted daily to appellant in Mason City, were approved there, and acknowledged directly to the purchaser with copies to the salesman.

In addition to the solicitation of approved dealers, appellant's salesmen also contacted potential customers

and users of cement products, such as builders, contractors, architects, and state, as well as local government purchasing agents. Orders were solicited and received from them, on special forms furnished by appellant, directed to an approved local dealer who in turn would fill them by placing a like order with appellant. Through this system appellant's salesmen would in effect secure orders for local dealers which in turn were filled by appellant in the usual manner. Salesmen would also receive and transmit claims against appellant for loss or damage in any shipments made by it, informing the company of the nature thereof and requesting instructions concerning the same.

No income tax returns were filed with the State by the appellant. The assessments sued upon, aggregating some $102,000, with penalties and interest, were made by the Commissioner of Taxation on the basis of information available to him.

No. 33.—*T. V. Williams, Commissioner,* v. *Stockham Valves & Fittings, Inc.*

The respondent here is a Delaware Corporation with its principal office and plant in Birmingham, Alabama. It manufactures and sells valves and pipe fittings through established local wholesalers and jobbers who handle products other than respondent's. These dealers were encouraged by respondent to carry a local inventory of its products by granting to those who did so a special price concession. However, the corporation maintained no warehouse or storage facilities in Georgia. It did maintain a sales-service office in Atlanta, which served five States. This office was headquarters for one salesman who devoted about one-third of his time to solicitation of orders in Georgia. He was paid on a salary-plus-commission basis while a full-time woman secretary employed there received a regular salary only. She was "a source of

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information" for respondent's products, performed stenographic and clerical services and "facilitated communications between the . . . home office in Birmingham, . . . [the] sales representative . . . and customers, prospective customers, contractors and users of [its] products." Respondent's salesman carried on the usual sales activities, including regular solicitation, receipt and forwarding of orders to the Birmingham office and the promotion of business and good will for respondent. Orders were taken by him, as well as the sales-service office, subject to approval of the home office and were shipped from Birmingham direct to the customer on an "f. o. b. warehouse" basis. Other than office equipment, supplies, advertising literature and the like, respondent had no property in Georgia, deposited no funds there and stored no merchandise in the State.

Georgia levies a tax [3] on net incomes "received by every corporation, foreign or domestic, owning property or doing

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[3] Ga. Code Ann. (1937), § 92–3102.

"Rate of taxation of corporations.—Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to five and one-half per cent. of the net income from property owned or from business done in Georgia, as is defined in section 92–3113: . . ."

Ga. Code Ann. (1937), § 92–3113.

"Corporations, allocation and apportionment of income.—The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce. . . ."

business in this State."[4] The Act defines the latter as including "any activities or transactions" carried on within the State "for the purpose of financial profit or gain" regardless of its connection with interstate commerce. To apportion net income, the Act applies a three-factor ratio based on inventory, wages and gross receipts. Under the Act the State Revenue Commissioner assessed and collected a total of $1,478.31 from respondent for the taxable years 1952, 1954 and 1955, and after claims for refund were denied the respondent filed this suit to recover such payments. It bases its right to recover squarely upon the constitutionality of Georgia's Act under the Commerce and the Due Process Clauses of the Constitution of the United States.

That there is a "need for clearing up the tangled underbrush of past cases" with reference to the taxing power of the States is a concomitant to the negative approach resulting from a case-by-case resolution of "the extremely limited restrictions that the Constitution places upon the states. . . ." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 445 (1940). Commerce between the States having grown up like Topsy, the Congress meanwhile not having undertaken to regulate taxation of it, and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. This Court alone has handed down some three hundred full-dress

[4] The tax on corporations is part of a general scheme of income taxation which Georgia imposes on individuals (§ 92–3101), corporations (§ 92–3102), and fiduciaries (§ 92–3103).

opinions spread through slightly more than that number of our reports. As was said in *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340, 344 (1954), the decisions have been "not always clear . . . consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law." From the quagmire there emerge, however, some firm peaks of decision which remain unquestioned.

It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824). In keeping therewith a State "cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose" such as itinerant drummers. *Robbins* v. *Taxing District,* 120 U. S. 489, 493–494 (1887). Moreover, it is beyond dispute that a State may not lay a tax on the "privilege" of engaging in interstate commerce, *Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951). Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, *Memphis Steam Laundry* v. *Stone,* 342 U. S. 389 (1952); *Nippert* v. *Richmond,* 327 U. S. 416 (1946), or by subjecting interstate commerce to the burden of "multiple taxation," *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954); *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307 (1938). Such impositions have been stricken because the States, under the Commerce Clause, are not allowed "one single-tax-worth of direct interference with the free flow of commerce." *Freeman* v. *Hewit,* 329 U. S. 249, 256 (1946).

On the other hand, it has been established since 1918 that a net income tax on revenues derived from interstate

commerce does not offend constitutional limitations upon state interference with such commerce. The decision of *Peck & Co.* v. *Lowe,* 247 U. S. 165, pointed the way. There the Court held that though true it was that the Constitution provided "No Tax or Duty shall be laid on Articles exported from any State," Art. I, § 9, still a net income tax on the profits derived from such commerce was not "laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. . . . At most, exportation is affected only indirectly and remotely." *Id.,* at 174–175. The first case in this Court applying the doctrine to interstate commerce was that of *U. S. Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321 (1918). There the Court distinguished between an invalid direct levy which placed a burden on interstate commerce and a charge by way of net income derived from profits from interstate commerce. This landmark case and those usually cited as upholding the doctrine there announced, *i. e., Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113 (1920), and *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649 (1942), dealt with corporations which were domestic to the taxing State (*U. S. Glue Co.* v. *Town of Oak Creek, supra*), or which had "established a commercial domicile" there, *Underwood Typewriter Co.* v. *Chamberlain, supra; Memphis Gas Co.* v. *Beeler, supra.*

But that the presence of such a circumstance is not controlling is shown by the cases of *Bass, Ratcliff & Gretton, Ltd.,* v. *State Tax Commission,* 266 U. S. 271 (1924), and *Norfolk & W. R. Co.* v. *North Carolina,* 297 U. S. 682 (1936). In neither of these cases was the taxpayer a domiciliary of the taxing State, incorporated or with its principal place of business there, though each carried on substantial local activities. Permitting the assessment of New York's franchise tax measured on a proportional formula against a British corporation selling ale in New

York State, the Court held in *Bass, Ratcliff & Gretton, Ltd., supra,* that "the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—the process of manufacturing resulting in no profits until it ends in sales—the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business." *Id.,* at 282. Likewise in *Norfolk & W. R. Co., supra,* North Carolina was permitted to tax a Virginia corporation on net income apportioned to North Carolina on the basis of mileage within the State. These cases stand for the doctrine that the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs. In fact, in *Bass, Ratcliff & Gretton* the operations in the taxing State were conducted at a loss, and still the Court allowed part of the over-all net profit of the corporation to be attributed to the State. A reading of the statute in *Norfolk & W. R. Co.* reveals further that one facet of the apportionment formula was specifically designed to attribute a portion of the interstate hauls to the taxing State.

Any doubt as to the validity of our position here was entirely dispelled four years after *Beeler,* in a unanimous *per curiam* in *West Publishing Co.* v. *McColgan,* 328 U. S. 823, citing the four cases of *Beeler, U. S. Glue Co.,* both *supra, Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245 (1928), and *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945). The case involved the validity of California's tax on the apportioned net income of West Publishing Company, whose business was exclusively interstate. See 27 Cal. 2d 705, 166 P. 2d 861. While the statement of the facts in that opinion recites that "The

employees were given space in the offices of attorneys in return for the use of plaintiff's books stored in such offices," it is significant to note that West had not qualified to do business in California and the State's statute itself declared that the tax was levied on income derived from interstate commerce within the State, as well as any arising intrastate. The opinion was not grounded on the triviality that office space was given West's soliciters by attorneys in exchange for the chanceful use of what books they may have had on hand for their sales activities. Rather, it recognized that the income taxed arose from a purely interstate operation.

> "In relying on the foregoing cases for the proposition that a foreign corporation engaged within a state solely in interstate commerce is immune from net income taxation by that state, plaintiff [West Publishing Co.] overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause." 27 Cal. 2d 705, 708–709, 166 P. 2d 861, 863. (Citations omitted.)

We believe that the rationale of these cases, involving income levies by States, controls the issues here. The taxes are not regulations in any sense of that term. Admittedly they do not discriminate against nor subject either corporation to an undue burden. While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from

carrying its fair share of the costs of the state government in return for the benefits it derives from within the State. The levies are not privilege taxes based on the right to carry on business in the taxing State. The States are left to collect only through ordinary means. The tax, therefore, is "not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce." *Underwood Typewriter Co.* v. *Chamberlain, supra,* at 119. As was said in *Wisconsin* v. *Minnesota Mining & Mfg. Co.,* 311 U. S. 452, 453 (1940), "it is too late in the day to find offense to that [commerce] Clause because a state tax is imposed on corporate net income of an interstate enterprise which is attributable to earnings within the taxing state . . . ."

While the economic wisdom of state net income taxes is one of state policy not for our decision, one of the "realities" raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here. This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share. As was said in *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653, 661 (1948), "it is interstate commerce which the State is seeking to reach and . . . the real question [is] whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation." The apportioned tax is designed to meet this very requirement and "to prevent the levying of such taxes as will discriminate against or prohibit the interstate activities or will place the interstate commerce at a disadvantage relative to local commerce." *Id.,* at 670. Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially

by levies in domiciliary States.[5] But that question is not before us. It was argued in *Northwest Airlines* v. *Minnesota,* 322 U. S. 292 (1944), that the taxation of the entire fleet of its airplanes in that State would result in multiple taxation since other States levied taxes on some proportion of the full value thereof. The Court rejected this contention as being "not now before us" even though other States actually collected property taxes for the same year from Northwest upon "some proportion" of the full value of its fleet.[6] Here the records are all to the contrary. There is nothing to show that multiple taxation is present. We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do.

It is also contended that *Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951), requires a contrary result. But there it was repeatedly emphasized that the tax was "imposed upon the franchise of a foreign corporation for the privilege of doing business within the State . . . ." Thus, it was invalid under a long line of precedents, some of which we have mentioned.[7] It was not a levy on net

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[5] In *Standard Oil Co.* v. *Peck,* 342 U. S. 382 (1952), we struck down Ohio's *ad valorem* property tax on vessels domiciled there but plying in interstate trade because it was not apportioned.

[6] The Court nevertheless pointed out that such payments did "not abridge the power of taxation of . . . the home State." 322 U. S., at 295.

[7] See also *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 216 (1925), where this Court, striking down a Massachusetts excise tax on a foreign corporation engaged exclusively in interstate commerce, noted that "[t]he right to lay taxes on tangible property or on income is not involved; . . ."

Furthermore, none of the cases which the dissent relies on for the proposition that "[N]o State has the right to lay a tax on interstate commerce in any form . . . ," was a net income tax case. In fact, all involved taxes levied upon corporations for the privilege of engag-

income but an excise or tax placed on the franchise of a foreign corporation engaged "exclusively" in interstate operations. Therefore, with the exception of *Beeler,* heretofore mentioned, the Court made no reference to the net-income-tax cases which control here. We do not construe that reference as intended to impair the validity of the *Beeler* opinion. Nor does it reach our problem. The taxes here, like that in *West Publishing Co.* v. *McColgan, supra,* are based only upon the net profits earned in the taxing State. That incidence of the tax affords a valid "constitutional channel" which the States have utilized to "make interstate commerce pay its way." In *Spector* the incidence was the privilege of doing business, and that avenue of approach had long been declared unavailable under the Commerce Clause. As was said in *Spector,* "taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and [are] non-discriminatory." 340 U. S., at 609. We find that the statutes here meet these tests.

Nor will the argument that the exactions contravene the Due Process Clause bear scrutiny. The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State. These activities form a sufficient "nexus between such a tax and transactions within a state for which the tax is an exaction." *Wisconsin* v. *J. C. Penney Co., supra,* at 445. It strains reality to say, in terms of our

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ing in interstate commerce. This Court has consistently held that the "privilege" of engaging in interstate commerce cannot be granted or withheld by a State, and that the assertion of state power to tax the "privilege" is, therefore, a forbidden attempt to "regulate" interstate commerce. Cf. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 112–113 (1943).

decisions, that each of the corporations here was not sufficiently involved in local events to forge "some definite link, some minimum connection" sufficient to satisfy due process requirements. *Miller Bros.* v. *Maryland,* 347 U. S. 340, 344–345 (1954). See also *Ott* v. *Miss. Valley Barge Line,* 336 U. S. 169 (1949); *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945); and *West Publishing Co.* v. *McColgan, supra.* The record is without conflict that both corporations engage in substantial income-producing activity in the taxing States. In fact in No. 12 almost half of the corporation's income is derived from the taxing State's sales which are shown to be promoted by vigorous and continuous sales campaigns run through a central office located in the State. While in No. 33 the percent of sales is not available, the course of conduct was largely identical. As was said in *Wisconsin* v. *J. C. Penney Co., supra,* the "controlling question is whether the state has given anything for which it can ask return." Since by "the practical operation of [the] tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred . . ." it "is free to pursue its own fiscal policies, unembarrassed by the Constitution . . . ." *Id.,* at 444.

No. 12—*Affirmed.*
No. 33—*Reversed.*

MR. JUSTICE HARLAN, concurring.

In joining the opinion of the Court, I deem it appropriate to make some further comments as to the issues in these cases because of the strongly held contrary views manifested in the dissenting opinions of MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER. I preface what follows by saying that in my view the past decisions of this Court clearly point to, if indeed they do not compel, the sustaining of these two state taxing measures.

Since *U. S. Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321, decided in 1918, this Court has uniformly held that a State, in applying a net income tax of general impact to a corporation doing business within its borders, may reach income derived from interstate commerce to the extent that such income is fairly related to corporate activities within the State. See, *e. g., Shaffer* v. *Carter,* 252 U. S. 37, 57; *Atlantic Coast Line R. Co.* v. *Daughton,* 262 U. S. 413, 416. See also *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119–120; *Bass, Ratcliff & Gretton, Ltd.,* v. *State Tax Comm'n,* 266 U. S. 271; *Norfolk & W. R. Co.* v. *North Carolina,* 297 U. S. 682.

As I read the cases the existence of some income from *intrastate* business on the part of the taxed corporation, while sometimes adverted to, has never been considered essential to the valid taxation of such "interstate" income. The cases upholding taxes of this kind cannot, in my opinion, properly be said to rest on the theory that the income earned from the carrying on of interstate commerce was not in fact being taxed, but rather was being utilized simply to measure the income derived from some separate, but unidentified, intrastate commerce, which income was in truth the subject of the tax. That this is so seems to me apparent from *U. S. Glue* itself. There the Court explicitly recognized that the question before it was whether net income from exclusively interstate commerce could be taxed by a State on an apportioned basis together with other income of a corporation. The careful distinction, drawn more than once in the course of the opinion, between gross receipts from interstate commerce, assumed to be immune from state taxation, and net income therefrom, 247 U. S., at 324, 326, 327, 328, 329, would be altogether meaningless if the case is to be explained on the basis suggested by my dissenting brethren, for if all that was in fact being taxed was income from intrastate commerce there is no reason why gross receipts

as well as net income could not have been reached by the State.[1]

Surely any possible doubt on this score is removed by *West Publishing Co.* v. *McColgan,* 328 U. S. 823, where this Court unanimously affirmed, without oral argument, a decision of the California Supreme Court upholding the validity of a statute taxing "income from any activities carried on in this State, regardless of whether carried on in intrastate, interstate or foreign commerce" as applied to reach a portion of the net income of a Minnesota corporation not qualified to do intrastate business in California and assumed by the California court to be deriving income in California *entirely* "from activities in furtherance of a purely interstate business . . . ." 27 Cal. 2d 705, 712, 166 P. 2d 861, 865.

It is suggested that the Court's summary affirmance in the *West* case went on the ground that the taxpayer there was found by the state court to have been engaged in intrastate commerce in California, and that it was only the income earned from such commerce that had in truth been taxed by the State. In my view, this explanation

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[1] As early as 1919 such a discriminating commentator as the late Thomas Reed Powell had this to say, in commenting on the decisions of this Court in *Peck & Co.* v. *Lowe,* 247 U. S. 165, and *U. S. Glue Co.* v. *Town of Oak Creek, supra:* "We may take it for granted, then, that the legal character of the recipient and the nature of the business in which the recipient is engaged are immaterial elements in considering the constitutionality of a state-wide, all-inclusive general tax on net income from business done within the state. The recipient may be an individual, a partnership, a domestic or a foreign corporation. The business may be exclusively interstate." Indirect Encroachment on Federal Authority by the Taxing Powers of the States. VII, 32 Harv. L. Rev. 634, 639. That nothing in *U. S. Glue* turned on the fact that the taxpayer there happened to be a domestic corporation is shown by the line of cases following it where the taxpayers were foreign corporations doing an interstate business. See cases cited, *ante,* p. 466.

of *West* is unacceptable. Apart from the fact that the California Supreme Court did not proceed on any such basis (see especially the quotation from the state court's opinion set forth at p. 461 of this Court's opinion), the only facts elucidated in support of this view of the *West* case are that employees of the taxpayer solicited business in California, that they were authorized to receive payments on orders taken by them, to collect delinquent accounts, and to adjust complaints, and that they were given space in California lawyers' offices in return for the use of the taxpayer's books there stored, which locations were also advertised as the taxpayer's local offices. It is said that these are "the usual criteria which this Court has consistently held to constitute the doing of intrastate commerce" and that "California determined and taxed only the amount of that intrastate commerce." With deference, this seems to me to be both novel doctrine and unreal analysis; novel doctrine because this Court has never held that activities of this kind, performed solely in aid of interstate sales, are intrastate commerce; unreal analysis, because it is surely stretching things too far to say that California was seeking to measure and tax office renting and complaint adjusting rather than part of the income from concededly interstate sales transactions.

I think that *West* squarely governs the two cases now before us.[2]

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[2] Apart from the considerations discussed in the text of this opinion, it is noteworthy that the Court in *West*, in relying on *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, cited directly to page "656" of the *Beeler* opinion where it was said: "In any case, even if taxpayer's business were *wholly interstate commerce* [italics supplied], a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there [citation], or upon net income derived from within the state [citations], is not prohibited by the commerce clause on which the taxpayer alone relies [citing among

It is said that the taxes presently at issue were "laid on income from [interstate commerce] because of its source." If this were so I should of course vote to strike down their application here as unconstitutionally discriminatory against interstate commerce. But this seems to me plainly not such a case. As the opinion of the Court demonstrates, the Minnesota and Georgia taxes are each part of a general scheme of state income taxation, reaching all individual, corporate, and other net income. The taxing statutes are not sought to be applied to portions of the net income of Northwestern and Stockham *because* of the source of that income—interstate commerce—but rather *despite* that source. The thrust of these statutes is not hostile discrimination against interstate commerce, but rather a seeking of some compensation for facilities and benefits afforded by the taxing States to income-producing activities therein, whether those activities be altogether local or in furtherance of interstate commerce. The past decisions of this Court establish that such compensation may be had by the States consistent with the Commerce Clause.

I think it no more a "regulation of," "burden on," or "interference with" interstate commerce to permit a State within whose borders a foreign corporation engages *solely* in activities in aid of that commerce to tax the net income derived therefrom on a properly apportioned basis than to permit the same State to impose a nondiscriminatory net income tax of general application on a corporation engaging in *both* interstate and intrastate commerce therein and to take into account income from both categories. Cf. *Peck & Co.* v. *Lowe,* 247 U. S. 165. In each case the amount of the tax will increase as the profitability of the interstate business done increases. This Court has

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other cases *U. S. Glue Co.* v. *Town of Oak Creek, supra*]. There is no contention or showing here that the tax assessed is not upon net earnings justly attributable to Tennessee [citations]."

consistently upheld state net income taxes of general application so applied as to reach that portion of the profits of interstate business enterprises fairly allocable to activities within the State's borders. We do no more today.

MR. JUSTICE FRANKFURTER, dissenting.

By way of emphasizing my agreement with my brother WHITTAKER, I add a few observations.

The Court sustains the taxing power of the States in these two cases essentially on the basis of precedents. For me, the result of today's decisions is to break new ground. I say this because, among all the hundreds of cases dealing with the power of the States to tax commerce, there is not a single decision adjudicating the precise situation now before us. Concretely, we have never decided that a State may tax a corporation when that tax is on income related to the State by virtue of activities within it when such activities are exclusively part of the process of doing interstate commerce. That is the precise situation which the state courts found here, to wit:

> "[Northwestern's] activities in this State were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce."

and,

> "[W]ithout dispute [Stockham] was engaged exclusively in interstate commerce in so far as its activities in Georgia are concerned." 213 Ga. 713, 719, 101 S. E. 2d 197, 201.

It is vital to realize that in no case prior to this decision in which the taxing power of a State has been upheld when applied to corporations engaged in interstate commerce, was there a total absence of activities pursued or

advantages conferred within the State severable from the very process which constitutes interstate commerce.

The case that argumentatively comes the closest to the situation now before the Court is *West Publishing Co.* v. *McColgan,* 328 U. S. 823.[1] But in that case too, as the

[1] The *West* case was a *per curiam* affirmance without opinion. The Court cited four cases in support: *United States Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 656; *International Shoe Co.* v. *Washington,* 326 U. S. 310. Not one of these cases presented the issue now here; in none had the Court to sustain a state net income tax on a business whose revenue derived solely from interstate commerce.

In *United States Glue Co.* v. *Town of Oak Creek, supra,* this Court upheld an apportioned net income tax levied by the State of Wisconsin on a Wisconsin corporation having its principal office and manufacturing establishment in that State. A substantial part of the corporation's business was intrastate. The only issue before the Court was the power of the State to include interstate income in its apportionment computation.

Interstate Busses Corp. v. *Blodgett, supra,* decided that appellant had not sustained the burden of showing that an excise tax of one cent per mile levied by Connecticut on motor vehicles using its highways in interstate commerce fell with discriminating weight on interstate commerce when the tax was viewed as part of the State's entire taxing scheme. Aside from this issue of discrimination, the case was merely another instance of a State charging for the use of its highways.

The Court in *Memphis Natural Gas Co.* v. *Beeler, supra,* upheld a net income tax imposed by the State of Tennessee on revenues earned by the Memphis Gas Company from shipping gas into the State and selling it, together with another company, to retail consumers in that State. The decision was explicitly based on a determination that the revenue was, in fact, derived from intrastate rather than interstate commerce. In addition the Memphis Company was licensed to do business in Tennessee, maintained its principal place of business there, and sold much of its gas in that State. It is true that on the page cited in *Beeler* the opinion indulged in a dictum that net income from interstate commerce was taxable. But this was

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opinion of the California Supreme Court which we there summarily sustained clearly set forth, 27 Cal. 2d 705, 166 P. 2d 861, the West Publishing Company did not merely complete in California the business which began in Minnesota. It employed permanent workers who engaged in business activities localized in California, activities which were apart from and in addition to the purely interstate sale of law books. These activities were more than an essential part of the process of interstate commerce; they were, in legal shorthand, local California activities constituting intrastate business. In dealing with those purely local activities the State could properly exert its taxing power in relation to opportunities and advantages which it had given and which it could have withheld by simply not allowing a foreign corporation to do local business, whereas no State may withhold from a foreign corporation within its borders the right to exercise what is part of a process of exclusively interstate commerce. The State gives to a corporation so engaged nothing which it can withhold and therefore nothing for which it can charge a price, whether the price be the cost of a license to do interstate business or a tax on the profits accruing from that business.

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an almost by-the-way observation, itself relying on citations which do not support it, by a writer prone to uttering dicta.

International Shoe Co. v. *Washington, supra,* decided that the Due Process Clause of the Fourteenth Amendment did not prohibit the State of Washington from exercising jurisdiction over the International Shoe Co., in the light of the frequency and extent of the company's business contacts within the State. There was no doubt that the unemployment compensation contributions exacted by Washington were entirely consistent with the Commerce Clause, since Congress had explicitly authorized such levies.

Thus none of the cases cited in *West* support an interpretation of that decision which goes beyond the actual situation of severable local activities presented in that case. Nor do they support the present taxes levied on exclusively interstate business.

I venture to say that every other decision—I say decision, not talk or dicta—on which reliance is placed, presented a situation where conjoined with the interstate commerce was severable local state business on the basis of which the state taxing power became constitutionally operative. The difference between those situations and this, as a matter of economics, involves the distinction between taking into account the total activity of the enterprise as a going business in determining a fairly apportioned tax based on locally derived revenues, and taxing a portion of revenue concededly produced by exclusively interstate commerce. To be sure, such a distinction is a nice one, but the last word on the necessity of nice distinctions in this area was said by Mr. Justice Holmes in *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 225: "It being once admitted, as of course it must be, that not every law that affects commerce is a regulation of it in a constitutional sense, nice distinctions are to be expected."

Accordingly, today's decision cannot rest on the basis of adjudicated precedents. This does not bar the making of a new precedent. The history of the Commerce Clause is the history of judicial evolution. It is one thing, however, to recognize the taxing power of the States in relation to purely interstate activities and quite another thing to say that that power has already been established by the decisions of this Court. If new ground is to be broken, the ground must be justified and not treated as though it were old ground.

I do not think we should take this new step. My objection is the policy that underlies the Commerce Clause, namely, whatever disadvantages may accrue to the separate States from making of the United States a free-trade territory are far outweighed by the advantages not only to the United States as a Nation, but to the component States. I am assuming, of course, that today's decision

will stimulate, if indeed it does not compel, every State of the Union, which has not already done so, to devise a formula of apportionment to tax the income of enterprises carrying on exclusively interstate commerce. As a result, interstate commerce will be burdened not hypothetically but practically, and we have been admonished again and again that taxation is a practical matter.

I think that interstate commerce will be not merely argumentatively but actively burdened for two reasons:

First. It will not, I believe, be gainsaid that there are thousands of relatively small or moderate size corporations doing exclusively interstate business spread over several States. To subject these corporations to a separate income tax in each of these States means that they will have to keep books, make returns, store records, and engage legal counsel, all to meet the divers and variegated tax laws of forty-nine States, with their different times for filing returns, different tax structures, different modes for determining "net income," and different, often conflicting, formulas of apportionment. This will involve large increases in bookkeeping, accounting, and legal paraphernalia to meet these new demands. The cost of such a far-flung scheme for complying with the taxing requirements of the different States may well exceed the burden of the taxes themselves, especially in the case of small companies doing a small volume of business in several States.[2]

Second. The extensive litigation in this Court which has challenged formulas of apportionment in the case of railroads and express companies[3]—challenges addressed

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[2] For a detailed exposition of the manifold difficulties in complying with the diverse and complex taxing systems of the States, see Cohen, State Tax Allocations and Formulas which Affect Management Operating Decisions, 1 Jour. Taxation, No. 2 (July 1954), p. 2.

[3] See, *e. g., Wallace* v. *Hines,* 253 U. S. 67; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194; *id.,* 166 U. S. 185 (opinion denying rehearing).

to the natural temptation of the States to absorb more than their fair share of interstate revenue—will be multiplied many times when such formulas are applied to the infinitely larger number of other businesses which are engaged in exclusively interstate commerce. The division in this Court on these railroad apportionment cases is a good index of what might reasonably be expected when cases involving the more numerous non-transportation industries come before the Court. This is not a suggestion that the convenience of the Court should determine our construction of the Commerce Clause, although it is important in balancing the considerations relevant to the Commerce Clause against the claims of state power that this Court should be mindful of the kind of questions it will be called upon to adjudicate and its special competence for adjudicating them. Wholly apart from that, the necessity for litigation based on these elusive and essentially non-legal questions casts a burden on businesses, and consequently on interstate commerce itself, which should not be imposed.

These considerations do not at all lead to the conclusion that the vast amount of business carried on throughout all the States as part of what is exclusively interstate commerce should not be made to contribute to the cost of maintaining state governments which, as a practical matter, necessarily contribute to the conduct of that commerce by the mere fact of their existence as governments. The question is not whether a fair share of the profits derived from the carrying on of exclusively interstate commerce should contribute to the cost of the state governments. The question is whether the answer to this problem rests with this Court or with Congress.

I am not unmindful of the extent to which federal taxes absorb the taxable resources of the Nation, while at the same time the fiscal demands of the States are on the increase. These conditions present far-reaching prob-

lems of accommodating federal-state fiscal policy. But a determination of who is to get how much out of the common fund can hardly be made wisely and smoothly through the adjudicatory process. In fact, relying on the courts to solve these problems only aggravates the difficulties and retards proper legislative solution.

At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.

The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power.[4] Congressional committees can make

[4] See *Northwest Airlines, Inc.*, v. *Minnesota*, 322 U. S. 292. In *Northwest* we pointed to the desirability of congressional action to formulate uniform standards for state taxation of the rapidly expanding airline industry. Following our decision Congress directed the Civil Aeronautics Board to study and report to Congress methods of eliminating burdensome, multiple state taxation of airlines. See H. R. Doc. No. 141, 79th Cong., 1st Sess. This report of the Board was a 158-page document whose length and complex economic content in dealing with only a single subject of state taxation, illustrate the difficulties and nonjudicial nature of the problem. Following the presentation of this extensive report, several bills were introduced into Congress providing for a single uniform apportionment formula

studies and give the claims of the individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States. The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE STEWART join, dissenting.

I respectfully dissent. My disagreement with the Court is over what I think are constitutional fundamentals. I think that the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, as consistently interpreted by this Court until today, precludes the States from laying taxes directly on, and thereby regulating, "exclusively interstate commerce." But the Court's decision today holds that the States may do so.

The statutes, facts and findings involved are clear, sharp and undisputed. There is no room to doubt that the statutes involved were designed to tax income derived "exclusively [from] interstate commerce"; that the courts of the States concerned have found that the income involved derived "exclusively [from] interstate com-

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to be used by the States in taxing airlines. H. R. 1241, 80th Cong., 1st Sess.; S. 2453, 80th Cong., 2d Sess.; S. 420, 81st Cong., 1st Sess. None of these bills was enacted.

Australia has resolved the problem of conflicting and burdensome state taxation of commerce by a national arrangement whereby taxes are collected by the Commonwealth and from these revenues appropriate allocations are made annually to the States through the mechanism of a Premiers' Conference—the Prime Minister of the Commonwealth and the Premiers of the several States.

merce"; and that the taxes in question were laid directly on that interstate commerce.

Northwestern States Portland Cement Company, an Iowa corporation maintaining its principal office and only manufacturing plant in Mason City in that State, has for many years sold its cement locally in Iowa and, in interstate commerce, to dealers in neighboring States including Minnesota. Although the "exclusively" interstate character of the commerce done by Northwestern in Minnesota is not disputed, the course of its conduct in that State is summarized in the margin.[1] In 1950 Minne-

[1] Northwestern did not qualify, under Minnesota laws, to do business in that State. During the years involved it maintained a small sales office in Minneapolis where it employed two salesmen and a secretary. Her duties were wholly clerical. It also employed from two to three salesmen at other points in Minnesota who worked out of their homes. Apart from a small amount of furniture in its Minneapolis office and two salesmen's automobiles, it owned no property within the State, nor did it have a bank account therein, and all salaries and reimbursable expenses of the salesmen and the secretary, office rent, telephone bills and all other expenses of the Minneapolis office, were paid directly from the home office. The salesmen solicited and took orders from dealers but they were not authorized to accept orders or make contracts for the company, nor were they authorized to receive payments, collect accounts or adjust claims. Orders which they received were mailed to the home office for approval of credit and for acceptance or rejection. The orders were acknowledged and accepted or rejected in writing, mailed from the home office directly to the purchasers. Accepted orders were filled by delivery of the cement to a rail carrier, f. o. b. plant at Mason City, and consigned to the purchasers. Sales invoices were prepared in and mailed from the home office directly to the purchasers who made payment directly to the company at its home office. The salesmen also called on contractors and other users of cement, not to solicit orders, but for the purpose of acquainting them with the merits of Northwestern's product and of advising them of the names of the local dealers where it might be purchased. There was evidence which might have supported a finding that these salesmen sometimes, in effect, took orders from contractors for, and delivered them to,

sota, acting under its statutory "three factor formula" now contained in Minnesota Statutes, 1957, § 290.19,[2] apportioned and allocated to Minnesota a substantial part of Northwestern's net income for each of the years 1933 through 1948. Upon the amount of net income so allocated, Minnesota assessed a tax against Northwestern for each of those years under what is now Minnesota Statutes, 1957, § 290.03, which, in pertinent part, provides:

> "290.03 . . . Classes of taxpayers. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> "(1) Domestic and foreign corporations . . . whose business within this state during the taxable year consists exclusively of . . . interstate commerce . . . ."

Upon Northwestern's refusal to pay those taxes, Minnesota brought this action in its own court to recover them. Northwestern defended upon the grounds (1) that

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local dealers who stocked Northwestern's cement, and thus were engaged in the local business of selling cement for such dealers, *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, 155. But no such finding was made, and there is more than colorable basis for believing that Minnesota did not press for such a finding, as any such practice could easily be ended by Northwestern and Minnesota's evident object was not to rest on such a basis, but to obtain an adjudication that its statute, § 290.03, validly imposed a tax upon Northwestern's net income from Minnesota customers though derived "exclusively [from] interstate commerce."

[2] Minnesota Statutes, 1957, § 290.19, provides, in substance, that where business is done "partly within and partly without this state" there shall be apportioned and allocated to Minnesota, as income derived from the intrastate commerce done in that State, an amount equal to the ratio which the taxpayer's (a) sales made within that State, (b) tangible property owned or used in that State, and (c) total payrolls paid in that State bear to the taxpayer's totals of those factors.

§ 290.03, as applied, imposed the taxes directly upon interstate commerce and, hence, regulated it in violation of the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, and (2) that the income involved was not subject to Minnesota's jurisdiction and its action in taxing it violated the Due Process Clause of the Fourteenth Amendment. At the conclusion of the trial, the court made formal findings of fact including the following:

> "[Northwestern's] activities in this state were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce."

But the trial court, nevertheless, sustained the tax and entered judgment for the State. Northwestern appealed to the Supreme Court of Minnesota which, without challenging the finding of fact above-quoted, affirmed, 250 Minn. 32, 84 N. W. 2d 373, and the case is here on Northwestern's appeal. 355 U. S. 911.

Stockham Valves & Fittings, Inc., is a Delaware corporation maintaining its principal office and only manufacturing plant in Birmingham, Alabama. It makes valves and pipefittings which it sells locally in Alabama and, in interstate commerce, to wholesalers and jobbers in Georgia as well as in all other States of the Union. Although the facts are stipulated and the "exclusively" interstate character of the commerce done by Stockham in Georgia is not in dispute, the course of its conduct in that State is summarized in the margin.[3] Petitioner, as

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[3] To facilitate the conduct of its commerce, Stockham keeps a stock of its products in public warehouses in Birmingham, Chicago, Houston and Vernon (California), and maintains in each of those cities, and in each of 8 other widely separated industrial centers, including Atlanta, a small sales office. It has not qualified, under Georgia laws, to do business in that State. Its Atlanta office, which is listed in the Atlanta telephone and city directories, is staffed with

State Revenue Commissioner of Georgia, acting under the "Three Factor Ratio" of the Code of Georgia, 1933, as amended, § 92–3113 (4),[4] apportioned and allocated to Georgia a part of Stockham's net income for each of the years 1952, 1954, and 1955. Upon the amounts of net income so allocated, petitioner assessed a tax against Stockham for each of those years under the Code of

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one salesman and a secretary. Her duties are entirely clerical. The salesman spends about one-third of his working time in Georgia, and the remainder in four other southeastern States, calling on persons who are in position to recommend or specify the use of particular building supplies in construction work, such as architects, engineers and contractors, and on independent wholesalers and jobbers, endeavoring to impress them with the merits of, and to induce them to specify or recommend the use of, Stockham's products. Although he has no authority to accept orders or to make contracts for the company, he solicits orders from wholesalers and jobbers, and transmits such as he receives to the home office for approval of credit and acceptance or rejection, but "for the most part" orders are mailed directly by the purchasers to the home office in Birmingham. Accepted orders are filled by delivery of the goods to the purchasers, or to a common carrier consigned to the purchasers, at the Birmingham plant. Sales invoices are prepared and mailed by the home office directly to the purchasers who remit to the home office. The salesman does not receive payments, collect accounts or adjust claims. Except for the small amount of office furniture in its Atlanta sales office the company has no property in Georgia, nor does it have a bank account there, and the salaries of the salesman and secretary and their reimbursable expenses, the office rent, telephone bills and all other expenses of the Atlanta office are paid directly from the home office.

[4] Code of Georgia, 1933, as amended, § 92–3113 (4) provides that "Where income is derived from the manufacture, production, or sale of tangible personal property, the portion of the net income therefrom attributable to property owned or business done within this State shall be taken to be the portion arrived at by" the arithmetical average which the ratios of the taxpayer's (a) inventories of products held in the State, (b) compensation paid or incurred in the State, and (c) gross receipts from business done within the State bear to the taxpayer's totals of those factors.

Georgia of 1933, as amended, § 92–3113, which, in pertinent part, provides:

> "Corporations, allocation and apportionment of income.—The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, . . . *whether or not any such activity or transaction is connected with interstate or foreign commerce.*" (Emphasis added.)

Upon demand, Stockham paid the taxes and, after denial of timely claim for refund, brought this suit to recover the amount paid, contending (1) that § 92–3113, as applied, imposed the taxes directly upon interstate commerce and, hence, regulated it in violation of the Commerce Clause of the Constitution, and (2) that the income involved was not subject to Georgia's jurisdiction and its action in taxing it violated the Due Process Clause of the Fourteenth Amendment. The trial court sustained the tax. Stockham appealed to the Supreme Court of Georgia. It found that:

> "[W]ithout dispute [Stockham] was engaged exclusively in interstate commerce in so far as its activities in Georgia are concerned . . . ." 213 Ga. 713, 719, 101 S. E. 2d 197, 201.

And it held that § 92–3113, as applied, violated the Commerce Clause of the Constitution. It thereupon reversed the judgment, 213 Ga. 713, 101 S. E. 2d 197, and we granted Georgia's petition for certiorari. 356 U. S. 911.

I submit that these simple recitals clearly show (1) that the Minnesota and Georgia statutes, in plain terms, purport to tax income derived "exclusively [from]

interstate commerce," (2) that the Minnesota and Georgia courts have found that the income involved was derived "exclusively [from] interstate commerce," and (3) that the taxes were laid directly on that interstate commerce. There is no room to dispute these admitted facts. Yet, I believe, the Court does not squarely face them but veiledly treats the cases as though intrastate commerce were to some extent involved. It says, referring to the Minnesota case, (a) that one of the salesmen was known as "district manager," (b) that the Minneapolis sales office was used "as a clearing house," (c) that "Orders were solicited and received from [builders, contractors and architects], on special forms furnished by appellant, directed to an approved local dealer who in turn would fill them by placing a like order with appellant, [and that] [t]hrough this system appellant's salesmen would in effect secure orders for local dealers which in turn were filled by appellant in the usual manner," and (d) that "Salesmen would also receive and transmit claims against appellant for loss or damage in any shipments made by it, informing the company of the nature thereof and requesting instructions concerning the same." These recitals, if found true, might very well have supported a finding, had there been one, that the taxpayer was engaged in intrastate commerce in Minnesota. Particularly might the statement about the salesmen taking orders from builders, contractors and architects for local dealers have done so, for it was expressly held in *Cheney Brothers Co.* v. *Massachusetts,* 246 U. S. 147, 155, that such conduct amounted to engaging in the local business of selling products for such dealers. But no such finding was made by the Minnesota courts. And there is more than colorable basis for believing that Minnesota did not desire such a finding, as any such practice could easily be ended by Northwestern, and Minnesota's purpose was not to rest on such a basis but to obtain an adjudication that

its statute, § 290.03, constitutionally imposed a tax upon the taxpayer's net income from Minnesota customers though derived "exclusively [from] interstate commerce." Nor can the Court's seeming disdain of the word "commerce" and its frequent use, instead, of "activities" obscure the fact that it was "exclusively interstate commerce" that was taxed. The abstract use of the word "activities," as applied to a commerce question and distinguished from a due process one, has no legal significance. What is of legal consequence is whether the "activities" were in intrastate or in interstate commerce. Here, the Minnesota and Georgia courts have found that the income which was taxed had derived "exclusively [from] interstate commerce."

So if anything is plain it is that we are not presented with cases involving the doing of *any* intrastate commerce in Minnesota or Georgia by the taxpayers. The courts of those States have expressly found that there was none. Therefore, we do not have a situation where a taxpayer was doing *both* intrastate and interstate commerce within the taxing State, thus to invoke application of the State's apportionment statute in order to determine how much of the total income of the taxpayer had derived from intrastate commerce in the taxing State, and was, therefore, subject to its taxing power. Instead we have here *only* interstate commerce, which the States are prohibited from regulating, by direct taxation or otherwise, by the Commerce Clause of the Constitution.

Yet, the Court "conclude[s] that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local *activities* within the taxing State forming sufficient nexus to support the same." (Emphasis added.) I respectfully submit that this is novel doctrine, and that this Court has never before so held.

The Court refers to our past opinions in this field as creating a "quagmire," and says "there is a 'need for clearing up the tangled underbrush of past cases' with reference to the taxing power of the States . . . ." I respectfully submit that this Court's past opinions, rightly understood and aligned in their proper categories, are remarkably consistent in a field so varied and complex, and that they do not deserve the characterizations given them. It is quite true in this field—as I think is the case in almost every field—that loose statements can be found in some of the opinions which when considered in isolation, and certainly when taken out of context, are seemingly outside the line of the law. But I think it is entirely fair to say that such confusion as exists is mainly due to a failure properly to analyze, understand, categorize and apply the decisions.

In applying the Court's opinions in the field of state income taxation of commerce, it is at least necessary sharply to discern (1) whether the tax was laid upon the general income of a resident or domiciliary of the taxing State, (2) whether the taxpayer's production, manufacturing, distribution or management facilities, or some of them, were located in the taxing State, (3) whether the taxpayer conducted *both* intrastate and interstate commerce in the taxing State, and, if so, (4) whether the tax was directly laid on income derived from interstate commerce, or—what is the equivalent—on the whole of the income, or whether the whole of the income was used as one of the several factors in an apportionment formula merely for the purpose of fairly measuring the uncertain percentage or proportion of the total income that was earned within the taxing State.

Let us start our consideration with fundamentals. Of course, the foundation is the Commerce Clause itself. It provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the sev-

eral States, and with the Indian Tribes . . . ." U. S. Const., Art. I, § 8, cl. 3. That clause "by its own force created an area of trade free from interference by the States." *Freeman* v. *Hewit,* 329 U. S. 249, 252. "[N]o State has the right to lay a tax on interstate commerce in any form. . . . [T]he reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." *Leloup* v. *Port of Mobile,* 127 U. S. 640, 648. And see the thirteen cases in this Court there cited in support of the quoted text. Mr. Justice Brandeis, speaking for the Court in *Sprout* v. *South Bend,* 277 U. S. 163, 171, declared that "in order that [a State] fee or tax shall be valid, it must appear that it is imposed *solely* on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; *that one engaged exclusively in interstate commerce would not be subject to the imposition;* and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business." (Emphasis added.) The same declaration was made for the Court by Mr. Justice Butler in *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 470, and again by Mr. Chief Justice Hughes in *Cooney* v. *Mountain States Tel. Co.,* 294 U. S. 384, 393.

From this alone it would seem necessarily to follow that the taxes here challenged, which were laid by the States directly on "exclusively interstate commerce," burdened that commerce and, hence, regulated it in violation of the Commerce Clause of the Constitution. But there is more. This Court has consistently struck down state taxes which were laid on business that was *exclusively* interstate in character. *Cheney Brothers Co.* v. *Massachusetts,* 246 U. S. 147, 153; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555; *Spector Motor Service* v. *O'Connor,* 340 U. S. 602. Cf. *Joseph* v. *Carter & Weekes Co.,* 330

U. S. 422; *Freeman* v. *Hewit, supra.* Neither the Court nor counsel have cited, and our research has not disclosed, a single opinion by this Court that has upheld a state tax laid on "exclusively interstate commerce," and we are confident none exists.

The Court recognizes that "the States, under the Commerce Clause, are not allowed 'one single-tax-worth of direct interference with the free flow of commerce.' *Freeman* v. *Hewit,* 329 U. S. 249, 256." It then says "On the other hand, it has been established since 1918 that a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon state interference with such commerce. The decision of *Peck & Co.* v. *Lowe,* 247 U. S. 165, pointed the way." What way did it point? There the 1913 *federal* income tax Act, imposing a tax upon the "entire net income arising or accruing from all sources during the preceding calendar year," was applied by the Federal Government to the whole net income of one who derived about three-fifths of it from "buying goods in the several States, shipping them to foreign countries and there selling them." The question was whether such a tax validly could be imposed in the light of Art. I, § 9, cl. 5 of the Constitution which provides that "No Tax or Duty shall be laid on Articles exported from any State." This Court held that the export clause only precluded taxation of "articles in course of exportation," and did not prohibit federal taxation of general income of the taxpayer "from all sources," and that the tax was "not laid on income from exportation because of its source," but upon general income "from all sources," and was, therefore, within the *federal* power to levy. 247 U. S., at 174. But here the States of Minnesota and Georgia "laid [the taxes directly] on income from [exclusively interstate commerce] because of its source." They do not contend that they were laid on *any* intrastate commerce but admit

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there was none. I submit that the *Lowe* case does not in any sense "point the way" for direct taxation by a State of that which it finds and admits to be "exclusively interstate commerce."

The Court then says "The first case in this Court applying the doctrine [of the *Lowe* case] to interstate commerce was that of *U. S. Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321." I submit that nothing in that case is authority for the proposition that a State may tax "exclusively interstate commerce." Exactly to the contrary, it sustained a tax only on "that proportion of [the taxpayer's] income derived from business transacted . . . within the State . . . ." 247 U. S., at 329. That was the whole point of the case. There the Glue Company, a Wisconsin corporation, maintained its principal office and its only manufacturing plant in the town of Oak Creek, in that State. It also maintained stocks in branches in other States. It sold its products both locally in Wisconsin, and in other States in interstate commerce, shipping either directly from its plant in Wisconsin or from one of its branches in another State. In the year involved, about one-seventh of its sales were made locally in Wisconsin, four-sevenths of them were made, and the goods shipped from its factory directly to customers in other States, in interstate commerce, and two-sevenths of them were made from stocks in its branches in other States. Wisconsin's income tax statutes provided, in pertinent part, that "any person engaged in business within and without the state shall . . . be taxed only upon that proportion of such income as is derived from business transacted . . . within the state." *"In order to determine what part of the income of a corporation engaged in business within and without the State . . . is to be taxed as derived from business transacted . . . within the State, reference is had to a formula prescribed by another statute,"* which employed the total income of the tax-

payer as one of its several factors. "This formula was applied in apportioning [the taxpayer's] net 'business income' for the year" involved, which produced an amount substantially exceeding one-seventh of its total income—the amount of its local sales. "[U]pon the portion thus attributed to the State . . . the tax in question was levied." 247 U. S., at 323–325. The Glue Company resisted the tax, contending that it was imposed directly upon interstate commerce in violation of the Commerce Clause of the Constitution, and, failing of relief in the Supreme Court of the State, it brought the case here on writ of error. This Court affirmed, concluding that the tax was "measured . . . by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations *doing business within the State* are taxed *upon that proportion of their income derived from business transacted . . . within the State* . . . ." 247 U. S., at 329. (Emphasis added.)

It would seem too obvious for debate that if a taxpayer maintains its factory and produces all its goods in one State but sells the whole in other States in interstate commerce, it has derived some portion of its income in the State of manufacture or production. It should be obvious, too, that where such a manufacturer has sold some of its products locally and others of them in interstate commerce, that the mere ratio of intrastate sales to interstate ones well might not constitute a fair basis for determining what part of the net income was derived from intrastate commerce on the one hand, and interstate commerce on the other. Inasmuch as it has always been thought by American lawyers that the States cannot tax interstate commerce but may tax intrastate commerce, it has been deemed necessary for the State to determine what portion of the total income of the taxpayer was derived from intrastate commerce done within its borders

and is therefore subject to its taxing power. To accomplish that purpose, most States, like Wisconsin in the *U. S. Glue* case, and like Minnesota and Georgia in the cases here, have adopted apportionment statutes, applicable to situations where the taxpayer is doing business *both* within and without the State, which use, as one of the several factors, the total income of the taxpayer in *measuring* the part of the income that was derived from within the taxing State. Those were the principles applied in the *U. S. Glue* case.

Those principles were again made unmistakably clear, and were applied, by Mr. Justice Brandeis, in *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, next relied on by the Court. That case does not hold that "exclusively interstate commerce" may be taxed by a State. It holds just the contrary. There Underwood Typewriter Company, though a Delaware corporation, had become a domiciliary of Connecticut and manufactured all of its machines at its factory in that State. It sold them both locally in Connecticut and in other States in interstate commerce. In the year involved, about 33 percent of its dollar volume of sales was made in Connecticut and the remainder in other States in interstate commerce. To determine the amount of Underwood's net income derived from intrastate commerce, Connecticut applied the formula prescribed by its apportionment statute. This resulted in a determination that 47 percent of Underwood's net income had been derived from intrastate commerce in Connecticut. Upon that amount it computed and assessed its 2 percent net income tax. This Court, in sustaining the tax, over Underwood's objection that it violated the Commerce Clause of the Constitution, said: "*This tax is based upon the net profits earned within the State.* That a tax *measured* by net profits is valid, although these profits may have been derived in part, or

indeed mainly, from interstate commerce is settled. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter,* 252 U. S. 37, 57. Compare *Peck & Co.* v. *Lowe,* 247 U. S. 165. . . . The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the *impossibility of allocating specifically* the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment *which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State.*" 254 U. S., at 120–121. (Emphasis added.)

The Court next takes up the case of *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649. That case does not at all hold that "exclusively interstate commerce" may be taxed by a State. It, too, holds just the contrary. There Memphis Natural Gas Company purchased gas in Louisiana which it transported through its interstate pipe line to Tennessee where it sold 20 percent of it in interstate commerce, but it delivered 80 percent of it to Memphis Power & Light Company. "That company distributes it to consumers under a contract with taxpayer which the Supreme Court of Tennessee has found to be a joint undertaking of the two companies whereby taxpayer furnishes gas from its pipeline, the Memphis company furnishes facilities and service for distribution and sale to consumers, and the proceeds of the sale, after deduction of specified costs and expenses, are divided between the two companies." 315 U. S., at 652. A Tennessee statute imposed a tax on all foreign and domestic corporations of "three per cent. of the net earnings . . . arising

from business done *wholly within the state, excluding earnings arising from interstate commerce.*" *Ibid.* Acting under that statute, a tax "was laid on [the taxpayer's] net earnings from the distribution of gas *under its contract* with the Memphis company." 315 U. S., at 653. This Court said that "if the Supreme Court of Tennessee correctly construed taxpayer's contract with the Memphis company as establishing a profit-sharing joint adventure in the distribution of gas to Tennessee consumers, the taxpayer's net earnings *under the contract* were subject to local taxation." 315 U. S., at 653–654. (Emphasis added.) This Court then found that the Supreme Court of Tennessee had correctly construed the contract and that the taxpayer's activities "constituted participation in the business of distributing the gas to consumers after its delivery into the service pipes of the Memphis company," and sustained the tax, concluding: "There is no contention or showing here that the tax assessed is not *upon net earnings justly attributable to Tennessee.*" 315 U. S., at 656, 657. (Emphasis added.)

It is true that Mr. Chief Justice Stone's opinion in the *Beeler* case contains the following language at page 656:

> "In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation *having a commercial domicile there,* cf. *Wheeling Steel Corp.* v. *Fox,* [298 U. S. 193], or upon net income derived from within the state, *Shaffer* v. *Carter,* 252 U. S. 37, 57; *Wisconsin* v. *Minnesota Mining Co.,* 311 U. S. 452; cf. *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, is not prohibited by the commerce clause on which alone taxpayer relies. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Underwood Typewriter Co.* v. *Chamberlain,* 245 U. S. 113, 119–20 . . . ." (Emphasis added.)

The first sentence of that quotation caused Mr. Justice Burton to say, in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 609, note 6, that the statement was "not essential to the decision in the case." But it is a mistake to say that Mr. Chief Justice Stone's language even comes near holding that exclusively interstate commerce may be taxed by a State. Note that he spoke of a foreign corporation "having a commercial domicile" in the taxing State. That connotes the conduct of intrastate commerce in the taxing State, such as was involved in the *Fox* case which he cited, *i. e.*, the maintenance in the taxing State of the taxpayer's "principal office" in which its principal officers were located and conducted their business, and where a duplicate stock ledger and the records of capital stock transactions of the taxpayer were continuously kept. Of course that conduct amounted to the doing of intrastate commerce, and naturally the State could tax that intrastate commerce. And that's all the State did in *Fox*. Interstate commerce was not taxed either in *Beeler* or in *Fox*.

The Court then cites *Bass, Ratcliff & Gretton, Ltd.*, v. *State Tax Commission*, 266 U. S. 271, and *Norfolk & W. R. Co.* v. *North Carolina*, 297 U. S. 682. But from the Court's own recitals respecting those cases it appears that the taxpayers there "carried on substantial local activities" within the taxing States, which permitted the States to lay taxes on that intrastate commerce, "measured on a proportional formula." Those cases are exactly in line with the *U. S. Glue*, *Underwood*, and *Beeler* cases. They did not sustain a state tax on exclusively interstate commerce.

The Court next cites this Court's *per curiam* in *West Publishing Co.* v. *McColgan*, 328 U. S. 823, and quotes from the California opinion, which was there affirmed, only the following: "The employees were given space in the offices of attorneys in return for the use of plaintiff's

books stored in such offices." It will be seen by reference to the California opinion that the California court had found considerably more intrastate commerce. It had found that the taxpayer "regularly employed solicitors in [that] state who . . . were authorized to receive payments on orders taken by them, to collect delinquent accounts, and to make adjustments in case of complaints by customers, [and who] were given space in the offices of attorneys in return for the use of [the taxpayer's] books stored in such offices [which were] advertised as its local offices . . . ." 27 Cal. 2d 705, 707, 166 P. 2d 861, 862. That finding established the usual criteria which this Court has consistently held to constitute the doing of intrastate commerce. California determined and taxed only the amount of that intrastate commerce. It did not tax any interstate commerce. This Court in its *per curiam* affirmance cited the landmark Commerce Clause cases of *U. S. Glue Co.* v. *Oak Creek, supra; Memphis Natural Gas Co.* v. *Beeler, supra,* and the landmark Due Process Clause case of *International Shoe Co.* v. *Washington,* 326 U. S. 310. Surely this makes it clear that at least this Court did not sustain any tax on interstate commerce.

The Court's quotation from *Wisconsin* v. *Minnesota Mining & Manufacturing Co.,* 311 U. S. 452, shows on its face that Wisconsin there taxed only income "attributable to earnings within the taxing state . . . ."

Spector Motor Service v. *O'Connor,* 340 U. S. 602, is quite consistent with the prior cases. There, by a process of elimination, the Court determined what the tax was *not* in arriving at what it was, and concluded that it was a tax which attached "solely to the franchise of petitioner to do interstate business." The Court then said:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a

> tax persists no matter how fairly it is apportioned to business done within the state." (Citing *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555; and referring, for comparison, to *Interstate Pipe Line Co.* v. *Stone,* 337 U. S. 662, 669; *Joseph* v. *Carter & Weekes Co.,* 330 U. S. 422; *Freeman* v. *Hewit,* 329 U. S. 249.)
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> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state . . . ." 340 U. S., at 609–610.

Is it not plain that this recent case holds that "exclusively" interstate commerce may not be taxed by a State?

With this demonstration of the holdings in the commerce cases relied upon by the Court, surely we can repeat, with the conviction of demonstrated truth, our statement that none of the cases relied on by the Court supports its holding "that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State . . . ." The fact that such taxes may be fairly or "properly apportioned" is without legal consequence, for "The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state." *Spector Motor Service* v. *O'Connor, supra,* at 609. That this Court has always sustained state taxes on fairly determined amounts of intrastate income should be evident enough from the shown fact that it has struck them down only when there was none.

The Court says "We believe that the rationale of these cases, involving income levies by States, controls the issues here." I agree that the rationale of those cases controls the issues here. But I cannot agree that those cases involved *like* "income levies by States." They involved levies of income taxes on intrastate commerce, not on "exclusively interstate commerce." Whereas, here both the Minnesota and Georgia courts have found that the income taxed by those States had derived "exclusively [from] interstate commerce," and that the tax was not levied upon any intrastate commerce for there was none.

In these circumstances, I submit it is idle to say that the taxes were not laid "on" interstate commerce, but on the taxpayer's general income after all commerce had ended, and, therefore, did not burden, nor hence regulate, interstate commerce. For in addition to the plainness of the fact, the courts of Minnesota and Georgia have explicitly held in these cases that the income involved was derived "exclusively [from] interstate commerce," and that the taxes were laid on that income. The taxes do not purport to have been, and could not have been, laid on any income derived from intrastate commerce in those States for there was none. It necessarily follows that the taxes were "laid on income from [interstate commerce] because of its source," *Peck & Co.* v. *Lowe, supra,* at 174, just as in *Spector Motor Service* v. *O'Connor, supra.*

The Commerce Clause denies state power to regulate interstate commerce. It vests that power exclusively in Congress. Direct taxation of "exclusively interstate commerce" is a substantial regulation of it and, therefore, in the absence of congressional consent, the States may not directly tax it. This Court has so held every time the question has been presented here until today. Without congressional consent, the States of Minnesota and Georgia have laid taxes directly on what they admit was

"exclusively interstate commerce." Hence, in my view, those levies plainly violated the Commerce Clause of the Constitution and cannot stand consistently therewith and with our prior cases. I would, therefore, reverse the judgment of the Supreme Court of Minnesota in No. 12 and affirm the judgment of the Supreme Court of Georgia in No. 33.

CAMMARANO ET UX. *v.* UNITED STATES.

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

No. 29. Argued November 19, 1958.—Decided February 24, 1959.*

1. In computing federal income taxes, sums paid by a taxpayer to an organization which expended them in extensive publicity programs designed to persuade voters to cast their ballots against proposed state initiative legislation which would have seriously affected or wholly destroyed the taxpayer's business may not be deducted from gross income as "ordinary and necessary" business expenses under § 23 (a) (1) (A) of the Internal Revenue Code of 1939, as interpreted by §§ 29.23 (o)–1 and 29.23 (q)–1 of Treasury Regulations 111, which forbid the deduction of sums expended for "the promotion or defeat of legislation." Pp. 499–507.

   (a) The Regulations apply to expenditures made in connection with efforts to promote or defeat legislation by persuasion of the general public as well as efforts to influence legislative bodies directly through "lobbying." Pp. 504–505.

   (b) They apply to expenses incurred in furthering or combatting proposed initiative measures as well as bills pending before legislatures. Pp. 505–507.

2. As so interpreted, the Regulations are not in conflict with § 23 (a) (1) (A) and are a valid exercise of the Commissioner's rule-making power. Pp. 507–512.

3. As thus construed and applied, the Regulations do not present a substantial constitutional question under the First Amendment. *Speiser* v. *Randall*, 357 U. S. 513, distinguished. Pp. 512–513.

246 F. 2d 751 and 251 F. 2d 724, affirmed.

Frederick Bernays Wiener argued the cause for petitioners in No. 29. With him on the brief was *Clinton M. Hester.*

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*Together with No. 50, *F. Strauss & Son, Inc., of Arkansas* v. *Commissioner of Internal Revenue*, on certiorari to the United States Court of Appeals for the Eighth Circuit.

E. Chas. Eichenbaum argued the cause for petitioner in No. 50. With him on the brief were *Leonard L. Scott* and *W. S. Miller, Jr.*

Oscar H. Davis argued the causes for respondents. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Myron C. Baum.*

Hart H. Spiegel filed a brief for the Bay Cities Transportation Co., as *amicus curiae.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases, coming to us from two different Circuits, present identical issues, and may appropriately be dealt with together in one opinion. The issues involve the interpretation and validity of Treas. Reg. 111, § 29.23 (o)–1 and § 29.23 (q)–1 as applied by the courts below to deny deduction as "ordinary and necessary" business expenses under § 23 (a)(1)(A) of the Internal Revenue Code of 1939 [1] to sums expended by the respective taxpayer petitioners in furtherance of publicity programs designed to help secure the defeat of initiative measures then pending before the voters of the States of Washington and Arkansas.

The Treasury Regulations in question each provides in pertinent part that no deduction shall be allowed to "sums of money expended for lobbying purposes, the promotion

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[1] That section (26 U. S. C. § 23 (a)(1)(A)) provides in pertinent part:

"§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or Business Expenses.

"(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising . . . ." [2] Both Courts of Appeals held that these provisions render nondeductible sums paid by petitioners to organizations which expended them in extensive publicity programs designed to persuade the voters to cast their ballots against state initiative measures, even though the passage of those measures would have seriously affected, or indeed wholly destroyed, the taxpayers' businesses—and that so interpreted the Regulations are a valid exercise of the Commissioner's rule-making power. We granted certiorari because of the recurring nature of the question, and because of its importance to the proper administration of the Internal Revenue laws. 355 U. S. 952; 356 U. S. 966.

A brief review of the facts in the two cases is necessary to an understanding of the issues.

No. 29: In 1948 petitioners William and Louise Cammarano, husband and wife, jointly owned a one-fourth interest in a partnership engaged in the distribution of beer at wholesale in the State of Washington. The partnership was a member of the Washington Beer Wholesalers Association. In December 1947 the Association had established a trust fund as a repository for assessments collected from its members to help finance a statewide publicity program urging the defeat of "Initiative to the Legislature No. 13," a measure to be submitted to the electorate at the general election of November 2, 1948, which would have placed the retail sale of wine and beer in Washington exclusively in the hands of the State.

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[2] Only § 29.23 (o)–1, which reads on individuals, is involved as to petitioners Cammarano, and only § 29.23 (q)–1, reading on corporations, as to petitioner F. Strauss & Son, Inc. Because the language and effect of the two Regulations are in all relevant respects identical they will be discussed throughout this opinion as if they were one.

During 1948 petitioners' partnership paid to the trust fund $3,545.15, of which petitioners' pro rata share was $886.29. The trust fund collected a total of $53,500, which was turned over to an Industry Advisory Committee organized by wholesale and retail wine and beer dealers, which in turn expended it as part of contributions totaling $231,257.10 for various kinds of advertising directed to the public, none of which referred to petitioners' wares as such and all of which urged defeat of Initiative No. 13.[3] The initiative was defeated.

In preparing their joint income tax return for 1948, petitioners deducted as a business expense the $886.29 paid to the Association's trust fund as their share of the partnership assessment. The deduction was disallowed by the Commissioner, and petitioners paid under protest the additional sum thus due and sued in the District Court for refund. That court ruled that the payments made to the trust fund were "expended for . . . the . . . defeat of legislation" within the meaning of Treas. Reg. 111, § 29.23 (o)–1 and were therefore not deductible as ordinary and necessary business expenses under § 23 (a)(1)(A) of the Internal Revenue Code of 1939. The Court of Appeals affirmed, holding the Regulation applicable and valid as applied. 246 F. 2d 751.[4]

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[3] A typical advertisement paid for by the Industry Advisory Committee, signed by "Men & Women Against Prohibition," begins "We intend to Vote Against Initiative 13—because it would mean a return to the speakeasy, the bootlegger, the gangster—and, finally, state-wide PROHIBITION! We urge our friends and neighbors to do likewise."

[4] The Court of Appeals alternatively held that judgment in favor of the Commissioner was required by a trial court finding that petitioners Cammarano had failed to show that passage of the initiative would have impaired their partnership's business as a beer distributor. 246 F. 2d, at 754. This ground of decision is not strongly defended by the Government in this Court, and on our view of the principles which control it need not be considered.

No. 50: Petitioner F. Strauss & Son, Inc., is a corporation engaged in the wholesale liquor business in Arkansas. In 1950 an initiative calling for an election on statewide prohibition was placed on the ballot to be voted on in the state general election on November 7, 1950. In May of that year Strauss, together with eight other Arkansas liquor wholesalers, organized Arkansas Legal Control Associates, Inc., as a means of coordinating their efforts to persuade the voters of Arkansas to vote against the proposed prohibition measure. Between May 30 and November 30, 1950, Arkansas Legal Control Associates collected a total of $126,265.84, which was disbursed for various forms of publicity concerning the proposed Act.[5] Strauss' contribution amounted to $9,252.67.

The initiative measure was defeated in the November election. On its 1950 income tax return Strauss deducted the $9,252.67 as a business expense. The Commissioner disallowed the deduction and Strauss filed a timely petition in the Tax Court seeking a redetermination of the deficiency asserted. That court upheld the action of the Commissioner in disallowing the claimed deduction, and the Court of Appeals unanimously affirmed. 251 F. 2d 724.

Since 1918 regulations promulgated by the Commissioner under the Internal Revenue Code have continuously provided that expenditures for the "promotion or defeat of legislation . . . ," or for any of the other purposes specified in the "corporate" Regulation now before us, are not deductible from gross corporate income; and

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[5] A typical advertisement, which ran in all Arkansas daily and weekly newspapers, and which shows as its sponsor "Arkansas Against Prohibition," begins:

"What Does 'One Quart' Prohibition REALLY MEAN? There's nothing like it anywhere . . . it's novel . . . it's unique. But it's sinister . . it's a plan to destroy the strictly-regulated alcohol beverage business and to turn that business over to the bootlegger."

since 1938 regulations containing identical language have forbidden such deductions from individual income.[6] During this period of more than 40 years these regulatory provisions have been before this Court on only one occasion. In *Textile Mills Securities Corp.* v. *Commissioner,* 314 U. S. 326, it was held that the Commissioner properly disallowed the deduction of sums paid by a corporation to a publicist and two legal experts employed to help secure the passage of legislation designed to secure the return of certain properties in this country seized during World War I under the provisions of the Trading With the Enemy Act. This holding was squarely based on the regulatory provisions now embodied in Treas. Reg. 111, § 29.23 (q)–1, which were found valid and applicable to the facts involved in that case, although the very busi-

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[6] Article 143 of Treas. Reg. 33 (1918 ed.) denied deductibility as ordinary and necessary business expenses to corporate expenditures for "lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda . . . ." The prohibition against corporate deduction of such expenditures first appears in its present form in Art. 562 of Treas. Reg. 45 (1919 ed.), promulgated under the Revenue Act of 1918. Thereafter it so appears continuously without change. See Art. 562 of Treas. Reg. 45 (1920 ed.), 62, 65, and 69, promulgated under the Revenue Acts of 1918, 1921, 1924, and 1926, Art. 262 of Treas. Reg. 74 and 77, promulgated under the Revenue Acts of 1928 and 1932, Art. 23 (o)-2 of Treas. Reg. 86, promulgated under the Revenue Act of 1934, Art. 23 (q)–1 of Treas. Reg. 94 and 101, promulgated under the Revenue Acts of 1936 and 1938, §§ 19.23 (q)–1, 29.23 (q)–1, and 39.23 (q)–1 of Treas. Reg. 103, 111, and 118, respectively, promulgated under the Internal Revenue Code of 1939.

The prohibition against individual deductibility of such expenditures first appears in Art. 23 (o)–1 of Treas. Reg. 101, promulgated under the Revenue Act of 1938, and thereafter in §§ 19.23 (o)–1, 29.23 (o)–1, and 39.23 (o)–1 of Treas. Reg. 103, 111, and 118, respectively, promulgated under the Internal Revenue Code of 1939.

In the proposed Income Tax Regulations under the 1954 Code the prohibitions are consolidated in § 1.162–15.

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ness of the taxpayer seeking the deduction was the direction of the publicity program in the course of which the expenditures were made.

Petitioners suggest that *Textile Mills* is not dispositive of the present cases, either as to the applicability of the Regulations upon the facts disclosed by these records or as to the validity of those Regulations under the statute if they are found to be applicable. Essentially, petitioners' contentions are (1) that the Regulations cannot properly be construed as applicable to expenditures made in connection with efforts to promote or defeat the passage of legislation by persuasion of the general public as opposed to direct influence on legislative bodies, that is "lobbying"; (2) that in any case the Regulations are inapplicable to expenditures made in connection with initiative measures; and (3) that if construed as applicable to the facts here presented the Regulations are invalid as contrary to the plain terms of § 23 (a)(1)(A) of the 1939 Code and possibly as unconstitutional under the First Amendment.

We need not be long detained by the question of the applicability of the Regulations to petitioners' expenditures. First, we see no justification for reading into these regulatory provisions the implied exceptions which petitioners would have us there find. We cannot accept petitioners' argument that *Textile Mills* should be read as limiting such provisions to direct dealings with legislators, insidious or otherwise. The deductions whose propriety was before the Court in that case were for expenditures, characterized by the Court of Appeals as being for "matters of publicity, 'including the making of arrangements for speeches, contacting the press, in respect of editorial comments, and news items,'" and for the preparation of "brochures" involving "a comprehensive study of the history of the treatment of persons and property in war," 117 F. 2d 62, 65, 63, all designed to influence

the opinions of the general public.[7] Apart from *Textile Mills,* the Courts of Appeals have uniformly applied these Regulations to expenditures for publicity directed to the general public on legislative matters. See, *e. g., Revere Racing Assn.* v. *Scanlon,* 232 F. 2d 816 (C. A. 1st Cir.); *American Hardware & Eq. Co.* v. *Commissioner,* 202 F. 2d 126 (C. A. 4th Cir.); *Roberts Dairy Co.* v. *Commissioner,* 195 F. 2d 948 (C. A. 8th Cir.); *Sunset Scavenger Co.* v. *Commissioner,* 84 F. 2d 453 (C. A. 9th Cir.). Petitioners' reading of these Regulations would make all but the reference to "lobbying" pure surplusage. We think that the Regulations must be construed to mean what they say—that not only lobbying expenses, but also sums spent for "the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising" are nondeductible.[8]

Likewise unpersuasive is petitioners' suggested distinction between expenses incurred in attempting to promote or defeat legislation pending before legislatures and those incurred in furthering or combatting an initiative measure. We think that initiatives are plainly "legislation" within the meaning of these Regulations. Had the

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[7] Petitioners Cammarano suggest that in fact "lobbying" was involved in *Textile Mills* because of the activities of one Mondell whose services had also been engaged by the petitioner there. But the opinion of the Court of Appeals shows that none of the payments made to Mondell were involved in the litigation (see 117 F. 2d, at 64), and the opinion of this Court makes no reference to any of Mondell's activities.

[8] Petitioners point to *United States* v. *Rumely,* 345 U. S. 41, and *United States* v. *Harriss,* 347 U. S. 612, where this Court interpreted the term "lobbying" in a congressional resolution and in the Federal Regulation of Lobbying Act, 2 U. S. C. §§ 261–270, to mean only representations and communications made directly to Congress and its members concerning pending or proposed legislation. These cases do not advance petitioners' cause, since the regulatory provisions here explicitly embrace more than "lobbying." Cf. *United States* v. *Rumely, supra,* at 47.

measures involved in these cases been passed by the people of Washington and Arkansas they would have had the effect and status of ordinary laws in every respect. The Constitutions of the States of Washington and Arkansas both explicitly recognize that in providing for initiatives they are vesting legislative power in the people.[9] Every court which has considered the question has found these provisions to be fully as applicable to initiatives and referendums as to any other kind of legislation. See *Revere Racing Assn.* v. *Scanlon, supra; Old Mission Portland Cement Co.* v. *Commissioner,* 69 F. 2d 676, affirmed on other issues, 293 U. S. 289; *Mosby Hotel Co.* v. *Commissioner,* decided October 22, 1954, P–H 1954 TC Mem. Dec. ¶ 54,288; *McClintock-Trunkey Co.* v. *Commissioner,* 19 T. C. 297, reversed on other issues, 217 F. 2d 329 (involving payments, like those of petitioners Cammarano, made to the Washington Beer Wholesalers Association in connection with "Initiative to the Legislature No. 13").

A contrary reading of the Regulations would, indeed, be anomalous, for it would mean that expenses of publicity campaigns directed to the public to influence it in turn to persuade its legislative representatives to vote for or against pending bills would be encompassed by the Regulations and denied deductibility, whereas a less-

[9] Amendment 7 of the Constitution of the State of Washington provides in pertinent part:

"Art. 2, Sec. 1. *Legislative Powers, Where Vested*—The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature . . . ."

Amendment 7 of the Arkansas Constitution contains a virtually identical provision.

diluted form of persuasion and influence, directed to the voters as legislators, would be left at large so far as the Regulations are concerned. We see no reason to give so artificial and strained a construction to the pertinent language.[10]

The cornerstone of petitioners' argument is that Treas. Reg. 111, § 29.23 (o)–1 and § 29.23 (q)–1 are invalid if interpreted to apply to the expenditures here at issue. It is contended that sums expended by a taxpayer to preserve his business from destruction are deductible as ordinary and necessary business expenses under the Code as a matter of law, and that therefore a regulation purporting to deny deductibility to such expenditures is plainly contrary to the statute and *ipso facto* invalid. Petitioners rely upon *Commissioner* v. *Heininger,* 320

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[10] Petitioners place heavy reliance on the Commissioner's acquiescence until 1958 in a 1944 decision of the Tax Court allowing deduction to expenditures—found otherwise to qualify under § 23 (a)(1)(A) of the 1939 Code—incurred by a taxpayer in connection with a self-operative amendment to the Missouri Constitution, on the ground that "no legislation was needed or involved." *Smith* v. *Commissioner,* 3 T. C. 696. Whether or not under the Regulations here at issue a distinction can rationally be drawn between a popularly enacted constitutional amendment and an initiative, we do not see how the fact that the Tax Court and the Commissioner for a period made such a distinction, compare *Smith* v. *Commissioner, supra,* with *McClintock-Trunkey Co.* v. *Commissioner,* 19 T. C. 297, reversed on other issues, 217 F. 2d 329, helps petitioners' case, as the Commissioner and the Tax Court have been entirely consistent in their position that expenditures connected with initiatives—as in the present cases—are not deductible.

The Tax Court appears to have modified its view since the *Smith* case even as to expenditures made in connection with constitutional amendments. See *Mosby Hotel Co.* v. *Commissioner,* decided October 22, 1954, P–H 1954 TC Mem. Dec. ¶ 54,288. And the Commissioner has recently withdrawn his acquiescence in the *Smith* decision. See Rev. Rul. 58–255, 1958–1 Cum. Bull. 91.

U. S. 467, where this Court held that attorney's fees incurred by a mail-order dentist in resisting a postal fraud charge which would have ended his business were deductible as an ordinary and necessary business expense.

We do not think that *Heininger* governs the present cases, nor that it establishes as broad a rule of law as petitioners suggest. In *Heininger* this Court held no more than that expenditures without which a business enterprise would inevitably suffer adverse effects, and the granting of deductibility to which would frustrate no "sharply defined national or state policies," 320 U. S., at 473 (see also *Commissioner* v. *Sullivan,* 356 U. S. 27), were deductible as ordinary and necessary business expenses under the statute.[11] Here the deductions sought are prohibited by Regulations which themselves constitute an expression of a sharply defined national policy, further demonstration of which may be found in other sections of the Internal Revenue Code.[12]

As was said in *Textile Mills,* "the words 'ordinary and necessary' are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that." 314 U. S., at 338. In the present cases there is before us regulatory language of more than 40 years' continuous duration expressly providing that sums expended for the activities here involved shall not be considered an ordinary and necessary business expense under the statute. The provisions of the Internal Revenue Code which underlie the Regulations have been repeatedly re-enacted by the Congress without the slightest suggestion that the

[11] The Court noted that in judging the issues before it "we do not have the benefit of an interpretative departmental regulation defining the application of the words 'ordinary and necessary' to the particular expenses here involved." 320 U. S., at 470.

[12] See p. 512, *post.*

policy expressed in these regulatory measures does other than precisely conform to its intent.[13]

In 1934 the Court of Appeals for the Ninth Circuit denied deduction to expenses incurred in connection with a referendum which would, if passed, have increased the taxpayer's business. *Old Mission Portland Cement Co.* v. *Commissioner, supra.*[14] And in 1936 the same court in *Sunset Scavenger Co.* v. *Commissioner, supra,* reversed the Board of Tax Appeals to hold that the regulatory language now before us, through repeated re-enactment by Congress of the underlying legislation, already had acquired the force of law, and applied it to deny deductibility to expenditures made by an incorporated association of garbage collectors for a publicity program directed to the general public urging the defeat of legislation which would have injured the business of the Association's membership. The court recognized that the Board of Tax Appeals had twice previously held similar expenditures deductible so long as not made for an illegal purpose,[15] but pointed out that in both of those cases the effect of the Regulation had been entirely disregarded, and that

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[13] See Note 6, *supra.*

[14] The suggestion of petitioners Cammarano that the decision in that case turned on factors of the kind involved in *McDonald* v. *Commissioner,* 323 U. S. 57, is contradicted by the statement of the Court of Appeals concerning *Old Mission* in *Sunset Scavenger Co.* v. *Commissioner,* 84 F. 2d, at 457.

[15] *G. T. Wofford* v. *Commissioner,* 15 B. T. A. 1225; *Los Angeles & Salt Lake R. Co.* v. *Commissioner,* 18 B. T. A. 168. Cf. *Lucas* v. *Wofford,* 49 F. 2d 1027, where a petition by the Commissioner for review of the decision in *G. T. Wofford, supra,* was denied upon a finding that the expenditures involved were not made "to secure the passage or defeat of any legislation." 49 F. 2d, at 1028.

After this Court's decision in *Textile Mills* the Board of Tax Appeals recognized that the Regulation was applicable to expenditures incurred in a "proper and legal attempt to prevent [business] injury" by endeavoring to secure the defeat of legislation. *Bellingrath* v. *Commissioner,* 46 B. T. A. 89, 92.

they were therefore not sound authority. Three years later the Congress, in the face of these decisions, again re-enacted without change in the 1939 Code the "ordinary and necessary" business expense section.

It is also noteworthy that Congress, in its 1954 re-enactment of the Internal Revenue Code, again adopted the "ordinary and necessary" provision without substantive change,[16] following consistent rulings by the courts subsequent to the 1939 re-enactment holding these Regulations applicable to sums spent in efforts to persuade the general public of the desirability or undesirability of proposed legislation affecting the taxpayer's business. See *Textile Mills; American Hardware & Eq. Co.* v. *Commissioner, supra; Roberts Dairy Co.* v. *Commissioner, supra; McClintock-Trunkey Co.* v. *Commissioner, supra.* Although the tax years involved in the cases before us are 1948 and 1950, and a 1954 re-enactment of course cannot conclusively demonstrate the propriety of an administrative and judicial interpretation and application as made to transactions occurring before the re-enactment, the 1954 action of Congress is significant as indicating satisfaction with the interpretation consistently given the statute by the Regulations here at issue and in demonstrating its prior intent. Cf. *United States* v. *Stafoff,* 260 U. S. 477, 480.

Under these circumstances we think that the Regulations have acquired the force of law. This is not a case where the Government seeks to cloak an interpretative regulation with immunity from judicial examination as to conformity with the statute on which it is based simply because Congress has for some period failed affirmatively to act to change the interpretation which the regulation gives to an otherwise unambiguous statute. Cf. *Jones* v. *Liberty Glass Co.,* 332 U. S. 524. Nor is it a case where

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[16] Internal Revenue Code of 1954, 26 U. S. C. (Supp. V) § 162.

no reliable inference as to Congress' intent can be drawn from re-enactment of a statute because of a conflict between administrative and judicial interpretation of the statute at the time of its re-enactment. Cf. *Commissioner* v. *Glenshaw Glass Co.,* 348 U. S. 426, 431. Here we have unambiguous regulatory language, adopted by the Commissioner in the early days of federal income tax legislation, in continuous existence since that time, and consistently construed and applied by the courts on many occasions to deny deduction of sums expended in efforts to persuade the electorate,[17] even when a clear business motive for the expenditure has been demonstrated.

In these circumstances we consider that what was said in *Massachusetts Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273, applies here:

> "This action [of Congress in re-enacting a statute] was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute [citations] unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it. [citation]." [18]

This Court has heretofore recognized that the "ordinary and necessary" language of the Code is hardly unambiguous, see *Textile Mills Securities Corp.* v. *Commissioner,*

[17] *Smith* v. *Commissioner, supra,* can hardly be regarded as a break in the uniform chain of decisions. See Note 10, *supra.*

[18] See also *Helvering* v. *Winmill,* 305 U. S. 79, 83: "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reënacted statutes, are deemed to have received congressional approval and have the effect of law."

supra, and we cannot say that these Regulations are clearly, or even apparently, inconsistent with it. Cf. *Trust of Bingham* v. *Commissioner,* 325 U. S. 365.

The statutory policy is further evidenced by the treatment given by Congress to the tax status of organizations, otherwise qualified for exemption as organized exclusively for "religious, charitable, scientific, literary, or educational purposes," which engage in activities designed to promote or defeat legislation. As early as 1934 Congress amended the Code expressly to provide that no tax exemption should be given to organizations, otherwise qualifying, a substantial part of the activities of which "is carrying on propaganda, or otherwise attempting, to influence legislation," and that deductibility should be denied to contributions by individuals to such organizations. Revenue Act of 1934, §§ 101 (6), 23 (o)(2), 48 Stat. 700, 690. And a year thereafter, when the Code was for the first time amended to permit corporations to deduct certain contributions not qualifying as "ordinary and necessary" business expenses, an identical limitation was imposed. Revenue Act of 1935, § 102 (c), 49 Stat. 1016. These limitations, carried over into the 1939 and 1954 Codes,[19] made explicit the conclusion derived by Judge Learned Hand in 1930 that "political agitation as such is outside the statute, however innocent the aim . . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." *Slee* v. *Commissioner,* 42 F. 2d 184, 185. The Regulations here contested appear to us to be but a further expression of the same sharply defined policy.

Petitioners suggest that if the Regulations are construed to deny them deduction, a substantial constitutional issue under the First Amendment is presented.

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[19] Internal Revenue Code of 1939, 26 U. S. C. §§ 23 (o)(2), (q) (2), 101 (6); Internal Revenue Code of 1954, 26 U. S. C. (Supp. V) §§ 170 (c)(2)(D), 501 (c)(3).

They rely upon *Speiser* v. *Randall,* 357 U. S. 513, where a California statute requiring the taking of a loyalty oath as a condition of property tax exemption was struck down on grounds of procedural due process. This contention, made by neither petitioner below, is without merit. *Speiser* has no relevance to the cases before us. Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " 357 U. S., at 519. Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

Valentine v. *Chrestensen,* 316 U. S. 52, 54, held that business advertisements and commercial matters* did not enjoy the protection of the First Amendment, made

*Two decisions prior to the *Valentine* case approved broad regulation of commercial advertising. *Fifth Avenue Coach Co.* v. *New York,* 221 U. S. 467, was decided long before *Stromberg* v. *California,* 283 U. S. 359, extended the application of the First Amendment to the States. In *Packer Corp.* v. *Utah,* 285 U. S. 105, the First Amendment problem was not raised. The extent to which such advertising could be regulated consistently with the First Amendment (cf. *Cantwell* v. *Connecticut,* 310 U. S. 296; *Martin* v. *Struthers,* 319 U. S. 141; *Breard* v. *Alexandria,* 341 U. S. 622; *Roth* v. *United States,* 354 U. S. 476) has therefore never been authoritatively determined.

applicable to the States by the Fourteenth. The ruling was casual, almost offhand. And it has not survived reflection. That "freedom of speech or of the press," directly guaranteed against encroachment by the Federal Government and safeguarded against state action by the Due Process Clause of the Fourteenth Amendment, is not in terms or by implication confined to discourse of a particular kind and nature. It has often been stressed as essential to the exposition and exchange of political ideas, to the expression of philosophical attitudes, to the flowering of the letters. Important as the First Amendment is to all those cultural ends, it has not been restricted to them. Individual or group protests against action which results in monetary injuries are certainly not beyond the reach of the First Amendment, as *Thornhill* v. *Alabama,* 310 U. S. 88, which placed picketing within the ambit of the First Amendment, teaches. And see *Newell* v. *Local Union,* 181 Kan. 898, 182 Kan. 205, 317 P. 2d 817, 319 P. 2d 171, reversed, 356 U. S. 341. A protest against government action that affects a business occupies as high a place. The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive. We held as much in *Follett* v. *McCormick,* 321 U. S. 573. And I find it difficult to draw a line between that group and those who in other lines of endeavor advertise their wares by different means. Chief Justice Hughes speaking for the Court in *Lovell* v. *Griffin,* 303 U. S. 444, 452, defined the First Amendment right with which we now deal in the broadest terms, "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." And see *Jamison* v. *Texas,* 318 U. S. 413, 416; *Martin* v. *Struthers,*

319 U. S. 141, 143; *Burstyn* v. *Wilson,* 343 U. S. 495, 501–502.

In spite of the overtones of *Valentine* v. *Chrestensen, supra,* I find it impossible to say that the owners of the present business who were fighting for their lives in opposing these initiative measures were not exercising First Amendment rights. If Congress had gone so far as to deny all deductions for "ordinary and necessary business expenses" if a taxpayer spent money to promote or oppose initiative measures, then it would be placing a penalty on the exercise of First Amendment rights. That was in substance what a State did in *Speiser* v. *Randall,* 357 U. S. 513. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.,* at 518. Congress, however, has taken no such action here. It has not undertaken to penalize taxpayers for certain types of advocacy; it has merely allowed some, not all, expenses as deductions. Deductions are a matter of grace, not of right. *Commissioner* v. *Sullivan,* 356 U. S. 27. To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights must be protected by tax exemptions. But that proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions (*Grosjean* v. *American Press Co.,* 297 U. S. 233, 250; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 112; *Follett* v. *McCormick, supra,* at 578), and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights. See *McCollum* v. *Board of Education,* 333 U. S. 203.

With this addendum, I concur in the opinion of the Court.

KELLY *v.* KOSUGA.

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

No. 267. Argued January 22, 1959.—Decided February 24, 1959.

In this suit brought in a Federal District Court on grounds of diversity of citizenship by a seller to recover from a buyer the unpaid balance due in respect to a lawful sale for a fair consideration, the District Court properly granted the plaintiff's motion to strike an affirmative defense pleaded by the buyer to the effect that the sale was made pursuant to, and as an indivisible part of, an agreement which violated § 1 of the Sherman Antitrust Act. Pp. 516–521.

257 F. 2d 48, affirmed.

Joseph W. Louisell argued the cause for petitioner. With him on the brief was *Ivan E. Barris.*

Lee A. Freeman argued the cause for respondent. With him on the brief were *Anthony Bradley Eben, Brainerd Currie* and *Philip B. Kurland.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The respondent sued the petitioner in the District Court for the Northern District of Illinois for failing to complete payment of the purchase price of 50 cars of onions which the respondent had sold to the petitioner in December 1955. Jurisdiction was based on diversity of citizenship. The petitioner interposed the defense that the sale was made pursuant to and as an indivisible part of an agreement which violated § 1 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. A motion was made to strike this defense and therefore the facts underlying it must be taken to be those set up in the petitioner's answer. Petitioner and respondent were both

engaged in the marketing of onions. Petitioner, who was a grower of onions, admitted that he bought the onions from the respondent. But he alleged that the respondent and one Sam Siegel had represented to him and to other onion growers that they were the owners of substantial amounts of onions in storage, controlling 600 cars in the Chicago area and 400 more elsewhere throughout the country; that respondent and Siegel further informed the petitioner and other growers, at meetings called for the purpose in November and December 1955, that unless the growers purchased a large quantity of these onions, the respondent and Siegel would deliver them on the futures exchange for the purpose of depressing the futures price and the cash market price of onions. The petitioner and the other growers, who usually sold through trade channels, were fearful that this would cause them considerable loss. It was finally agreed by the petitioner and other growers that they would purchase 287 of the 600 cars of onions stored in the Chicago area, and the respondent and Siegel agreed not to deliver any onions on the futures market for the remainder of the current trading season. The petitioner and the other purchasers themselves agreed not to deliver any of the onions purchased from respondent and Siegel on the futures market for the remainder of the season; this was "for the purpose of creating a false and fictitious market condition," and "to fix the price of onions and limit the amount of onions sold in the State of Illinois." The District Court granted respondent's motion and struck the defense as insufficient in law.[1]

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[1] Petitioner also interposed defenses of illegality under the Commodity Exchange Act, § 9, 42 Stat. 1003, as amended, 7 U. S. C. § 13, and the Illinois Antitrust Act, Smith-Hurd Illinois Ann. Stat., c. 38, §§ 569, 573, 574, and a counterclaim alleging respondent's breach of the nondelivery agreement. These issues were decided adversely to the petitioner below and are not preserved by him here.

The District Court then found, on the undisputed facts, that petitioner had in fact purchased the 50 cars of onions from the respondent, at an agreed price of $960 per car, plus storage charges incurred after sale; that petitioner had withdrawn 13 cars of the onions from the designated storage places after the sale, but had not withdrawn the remainder; that while petitioner had made some payments on account of the sale, he had come into default on them; and that, when the onions began to show signs of deterioration, the respondent properly, after repudiation of the purchase by the petitioner, withdrew the remaining cars from storage and sold them for petitioner's account. The District Court entered summary judgment for the unpaid purchase price and storage charges, less the amounts obtained on the sale by respondent, the market price having declined in the interim. The Court of Appeals for the Seventh Circuit affirmed. 257 F. 2d 48. We granted certiorari to consider the availability of the petitioner's pleaded defense of illegality under the Sherman Act to this action to enforce the terms of a sale made under state law. 358 U. S. 811.

As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act [2] has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, one who had purchased merchandise from a firm allegedly a combination in restraint of trade was not allowed to set up that fact as a defense to an action for the purchase price. In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, Corn Products sold merchandise to Wilder with a standing offer, of which the

[2] Without deciding the point, we shall assume that the petitioner's allegations duly charged a violation of the Sherman Act.

latter apparently had sought to take some advantage, to give Wilder a rebate if it bought exclusively from it. Again, in an action by the seller, Corn Products, to recover the agreed price, the purchaser, Wilder, was denied any defense of illegality based on the Sherman Act. The Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction. *Id.*, at 174–175. Cf. *Bruce's Juices, Inc.*, v. *American Can Co.*, 330 U. S. 743, 755. See *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 252, generally to the same effect. Obviously, state law governs in general the rights and duties of sellers and purchasers of goods, and, while the effect of illegality under a federal statute is a matter of federal law, *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176–177, even in diversity actions in the federal courts after *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, still the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act.

The petitioner recognizes the import of the holdings in *Connolly, Wilder* and *Small,* but he argues that they involve situations where a person not party to any unlawful agreement sought to defend against the action on the grounds of the seller's unlawful acts; where the purchaser is party to the unlawful agreement and the agreement bears some relation to the suit, the petitioner claims he is not to be held to the purchase price. The distinction asserted is, to say the least, on its face paradoxical; and the petitioner quotes from this Court's opinion in *McMullen* v. *Hoffman,* 174 U. S. 639, 669, which dealt with the plea of illegality in another context: "It has been often stated in similar cases that the defence is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions."

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Petitioner evidently is willing to take the bitter as well as the sweet from this passage. If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general.

In any event, an analysis of the narrow scope in which the defense is allowed in respect of the Sherman Act indicates that the principle of distinction is not what the petitioner claims it to be. The leading case here in which the defense was allowed is *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, much relied on by petitioner. There the Voight company had made purchases from Continental, a corporation which existed only as a selling agent for numerous wallpaper companies doing business as a pool and selling at prices, alleged to be excessive and unreasonable, fixed through the pool agreement. The Court was of opinion that to give judgment for the excessive purchase price so fixed in favor of such a vendor would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act. 212 U. S., at 261. Any thought that the Court might have been proceeding on broader grounds was shortly afterwards laid to rest by the unanimous opinion of the Court in the *Wilder* case. 236 U. S., at 177. The scope of the defense of illegality under the Sherman Act goes no further. While enforcement of a contract between wrongdoers may more frequently present such a situation, cf. *Lyons* v. *Westinghouse Electric Corp.*, 222 F. 2d 184, 188, the character of the parties is not in itself determinative. Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be

buying it." *Continental Wall Paper Co.* v. *Louis Voight & Sons Co., supra,* at 271 (dissenting opinion). Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation, cf. *Bruce's Juices, Inc.,* v. *American Can Co., supra,* at 753–754, is avoided by treating the defense as so confined.

Accordingly, while the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price. And while analysis in terms of "divisibility" or some other verbal formula may well be circular, see 6 Corbin, Contracts, § 1520, in any event, where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question. Cf. *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co.* v. *Bay,* 200 U. S. 179, 185.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

ALLIED STORES OF OHIO, INC., *v.* BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 10. Argued November 12, 1958.—Decided February 24, 1959.

Appellant, an Ohio corporation owning and operating department stores in Ohio and maintaining there private warehouses where it stores stocks of merchandise to be sold in its stores, challenged in the Ohio courts the validity of an ad valorem state tax on the contents of its warehouses. It claimed that it was denied the equal protection of the laws guaranteed by the Fourteenth Amendment because Ohio exempted from such taxation merchandise belonging to non-residents "if held in a storage warehouse for storage only." The trial court sustained the tax. The State Supreme Court held that appellant lacked standing to raise this constitutional question and affirmed the judgment. *Held:*

1. Appellant had standing to prosecute its constitutional claim. Pp. 525–526.

2. The exemption from taxation of merchandise belonging to a non-resident when "held in a storage warehouse for storage only" did not deny to appellant, a resident of the State, the equal protection of the laws guaranteed by the Fourteenth Amendment. *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, distinguished. Pp. 526–530.

166 Ohio St. 116, 140 N. E. 2d 411, affirmed.

Carlton S. Dargusch, Sr. argued the cause for appellant. With him on the brief were *Carlton S. Dargusch, Jr.* and *Jack H. Bertsch.*

William Saxbe, Attorney General of Ohio, and *John M. Tobin,* Assistant Attorney General, argued the cause and filed a brief for appellee.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

The principal question presented is whether an Ohio statute that exempts from ad valorem taxation "merchandise or agricultural products belonging to a nonresi-

dent . . . if held in a storage warehouse for storage only" denies to appellant, a resident of the State, the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution.

The facts are stipulated. So far as pertinent, they are that appellant, Allied Stores of Ohio, Inc., an Ohio corporation, owns and operates a department store in each of four Ohio cities. It also maintains in each of those cities a private warehouse where it stores stocks of merchandise of the kinds sold in its stores. As needed, merchandise is transferred from the warehouse to the store, and when merchandise is sold by sample in the store—usually a heavy or bulky article—it is delivered from the warehouse directly to the customer.

Title 57, Page's Ohio Rev. Code Ann., 1953, § 5709.01, provides, *inter alia,* that "All personal property located and *used in business* in this state [shall be] subject to taxation, regardless of the residence of the owners thereof. . . ." (Emphasis added.) During the tax year involved another Ohio statute, Title 57, Page's Ohio Rev. Code Ann., 1953, § 5701.08 (A), provided, in pertinent part, that:

> "As used in Title LVII of the Revised Code:
>
> "(A) Personal property is 'used' within the meaning of 'used in business' . . . when stored or kept on hand as material, parts, products, or merchandise; *but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only. . . .*"[1] (We have added the italics, and, as was done by the Supreme Court of Ohio, we will refer to the italicized portion as the "proviso.")

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[1] The unitalicized portion of the statute was enacted in 1931, 114 Ohio Laws 714, 716. The italicized clause was added by the Ohio Legislature at its next session in 1933, 115 Ohio Laws 548, 553. In

Acting under those statutes, appellee, as Tax Commissioner of Ohio, proposed the assessment of an ad valorem tax against appellant based on the average value of the merchandise that it had stored in its four Ohio warehouses during the tax year ending January 31, 1954.[2] Appellant petitioned the Board of Tax Appeals of Ohio for a redetermination, contending that the property stored in its four warehouses in the tax year involved was "merchandise . . . held in a storage warehouse for storage only," within the meaning of § 5701.08 (A), and that because the section exempted nonresidents,[3] but taxed residents, on stocks of merchandise so held, it denied to appellant, a resident of Ohio, the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. The Board of Tax Appeals upheld the tax, and so did the Court of Appeals of Cuyahoga County. On appeal, the Supreme Court of Ohio held that appellant

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September 1955 the section was amended by deleting the italicized clause and inserting the following: "and merchandise or agricultural products shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside of this state are not used in business in this state." 126 Ohio Laws 78.

[2] The Ohio taxing date is January 1, Title 57, Page's Ohio Rev. Code Ann., 1953, § 5711.03. Why the assessment involved was for the year ended January 31, instead of January 1, 1954, is not explained in the record or the briefs. A merchant's personal property is valued for tax purposes "by taking the amount in value on hand, as nearly as possible, in each month of the next preceding year in which he has been engaged in business, adding together such amounts, and dividing the aggregate amount by the number of months that he has been in business during such year." Title 57, Page's Ohio Rev. Code Ann., 1953, § 5711.15.

[3] The Supreme Court of Ohio has held that a foreign corporation, although authorized to do and doing a local business in Ohio, is a nonresident within the meaning of the proviso here in question. *B. F. Goodrich Co.* v. *Peck,* 161 Ohio St. 202, 204, 118 N. E. 2d 525, 527.

lacked standing to raise the constitutional question presented and affirmed the judgment. 166 Ohio St. 116, 140 N. E. 2d 411. The case comes here on Allied's appeal.

The first and preliminary question thus is whether the Supreme Court of Ohio correctly held that appellant lacked standing to prosecute the constitutional question sought to be presented. It is settled that "[w]hether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court." *First National Bank* v. *Anderson,* 269 U. S. 341, 346; *Staub* v. *City of Baxley,* 355 U. S. 313, 318.

In reaching its conclusion, the Ohio court said "In our opinion, it is not necessary to consider the constitutional question raised by the taxpayer in the instant case because, if its contention with regard to that question is sound, it necessarily leads to the conclusion that the entire proviso in subdivision (A) of Section 5701.08, which read, 'but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only,' was void and should be stricken. That being so, it is apparent that any of taxpayer's 'merchandise . . . held in a storage warehouse for storage only' would be taxable because described by the preceding words remaining in the statute and reading, 'stored . . . as . . . merchandise.'" But the court did not hold that the proviso was invalid, nor did it strike it from the statute. Instead, it held that the proviso expressed the valid legislative purpose to exempt the merchandise and agricultural products of nonresidents when held in a storage warehouse for storage only and that the court was powerless to strike it. In

this, the court was following its prior decisions on the question. *General Cigar Co.* v. *Peck,* 159 Ohio St. 152, 111 N. E. 2d 265 (1953), and *B. F. Goodrich Co.* v. *Peck,* 161 Ohio St. 202, 118 N. E. 2d 525 (1954), had so held. In the latter case the court had answered a contention that the proviso was invalid for undue preference of nonresidents by saying "such an argument should be addressed to the General Assembly and not to this court." 161 Ohio St., at 210, 118 N. E. 2d, at 530. Those interpretations, for present purposes, became a part of the proviso. *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 566. The proviso is the basis of appellant's claim of denial of the equal protection of the laws. With the proviso thus validly remaining in the statute it is quite immaterial that appellant's claim necessarily would fall if it were out. It follows that appellant does have standing to prosecute its constitutional claim.

This brings us to the merits. Does the proviso exempting "merchandise or agricultural products belonging to a nonresident . . . if held in a storage warehouse for storage only" deny to appellant, a resident of the State, the equal protection of the laws within the meaning of the Fourteenth Amendment? The applicable principles have been often stated and are entirely familiar. The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The

State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 573; *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 353; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 255; *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172, 179; *Stebbins* v. *Riley,* 268 U. S. 137, 142; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159; *State Board of Tax Comm'rs* v. *Jackson,* 283 U. S. 527, 537. "To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Ohio Oil Co.* v. *Conway, supra,* 281 U. S., at 159.

But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 37; *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 160. "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Brown-*

Forman Co. v. *Kentucky,* 217 U. S. 563, 573. *State Board of Tax Comm'rs* v. *Jackson,* 283 U. S. 527, 537. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. *American Sugar Ref. Co.* v. *Louisiana,* 179 U. S. 89; *Stebbins* v. *Riley,* 268 U. S. 137, 142.

Coming directly to the concrete problem now before us, it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment. *Bell's Gap R. Co.* v. *Pennsylvania, supra,* 134 U. S., at 237; *Ohio Oil Co.* v. *Conway,* 281 U. S., at 159; *Williams* v. *Baltimore,* 289 U. S. 36; *Colgate* v. *Harvey,* 296 U. S. 404, 439 (dissenting opinion). Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78; *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357; *State Board of Tax Comm'rs* v. *Jackson,* 283 U. S., at 537.

In the light of the law thus well settled, how stands appellant's case? We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. What were the special reasons, motives or policies of the Ohio Legislature for adopting the questioned proviso we do not know with certainty, nor is it important that we should, *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 126, for a state legislature need not explicitly declare its purpose. But it is obvious that it may reasonably have

been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy, or to stimulate the market for merchandise and agricultural products produced in Ohio by enabling nonresidents to purchase and hold them in the State for storage only, free from taxes, in anticipation of future needs. Other similar purposes reasonably may be conceived. Therefore, we cannot say that the discrimination of the proviso which exempted only the "merchandise or agricultural products belonging to a nonresident . . . if held in a storage warehouse for storage only" was not founded upon a reasonable distinction, or difference in state policy, or that no state of facts reasonably can be conceived to sustain it. For those reasons, it cannot be said, in the light of the settled law as shown by the cases cited, that the questioned proviso was invidious or palpably arbitrary and denied appellant the equal protection of the laws within the meaning of the Fourteenth Amendment.

Appellant heavily relies on *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562. We think that case is not apposite. There Ohio statutes exempted from taxation certain accounts receivable owned by residents of the State but taxed those owned by nonresidents. The statutes, on their face admittedly discriminatory against nonresidents, themselves declared their purpose. That purpose was to proffer to other States a scheme of "reciprocity" for taxing accounts receivable.[4] Ohio argued that

[4] The stated purpose was to proffer to other States a right to tax accounts receivable owned by residents of Ohio that derived from sales of Ohio goods negotiated and consummated in such other States in exchange for a claimed Ohio right to tax the accounts receivable owned by residents of other States that derived from sales of their goods negotiated and consummated in Ohio. "The effect," this Court said, "[was] that intangibles of nonresident owners [were] assigned

the reciprocal character of its statutes eliminated the discriminatory effects against nonresidents, but this Court held that it did not. Having themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence. And the declared purpose having been found arbitrarily discriminatory against nonresidents, the Court could hardly escape the conclusion that "the inequality [was] not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner." 337 U. S., at 572. As we have shown, that is not the situation here. Here the discrimination against residents is not invidious nor palpably arbitrary because, as shown, it rests not upon the "different residence of the owner," but upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy, which the State is not prohibited from separately classifying for purposes of taxation by the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

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

MR. JUSTICE BRENNAN, with whom MR. JUSTICE HARLAN joins, concurring.

We hold today that Ohio's ad valorem tax law does not violate the Equal Protection Clause in subjecting the property of Ohio corporations to a tax not applied to

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a situs within the taxing reach of Ohio while those of its residents [were] assigned a situs without. [Thus], [t]he exempted intangibles of residents [were] offered up to the taxing power of other states which may embrace this doctrine of a tax situs separate from residence, [but] no other state [ever] sought to take advantage of the 'reciprocity' proffer." *Wheeling Steel Corp.* v. *Glander, supra,* at 573–574.

identical property of non-Ohio corporations. Yet in *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562,[1] the Court struck down, as violating the Equal Protection Clause, another provision of Ohio's ad valorem tax law which subjected the property of non-Ohio corporations to a tax not applied to identical property of Ohio corporations.[2]

The question presented in the two cases, if stated generally, and as I shall show, somewhat superficially, is: Measured by the demands of the Equal Protection Clause, is a State constitutionally permitted separately to classify domestic and foreign corporations for the purposes of payment of or exemption from an ad valorem tax? In both cases the distinction complained of as denying equal protection of the laws is that the incidence of the tax in fact turns on "the different residence of the owner." With due respect to my Brethren's view, I think that if this were all that the matter was, *Wheeling* and this case would be indistinguishable.[3] Therefore, while I agree with my Brethren that the classification is valid in this case, I

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[1] To the same effect as the *Wheeling* case are *Southern R. Co.* v. *Greene,* 216 U. S. 400, and *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494.

[2] The Court distinguished ad valorem property taxes, levied on a foreign corporation permitted to do a local business, from an original entry privilege tax on a foreign corporation. 337 U. S., at 571–572. "A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law." *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 79–80.

[3] The statute in *Wheeling* "discriminated" against nonresidents in the same way that the present statute "discriminates" against residents. What my Brethren describe as the forbidden purpose of the distinction in *Wheeling* seems to me clearly to be only a rejected argument made by the State to show that there was no discrimination in fact. 337 U. S., at 572–574. I see no indication in *Wheeling* that the Court's condemnation of the tax was based solely on its rejection of the "reciprocity" argument.

cannot reach that conclusion without developing the ground on which *Wheeling* is distinguishable.

Why is the "different residence of the owner" a constitutionally valid basis for Ohio's freeing the property of the foreign corporation from the tax in this case and an invalid basis for its freeing the property of the domestic corporation from the tax involved in the *Wheeling* case?

I think that the answer lies in remembering that our Constitution is an instrument of federalism. The Constitution furnishes the structure for the operation of the States with respect to the National Government and with respect to each other. The maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action. Because there are 49 States and much of the Nation's commercial activity is carried on by enterprises having contacts with more States than one, a common and continuing problem of constitutional interpretation has been that of adjusting the demands of individual States to regulate and tax these enterprises in light of the multistate nature of our federation. While the most ready examples of the Court's function in this field are furnished by the innumerable cases in which the Court has examined state taxation and regulation under the Commerce and Due Process Clauses, still the Equal Protection Clause, among its other roles, operates to maintain this principle of federalism.

Viewing the Equal Protection Clause as an instrument of federalism, the distinction between *Wheeling* and this case seems to me to be apparent. My Brethren's opinion today demonstrates that in dealing with as practical and complex a matter as taxation, the utmost latitude, under the Equal Protection Clause, must be afforded a State in defining categories of classification. But in the case of

an ad valorem property tax, *Wheeling* teaches that a distinction which burdens the property of nonresidents but not like property of residents is outside the constitutional pale. But this is not because no rational ground can be conceived for a classification which discriminates against nonresidents solely because they are nonresidents: could not such a ground be found in the State's benign and beneficent desire to favor its own residents, to increase their prosperity at the expense of outlanders, to protect them from, and give them an advantage over, "foreign" competition? These bases of legislative distinction are adopted in the national policies of too many countries, including from time to time our own, to say that, absolutely considered, they are arbitrary or irrational. The proper analysis, it seems to me, is that *Wheeling* applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation. On the other hand, in the present case, Ohio's classification based on residence operates *against* Ohio residents and clearly presents no state action disruptive of the federal pattern. There is, therefore, no reason to judge the state action mechanically by the same principles as state efforts to favor residents. As my Brethren's opinion makes clear, a rational basis can be found for this exercise by Ohio of the latitude permitted it to define classifications under the Equal Protection Clause. One could, in fact, be found in the concept that it is proper that those who are bound to a State by the tie of residence and accordingly the more permanently receive its benefits are proper persons to bear the primary share of its costs. Accordingly, in this context, it is proper to say that any relief forthcoming must be obtained from the State Legislature.

YOUNGSTOWN SHEET & TUBE CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 9. Argued November 12, 1958.—
Decided February 24, 1959.*

1. On the records in these two cases, *held* that manufacturing corporations which imported materials for their own use in their current manufacturing operations had so acted upon them as to cause them to lose their distinctive character as "imports" within the meaning of that term as used in the Import-Export Clause of the Constitution and that, therefore, the materials had become subject to state taxation. *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, distinguished. Pp. 536–550.
2. In the *Youngstown* case, a manufacturer of iron and steel imported iron ore for use in its own manufacturing process. Upon arrival at destination, these ores were stored in "ore yards" adjacent to the furnaces. The daily ore needs of the plant were taken from those "ore yards" and conveyed to "stock bins," from which the ores were fed into the furnaces. Ohio assessed an ad valorem tax based on the average value of the ore in these "ore yards" during the tax year. *Held:* Since these ores were not only needed, imported and irrevocably committed to supply, but were actually being used to supply, the daily requirements of the manufacturing plant, they had lost their distinctive character as "imports" and all tax immunity as such. Pp. 536–538, 545–547.
3. In the *Plywood* case, a manufacturer of veneered wood products imported "green" lumber "in bulk" and veneers "in bundles" for use in its own manufacturing process. Upon arrival at destination, the lumber was stacked in yards "adjacent" to its manufacturing plant in such a way as to facilitate air-drying. From time to time, so much of the lumber as was about to be put into veneered products was taken from the stacks and placed in a kiln, where

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*Together with No. 44, *United States Plywood Corp.* v. *City of Algoma,* on certiorari to the Supreme Court of Wisconsin, argued November 12–13, 1958.

the drying was completed. The imported veneers were received "in bundles" and kept in that form in piles, separated as to specie, in the manufacturer's plant for use as needed in the day-to-day operations of the plant. The City assessed a tax against petitioner, based upon the value of one-half of the imported lumber and veneers then on hand. *Held:* The lumber and veneers that were taxed were not only needed, imported and irrevocably committed to supply, but actually were being used to supply, the daily requirements of the manufacturing plant, and they had lost their distinctive character as "imports" and all tax immunity as such. Pp. 538–540, 547–548.

4. In the *Plywood* case, the fact that the veneers were received in "bundles" which were not opened until the veneers were put into the daily manufacturing operations of the plant does not require a different result. Pp. 548–549.

5. In the *Youngstown* case, the fact that a tax was levied by Ohio on domestic ores stored on public docks in Ohio, whereas merchandise belonging to a non-resident when "held in a storage warehouse for storage only" was exempted from taxation, did not deny to appellant, a resident of Ohio, the equal protection of the laws guaranteed by the Fourteenth Amendment. *Allied Stores* v. *Bowers, ante,* p. 522. Pp. 550–551.

166 Ohio St. 122, 140 N. E. 2d 313, affirmed.
2 Wis. 2d 567, 87 N. W. 2d 481, affirmed.

Carlton S. Dargusch, Sr. argued the cause for appellant in No. 9. With him on the brief were *Carlton S. Dargusch, Jr.* and *Jack H. Bertsch.*

Roger C. Minahan argued the cause and filed a brief for petitioner in No. 44.

William Saxbe, Attorney General of Ohio, and *John M. Tobin,* Assistant Attorney General, argued the cause and filed a brief for appellee in No. 9.

Edwin Larkin argued the cause and filed a brief for respondent in No. 44.

Bruce Bromley and *Roswell Magill* filed a brief, as *amici curiae,* in Nos. 9 and 44.

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MR. JUSTICE WHITTAKER delivered the opinion of the Court.

The principal question presented by these cases is whether appellant in No. 9, the Youngstown Sheet and Tube Company, and petitioner in No. 44, United States Plywood Corporation, have so acted upon the materials which they have imported for use in their manufacturing operations as to cause them to lose their distinctive character as "imports," within the meaning of that term as used in the Import-Export Clause, Art. I, § 10, cl. 2, of the United States Constitution.[1] The Supreme Courts of the States concerned have held that these manufacturers have done so. Our task is to decide whether, on the particular facts involved, those holdings violate the Import-Export Clause of the Constitution.

The facts in the *Youngstown* case are stipulated. In essence, they are that Youngstown, an Ohio corporation, operates an industrial plant in or near Youngstown, Ohio, where it manufactures iron and steel. In addition to the use of domestic ores, it imports iron ores from five countries "for ultimate use in [its] open hearth [and] blast furnaces" in its manufacturing processes. The imported ores arrive in shiploads "in bulk" either at an Atlantic or a Lake Erie port of entry where they are unloaded from the ship into railroad cars and are thereby transported to Youngstown's plant in Ohio. The plant is enclosed by a wire fence. Within the enclosure and "adjacent to [the] manufacturing facilities" are several "ore yards" for the storage of supplies of ore.[2] Each ore yard consists

[1] Article I, § 10, cl. 2 of the United States Constitution, in pertinent part, provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws. . . ."

[2] Exhibits in the record, though not giving measurements, indicate that the nearest ore yard is located within two or three hundred feet, and the most distant one is located within two or three hundred yards, of the furnaces.

of "two parallel walls, on which there [is] a movable ore bridge." When the imported ores arrive at this final destination, they are unloaded into one of the ore yards, but, because the ore from each country is different from the others and each is imported for a different use, the ores are kept segregated as to the country of origin by being "placed in a separate pile in a separate area of the ore yard." The daily manufacturing needs for ore are taken from these piles. As needed, ores are conveyed from the particular pile or piles selected to "stock bins" or "stock houses," holding one or two days' supply and located in close proximity to the furnaces, from which the ores are fed into the furnaces. As ore from a particular "pile" in the ore yard is thus taken and consumed, other like ore is similarly imported from the same country and is brought to the plant and unloaded on top of the remainder of that particular pile. This course is continuously repeated. Youngstown endeavors to maintain "a supply of imported ores to meet its estimated requirements for a period of at least three months." The ores are not imported "for resale," but "for use in manufacturing [at the Ohio plant]."

Acting under Ohio statutes which provide, *inter alia,* that "All personal property located and used in business in this state [shall be] subject to taxation . . ." [3] and that "Personal property is 'used' within the meaning of 'used in business' . . . when stored or kept on hand as material, parts, products, or merchandise . . . ," [4] the Tax Commissioner of Ohio proposed to assess an ad valorem tax against Youngstown based on the average value of the iron ores in its ore yards during the tax year ended January 1, 1954.[5] Youngstown contested the proposed

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[3] Title 57, Page's Ohio Rev. Code Ann., 1953, § 5709.01.

[4] Title 57, Page's Ohio Rev. Code Ann., 1953, § 5701.08 (A).

[5] The Ohio taxing date is January 1, Title 57, Page's Ohio Rev. Code Ann., 1953, § 5711.03. But personal property held by a

assessment. It contended, among other things, that the imported ores had not lost their character as imports and were therefore immune from state taxation under Art. I, § 10, cl. 2 of the United States Constitution.

After exhaustion of administrative proceedings, the case reached the Supreme Court of Ohio. It held that the "protection [of the Import-Export Clause cannot] extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing." It then entered judgment sustaining the tax, 166 Ohio St. 122, 140 N. E. 2d 313, and we noted probable jurisdiction of Youngstown's appeal. 355 U. S. 911.

The facts in the *United States Plywood Corporation* case were found in detail by the trial court and those findings are not challenged here. In essence, they are that United States Plywood Corporation (petitioner) operates an industrial plant in Algoma, Wisconsin, where it manufactures veneered wood products. It uses both domestic and imported lumber and veneers in its manufacturing processes. The imported lumber is shipped in railroad cars directly from Canada to petitioner's plant. It is unfinished, and is received in bulk or as loose, individual pieces or boards. It is also "green" when received and therefore must be dried before it can be used by petitioner. Upon arrival at destination, it is unloaded and carted to petitioner's storage yard, located "adjacent" to

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manufacturer for use in manufacturing is valued for tax purposes "by taking the value of all [such] property . . . owned by such manufacturer on the last business day of each month [that] the manufacturer was engaged in business during the year, adding the monthly values together, and dividing the result by the number of months the manufacturer was engaged in such business during the year." Title 57, Page's Ohio Rev. Code Ann., 1953, § 5711.16.

its plant, where it is stacked in the open in such a way as to allow the air freely to circulate through the stacks for the "dominant purpose" of air-drying it. This method does not so completely dry the lumber as to make kiln-drying unnecessary, but it does materially reduce the time and expense of that process. From time to time, so much of the lumber as is about to be put into veneered products is taken from the stacks and placed in a kiln where the drying is completed and the lumber readied for use. The veneers are imported from three countries. They are received in bundles and are kept in that form in piles, separated as to specie, in petitioner's plant for use as needed in the day-to-day operations of the plant.

On the assessment date of May 1, 1955, the Assessor of the City of Algoma, acting under what is now Wis. Stat., 1957, § 70.01, assessed a tax against petitioner based upon the value of one-half of the imported lumber and veneers then on hand. Petitioner paid the tax and then sued in the state court for its recovery. The trial court also found that air-drying the lumber "was part of [petitioner's] manufacturing practices," and that, when stacked for air-drying, the lumber "entered the process of manufacture" and thus lost its character as an "import," and therefore all of it might lawfully have been taxed by the city. The court further found that the lumber and veneers had been imported by petitioner "for use in manufacturing" at its Algoma plant, and that their importation journeys definitely had ended; that the lumber and veneers that were taxed (one-half of the amounts on hand) had been irrevocably committed to "use in manufacturing" at that plant, were "necessarily required to be kept on hand to meet [petitioner's] current operational needs," were being "used in manufacturing," and had therefore lost their character as "imports" and were subject to local taxation. It then entered judgment for the city, sustaining the tax, and, on petitioner's appeal, the

Supreme Court of Wisconsin affirmed. 2 Wis. 2d 567, 87 N. W. 2d 481. Because of the importance of the constitutional question presented we granted certiorari. 356 U. S. 957.

The Constitution confers on Congress the power to lay and collect import duties, Art. I, § 8, and provides that "No State shall, without the Consent of the Congress, lay any Impost or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws. . . ." Art. I, § 10, cl. 2. That these provisions were intended to confer on the National Government the exclusive power to tax the act of importation is plain from their terms. And early in our national history Chief Justice Marshall held, in the landmark case of *Brown* v. *Maryland,* 12 Wheat. 419, that one who had imported goods for the purpose of selling them had, "by payment of the duty to the United States, [acquired the] right to dispose of his merchandise, as well as to bring it into the country" (*id.,* at 442), and that the State could not tax it "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported."[6] *Id.,* at 442. But he made very clear that ". . . there must be a point of time when the prohibition ceases, and the power of the State to tax commences." *Id.,* at 441. Elaborating this concept, he said:

> "The constitutional prohibition on the States to lay a duty on imports . . . may certainly come in conflict with their acknowledged power to tax persons

[6] Chief Justice Taney, while still at the bar, had argued that case for the State of Maryland. After coming to this Court, he had occasion to say that the theory of that holding was that while the imported articles "are in the hands of the importer for sale . . . they may be regarded as merely *in transitu,* and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported." *License Cases,* 5 How. 504, 575.

> and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet . . . approach so nearly as to perplex the understanding. . . . Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer *has so acted upon the thing imported,* that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State. . . ." *Id.,* at 441–442. (Emphasis added.)

While Chief Justice Marshall did not undertake definitively to state just what acts or conduct of the importer would be deemed to have "so acted upon the thing imported" as to cause it to be "mixed up with the mass of property in the country [and to lose] its distinctive character as an import," he did specify some of the acts that would so result. He held that the goods lose their character as imports when the importer (1) "sells them," [7] or (2) "[breaks] up his packages, and [travels] with them as an itinerant pedlar." *Id.,* at 443. More important to the question confronting us, he also held (3) that goods brought into this country by an importer "for his own use" and here "used" by him are to be regarded as a

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[7] The Court said that when the imported goods are sold "the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State." 12 Wheat., at 443. That imported goods lose their character as "imports" upon being sold is well-settled. *License Cases,* 5 How. 504, 575; *Waring* v. *The Mayor,* 8 Wall. 110; *Low* v. *Austin,* 13 Wall. 29; *May* v. *New Orleans,* 178 U. S. 496.

part of "the common mass" of property and are not immune from state taxation.[8]

In *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, it was held that goods imported for "use" share the same immunity as goods imported for "sale," and that goods imported "for manufacture [do not] lose their character as imports any sooner or more readily than imports for sale" (*id.,* at 667); but "when [the imported goods are] used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end." *Id.,* at 665.

Thus, though *Brown* v. *Maryland, supra,* holds that goods brought into the country by an importer "for his own use" are not exempted from state taxation by the Import-Export Clause, and *Hooven & Allison Co.* v. *Evatt, supra,* holds that they are, both agree that when the imported goods are "used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end." *Hooven & Allison Co.* v. *Evatt, supra,* at 665. Compare *Brown* v. *Maryland, supra,* at 441–443.

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[8] Counsel for Maryland had argued that to permit state tax immunity in that case would result in granting immunity to "an importer who may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." In reply to that argument, Marshall rejected the assumption that the principles then announced would grant state tax exemptions to imports that were being used or held for use by the importer. In such a case, as in a case where the importer "[breaks] up his packages, and [travels] with them as an itinerant pedlar," he said "[T]he tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege [*i. e.,* of importation and sale] he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. *The same observations apply to plate, or other furniture used by the importer.*" 12 Wheat., at 443. (Emphasis added.)

Do the facts as stipulated and found in the cases before us, when considered in the light of applicable legal principles, show that these manufacturers *have so acted upon the imported materials* as to cause them to lose their distinctive character as "imports" by irrevocably committing them, after their importation journeys have definitely ended, to "use in manufacturing" at the plant and point of final destination, and by "entering" and "using" them "in manufacturing" at that place? The manufacturers, relying upon their understanding of the *Hooven* case, argue that they do not, but we have concluded that they do.

In *Hooven* the taxpayer had imported bales of hemp and other fibers which it stored in its warehouse at its factory in Ohio with the intention of eventually using them in the manufacture of cordage and similar products. Ohio sought to lay an ad valorem tax on the bales of fibers so stored in the taxpayer's warehouse. The taxpayer contended that the bales of fibers were "imports" and thus immune from state taxation under the Import-Export Clause of the Constitution. The Supreme Court of Ohio "thought that *Brown* v. *Maryland, supra,* laid down a rule applicable only to imports for the purpose of sale, and that imports for use became, upon storage, even if still in the original package, so intermingled with the common mass of property within the State as to be subject to the State power of taxation" (324 U. S., at 655), and upon that ground upheld the tax. This Court, holding that the tax immunity applies to goods imported for "use" as well as for "sale," that the bales of fibers would not lose their character as imports "until [they were] put to the use for which [they were] imported" (*id.,* at 665), and that the fibers were not shown by the record in that case to have been "subjected to manufacture

when they were placed in [the taxpayer's] warehouse in their original packages" (*id.*, at 667), reversed the judgment. But the record there did not present, and this Court did not reach or decide, the question we have here. Indeed, the Court expressly reserved it. It said:

> "[I]t is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." *Id.*, at 667.

Unlike *Hooven,* these are not cases of the mere storage in a warehouse of imported materials intended for eventual use in manufacturing but not found to have been essential to current operational needs. Here the Ohio and Wisconsin courts have in effect held that the stipulated and found facts show that the imported materials that were taxed by those States were so essential to current manufacturing requirements that they must be said to have entered the process of manufacture, and those courts have rested their judgments, in major part at least, on that ground. Our question therefore is precisely the one which the Court did not reach or consider in the *Hooven* case.

We are therefore confronted with the practical, albeit vexing, problem of reconciling the competing demands of the constitutional immunity of imports and of the State's power to tax property within its borders. The design of the constitutional immunity was to prevent "[t]he great importing States [from laying] a tax on the non-importing States," to which the imported property is or might ultimately be destined, which would not only discriminate against them but also "would necessarily produce countervailing measures on the part of those States whose situation was less favourable to importation." *Brown* v. *Maryland, supra,* at 440. See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.). And see, *e. g., Cook* v. *Pennsylvania,* 97 U. S. 566, 574; *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 76–77. The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. Hence, that design is not impinged by the taxation of materials that were imported for use in manufacturing after all phases of the importation definitely have ended and the materials have been "put to the use for which they [were] imported" (*Hooven & Allison Co.* v. *Evatt, supra,* at 657), for in such a case they have lost their distinctive character as imports and are subject to taxation. And inasmuch as "the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter" (*Hooven & Allison Co.* v. *Evatt, supra,* at 668), we must approach the question whether these materials had been "put to the use for which they [were] imported" (*id.,* at 657) with full awareness of realities and treat with them in a practical way.

The stipulation in the *Youngstown* case shows that the imported ores were essential to the operation of Youngs-

town's Ohio plant; that Youngstown had imported them "for use in manufacturing" and "to meet its estimated [manufacturing] requirements" at that plant; that the ores had arrived at their destination, had been placed in "piles" in the "ore yards" of that plant, and their importation journey definitely had ended; that the ores were irrevocably committed to "use in manufacturing" at that plant and point of final destination; and that the daily ore needs of the plant were conveyed from the "piles" in the "ore yards" to "stock bins" or "stock houses," holding one or two days' supply, from which they were fed into the furnaces. Does not the stipulation thus show that the ores were not only needed, imported, and irrevocably committed to supply, but were actually being used to supply, the daily requirements of the plant? It seems to us that these stipulated facts inescapably establish that Youngstown had "so acted upon the [imported ores]" (*Brown* v. *Maryland, supra,* at 441), by using them "for the purpose for which they [were] imported," that they must be held "to have then entered the manufacturing process" (*Hooven & Allison Co.* v. *Evatt, supra,* at 665, 667) and to have lost their distinctive character as "imports" and all tax immunity as such.

Youngstown does not deny that so much of the ores as have been conveyed from the "piles" in the "ore yards" to the "stock bins" or "stock houses" have lost their distinctive character as imports. Is there any real basis of distinction? The only possible differences are in the sizes of the piles and their distances from the furnaces. Surely the size of the pile is not material. Just as surely the short distance between the smaller piles in the "stock bins" or "stock houses" and the larger piles in the ore yards is not a real distinction. If the larger piles stood on higher ground adjoining the "stock bins" and "stock houses" so that the ores might feed by gravity from the

former to the latter there would be no practical difference from the actual facts involved, but it could not be argued that the ores in the one are any less certainly being used in the processes of manufacture than the ores in the other. It seems entirely plain that the ores in the smaller piles in the "stock bins" and "stock houses" are no more definitely and irrevocably committed to use, or being used, at the plant than are the ores in the larger piles in the ore yards from which the smaller ones are constantly kept supplied. "[R]econciliation of the competing demands of the constitutional immunity and of the state's power to tax [being] an extremely practical matter" (*Hooven & Allison Co.* v. *Evatt, supra,* at 668), taxability cannot depend upon whether the size of the pile of stored materials or its distance from the place of actual fabrication or consumption is a little more or a little less.

In the *United States Plywood Corporation* case, two types of imported materials are involved—unfinished "green" lumber received "in bulk" and veneers received in "bundles." The Assessor of the City of Algoma, believing that one-half of the lumber and veneers on hand on the taxing date was necessarily required to be kept on hand to meet the current operating needs of petitioner's manufacturing plant, assessed an ad valorem tax upon the value of that one-half of the lumber and veneers. In the ensuing litigation, the Wisconsin courts found that the imported materials had been imported by petitioner "for use in manufacturing" at its Algoma plant, had arrived at that place and that their importation journeys definitely had ended; that the lumber and veneers that were taxed (one-half of the amounts on hand on the taxing date) had been irrevocably committed to "use in manufacturing" at that plant, were "necessarily required to be kept on hand to meet [its] current operational needs," and were actually being "used" to supply those

needs. These findings are amply supported by the evidence and are not contested here. We think they clearly show that the lumber and veneers that were taxed were not only needed, imported, and irrevocably committed to supply, but were actually being used to supply, the day-to-day manufacturing requirements of the plant. They thus establish that petitioner had "so acted upon the [imported materials]" (*Brown* v. *Maryland, supra,* at 441) that were taxed by using them "for the purpose for which they [were] imported," that—like the ores in the *Youngstown* case—they must be held "to have then entered the manufacturing process" (*Hooven & Allison Co.* v. *Evatt, supra,* at 665, 667) and to have lost their distinctive character as "imports" and all tax immunity as such.

The fact that the veneers were received in "bundles" which were not opened until the veneers were put into the daily manufacturing operations of the plant is not controlling under the facts and findings here. Whatever may be the significance of retaining in the "original package" goods that have been so imported for sale (*Brown* v. *Maryland, supra; Waring* v. *The Mayor,* 8 Wall. 110, 122–123; *Low* v. *Austin,* 13 Wall. 29, 32–33; *Cook* v. *Pennsylvania,* 97 U. S. 566, 573; *May* v. *New Orleans,* 178 U. S. 496, 501, 507–508), goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the "original package," if, as found here, they have been "put to the use for which they [were] imported." *Hooven & Allison Co.* v. *Evatt, supra,* at 657. Breaking the original package is only one of the ways by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports. Another way is by putting them "to the use for which they [were] imported." *Id.* That the package has not been broken is, there-

fore, only one of the several factors to be considered in factually determining whether the goods are being "used for the purpose for which they [were] imported." *Hooven & Allison Co.* v. *Evatt, supra,* at 665. Here the fact that the bundles are not opened until the veneers are put into the day-to-day manufacturing operations of the plant was fully considered by the Wisconsin courts before they made the finding that the veneers that were taxed were "necessarily required to be kept on hand to meet [petitioner's] current operational needs," and were actually being "used" to supply those needs.

Because of the views expressed, it is unnecessary to reach or discuss the further finding and conclusion of the Wisconsin courts that when the "green" lumber was stacked by petitioner in the open in a particular way for the "dominant purpose" of air-drying it, the lumber "entered the process of manufacture," and, for that reason also, lost its character as an import.

The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relation to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on "imports," nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept at the same place in the same way

for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers. Compare *May* v. *New Orleans,* 178 U. S., at 509.

Youngstown also challenged a portion of the tax on the ground that its domestic ores stored on public docks on the shore of Lake Erie in Ohio were "merchandise . . . held in a storage warehouse for storage only" within the meaning of § 5701.08 (A),[9] and that, because the section exempted nonresidents but taxed residents on stocks of merchandise so held, it denied to Youngstown, a resident of Ohio, the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution. The Supreme Court of Ohio answered that contention by saying: "For the reasons stated in *Allied Stores of Ohio, Inc.,* v. *Bowers, Tax Commr., ante* [166 Ohio St.], 116, the taxpayer's contentions [in that respect] must be rejected . . . ." *Youngstown Sheet & Tube Co.* v. *Bowers,* 166 Ohio St. 122, 124, 140 N. E. 2d 313, 316. We have today affirmed the judgment of the Supreme Court of Ohio in *Allied Stores of Ohio, Inc.,* v. *Bowers, Tax Comm'r, ante,* p. 522, and for the reasons stated in our

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[9] As earlier stated (Note 3), § 5709.01 provides in pertinent part, "All personal property located and used in business in this state [shall be] subject to taxation . . . ." (Title 57, Page's Ohio Rev. Code Ann., 1953, § 5709.01), and § 5701.08 (A), at the time in question, provided, in pertinent part, that:

"As used in Title LVII of the Revised Code:

"(A) Personal property is 'used' within the meaning of 'used in business' . . . when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only. . . ." Title 57, Page's Ohio Rev. Code Ann., 1953, § 5701.08 (A).

opinion in that case we hold that § 5701.08 (A) and the questioned tax laid thereunder did not violate the Equal Protection Clause of the Fourteenth Amendment.

It follows that the judgment in each case must be

Affirmed.

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

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins, dissenting on the main issue.

As one follows the tortuous and anguished endeavors to establish a free trade area within Western Europe, unhampered by interior barriers, against the opposition of inert and narrow conceptions of self-interest by the component nations, admiration for the far-sighted statecraft of the Framers of the Constitution is intensified. Guided by the experience of the evils generated by the parochialism of the new States, the wise men at the Philadelphia Convention took measures to make of the expansive United States a free trade area and to withdraw from the States the selfish exercise of power over foreign trade, both import and export. They accomplished this by two provisions in the Constitution: the Commerce Clause and the Import-Export Clause.

The former reached its aim, as a matter of settled judicial construction, by placing the regulation of commerce among the States in the hands of Congress, except insofar as predominantly local interests give the States concurrent power until displaced by congressional legislation. This leeway to the States was established by the decision in *Cooley* v. *Board of Wardens,* 12 How. 299, foreshadowed by Marshall's decision in *Willson* v. *Black Bird Creek Marsh Co.,* 2 Pet. 245. This permissive area for state action has given rise, as we know too well, to multitudinous litigation.

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But in dealing with foreign commerce the Constitution left no such leeway. It rigorously confined the States to what might be "absolutely necessary," the only constitutional permission in terms so drastically limited, and beyond this permission of what is "absolutely necessary" state action was barred except by consent of Congress as expressive of the national interest. Thus, hardly any room was left by the Constitution for judicial construction of the command, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ." This strict limitation on the States was still further qualified by the requirement that the "net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

For one hundred and thirty-two years, in a course of decision following Chief Justice Marshall's seminal discussion in *Brown* v. *Maryland,* 12 Wheat. 419, this Court has held, without a single deviation, that a State may not tax imports from foreign countries while retained by the importer in their original "package" [1] or form prior to the use of the goods or their sale. Today the Court, I am

[1] Although the principles of *Brown* v. *Maryland* are often termed the "original package doctrine," Marshall was concerned with a "package" only because the statute in that case taxed the selling of goods in their original packages. 12 Wheat., at 436 & 443. Marshall himself is careful to use the phrase, "form or package," 12 Wheat., at 442, and Mr. Chief Justice Taney, in his reformulation of *Brown* v. *Maryland,* used the characterization "form and shape." See p. 560, *infra.* "It is a matter of hornbook knowledge that the original package statement of Justice Marshall was an illustration, rather than a formula, and that its application is evidentiary, and not substantive, ..." *City of Galveston* v. *Mexican Petroleum Corp.,* 15 F. 2d 208.

bound most respectfully to say, disregards this historic course of constitutional adjudication by allowing the States of Wisconsin and Ohio, and, therefore, all the States, to tax foreign imports despite the prohibition of Art. I, § 10, cl. 2, that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, . . ." as that clause has been authoritatively interpreted by this Court. And it does so, moreover, without overruling the decisions which the basis and logic of this new reading of the Constitution can no longer sustain. But they remain decisions of this Court. Thus, we are left with a confusing series of conflicting cases amidst which the States must blindly move in determining the extent of their constitutional power to tax. This confusion is substituted for a principle so plain of application that the controversies in this Court over the meaning of this far-reaching constitutional provision have numbered less than a dozen in our entire history. Of course, I do not believe that we should overrule this consistent course of decisions. But to do so would at least have the merit of explicit announcement of a new legal policy, with its concomitant repercussions on the conduct of our national economic life.

Since the legal analysis of the challenged taxes must derive from due regard for the precise circumstances on which they are based, it becomes necessary to set forth the facts of the two cases now before us.

In No. 44, *United States Plywood Corp.* v. *City of Algoma,* petitioner, a New York corporation licensed to do business in Wisconsin, attacks the validity of a tax levied by the City of Algoma on its storage stock of imported lumber and veneers. The veneers are imported from Canada, France and the Belgian Congo. From Canada comes birch veneer, from France, French oak veneer, and from Africa, species of veneer known as korina and fuma. The veneers are shipped to petitioner

in wooden crates or in bundles secured by metal straps. After arrival at petitioner's plant the veneers are stored in a warehouse in their original packages prior to their use in the manufacture of veneered products. When used the packages are broken and take their course through the factory. The lumber, birch and cedar, is imported from Ontario, Canada. When received it is piled in the yard preparatory to use in manufacture.

The City of Algoma assessed for taxation one-half of the total value of the imported lumber piled in the yard and the veneers stored in their original packages in the warehouse, on tax day—May 1, 1955. The city said that at least that amount of the imported materials was necessary to meet the "current operational requirements" of petitioner and thus was subject to state taxation.

The State Supreme Court upheld the tax on the basis of the finding below that the goods taxed were necessary for the "current operational needs" of the plant. The tax on the lumber was sustained on an alternative ground. Since the dominant purpose of piling the lumber in the storage yard was to prepare it for manufacture by air drying, the lumber had entered the process of manufacture and lost its immunity from state taxation. Most of the Canadian lumber was received green and, as a matter of good business practice, it is customary to air dry such lumber before running it through dry kilns to further remove moisture.

In No. 9, *Youngstown Sheet & Tube Co.* v. *Bowers,* appellant challenges the application of a personal property tax to its stocks of imported iron ore stored at its plant in Youngstown, Ohio. The facts were stipulated. Appellant purchases and imports five grades of iron ore: Brazilian ore, Cuban ore, Mexican ore, Liberian ore, and Seine River ore. These ores are loaded in bulk at foreign ports into chartered vessels, each of which carries but a single cargo of a single grade of ore. When

the vessels reach the port of entry, the ore is discharged into railroad cars and transported in bulk to appellant's plant in Youngstown. Upon arrival the ore is unloaded into a storage yard adjacent to the manufacturing plant. A separate storage pile in a separate area of the storage yard is maintained for each grade of imported ore, and such ore is not commingled with any other property. A supply of ore necessary to meet estimated requirements for at least three months is maintained. Since the ore is located at some distance from stock bins and furnaces, when the need arises for a particular grade of ore it is taken from the grade stock pile and transported to stock bins or stock houses preparatory to use in the furnaces. When a shipment of bulk ore of a particular grade is received it is placed in the stock pile designated for that grade, *i. e.*, all imports of Brazilian ore are placed in the Brazilian pile, etc. Hence a stock pile of a particular grade may be diminished by a particular day's need, and augmented the next by subsequently imported ore of the same grade.

Appellant conceded that the imported ores had lost their immunity from taxation once they were removed from storage piles and placed in stock bins. The Supreme Court of Ohio decided that all the imported ore, including that remaining in the storage piles, could be taxed by the State, and upheld the challenged assessment. The Ohio court thought that the mere mingling of imported ore with other imported ore of the same grade, coupled with the fact that parts of each pile were taken for use in manufacturing, had terminated the constitutional immunity and subjected the entire stock of imported ore to state taxation.

Primary among the forces which led to the inclusion of Art. I, § 10, cl. 2, the Import-Export Clause, in the Constitution, was the deeply felt necessity of vesting exclusive power over foreign economic relations and foreign

commerce in the new National Government.[2] The importance of control over duties, imposts, and subsidies as an instrument of foreign trade and as a protection for the encouragement and growth of domestic manufactures was recognized as a matter of course by the Framers. For the effective exercise of this control it was necessary that the Government speak with one voice when regulating commercial intercourse with foreign nations. Orderly and effective policy would be impossible if thirteen States, each with their distinctive interests, and often conflicting, one with another, were allowed to exercise their own initiative in the regulation of foreign economic affairs. And so the States were prohibited from such regulation—they were forbidden, except by leave of Congress, to lay any duties on imports or on exports. Second only to this goal in importance, was the need to secure to the National Government an important source of revenue.[3] The Framers assumed that, for many years, duties on foreign imports would be the prime source of national funds; the revenue on whose constant flow the operations of government would depend. It therefore was essential to the fiscal well-being of the new country to ensure exclusive access to this revenue to the National Government. Subordinate to these goals in importance was the desire to prevent the seaboard States, possessed of important ports of entry, from levying taxes on goods flowing through their ports to inland States.[4] It was important not to allow these States to take advantage of their favorable geographical position in order to exact a price for the use of their ports from the consumers dwelling in

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[2] See Letter of James Madison to Professor Davis, 3 Farrand, Records of the Federal Convention (1911), 520–521; Federalist No. 12 (Lodge ed. 1908) 67 (Hamilton); *ibid.*, No. 44, at 280 (Madison).

[3] See Federalist No. 12 (Lodge ed. 1908) 67 (Hamilton).

[4] See 2 Farrand, Records of the Federal Convention (1911), 441–442.

less advantageously situated parts of the country. This fear of the use of geographical position to exact a form of tribute found an especially forceful expression in the absolute prohibition against duties on exports by either Nation or States.

The Import Clause was a result of the desire to safeguard these national goals and realize these necessities. Thus, the considerations governing its interpretation marked out for it a special path in the stream of constitutional adjudication—a course which diverged in many respects from the history of the Commerce Clause: that broad grant of power designed primarily to assure national control over commercial trade among the States. The often difficult, and continually delicate, considerations of the economic impact of a challenged tax, of the directness of its burden upon commerce, of its potential or actual discrimination against interstate trade, which have been of controlling importance to the proper evaluation of state taxes challenged under the Commerce Clause, are not the pertinent factors in assessing the constitutional validity of a tax charged with being in violation of the bar of Art. I, § 10, cl. 2. In the taxation of imports, the grant of power to the National Government is exclusive; the prohibition of the States, absolute.[5] Thus the

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[5] In *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, at 75–76, we pointed out that

". . . the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits . . . and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. . . .

"It seems clear that we cannot write any such qualifications into

objects of relevant inquiry have been carefully circumscribed. Once it is clear, as a matter of economic fact, that a State has levied a tax upon foreign goods, this Court has always found it necessary to answer only one further question. The question was put by Chief Justice Marshall in 1827 in *Brown* v. *Maryland:* Have the goods retained their status as imports in the hands of the importer? If so, the tax is invalid. If not, if the goods have become part of the general property of the State, the tax is not barred by the Import Clause. The answer to this question involves essentially a determination of the physical status of the foreign goods. But, however variant the facts in different situations, the determinative principles have remained constant. And in the cases now before us, just as in every case this Court has decided under the Import Clause, the rules of decision must flow from the careful and authoritative exposition of Chief Justice Marshall in the governing case of *Brown* v. *Maryland.* The Chief Justice recognized that at some point in the importing process foreign goods lose their immunity and become subject to the taxing power of the State. Yet the goods must remain immune from state levies long enough to give the constitutional prohibition its intended effect. Every case decided under the Import Clause, from that day to this, has been concerned with applying to the particular facts before the Court the considerations and standards formulated in *Brown* v. *Maryland* for determin-

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the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. . . . It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. . . . the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other."

See also *Woodruff* v. *Parham,* 8 Wall. 123; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; Federalist No. 32 (Lodge ed. 1908) 186–188 (Hamilton).

ing when the exclusive national power ends and state power begins.[6] In words grown familiar with judicial statement, yet deserving of repetition here, the great Chief Justice stated both the problem and the guide for decision. "[T]here must be a point of time," Marshall postulated, "when the prohibition ceases, and the power of the State to tax commences; . . . It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." 12 Wheat., at 441–442.

Since, in *Brown* v. *Maryland,* the object of importation had been sale, reasoned the Chief Justice, certainly the importer was entitled to realize that aim without being subject to state taxation. Although more subtle, more befogging cases might be imagined, it was "plain" that, at least while in the hands of the importer in its original form or package, the foreign good remained an import and thus free from state levies.

The counsel for the State of Maryland in *Brown* v. *Maryland* was its Attorney General, Roger B. Taney.

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[6] *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652; *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218; *Gulf Fisheries Co.* v. *MacInerney,* 276 U. S. 124; *New York ex rel. Burke* v. *Wells,* 208 U. S. 14; *May* v. *New Orleans,* 178 U. S. 496; *Low* v. *Austin,* 13 Wall. 29; *Waring* v. *The Mayor,* 8 Wall. 110. See also *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414; *Cook* v. *Pennsylvania,* 97 U. S. 566. For additional statements of the authority and importance of the doctrine of *Brown* v. *Maryland,* see *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519–520; *Norfolk & Western R. Co.* v. *Sims,* 191 U. S. 441, 449; *The License Cases,* 5 How. 504, 575.

Twenty years later, sitting as Chief Justice, Taney acknowledged that "further and more mature reflection" had made clear to him the wisdom of the principles laid down by his predecessor. "Indeed," said Mr. Chief Justice Taney, "goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government." [7]

It is needless to review the consistency with which this Court has repeated and applied the formulas of Marshall and Taney. A few of the more important examples will serve as concrete illustrations. In *Low* v. *Austin*, 13 Wall. 29, the Supreme Court of the State of California had sustained the application of a general ad valorem property tax to cases of imported French champagne which were being held in the warehouse of the importer, a commission merchant, for purposes of sale. The California court was unable to discern any "reason why imported goods, exposed in the store of a merchant for sale, do not constitute a portion of the wealth of the state as much as do domestic goods similarly situated." [8] This Court rejected the reasoning of the state court as in conflict with the principles of *Brown* v. *Maryland,* and invalidated the application of the tax to the imported wine. "[G]oods imported," said this Court, "do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition." [9] Similarly, in *Anglo-Chilean Corp.* v. *Ala-*

[7] *The License Cases,* 5 How. 504, 575.

[8] 1 Calif. Unreported Cases 638, 643. The passage is also quoted at 13 Wall. 30–31.

[9] 13 Wall., at 34.

bama, 288 U. S. 218, bags of Chilean nitrate stored in the importer's warehouse, awaiting sale, were held to be immune from assessment under the general franchise tax of the State of Alabama. The consistency with which these principles have been applied is demonstrated even more lucidly in those instances in which the Court has upheld a tax on goods held by the importer. In each such case the tax has been allowed only after an indubitable demonstration that the goods involved had been so altered from the physical form in which they had arrived upon importation that they had lost their character as foreign imports and had become, through the importer's action, a new ingredient of the general mass of property of the State.[10]

The historic standards governing the application of the Import Clause received recent reaffirmation in *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652. That case is of compelling significance here. For the situation there involved so precisely parallels the circumstances now before us as to control these cases, unless *Hooven & Allison* is to be overruled and the dissenting views expressed in that case adopted as the Court's views.

The Hooven & Allison Company imported bales of foreign hemp for use in the manufacture of cordage and similar products. The State of Ohio sought to tax this hemp while it was stored in the manufacturer's warehouse subsequent to importation, and prior to use. During hearings before the Ohio Board of Tax Appeals it was established that the company was accustomed to keep on hand merely a "minimum working inventory" of imported hemp, an amount sufficient to compensate for the three- to six-month delay involved in shipping the hemp from foreign countries. On appeal, the Ohio Supreme Court

[10] *New York ex rel. Burke* v. *Wells,* 208 U. S. 14; *Gulf Fisheries Co.* v. *MacInerney,* 276 U. S. 124; *May* v. *New Orleans,* 178 U. S. 496. Cf. *Waring* v. *The Mayor,* 8 Wall. 110.

sustained the tax on the grounds that the hemp, having been stored for the purposes of manufacture, had lost its constitutional immunity. In support of its conclusion the Ohio court quoted the portion of the proceedings below in which the company had admitted the presence of only a "minimum working inventory." This fact was urged before this Court in support of the State's request for affirmance.[11]

This Court invalidated the tax and reversed the judgment of the Ohio Supreme Court. Mr. Chief Justice Stone thus spoke for the Court:

> "Although one Justice dissented in *Brown* v. *Maryland, supra,* from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported." 324 U. S., at 657.
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> . . . . . .
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> ". . . no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. On the contrary, Chief Justice Taney, in affirming the doctrine of *Brown* v. *Maryland,* in which he appeared as counsel for the State, declared, as we now affirm: 'Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just

[11] The record and proceedings below in *Hooven & Allison* are discussed in detail at notes 13 and 14, *infra.*

sense be regarded as a part of that mass of property in the state usually taxed for the support of state government.' . . .

". . . We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale. The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases." 324 U. S., at 666–667.

Indeed there is no process of logic, however dextrous, which would strike down a tax on imported goods being held prior to sale and allow a tax on goods stored prior to the processing which is preliminary to sale. In fact, the latter tax is less essential to state revenue since, in the case of goods held for manufacture, the State still retains the opportunity to impose a tax on the first sale. If the merchant who imported goods for the purpose of sale was entitled to realize that purpose before being subject to state taxes, certainly the manufacturer who had imported goods in order to process them was entitled to no lesser privilege. Goods lying in a manufacturer's warehouse in their original form or container are no more a part of the general mass of property of a State than are goods which are displayed by a commission merchant, in their original crates, for purposes of sale; nor is a tax on goods stored for manufacture any less of an "interception" of those goods while they are still imports than is a tax on goods immediately prior to their first sale. Clearly *Hooven & Allison* did not represent an extension of the principles of *Brown* v. *Maryland* but was an application of that deci-

sion in a context where to distinguish the principle would have been to reject it.[12]

The lucid standards developed by this Court for the interpretation of the Import Clause give clear guidance

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[12] The opinion of the Court asserts that the decision in *Hooven & Allison* is inconsistent with the reasoning of Marshall in *Brown* v. *Maryland*. We are told that *Brown* v. *Maryland* "holds that goods brought into the country by an importer 'for his own use' are not exempted from state taxation . . . and *Hooven & Allison Co.* v. *Evatt*, . . . holds that they are. . . ." Surely this expresses a misapprehension of what Marshall said. Such a contention was made here, by the dissent in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, at 686–688 (dissenting opinion), and silently rejected. For its refutation see Professor Thomas Reed Powell's State Taxation of Imports—When Does an Import Cease to be an Import, 58 Harv. L. Rev. 858, 859–864.

The statement of Marshall which is the basis of what is attributed to him was made by the Chief Justice in response to a contention by the State of Maryland that to grant immunity in this case would mean that an importer "may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." 12 Wheat., at 442–443. Marshall thus dealt with this and similar contentions:

"This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and travelling with them as an itinerant pedlar. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer." 12 Wheat., at 443.

It is clear that Marshall is referring to personal household goods

for the disposition of the present cases. We accept the finding of the Wisconsin courts that the imported lumber was stored for the dominant purpose of air drying. Having entered the process of manufacture, the goods had become subject to the taxing power of the State. However, neither the imported ores in No. 9 nor the foreign veneers in No. 44 had been subject to manufacturing. On tax day they lay in the manufacturer's storage area, in their original "form and shape," awaiting their initial processing. Thus the taxes sought to be levied on these materials are clearly barred by the historic series of adjudications of this Court, which have established that goods so situated, whether awaiting sale or manufacture, are constitutionally immune from state taxation under the proscription of Art. I, § 10, cl. 2, of the Constitution.

Yet the Court does not choose to take this plainly marked path of constitutional decision. Rather it has

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brought in by the importer and used by him. He is rejecting the idea that immunity can continue indefinitely after use if there has been no sale. He does not say, as the Court would have him say, that goods brought in by an importer "for his own use," or goods "held for use," are subject to state taxation. The phrase "for his own use," which the Court places in quotation marks and attributes to Marshall, was the Chief Justice's statement of counsel's contention and is not to be found in his own conclusion. The phrase "held for use," which the Court also attributes to Marshall in its paraphrase of his views, is an interpolation nowhere to be found in the Chief Justice's discussion. Goods which are imported for purposes of sale are brought in for "use" as much as are goods which have been brought in for manufacture. A tax imposed prior to processing "intercepts" goods on their way to incorporation in the general mass of property as effectively as does a tax prior to sale. Marshall was not distinguishing between goods brought in for manufacture and those brought in for sale. There is no rational distinction. He was merely denying immunity to goods which had been brought in and thereafter actively used by the importer. There is nothing in *Brown* v. *Maryland* that is not in complete accord with what was decided in *Hooven & Allison*.

effectively departed from established doctrine and upholds the challenged taxes. It does so on the basis of a theory which is as elusive to logic as it is opposed to authority—a theory which is not only unsupported by economic fact or reason and without basis in any of the invoked "realities," but which turns *Brown* v. *Maryland* and its progeny into *ad hoc* results unrelated to their rationale, and disregards the harmonious reasoning on which these decisions were based and the process of one hundred and thirty-two years of constitutional adjudication.

The Court finds support for its decision in the language of *Hooven & Allison*. "Unlike *Hooven*," we are told, "these are not cases of the mere storage in a warehouse of imported materials intended for eventual use in manufacturing but not found to have been essential to current operational needs." On the assumption that the cases before us present a situation not governed by prior adjudication, it is maintained that, since the goods in question had been "irrevocably committed . . . to 'use in manufacturing' at the plant and point of final destination," and were being used to supply the daily manufacturing needs of the plant, petitioners must be deemed to have *"so acted upon the imported materials* as to cause them to lose their distinctive character as 'imports.' " But is not this merely a way of giving an asserted conclusion of law the appearance of a fact? The vital question is how, if not when, do "imported materials . . . lose their distinctive character as 'imports.' " After all, the vast bulk of imports are brought in for commercial purposes—to be exposed for sale in their original form or to be used as raw materials in manufacture. They are, that is, "irrevocably committed" to be sold or to be used in manufacturing. They are not, normally, brought in to be dumped into the sea, as was the tea at the Boston Tea Party. Of course the goods here had been imported and stored for

a manufacturing purpose. The manufacturer did not import them to sit idly in his storage area.

The very ground now relied upon by the Court, in its affirmance of the challenged taxes, was rejected in *Hooven & Allison,* as the record in that case overwhelmingly demonstrates.[13] One is bound to say that the passage

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[13] At the hearing before the Ohio Board of Tax Appeals, the general manager of the Hooven & Allison Company was asked if the imported hemp was kept in the warehouse for any definite length of time. He answered:

"No; it might be we would need the stuff as soon as it got there and again we might not; it comes from long distances and we do not carry any more inventory than we need to; it takes three to six months for it to get to us; we attempt to keep a backlog for that; we attempt to run our business with a minimum working inventory, of course." Transcript of Record, p. 42, *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652.

Relying in large part on this testimony the Supreme Court of Ohio concluded that the goods "had so come to rest as to be mingled with the mass of property in this country . . . ." *Hooven & Allison Co.* v. *Evatt,* 142 Ohio St. 235, 242, 51 N. E. 2d 723, 726. In its brief before this Court, Ohio supported the validity of the tax on the basis of the above industrial circumstances:

"The evidence in the instant case shows that the petitioner purchased fibers solely for its own use, never for sale. It was impracticable to buy fibers a bale at a time to meet the immediate needs of its mill. It took from three to six months to get delivery after an order was placed. The undisputed testimony shows that the petitioner did not carry any more inventory than was actually needed, but due to the uncertainty of deliveries, it attempted 'to keep a backlog for that.' It attempted to operate 'with a minimum working inventory' (R. 16). In other words, when the imported goods reached the plant they were immediately used, in that they were essential to the continuous daily operation of petitioner's plant." Brief for Respondent, p. 20, *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652.

This Court's decision did not accept the arguments made by the State throughout the course of litigation. The theory thus rejected now serves as the basis for this decision.

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quoted by the Court from Mr. Chief Justice Stone's opinion in support of the statement that the cases before us are "unlike *Hooven & Allison*," does not support that proposition.[14]

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[14] In support of its argument that the cases before us are "unlike" *Hooven & Allison*, the Court quotes from the following passage from that case:

"It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's *warehouse* in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the *factory* was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." (Italics added.) 324 U. S., at 667.

The record in the case, the opinions below, and the briefs in this Court, leave no doubt that this passage does not refer to the bulk of the imported hemp stored in the warehouse of the Hooven & Allison Company as a "minimum working inventory." Indeed, such reference would be wholly inconsistent with the principles on which the opinion rests. Due regard for the record and for the opinions clarifies the Chief Justice's meaning. When the imported hemp was ready for use it was moved from the warehouse to the factory. At the hearing, the general manager testified as to this hemp:

". . . it is removed from the raw material account and charged into processing in the mill; each bale of fiber as it is removed from the raw material warehouse becomes, according to our records, in process. Of course we have to batch and treat this stuff; it may not be used for a couple of days; but as soon as it leaves the warehouse it is charged in process; . . . ." Transcript of Record, p. 43, *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652.

The Ohio Supreme Court took special note of this hemp which was

Putting thus to one side the unwarranted reliance on language in *Hooven & Allison,* let us examine the basis on which the state taxes are upheld. Both the imported veneers in *City of Algoma* and the ore in *Youngstown,* the Court holds, must be said to have been "put to the use for which they were imported," to have "entered the manufacturing process" and therefore to have lost their constitutional immunity, since they were "not only needed, imported and irrevocably committed to supply, but were actually being used to supply, the daily requirements of the plant." Again one must ask whether these phrases mean any more than that the goods were being held by the manufacturer for the purpose for which he had imported them—use in manufacture. They had not been processed, changed from their original form or shape, acted upon, physically altered in the slightest, mingled with domestic goods, or "used," in the sense that anything

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in transit from the warehouse to the processing line. It remarked that:

"While the bales remain in the raw-material warehouse, they are carried in a raw-material account on appellant's books; but upon their removal from such warehouse the bales are immediately charged to goods-in-process account whether the bales have been broken or not." *Hooven & Allison Co.* v. *Evatt,* 142 Ohio St. 235, 237, 51 N. E. 2d 723, 724.

As far as appears, these bales of hemp which had been removed to the factory as immediately necessary for current needs, but which remained in their original packages, were not separately assessed for taxation, nor were they, at any stage of the proceedings, treated as a separate item. It is obvious, though his language is somewhat cloudy, that what Chief Justice Stone meant was that he was not considering whether the removed hemp had a special status. Therefore, although it could not "be said that the fibers were subjected to manufacture when they were placed in petitioner's *warehouse* . . ." it was "unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the *factory* was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture." (Italics added.)

was done to them. They simply lay in storage areas awaiting use. To say that the goods "were actually being used to supply, the daily requirements of the plant," simply affirms the obvious fact that the imports, unaffected in the form in which they were brought in from abroad and deposited, awaited their intended, but not begun, manufacturing process. In all prior considerations of the Import-Export Clause the immunity of imported goods has been terminated only by physical handling or alteration, not by reference to their assumed prospective role in the importer's use of them. The imported hemp in *Hooven & Allison* was similarly "needed." It too was "irrevocably committed to supply," and clearly it was "actually being used to supply the daily requirements of the plant." To that end the hemp was imported. If the hemp was not to be so used it would not have been imported.

Furthermore, if we simply substitute "place of sale," for "plant" in the Court's reasoning—and we are not vouchsafed reasons either in abstract reasoning or in practical logic to disallow it—the identical enumeration of factors here thought sufficient to subject the imports to tax is found to be present in virtually every case in which this Court has invalidated a state tax on imports. The crates of champagne in *Low* v. *Austin,* and the bags of nitrate in *Anglo-Chilean Corp.* were also "needed, imported and irrevocably committed to supply," and "were actually being used to supply, the daily requirements" of the place of sale. In effect, the result of today's decision means that if imported goods are needed, they are taxable. If useless, they retain their constitutional immunity.

A close examination of the *Youngstown* case makes apparent this effective reversal of all previous judicial decision on the Import Clause, and justifies concern over today's holding. The stipulation of facts merely provides that the ore had been imported for purposes of manufac-

ture and that "at least" three months' supply was generally kept on hand. (R. 35.) There were no stipulations, nor were there any findings, as to the rate of use of the ore, the immediacy of the need for it, or its relation to the requirements of the plant, which also used domestic ore in its manufacturing. We have simply the fact that an inventory of ore was kept for eventual use. The tax was sustained by the Ohio Supreme Court on the ground that the bulk ore had become mingled with the general property of the State because new ore had been added to the pile, and old ore removed.[15] The Ohio court did not discuss or rest on the fact that the goods were "so essential to current manufacturing requirements that they must be said to have entered the process of manufacture." There is no possible way to make the Court's reasoning fit with the circumstances which underlie and define *Brown* v. *Maryland* or *Hooven & Allison*. Nothing has been done to the ore; it is in its original form and shape prior to use. Even as a matter of sound accounting, were that relevant, the goods could not be said to have entered the process of manufacture. We cannot assume or fictionalize facts. They must be found to exist. By assuming them, the Court strips them of relevance and impliedly rejects the unbroken meaning that the decisions have given the Import Clause.

Nor is the Court's conclusion strengthened by the suggestion that, since petitioner did not contest the taxability of that ore which had been removed to stock bins or houses, we must allow the rest of the ore to be taxed, as to distinguish between the two would be incongruous.

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[15] Since the Court does not rely on the reasoning of the Ohio court, I will not stop to examine closely its ground of decision. It is sufficient to note that it is difficult to understand by what mutation an import loses its status as an import merely by mingling it with identical imported goods which are similarly being stored prior to use.

The question of the taxability of the removed ore is not before us. That question was not involved in any previous proceeding in this case. We have not the basis for knowledge as to what, if any, processing the ore underwent when removed to the stock bins. There is certainly no basis for assigning a hypothetical constitutional position to the removed ore, and using such an argumentative figment as the means for upholding the tax on the ore about which we do have the precise facts and whose immunity is the question before us.

In *United States Plywood* v. *City of Algoma,* one-half of the value of the imported wood was assessed for taxation. That amount was found to be necessary in order to meet "current operational needs," (R. 31) and was thus thought to be subject to state taxation. Formulas for the determination of current operational needs were discussed in detail by the Wisconsin courts, but the Court's opinion in *Youngstown* makes it unnecessary to examine those formulas here.[16] For the reasoning of *Youngstown* makes it clear that not merely half, but all of the imported veneers can be properly taxed by Wisconsin, since they were all "not only needed, imported, and irrevocably committed to supply, but were actually

[16] The Wisconsin court found that one-half of the imported goods was necessary to meet "current operational needs." On the basis of this finding of "fact," this Court finds its new interpretation of the Import Clause satisfied. Since that interpretation is far broader than the narrow concept of "current operational need," as applied by the Wisconsin court, it is unnecessary to discuss the constitutional validity of a rule based on "current operational need." It is sufficient to note here that such a formula possesses no basis in economics; it is merely an arbitrary figure assigned to a portion of inventory. An appropriate analysis of the formulas tentatively offered by the Wisconsin Circuit Court to support its finding would reveal the unreal and arbitrary nature of the finding. However such discussion would be superfluous here.

being used to supply, the daily manufacturing requirements of the plant." I can only reiterate that the fact that goods were "actually" to be used for the purpose for which imported is not, and has never been thought to be, relevant in determining their taxability under the Import Clause. The abstract assignment of a status to goods which are to be used in manufacture is certainly not germane to an evaluation of that physical transformation of the goods which has hitherto been required before an import could become vulnerable to state taxes. To say that goods are necessary to meet requirements merely asserts a truism which is equally applicable in every case this Court has decided under the Import Clause.

The Court summarizes its conclusion by stating that the imported goods "stood in the same relation to the State as like piles of domestic materials at the same place that were kept for use and used in the same way . . . ." [17] The Court then continues:

> "In those circumstances, the tax was not on 'imports,' nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept at the same place in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers."

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[17] This merely states a legal conclusion. The physical status of the imports did not differ in the slightest from that of any other import this Court has held to be immune from state taxation. Their "relation" to the State is the question for decision.

This is exactly the argument offered by the Supreme Court of California in support of the tax involved in *Low* v. *Austin*. That argument was then rejected unanimously by this Court and has never thereafter won acceptance. Whether the imposition of a tax resulted in "a discrimination in favor of materials imported from other countries" has never been thought relevant to the determination of its constitutional validity. The taxes which the Court struck down in *Low* v. *Austin*, in *Anglo-Chilean Corp.* and in *Hooven & Allison* were non-discriminatory taxes which fell equally on imported and domestic goods similarly situated. The Framers of the Constitution provided an absolute immunity for imports. The decisions of this Court have given to the brief phrases of Art. I, § 10, cl. 2, the content of a command: "a state shall not tax imports," not, "a state shall not tax imports discriminatorily." It is one hundred and thirty-two years too late to refuse to attribute to the Framers the purpose of freeing imports from state taxation which this Court has consistently assumed.[18]

Moreover, it cannot properly be said that the application here of the settled principles of the Import Clause results in "discrimination" in favor of foreign goods. Whether foreign goods are receiving a tax advantage over similar domestic goods can only be determined by an evaluation of the full range of imposts and duties which the importer has been required to pay to the National Government. Only then can we know, as a matter of economic reality, whether, in fact, there is discrimination. And if we find discrimination, it is the result of the decision of the Congress and the President that the goods involved should, as a matter of national policy, receive

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[18] See the passage quoted at note 5, *supra*, from *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 75–76. See also Federalist No. 32 (Lodge ed. 1908) 186–188 (Hamilton).

preferential treatment. Certainly this Court should be reluctant to make inroads on a rule of law so well and lucidly settled that it may legitimately be regarded as an ingredient in the formulation which is made by the National Government when it determines, as a considered national policy, the extent to which import duties should be imposed.

Reluctant as one is to say so, it must be said that the Court proposes no reason for its decision which has not heretofore been rejected by this Court. Nor are we pointed to new compelling policies which must be invoked in order to upset a firmly established principle of our constitutional law; a principle which, perhaps more clearly than any other constitutional standard, has arrived at a lucid, coherent, and eminently workable distribution of power between the Nation and the States.

In the *Youngstown* case appellant also claims that the tax on a portion of its domestic ores was imposed in violation of the Equal Protection Clause of the Fourteenth Amendment. I concur in the Court's rejection of that claim.

WILLIAMS *v.* OKLAHOMA.

CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF OKLAHOMA.

No. 124. Argued January 21, 1959.—Decided February 24, 1959.

While fleeing from police after robbing a filling station, petitioner forced his way at gunpoint into the automobile of one Cooke, forced him to drive far into the country, there shot and killed him, and escaped in his car. Charged in an Oklahoma court with murder, he entered a plea of guilty and was sentenced to life imprisonment. Thereafter, he was charged in another Oklahoma court with the kidnaping involved in the same occurrence. While represented by counsel and after being warned by the court that conviction might result in a death sentence, he pleaded guilty and was convicted. Before sentencing him, the court permitted the State's Attorney to make an unsworn statement in which he recounted at length the armed robbery, the chase, the elusion of police, the gruesome details of the kidnaping and murder and petitioner's past criminal record; and petitioner was sentenced to death on the kidnaping charge. Under Oklahoma law, kidnaping and murder are separate and distinct offenses, and petitioner made no claim prior to his conviction that he was being put twice in jeopardy for the same offense. Under Oklahoma law, the granting of a presentence hearing at which testimony is taken is discretionary with the trial court, and petitioner did not request such a hearing. *Held:* Petitioner was not denied due process of law in violation of the Fourteenth Amendment. Pp. 577–587.

(a) On the record, this Court cannot say that petitioner was deprived of any right or of fundamental fairness by the fact that the trial court did not pursue the presentencing procedures prescribed by the Oklahoma statutes. Pp. 582–583.

(b) The statement by the State's Attorney of the details of the crime and of petitioner's criminal record—all admitted by petitioner to be true—did not deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination. Pp. 583–584.

(c) On the record in this case, this Court cannot say that the sentencing judge was not entitled to consider the murder, along with all other circumstances involved, in determining the proper sentence for the kidnaping. Pp. 584–586.

(d) Since kidnaping and murder are separate and distinct crimes under Oklahoma law, the court's consideration of the murder as a circumstance involved in the kidnaping cannot be said to have resulted in punishing petitioner a second time for the same offense nor to have denied him due process of law in violation of the Fourteenth Amendment. P. 586.

(e) This Court cannot say that the death sentence for kidnaping, which was within the range of punishments authorized for that crime by Oklahoma law, denied to petitioner due process of law or any other constitutional right. Pp. 586–587.

321 P. 2d 990, affirmed.

John A. Ladner, Jr. filed a brief and argued the cause, *pro hac vice,* by special leave of the Court, for petitioner.

Mac Q. Williamson, Attorney General of Oklahoma, and *Sam H. Lattimore,* Assistant Attorney General, argued the cause and filed a brief for respondent.

Mr. Justice Whittaker delivered the opinion of the Court.

Upon his plea of guilty to a charge of kidnaping in the District Court of Tulsa County, Oklahoma, petitioner was sentenced to death. On appeal, the Criminal Court of Appeals of Oklahoma affirmed, 321 P. 2d 990, and certiorari was sought on the ground that the sentence was imposed in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. We granted the writ to determine that question. 357 U. S. 925.

The undisputed facts are that on June 17, 1956, within a few hours after robbing a filling station attendant in Tulsa, Oklahoma, and eluding police in an ensuing chase, petitioner forced his way into an automobile being driven by one Tommy Cooke, a young divinity student, as it stopped for a traffic light in that city, and, at gunpoint, forced Cooke to drive beyond the City and County of Tulsa and for a considerable distance through northeastern

Oklahoma to a point on a dead-end road in Muskogee County where he shot and killed him, and then escaped in the car. On June 19, 1956, petitioner was apprehended, and soon afterward he was charged in the District Court of Muskogee County with murdering Cooke in that county. On arraignment, he entered a plea of not guilty, but during the course of his trial petitioner, on November 19, 1956, withdrew that plea and entered a plea of guilty as charged. He was thereupon convicted and sentenced to life imprisonment in the Oklahoma State Penitentiary.[1]

Thereafter, on December 17, 1956, petitioner was charged in the District Court of Tulsa County with kidnaping Cooke in that county on June 17, 1956, in violation of Okla. Stat., 1951, Tit. 21, § 745.[2] At his arraignment on December 19, 1956, petitioner entered a plea of not guilty, but on January 30, 1957, a few days before the scheduled date of trial, he withdrew that plea and entered a plea of guilty as charged. After interrogating petitioner to make sure that he had entered the plea of guilty voluntarily and that he understood that he might be sentenced to death upon it,[3] the court accepted the plea

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[1] Okla. Stat., 1951, Tit. 21, § 707, provides, in pertinent part: "Every person convicted of murder shall suffer death, or imprisonment at hard labor in the State penitentiary for life, at the discretion of the jury, [but] upon a plea of guilty the Court shall determine the [punishment]."

[2] Okla. Stat., 1951, Tit. 21, § 745, provides, in pertinent part, that "Every person who, without lawful authority, forcibly seizes and confines another, or inveigles or kidnaps another, for the purpose of extorting any money, property or thing of value or advantage from the person so seized . . . , or in any manner threatens [the person so seized] shall be guilty of a felony, and upon conviction shall suffer death or imprisonment in the penitentiary, not less than ten years."

[3] The court's interrogation and petitioner's answers were as follows:

"The Court: [T]he Court is advised by the assistant County Attorney and also by your counsel, that at this time you wish to withdraw your plea of not guilty, which has heretofore been entered

and adjudged petitioner guilty of the crime of kidnaping Cooke as charged. Thereupon the court asked counsel for petitioner if he wished to be heard regarding the sentence to be imposed, and counsel replied that he preferred to reserve his statement until after the State's Attorney had spoken. The State's Attorney then made a statement—reading much of it from a prepared statement—recounting the armed robbery of the filling station attendant and the following chase by and elusion of the Tulsa police; reciting the gruesome details of the kidnaping of Cooke in Tulsa County and of his murder in Muskogee County; stating petitioner's past criminal record as shown

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in this case, wherein you are charged with the crime of kidnapping, and enter a plea of guilty to this charge—

"Mr. WILLIAMS: Yes, sir.

"The COURT: —is that correct?

"Mr. WILLIAMS: Yes, sir.

"The COURT: Now, you understand the nature of this charge, do you?

"Mr. WILLIAMS: That's right.

"The COURT: You understand, that it is a charge that is punishable with the extreme penalty of life imprisonment, or death in the electric chair?

"Mr. WILLIAMS: Yes, sir.

"The COURT: In the light of that knowledge and information and understanding, are you entering this plea freely and voluntarily upon your part?

"Mr. WILLIAMS: Yes, sir.

"The COURT: Has there been any representation made to you by counsel, or by anyone else, as to the sentence which you might expect from the Court in this case?

"Mr. WILLIAMS: I was told I could expect the maximum.

"The COURT: Of death in the electric chair?

"Mr. WILLIAMS: Yes, sir.

"The COURT: In the light of that representation made to you by your counsel, you wish to withdraw your plea of not guilty and enter a plea of guilty to the charge?

"Mr WILLIAMS: Yes, sir."

by the files of the Federal Bureau of Investigation; [4] and concluding with a request for a death sentence. Counsel for petitioner objected to any reference to the murder on the ground that sentence for that crime had already been imposed by the District Court of Muskogee County and that it could not again lawfully be considered in imposing sentence on the kidnaping charge. The court, expressing the view that it was "proper to advise the Court of all the facts [occurring while petitioner] had the victim in his charge and under his control," overruled the objection. After the State's Attorney had concluded, counsel for petitioner put in evidence a transcript of the sentencing proceedings had in the District Court of Muskogee County in the murder case, and made an extended plea for a sentence to life imprisonment rather than a sentence to death.

After thus fully hearing the parties, the court deferred the imposition of sentence for two days. Upon reconvening, the court called petitioner to the bar and asked him whether he wished to make any correction in the statement that had been made to the court by the State's Attorney. Petitioner answered that he did not, and that the matters related in that statement were true.[5] There-

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[4] As recited by the State's Attorney, the FBI files disclosed the commission of five crimes by petitioner, consisting of grand theft in 1944, at the age of 14, resulting in his release to a juvenile bureau; a Dyer Act violation in 1945, resulting in a three-year sentence to the federal juvenile correctional institution at Inglewood, Colorado; escape from Inglewood and a Dyer Act violation in 1947, resulting in a sentence for a term of 18 months; and armed robbery in 1949, resulting in a sentence for a term of 12 years in the Indiana State Penitentiary.

[5] The court's questions and petitioner's answers were as follows:

"The COURT: Now, at that time on Wednesday, there was a statement of facts made by the State, relative to this case, and the sequence of events and the facts surrounding the sequence of events and the facts surrounding the commission of this crime. Do you have any

upon, the court sentenced petitioner to death, and in the course of his pronouncement the judge said, among other things, that he had considered the facts "which [had] been stated [by counsel] and which [petitioner had] admitted were [involved in] this crime [of kidnaping], committed in Tulsa County, which resulted in the murder of the victim, [all of] which the Court takes into consideration . . . as a continuing thing."

As stated, petitioner's broad claim is that these proceedings show that the death sentence was determined and imposed in violation of the Due Process Clause of the Fourteenth Amendment. In support of that position he makes, and variously repeats, a number of arguments which upon analysis come down to three contentions: first, that the trial court violated the presentence procedure prescribed by Okla. Stat., 1951, Tit. 22, §§ 973, 974 and 975, in permitting the State's Attorney to make an unsworn statement to the court of the details of the crime and of petitioner's criminal record, and that this also denied to him the rights of confrontation and cross-examination; second, that the court in taking the murder into consideration in imposing sentence on the kidnaping charge punished him a second time for the same offense; and, third, that in any event the sentence to death for kidnaping was "disproportionate" to that crime and to

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correction to make in reference to the statement of counsel for the State, in that regard?

"Mr. WILLIAMS: No, sir.

"The COURT: Those facts were true?

"Mr. WILLIAMS: Yes, sir.

"The COURT: And you at this time admit that they were true and that you committed the acts as set forth by the State, that is correct, is it?

"Mr. WILLIAMS: Yes, sir.

"The COURT [addressing counsel for petitioner]: All right. Do you have anything further to say on behalf of this defendant?

"[COUNSEL FOR PETITIONER]: Nothing further."

the life sentence that had earlier been imposed upon him for the "ultimate" crime of murder.

Petitioner's contentions that the trial court deprived him of his legal rights and of fundamental fairness in failing to pursue the formal presentence procedures prescribed by Okla. Stat., 1951, Tit. 22, §§ 973, 974 and 975, and in permitting the State's Attorney to make an unsworn statement to the court of the details of the crime and of petitioner's criminal record were also made by petitioner in the Criminal Court of Appeals of Oklahoma. That court rejected those contentions. Sections 973–975 provide in substance that after a plea or verdict of guilty in a case where the extent of the punishment is left with the court, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may, in its discretion, hold a formal hearing and take evidence thereon.[6] The Oklahoma court held that whether those procedures shall be used is discretionary with the trial court, and that, at all events, petitioner waived their use by failing to request a hearing under those statutes. In construing those statutes it said: "But, two things are clear under the provisions of § 973. First,

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[6] Sections 973, 974 and 975, Okla. Stat., 1951, Tit. 22, provide:

§ 973. "After a plea or verdict of guilty in a case where the extent of the punishment is left with the court, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may in its discretion hear the same summarily at a specified time and upon such notice to the adverse party as it may direct."

§ 974. "The circumstances must be presented by the testimony of witnesses examined in open court. . . ."

§ 975. "No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court or member thereof in aggravation or mitigation of the punishment, except as provided in the last two sections."

pursuing this method of procedure is a matter of the trial court's sound discretion. Second, its use is further contingent upon the request of either the state or the defendant." It further said: "It is contended that under the provisions of § 975 it is the mandatory duty of the court to hear witnesses. But, in construing §§ 974 and 975 in light of the provisions of § 973, we are of the opinion that both the provisions of § 974 and § 975 are contingent upon the request for evidence under the provisions of § 973, [and that] [w]hen the parties fail to make a request for the privilege thereof, the same is waived and some other method of supplying the court with the necessary information for the pronouncement of judgment and sentence may be substituted instead." This construction of the State's statutes by its court of last resort must be accepted here.

It is not contended that petitioner requested or suggested that the trial court hear evidence in mitigation of the sentence. Nor did petitioner request or suggest that the court require the State to offer evidence in support of the aggravating circumstances. In these circumstances, we cannot say that petitioner was deprived of any right or of fundamental fairness by the fact that the trial court did not pursue the presentencing procedures prescribed by the Oklahoma statutes.

Nor did the State's Attorney's statement of the details of the crime and of petitioner's criminal record deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination. As we have seen, the Court of Criminal Appeals of Oklahoma held in this case that when petitioner failed to request the privilege of adducing evidence in mitigation of the crime, and thereby waived the presentence procedures prescribed by §§ 973–975, the law of Oklahoma authorized "some other method of supplying the court with the necessary information for the pronouncement of judgment and sentence [to] be

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substituted instead," and it held that the State's Attorney's statement was a proper method in these circumstances under the law of Oklahoma. Moreover, after the State's Attorney had made his statement, petitioner, upon interrogation by the court, stated that the recitals of that statement were true. See Note 5. This alone should be a complete answer to the contention. But we go on to consider this Court's opinion in *Williams* v. *New York*, 337 U. S. 241. This Court there dealt with very similar contentions and held that, once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or "out-of-court" information relative to the circumstances of the crime and to the convicted person's life and characteristics.

These considerations make it clear that the State's Attorney's statement of the details of the crime and of petitioner's criminal record—all admitted by petitioner to be true—did not deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination.

We come now to petitioner's contention that the court in taking the murder into consideration in imposing sentence on the kidnaping charge punished him a second time for the same offense. But murder and kidnaping are not the same offense in Oklahoma. The Oklahoma statutes separately create and define the crimes of murder [7] and

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[7] Okla. Stat., 1951, Tit. 21, § 701, provides:

"Homicide is murder in the following cases.

"1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being.

"2. When perpetrated by any act imminently dangerous to others

of kidnaping,[8] and it is evident from their terms that, as held by the Oklahoma court in this case, they create "separate and distinct offenses." It is not contended that the charge of murder to which petitioner pleaded guilty and was sentenced in Muskogee County made any reference to the crime of kidnaping, and the charge involved in this case made no reference to the murder but was substantially in the language of the kidnaping statute. See Note 2. Petitioner did not object to the charge in the trial court on double jeopardy or double punishment grounds as the Oklahoma courts have held to be necessary to preserve such a point,[9] but instead he entered a plea of guilty to the charge. Upon that plea it became the duty of the trial judge to impose an appropriate sentence. The statute made appropriate, and required the imposition of, a sentence within the range of imprisonment for a term of 10 years to the maximum of death (see Note 2), as determined by the sentencing judge in the exercise of his sound discretion. Necessarily, the exercise of a sound discretion in such a case required consideration of all the circumstances of the crime, for "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment. . . ." *Williams* v. *New York, supra,* at 247. In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime. The Okla-

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and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

"3. When perpetrated without any design to effect death by a person engaged in the commission of any felony."

[8] See Note 2.

[9] *Collins* v. *State,* 70 Okla. Crim. 340, 106 P. 2d 273; *Mowels* v. *State,* 52 Okla. Crim. 193, 11 P. 2d 205; *Ex parte Zeligson,* 47 Okla. Crim. 45, 287 P. 731; *Fines* v. *State,* 32 Okla. Crim. 304, 240 P. 1079; *White* v. *State,* 23 Okla. Crim. 198, 214 P. 202.

homa court has so declared in this case and in *Powell* v. *State,* 94 Okla. Crim. 1, 229 P. 2d 230. This Court, too, has so held. *Williams* v. *New York, supra.* Certainly one of the aggravating circumstances involved in this kidnaping crime was the fact that petitioner shot and killed the victim in the course of its commission. We cannot say that the sentencing judge was not entitled to consider that circumstance, along with all the other circumstances involved, in determining the proper sentence to be imposed for the kidnaping crime. And in view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing petitioner a second time for the same offense, nor to have denied to him due process of law in violation of the Fourteenth Amendment.

Petitioner's further claim that the sentence to death for kidnaping was "disproportionate" to that crime and to the life sentence that had earlier been imposed upon him for the "ultimate" crime of murder proceeds on the basis that the sentence for kidnaping was excessive, that the murder was the greater offense, and that the sentence for the lesser crime of kidnaping ought not, in conscience and with due regard for fundamental fairness, exceed the life sentence that was imposed in another jurisdiction for the murder. But the Due Process Clause of the Fourteenth Amendment does not, nor does anything in the Constitution, require a State to fix or impose any particular penalty for any crime it may define or to impose the same or "proportionate" sentences for separate and independent crimes. Therefore we cannot say that the sentence to death for the kidnaping, which was within the range of punishments authorized for that crime by the law of the State, denied to petitioner due process of

law or any other constitutional right. Nor, in view of the fact that kidnaping and murder are separate and independent offenses in Oklahoma, is there any merit in petitioner's collateral claim that what he calls "the lesser crime" of kidnaping "merged" in what he calls "the greater crime" of murder and that the sentence to life imprisonment for the murder was a bar to the imposition of any sentence for the kidnaping, or at least to any greater sentence than was imposed for the murder, and that imposition of a death sentence for the kidnaping deprived him of due process in violation of the Fourteenth Amendment.

We have now treated with all of petitioner's claims, and failing to find any deprivation by the Oklahoma courts of any of his fundamental rights, we must hold that petitioner was not denied due process of law.

Affirmed.

MR. JUSTICE DOUGLAS, being of the view that petitioner was in substance tried for murder twice in violation of the guarantee against double jeopardy, dissents.

THE TUNGUS ET AL. *v.* SKOVGAARD, ADMINISTRATRIX, ET AL.

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

No. 43. Argued October 23, 1958.—Decided February 24, 1959.

While oil was being unloaded from a ship in a New Jersey port by an independent contractor engaged by the consignee, one of the contractor's employees went aboard to repair a pump furnished by the contractor, and he slipped on spilled oil and fell to his death. His widow and administratrix brought suit in admiralty against the ship and its owners to recover damages for his death, alleging unseaworthiness of the vessel and negligent failure to provide the decedent with a reasonably safe place to work. The District Court dismissed the suit; but the Court of Appeals set aside that judgment and remanded the case for further proceedings. *Held:*

1. Since the decedent was not a seaman and his death did not occur on the high seas, there is no applicable federal statute, and the right of recovery depended entirely on the New Jersey Wrongful Death Act, which may be applied by a court of admiralty. Pp. 590–591.

2. When admiralty adopts a State's right of action for wrongful death, it must enforce that right as an integrated whole, with whatever conditions and limitations the creating State has attached. Pp. 591–594.

3. The New Jersey Wrongful Death Act embraces a claim for death negligently caused, and the law imposed on the ship and its owners a duty to exercise ordinary care to provide the decedent with a reasonably safe place to carry on his work of repairing the pump. P. 594.

4. In the circumstances of this case, this Court will not disturb the conclusion reached by a majority of the Court of Appeals, sitting *en banc*, that a claim for unseaworthiness is encompassed by the New Jersey Wrongful Death Act as a matter of state law, notwithstanding the fact that the New Jersey courts have not passed on the question. Pp. 595–596.

5. Decedent was within the class protected by the warranty of seaworthiness as developed by federal maritime law. *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406. P. 595, n. 9.

252 F. 2d 14, affirmed.

J. Ward O'Neill argued the cause for petitioners. With him on the brief was *David P. H. Watson.*

Bernard Chazen argued the cause for respondents. With him on a brief for Skovgaard, respondent, were *Nathan Baker* and *Milton Garber.*

Vernon S. Jones entered an appearance for the El Dorado Oil Works, respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

On the evening of December 5, 1952, the motor vessel *Tungus* docked at Bayonne, New Jersey, with a cargo of coconut oil in its deep tanks. El Dorado Oil Works had been engaged by the consignee to handle the discharge of this cargo, and for the next several hours the work of pumping the oil ashore was carried on by El Dorado employees, using a pump and hoses furnished by their employer. Two officers and two crew members of the *Tungus* remained aboard, the latter specifically assigned to assist in the discharge operations. Shortly after midnight the pump became defective, resulting in the spillage of a large quantity of oil over the adjacent deck area. The pump was stopped and the oil cleaned from its immediate vicinity. Efforts to restore the pump to normal operation were unsuccessful, and Carl Skovgaard, an El Dorado maintenance foreman, was therefore summoned from his home to assist in the repair work. After arriving on board he walked through an area from which the oil had not been removed, and in attempting to step from the hatch beams to the top of the partly uncovered port deep tank, he slipped and fell to his death in eight feet of hot coconut oil.

His widow and administratrix, the respondent here, commenced this suit in admiralty against the ship and its owners to recover damages for his death, alleging unsea-

worthiness of the vessel and a negligent failure to provide the decedent with a reasonably safe place to work.[1] The District Court dismissed the libel, holding that a wrongful death action for unseaworthiness would not lie, and that the petitioners owed no duty of exercising ordinary care to provide the decedent a safe place to work. 141 F. Supp. 653. The Court of Appeals set aside this decree and remanded the case for further proceedings, a divided *en banc* court deciding that the New Jersey Wrongful Death Act embraces a claim for unseaworthiness, and also that the District Court had erred with respect to the scope of the petitioners' duty to exercise reasonable care for the decedent's safety. 252 F. 2d 14. The court did not decide "what defenses, if any, might be available," leaving that question for the District Court to determine. Certiorari was granted primarily to consider the relationship of maritime and local law in cases of this kind. 357 U. S. 903.

We begin as did the Court of Appeals with the established principle of maritime law that in the absence of a statute there is no action for wrongful death. *The Harrisburg,* 119 U. S. 199. Although Congress has enacted legislation, notably the Jones Act [2] and the Death on the High Seas Act,[3] providing for wrongful death actions in a limited number of situations,[4] no federal

[1] The libel also asserted a claim, presumably under the New Jersey survival statute, N. J. Stat. Ann. 2A:15–3, for damages sustained by the decedent prior to his death. This claim has been abandoned.

[2] 41 Stat. 1007, 46 U. S. C. § 688.

[3] 41 Stat. 537 *et seq.*, 46 U. S. C. § 761 *et seq.*

[4] See also the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 *et seq.*, 33 U. S. C. § 901 *et seq.* In the present case, the record shows that the respondent was awarded compensation under the New Jersey compensation act upon a finding that her decedent's death occurred in the "twilight zone." See *Davis* v. *Department of Labor,* 317 U. S. 249.

statute is applicable to the present case; Skovgaard was not a seaman,[5] and his death occurred upon the territorial waters of New Jersey.[6] The respondent's rights in this suit depended entirely, therefore, upon the New Jersey wrongful death statute, and the long-settled doctrine that "where death . . . results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given." *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242.

The primary issue in this case, therefore, as the Court of Appeals unanimously saw it, was whether the New Jersey statute giving a right of action where death is caused "by a wrongful act, neglect or default" is broad enough to encompass an action for death caused by the unseaworthiness of a vessel.[7] It was upon this issue—construction of the state statute—that the court divided.

The respondent asks us to uphold the interpretation which the majority in the Court of Appeals has put upon the New Jersey statute. Failing that, a much broader alternative argument is advanced—that a court in a case

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[5] The Jones Act applies "in case of the death of any seaman. . . ."

[6] The Death on the High Seas Act creates a right of action only for a "wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State . . . ." 46 U. S. C. § 761.

[7] The relevant text of the New Jersey statute is as follows:

"When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime." N. J. Stat. Ann. 2A:31–1.

such as this may disregard completely the conditions which the State has put upon the right it has created, and may apply instead the full *corpus* of the maritime law, free of any qualifications imposed by the State. If death occurs upon navigable waters within a State, the argument runs, the law should seize only upon the blunt fact that there is some kind of state statute providing some kind of a right of action for death caused by some kind of tortious conduct. That, it is said, is enough to fill the "void" in the maritime law, which then becomes applicable in all its facets, without further inquiry as to what it is that the State has actually enacted.

This broad argument must be rejected. The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached. That is what was decided in *The Harrisburg,* where the Court's language was unmistakable: ". . . [I]f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . . The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." 119 U. S. 199, at 214. That is the doctrine which has been reiterated by the Court through the years.[8] See *The Hamilton,* 207 U. S. 398; *La Bourgogne,*

[8] That this is the law has been generally understood by the other federal courts. *United New York and New Jersey Pilots Assn.* v. *Halecki,* 251 F. 2d 708 (C. A. 2d Cir.), judgment vacated and cause remanded, *post,* p. 613; *Continental Casualty Co.* v. *The Benny Skou,* 200 F. 2d 246 (C. A. 4th Cir.); *Graham* v. *A. Lusi, Ltd.,* 206 F. 2d 223 (C. A. 5th Cir.); *Lee* v. *Pure Oil Co.,* 218 F. 2d 711 (C. A. 6th Cir.); *Klingseisen* v. *Costanzo Transp. Co.,* 101 F. 2d 902 (C. A. 3d Cir.); *The H. S., Inc., No. 72,* 130 F. 2d 341 (C. A. 3d Cir.); *Feige* v. *Hurley,*

210 U. S. 95; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Levinson* v. *Deupree,* 345 U. S. 648; cf. *Just* v. *Chambers,* 312 U. S. 383.

"[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State." *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 245. The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.

It is manifest, moreover, that acceptance of the respondent's argument would defeat the intent of Congress to preserve state sovereignty over deaths caused by maritime torts within the State's territorial waters. The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave "unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States." S. Rep. No. 216, 66th Cong., 1st Sess. 3; H. R. Rep. No. 674, 66th Cong., 2d Sess. 3. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong. Rec. 4482–4486.

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89 F. 2d 575 (C. A. 6th Cir.); *Curtis* v. *A. Garcia y Cia.,* 241 F. 2d 30 (C. A. 3d Cir.); *O'Brien* v. *Luckenbach S. S. Co.,* 293 F. 170 (C. A. 2d Cir.); *Quinette* v. *Bisso,* 136 F. 825 (C. A. 5th Cir.); *The A. W. Thompson,* 39 F. 115 (D. C. S. D. N. Y.); but cf. *Riley* v. *Agwilines, Inc.,* 296 N. Y. 402, 73 N. E. 2d 718; *Kuhn* v. *City of New York,* 274 N. Y. 118, 8 N. E. 2d 300; *O'Leary* v. *United States Line Co.,* 215 F. 2d 708 (C. A. 1st Cir.).

There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even *Southern Pacific Co.* v. *Jensen,* which fathered the "uniformity" concept, recognized that uniformity is not offended by "the right given to recover in death cases." 244 U. S. 205, at 216. It would be an anomaly to hold that a State may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. Cf. *Caldarola* v. *Eckert,* 332 U. S. 155.

We hold, therefore, that the Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey. It is within that frame of reference that we consider the issues presented.

The negligence claim needs little discussion. Obviously the New Jersey wrongful death statute embraces a claim for death negligently caused. The majority in the Court of Appeals pointed out that the officers and crew of the *Tungus* remained in over-all control of the vessel, and that they were well aware of the existence of the oil spill and of the danger created by it for approximately an hour before Skovgaard arrived on board. Upon these facts it was concluded that the law imposed upon the petitioners a duty of exercising ordinary care to provide Skovgaard with a reasonably safe place to carry on his work of repairing the pump. In reaching this conclusion the court distinguished the New Jersey Supreme Court's decision in *Broecker* v. *Armstrong Cork Co.,* 128 N. J. L. 3, 24 A. 2d 194. We find no reason to question the disposition of this branch of the case.

As to the other issues, a majority of the Court of Appeals concluded that a claim for unseaworthiness is encompassed by the New Jersey Wrongful Death Act as a matter of state law.[9] The three dissenting members of the court reached the opposite conclusion. Apparently because the trial court had made no finding as to the decedent's contributory negligence or assumption of risk, the Court of Appeals refrained from deciding what effect state law would give to such findings, leaving that question to be decided if it arose on retrial.

In a case such as this it is incumbent upon the admiralty to enforce the New Jersey statute just "as it would one originating in any foreign jurisdiction." *Levinson* v. *Deupree,* 345 U. S. 648, 652. Yet the fact is that the New Jersey courts have simply not spoken upon the question of whether in a case such as this maritime law or common law is applicable under the State's Wrongful Death Act. In sum, there is no way of knowing whether New Jersey would impose uniform legal standards throughout its jurisdiction, or would apply in this case rules different from those that would govern if, instead of meeting his death aboard the *Tungus,* Skovgaard had been killed on the adjacent dock. An effort to resolve that question here, no less than the effort of the Court of Appeals, could be nothing but a prediction, a prediction that might tomorrow be proved wrong by the courts of New Jersey, which alone have power to render an authoritative interpretation.

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[9] The Court of Appeals also determined that the decedent was within the class protected by the warranty of seaworthiness as developed by federal maritime law, which it found the New Jersey statute had incorporated. This subsidiary determination is clearly correct. The decedent's status is practically indistinguishable from that of the plaintiff in *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406, the only difference being that the cargo here was oil instead of grain, and was being unloaded instead of loaded.

In view of these considerations, it might plausibly be argued that the judgment should be vacated, and the case remanded to the District Court to be held until the parties can secure from the courts of New Jersey a decision upon the controlling and seriously doubtful question of state law. Under traditional principles of equitable abstention this Court has often followed such a course for the limited and obviously wise purpose of avoiding unnecessary resolution of constitutional issues. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Spector Motor Service, Inc.*, v. *McLaughlin*, 323 U. S. 101; *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Leiter Minerals* v. *United States*, 352 U. S. 220. Cf. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478.

Before deciding to dispose of a case like the present one in that way, however, important and competing jurisdictional considerations would have to be thoroughly evaluated. See *Propper* v. *Clark*, 337 U. S. 472, 486–489; *Meredith* v. *Winter Haven*, 320 U. S. 228. This case has not presented the occasion for full exploration of these jurisdictional questions.[10] The Court of Appeals, *en banc*, has given careful consideration to the meaning of the state statute. We cannot say that its conclusion is clearly wrong. Therefore, despite the inherent uncertainties involved, we will not disturb that court's interpretation of the New Jersey law. Such a course is consistent with the practice that has been followed in the past. *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707–708; *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534; *General Box Co.* v. *United States*, 351 U. S. 159, 165.

Affirmed.

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[10] Indeed, such a disposition has not even been suggested by counsel.

MR. JUSTICE FRANKFURTER, concurring in the opinion of the Court.*

Deeming the proper determination of the substantive issues of admiralty law of such controlling importance, I abstain from stating my strong conviction, heretofore expressed, that in situations like the present the construction of state law should not, as a matter of the wise administration of law, be made independently by the lower federal courts, but its authoritative construction should be sought, under readily available state procedure, from the state court, while the case is held in the federal court. See my opinions in *Sutton* v. *Leib,* 342 U. S. 402, 412–414 (concurring opinion), and *Propper* v. *Clark,* 337 U. S. 472, 493–497 (dissenting opinion), in connection with *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, 500; *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, 484.

Where an issue is solely concerned with diversity jurisdiction, as was the situation in *Meredith* v. *Winter Haven,* 320 U. S. 228, a different consideration may become relevant. "For purposes of diversity jurisdiction a federal court is, 'in effect, only another court of the State.' " *Angel* v. *Bullington,* 330 U. S. 183, 187.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

It should be clear from the Court's statement of facts that the respondent's decedent, Skovgaard, was at the time of the accident aboard the *Tungus* in order to assist in repairing the pump used in discharging its cargo of oil—in unloading the vessel. While he was not a member of the crew, but rather an employee of an independent

*[NOTE: This opinion applies also to No. 56, *United New York and New Jersey Sandy Hook Pilots Assn.* v. *Halecki, post,* p. 613.]

contractor, he was unquestionably one to whom the vessel owed the duty of seaworthiness. *Pope & Talbot, Inc.*, v. *Hawn,* 346 U. S. 406, 412–413. This means that there was, as it is often put, a "warranty," or more precisely stated, an obligation, a duty owed to certain persons, that the vessel and its equipment, appurtenances and crew met a certain standard. For any breach of that duty, any failure to meet that standard, on the part of the vessel, which gave rise to injury to a person to whom that duty was owed, the vessel and its owner were bound to respond in damages. If that duty was in breach here, and Skovgaard's fall, occasioned thereby, had injured him short of death, there would be no doubt that federal law would afford him a remedy for the injury, and that free of any defense imposed by the law of the State in whose territorial waters the accident took place.[1] *Pope & Talbot, Inc.*, v. *Hawn, supra,* at 409–410. But Skovgaard's injuries were almost immediately fatal, and, as is evident from the record, the principal, if not the sole, claim for damages arising out of the alleged breach of the duty of seaworthiness must be for the damages caused by his death. It was decided in *The Harrisburg,* 119 U. S. 199, that the federal maritime law did not afford a remedy for the death of a human being, even where the death arose out of a tortious breach of maritime duty.

In the light of this holding, the Court addresses itself to the problem whether the New Jersey Wrongful Death Act can be utilized to furnish a remedy for the breach of the federally defined duty owed to Skovgaard. In reaching its solution of this problem, I fear that it has posed the wrong question. The Court takes the view that it is

[1] Clearly so where the action was pursued in admiralty. In other forums, and in some circumstances, there might arguably be some room for the application of such defensive features of state remedial law as statutes of limitations. See *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 224, n. 5.

a question of state law whether the respondent can utilize the New Jersey Act to supply a remedy for the breach of the duty of seaworthiness charged here. It accepts the answer of the Court of Appeals to this question. The problem to the Court is one of construction of the State Act to determine whether it "incorporates" the maritime standard. This is also the view taken by the lower courts of what the basic question in this case is. I think it is wrong, and I shall state my reasons why.

I.

First. I have developed that Skovgaard was entitled to the duty of seaworthiness at the time of the accident, and that there would be no concern at all with state law in this regard if he had been injured short of death. But the holding of *The Harrisburg, supra,* denies the existence of a federally created remedy for wrongful death arising out of maritime torts. Though this holding was far from being at one with the results that had been reached in the lower admiralty courts prior to it, and was based largely on an application of the harsh common-law principle, then rather lately evolved,[2] that in the absence of an appropriate statute there was no civil remedy for wrongful death, the holding has become part and parcel of our maritime jurisprudence. But its harshness was averted by the practice in admiralty of drawing on the state wrongful death statutes to furnish remedies for fatal maritime torts. To an extent this practice antedated *The Harrisburg,* as the cases cited in that opinion illustrate. See, *e. g., The Garland,* 5 F. 924. It was continued thereafter, and even extended to torts committed on the high seas, beyond the territorial waters of any State. *The*

[2] The principle was finally settled for the federal courts sitting at law, under the regime of *Swift* v. *Tyson,* 16 Pet. 1, by *Insurance Co.* v. *Brame,* 95 U. S. 754.

Hamilton, 207 U. S. 398. And after the passage by the Congress of the Death on the High Seas Act in 1920, 41 Stat. 537, 46 U. S. C. § 761 *et seq.,* which established a federal remedy for cases of wrongful death occurring more than a marine league from shore, state acts continued to be used by the admiralty, pursuant to the terms of the Act, in the case of wrongs occurring in territorial waters.

Though the individual statutes vary in terminology and to an extent in concept, all the States have wrongful death acts—acts which provide remedies to a decedent's estate, or to certain specified beneficiaries, for the harm done on account of the tortious killing of the decedent. While the course of development of the common law has brought it about that this remedy has always been embodied in a statutory enactment, the existence of such a remedy is now a basic premise of the law of torts administered throughout the country. And with the Death on the High Seas Act and the state statutes, the federal admiralty law has available a remedy to fashion for the fatal breach of a maritime duty anywhere within its jurisdiction.

Second. Can such a remedy, based on a state statute, be afforded for breach of the duty, imposed by federal law, to maintain a vessel in seaworthy condition? I think it can. The question is viewed by the Court today and by the courts below as one of interpretation of the statute of a particular State; the Court of Appeals divided over what intent should be ascribed to the New Jersey Legislature in enacting that State's Wrongful Death Act. The process of divining the "intent" of the various state legislatures in such circumstances is not a completely fruitful one, as the Court's opinion makes abundantly clear, and, as I have intimated, I do not believe it is part of the real question the Court should be asking here. The Court has simply failed to grasp the important distinction

here between duties and remedies; between the law governing the details of human behavior and the law governing the specific application of judicial sanctions for breach of duty. It is vital to an understanding of this case to recall that the duty claimed to have been broken here was one grounded in federal law. It would be a strained statement of the effect of *The Harrisburg* to say that there was no duty imposed by the maritime law not to kill persons through breach of the duty of seaworthiness. The libel alleged a condition constituting a breach of a federally defined duty and set forth a cause of action under federal law, and this nonetheless because the breach of the federal duty had resulted in death rather than in nonfatal injury. It is the federal maritime law that looks to the state law of remedies here, not the state law that incorporates a federal standard of care. This Court plainly declared in *Pope & Talbot, Inc.*, v. *Hawn, supra,* at 409, that even when the injured party seeks to enforce "a state created remedy" for the breach of the federally defined duty owing to him, "federal maritime law would be controlling." The Court today does not refer to this recent expression, clearly of the greatest relevance here. Given a federal legal system where the remedy for wrongful death is as universal as in ours, I think it unwarrantedly destructive of the uniformity of the federal maritime law, cf. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205,[3] to make the applicability of a remedy for the breach

[3] The Court's citation of *Jensen* as lending some support to its position is not well taken. The language quoted, 244 U. S., at 216, says no more than that the state statutes are allowed to perform a function in this area, which everyone concedes is correct. I fear, too, that in its somewhat deprecatory reference to the *Jensen* case, the Court may be ignoring the basically sound and enduring principle of that decision, the necessity that the federal maritime law exhibit independence of the varying rules of state law. Of course, there is

of a federally defined duty resulting in death dependent on a frankly supposititious determination of the intent of the various state legislatures, generally acting at a time long before a clear concept of the scope of the federal duty had emerged. And of course this determination will almost invariably be made by the federal courts.

The Court's solution not only creates potential differences in the availability of a remedy for breach of the federally created duty where the victim dies as opposed to cases where he is injured short of death; those differences may exist in varying degrees as to maritime torts occurring in the territorial waters of various States. I cannot think that any such variation is appropriate or necessary in the enforcement of the cause of action for unseaworthiness. The federal duty need not be subject to this potential diversity of remedies. Cf. *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239.[4] The existence of a remedy for wrongful death has become almost a postulate of our legal system, though the remedy was generally provided by legislation rather than by the decisional law. It

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more warranted criticism of *Jensen* for the unfortunate practical results it created in its own specific area of application. Cf. Gilmore and Black, The Law of Admiralty, § 1–17.

[4] The Court's quotation from *Garrett,* "[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State," made in support of its conclusion, is a patent begging of the question at issue here. The issue is what system of law gives rise to the rights and duties here involved. No one would doubt that the federal law gives rise to the substantive standards by which the conduct of the parties here involved would have been judged if Skovgaard's injuries had not been fatal. The question is whether his rights, and those of his representatives in respect to the conduct that injured and killed him, remain rooted in federal law here, where the suit is for damages for his death. The Court's confusion of rights and duties with remedies is apparent again here.

is against this background that the federal law must look for an appropriate remedy to enforce its duties in a complete and rational way. Cf. *Cox* v. *Roth,* 348 U. S. 207, 210. Any state statute which generally provides remedies for tortious death can and should be drawn upon by the maritime law in enforcing the federal cause of action. Cf. *Just* v. *Chambers,* 312 U. S. 383, 389.

It is true that for state-law purposes these statutes are frequently spoken of as creating a "new cause of action." See *Turon* v. *J. & L. Construction Co.,* 8 N. J. 543, 556, 86 A. 2d 192, 198; *Ake* v. *Birnbaum,* 156 Fla. 735, 751, 25 So. 2d 213, 215–216; [5] cf. *Seward* v. *The Vera Cruz,* 10 A. C. 59, 67. And so they do, in the sense that they give remedies where frequently none existed before, in favor of classes of persons potentially different from the distributees of a decedent's estate, and in the large to an extent designed to furnish redress for the death. And it is further true that not every tort duty imposed by a particular State's law may be afforded a remedy by them. But insofar as these acts have as their purpose the effecting of a general and rough equivalency between the duties for breach of which a remedy lies in the case of injuries causing death and those short of it, they can be proper subjects for the flexibility of the federal maritime law in fashioning a remedy for breach of the duty of seaworthiness. The content of the concept of

[5] The *Ake* case, like others, suggests that there may possibly be two "rights" infringed by a tort causing death—one of the injured party and the other of his beneficiaries. But this is not an analytically helpful way of viewing the situation. The measure of the duty of conduct owed the injured party is typically the limit of the substantive liability of the tortfeasor and of the "right" enjoyed by the beneficiaries. It is clear that what is meant by the "right" of the beneficiaries is a special and distinct remedial incident attributable to a single breach of duty.

"cause of action" is a variable and uncertain one, and there is little point in analyzing the various senses in which it has been used in connection with the state statutes. In a real sense the state acts are remedial, and as such they can be used by the admiralty. Used in this way for remedial purposes, they would not interfere with the uniform character of the general maritime law, cf. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384, but rather would be an effective method of promoting it.

Of course there is no objection to using state remedial incidents to supplement and enforce duties arising under federal law. The federal courts of their own initiative have used state statutes for remedial purposes when federal duties were concerned. State statutes of limitation applicable to analogous types of claims have been utilized to define the limitations of federal rights of action for which no federal statute of limitations has been provided. *Campbell* v. *Haverhill*, 155 U. S. 610; *Cope* v. *Anderson*, 331 U. S. 461; cf. *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395; *Hamilton Foundry & Machine Co.* v. *International Molders Union*, 193 F. 2d 209, 215. This remedial incident, tied up with the felt necessity of having some statutory definition, is drawn upon not because of any intent of the state legislatures to make their statute applicable to federal claims, but because it could be rationally utilized through analogy by courts charged with the enforcement of federal rights and duties and the construction of a proper pattern of remedies to that end. It is on such a basis that the federal maritime law here, in my view, can make use of the New Jersey statute to enforce those duties that are grounded in federal law.

I am supported in this conclusion by two carefully reasoned opinions of the New York Court of Appeals. *Kuhn* v. *City of New York*, 274 N. Y. 118, 8 N. E. 2d 300; *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402, 73 N. E. 2d 718. Both

cases considered actions brought in the state courts under the Saving Clause, 28 U. S. C. § 1333 (1), to redress maritime torts which resulted in death. The actions were based upon the maritime theories of negligence and unseaworthiness. The New York Court of Appeals held that the State's Wrongful Death Statute afforded only an appropriate remedy for breaches of duties which were to be recognized as essentially federal in their source and uniform in their application: "[W]e must look to the decisions of the Federal courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal courts." *Riley* v. *Agwilines, Inc.,* 296 N. Y. 402, 405–406, 73 N. E. 2d 718, 719. The court clearly viewed the issue of the duties alleged to have been in breach to be not a matter of interpretation of the New York Wrongful Death Statute but to be a question upon which the federal maritime law was compelling.[6] Cf. *O'Leary* v. *United States Lines Co.,* 215 F. 2d 708, 711.

Third. I find no reason to reach a contrary result in the authorities relied upon by the Court, or urged by the petitioner. It is true that there is language in *The Harrisburg,* 119 U. S. 199, 214, describing the state Wrongful Death Act enforced by the admiralty as creating both a liability and a remedy. But the legal source of the duty sought to be enforced there was not claimed or recognized to be rooted in federal law. The case was decided long before the cause of action for unseaworthiness reached its present mature state, recognized as being federal in its origin and incidents. *Seas Shipping Co.* v. *Sieracki,* 328

[6] Judge Learned Hand's opinion in *Guerrini* v. *United States,* 167 F. 2d 352, 354, took the view that the New York cases were decided as compelled by the federal law, as is amply evident from the opinions themselves.

U. S. 85; *Pope & Talbot, Inc.*, v. *Hawn, supra; Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396. And *The Harrisburg,* on this point, together with *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, on which there is also reliance, actually held that in an admiralty action using the state Wrongful Death Act the state statute of limitations applicable to actions under the state law using the state act would be utilized. This was a solution to one aspect of the limitations problem in maritime personal tort actions, see *McAllister* v. *Magnolia Petroleum Co.,* 357 U. S. 221, 224, 228–229. The most readily available limitations period for an action making use of a state Wrongful Death Act was the period stated therein, and the Court relied on it rather than the admiralty rule of laches. In *Levinson* v. *Deupree,* 345 U. S. 648, the Court was not concerned with a situation in which the duty alleged to have been broken was as clearly federal as is that in the instant case, and it was apparently assumed that the right to be enforced was grounded in state law. The action was not a seaman's or harbor worker's action at all, but rather arose out of a collision between two motorboats on the Ohio River, fatal to a girl riding in one of them. And of course the holding of the Court there is of no assistance to the majority, since a state-law procedural incident, alleged to be binding since the admiralty was making use of the state act, was in fact rejected. *Lindgren* v. *United States,* 281 U. S. 38, which held that a seaman's representative could not sue for unseaworthiness under a state Wrongful Death Act, does not govern this point at all. The opinion dealt primarily with the effect of the Jones Act's wrongful death provision in removing the seaman's right to invoke the remedies of state Death Acts for the identical gravamen of negligence. And, although the libel did not allege unseaworthiness, the Court briefly observed that the Jones Act's death provision would be construed

equally as foreclosing a state statute's use on that count. The case provides no rule here, since its holding was premised on the Jones Act, and to Skovgaard's injury and death the Jones Act is not applicable.[7] Finally, there is not presented here any question of the extent to which a State is required to supply a forum for the enforcement of the duties here involved. Cf. *Caldarola* v. *Eckert,* 332 U. S. 155, 158; [8] but cf. *Testa* v. *Katt,* 330 U. S. 386.

The Court's reasoning that the Death on the High Seas Act is somehow dispositive of the question presented today appears to me to continue its confusion between the rights and duties of the parties and the remedial pattern to be followed in enforcing them. No one is contending that the state statutes are to be given no operation in this area; they are an important remedial incident of the right that respondent seeks to assert here. Of course Congress in the Death on the High Seas Act was interested in preserving their availability. There is, however, no suggestion in the Act or its legislative history that

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[7] *The Hamilton,* 207 U. S. 398, cited by the Court, only holds that a state-created death remedy could be applied to a collision on the high seas. It appears from the opinion that Mr. Justice Holmes considered the general federal maritime law relevant to a determination of liability under it. *Id.,* at 406–407. And in *La Bourgogne,* 210 U. S. 95, where recovery made use of the French death remedy, liability was found as a matter of substantive law where France would not have found it. Finally, *The Corsair,* 145 U. S. 335, held that the Louisiana Death Act did not create a maritime lien. It was not there considered whether the breach of a federally defined duty could have created such a lien, even though the breach resulted in death, and in fact the source of the duty being enforced through the Louisiana Act was not discussed.

[8] The New York Court of Appeals did not consider its own decision in *Caldarola,* 295 N. Y. 463, 168 N. E. 2d 444, aff'd, 332 U. S. 155, as preclusive of its decision less than a year later in *Riley* v. *Agwilines, Inc.,* 296 N. Y. 402, 73 N. E. 2d 718. See pp. 604–605, *supra.*

Congress intended that the substantive law of the States be the only law applicable in death cases in territorial waters, or that in fact it be applicable at all in particular proceedings. The effect of Congress' action was to leave the state statutes available as remedial measures in territorial water death cases. It offers no guide for any conclusion as to what substantive law is to apply under the state acts in situations where federally created rights and duties would have prevailed had the injury not been fatal. The only concrete examples of what the Congress was interested in saving to the States given on the floor of the House were the jurisdiction of the state courts, which was dwelt on at length, 59 Cong. Rec. 4484–4485, and the maintenance of the state scheme of beneficiaries, *ibid.*, which is not challenged here. It is odd to draw restrictive inferences from a statute whose purpose was to extend recovery for wrongful death. The legislative history does not reveal the utmost precision in thought regarding the role of state law here, but certainly there is no clear basis in it from which to infer that the Court's anomalous result is a necessary one.

Clearly, then, neither the decided cases nor legislative materials foreclose the question of the approach to state Wrongful Death Acts that should be taken by the federal admiralty law in fashioning remedies for breach of the federally defined duty with which we are here concerned. And as I have indicated, the vital principles of the admiralty law as defined by this Court in the past point to the result I have indicated. A proper uniformity on essential matters of maritime cognizance, see *Just* v. *Chambers*, 312 U. S. 383, 389, cannot be reached by making the availability of this remedy dependent upon exegesis of the statute of each State. It is enough for me that the State provide such a remedy in a general way; the remedy is now a universal feature of the common-law system in this

country, and in its essential features offers a sufficient basis for the operation of the general maritime law. While there is ground for local variation on nonessential matters, on the essentials the admiralty may look to uniform features in these statutes rather than to the diverse. The Court's anomalous result that different systems of law govern in determining the tortious character of conduct, depending on whether it kills or merely injures its victim, is a conscious choice of a nonuniform solution on an essential matter, and as such contrary to one of the basic principles of admiralty law.

It might be contended that the contours of the various state remedies are so diverse in the varying lists of statutory beneficiaries they provide that the area becomes one in which uniformity cannot in any event be attained, and accordingly it could be said to be inappropriate to seek uniformity even in the content of the duty to be enforced. I cannot find such a contention persuasive. The distribution of funds accruing to a decedent's representatives by reason of his death is a matter, in our federal system, peculiarly within the competence of the States. Certainly it is not a matter more destructive of the uniform character of the maritime law than were the state statutes of limitations enforced in *Western Fuel Co.* v. *Garcia, supra.* And it is no more disturbing to the maritime law whether the state distributional scheme is one provided generally by its law or one peculiar to its Wrongful Death Statute.[9]

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[9] Despite Judge Learned Hand's initial suggestion in *Puleo* v. *H. E. Moss & Co.*, 159 F. 2d 842, 845, quickly retracted in *Guerrini* v. *United States*, 167 F. 2d 352, 355, the Conservation Act, 45 Stat. 54, 16 U. S. C. § 457, is not relevant to the problem here. That Act makes applicable state death acts (as well as state personal injury law generally) to torts "within a national park or other place subject to the exclusive jurisdiction of the United States." The state terri-

II.

Petitioner contends that, on the respondent's negligence claim, the Court of Appeals improperly applied federal law to the determination of the question whether a duty to furnish a reasonably safe place to work was owed the decedent by the respondent vessel and its owner. On this aspect of the case, the Court of Appeals, citing both New Jersey and federal cases, indicated that such a duty existed and that it would have been tortious for the respondent negligently to have failed to provide a safe place. It remanded the case to the District Court for findings on the issue of negligence and on any defenses on that issue that might be available to the petitioner. Petitioner contends here that New Jersey law applies to the question whether such a duty was owed, alleging that the New Jersey precedents are contrary to the result reached by the court below. Although it believes that the Court of Appeals properly applied New Jersey law, the Court accepts the contention that state law applies here. In view of what I have said above, I cannot agree. In *Pope & Talbot, Inc.*, v. *Hawn, supra,* at 409, it was made clear that the duty imposed by the theory of negligence to act in accordance with a standard of reasonable care, when coupled with the duty to maintain a seaworthy ship, owed to a person in Skovgaard's status, was a federally created duty. Cf. *The Max Morris,* 137 U. S. 1, 14–15. The factual circumstances involving proof of negligence and of unseaworthiness, where both are claimed, are generally intertwined. *Pope & Talbot, Inc.*, v. *Hawn, supra,* at 416

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torial waters, while within the cognizance of the federal maritime law, are also subject to the jurisdiction of the States, *Toomer* v. *Witsell,* 334 U. S. 385, 393, and hence one need go no further than its terms to find the Act inapposite.

(concurring opinion); *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 224–225. Cf. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316. My view is that it is plain that in enforcing the related duty imposed by the obligation not negligently to inflict harm the federal courts must look to state Wrongful Death Acts in the same light as I have indicated it is appropriate to look at them in enforcing the duty to maintain a seaworthy vessel. The basis for the holding that New Jersey law applies is the Court's acceptance of a distinction in primary legal duties in respect to maritime accidents causing fatal as opposed to nonfatal injuries. As I have developed above, I cannot view any such distinction as tenable. Since the Court of Appeals' holding on the negligence issue was correct as a matter of federal law, its judgment should be affirmed on this point, except to the extent that it directed the District Court to determine what defenses were available as a matter of New Jersey law.

III.

Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases. See *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 314; cf. *The John G. Stevens*, 170 U. S. 113, 126–127. This responsibility places on this Court the duty of assuring that the product of the effort be coherent and rational. Admiralty law is an area where flexibility and creativity have been demonstrated in accomplishing this. Today the Court announces the strange principle that the substantive rules of law governing human conduct in regard to maritime torts vary in their origin depending on whether the conduct gives rise to a fatal or a nonfatal injury. I have demonstrated that it does so under no compulsion of binding precedent here or of

Act of Congress. Its anomalous result is purely of its own making. Certainly the responsibility incumbent upon this Court in this area demands more by way of fulfillment than the Court has furnished today.[10]

For the reasons I have stated, I concur in the judgment affirming the judgment of the Court of Appeals, except to the extent I have just indicated.

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[10] I might likewise say that even if the source of substantive law here be considered as state law, it hardly would comport with the responsibility of the federal courts for them to send the parties to an admiralty action before them to the state courts to obtain an adjudication of the legal issues involved. Though the Court does not make such a disposition here, certain inclinations in this direction are discernible in its opinion. The words of Chief Justice Stone in *Meredith* v. *Winter Haven*, 320 U. S. 228, might furnish the lesson here; we must recollect that jurisdiction creates the duty of decision, and that, like the diversity, the admiralty jurisdiction "was not conferred for the benefit of the federal courts or to serve their convenience." *Id.*, at 234.

Syllabus.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION ET AL. *v.* HALECKI, ADMINISTRATRIX.

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

No. 56. Argued October 23, 1958.—Decided February 24, 1959.

While a pilot boat was being overhauled by a contractor at a shipyard in New Jersey, two employees of a specialized subcontractor went aboard to clean the generators with carbon tetrachloride, a task which could be performed only when there was no one else on board the ship and which required the use of special equipment and special safety precautions. Though such special equipment was used and the usual precautions were taken, one of these employees died of carbon tetrachloride poisoning. His administratrix brought this action for damages against the owners of the pilot boat in a federal district court, basing jurisdiction on diversity of citizenship. Under instructions that either unseaworthiness of the vessel or negligence would render the defendants liable and that contributory negligence on the part of the decedent would serve only to mitigate damages, a jury returned a general verdict for the administratrix, and judgment was entered thereon. The Court of Appeals affirmed, holding that the New Jersey Wrongful Death Act incorporates liability for unseaworthiness, as developed by federal law, and adopts the admiralty rule of comparative negligence when death occurs as a result of tortious conduct upon the navigable waters of that State. *Held:*

1. The right of recovery depended upon the interpretation of New Jersey law; and this Court accepts the Court of Appeals' determination of the effect which New Jersey law would accord to the decedent's contributory negligence. *The Tungus* v. *Skovgaard, ante,* p. 588. P. 615.

2. Even if the Wrongful Death Act of New Jersey be interpreted as importing the federal maritime law of unseaworthiness, the Court of Appeals erred in holding that the circumstances of this case were such as to impose liability under that doctrine. Pp. 615–618.

3. Since the doctrine of unseaworthiness was not applicable, it was error to instruct the jury that the shipowner could be held

liable even if the jury should find that the shipowner had exercised reasonable care. P. 618.

4. As to the claim based on negligence, the evidence created an issue of fact to be determined by the jury. Pp. 618–619.

5. A new trial will be required, since there is no way of knowing whether the invalid claim of unseaworthiness was the sole basis for the jury's verdict. P. 615.

251 F. 2d 708, judgment vacated and cause remanded.

Lawrence J. Mahoney argued the cause and filed a brief for petitioners.

Nathan Baker argued the cause for respondent. With him on the brief were *Bernard Chazen* and *Milton Garber*.

Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Leavenworth Colby and *Seymour Farber* filed a brief for the United States, as *amicus curiae*, urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The administratrix of the estate of Walter J. Halecki brought this action against the owners of the pilot boat *New Jersey* to recover damages for Halecki's death, allegedly caused by inhalation of carbon tetrachloride fumes while working aboard that vessel. The action, based upon the New Jersey Wrongful Death Act, N. J. Stat. Ann. 2A:31–1, was brought in the federal court by reason of diversity of citizenship. Under instructions that either unseaworthiness of the vessel or negligence would render the defendants liable and that contributory negligence on the part of the decedent would serve only to mitigate damages, a jury returned a verdict for the administratrix, upon which judgment was entered. The Court of Appeals affirmed, holding that the New Jersey Wrongful Death Act incorporates liability for unseaworthiness, as developed by federal law, and adopts the admiralty rule of comparative negligence when death occurs as a

result of tortious conduct upon the navigable waters of that State. 251 F. 2d 708.

For the reasons stated in *The Tungus* v. *Skovgaard,* decided today, *ante,* p. 588, we hold that the Court of Appeals was correct in viewing its basic task as one of interpreting the law of New Jersey. For reasons also stated in *Tungus,* we accept in this case the Court of Appeals' determination of the effect which New Jersey law would accord to the decedent's contributory negligence. But even if the Wrongful Death Act of New Jersey be interpreted as importing the federal maritime law of unseaworthiness, the court was in error in holding that the circumstances of this case were such as to impose liability under that doctrine.

The essential facts are not in dispute. In September of 1951 the vessel was brought to Jersey City, New Jersey, for its annual overhaul at the shipyard of Rodermond Industries, Inc. One of the jobs to be done was the dismantling and overhaul of the ship's generators, requiring, among other things, that they be sprayed with carbon tetrachloride. Since Rodermond Industries was not equipped to do electrical work, this job was subcontracted to K. & S. Electrical Company, Halecki's employer.

The generators were in the ship's engine room, and both Halecki and his foreman, Donald Doidge, were aware of the necessity of taking special precautions in undertaking the job of spraying them with tetrachloride, a toxic compound.[1] They arranged to do the work on Saturday,

[1] Carbon tetrachloride, a somewhat volatile compound five times heavier than air, is toxic to humans if present in the atmosphere in concentrations of more than 100 parts to 1,000,000. It therefore is essential when working with this chemical to provide adequate ventilation, a task that is complicated because the density of the compound may result in a high concentration of the fumes in the lower portions of an enclosed area.

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a day chosen because, as Doidge testified, "[W]e know it has to be done when there is nobody else on board ship."

Halecki and Doidge came aboard on the appointed day, equipped with gas masks. They found only a watchman, to whom they gave instructions not to permit anyone to enter the engine room. Before starting the job they rigged an air hose underneath the generators to blow the fumes away from the man spraying. A high-compression blower was placed so that it would exhaust foul air through one of the two open doorways. These pieces of equipment belonged to Rodermond Industries and had been brought aboard by Doidge and Halecki the previous day. Together with the engine room's regular ventilating system, the air hoses and blower were operated by electrical power supplied from the dock. Halecki did most of the spraying, working for 10- or 15-minute periods with intervening rests of equal length. The ventilating equipment was in operation, and Halecki wore a gas mask during the entire period that he worked. He became sick the next day and died two weeks later of carbon tetrachloride poisoning.

The eventful development of the doctrine of unseaworthiness in this Court is familiar history. Although of dubious ancestry,[2] the doctrine was born with *The Osceola*[3] and emerged full-blown 40 years later in *Mahnich* v. *Southern S. S. Co.*[4] as an absolute and nondelegable duty which the owner of a vessel owes to the members of the crew who man her. The justification for this rigid standard was clearly stated in the Court's opinion in *Mahnich:*

> "He [the seaman] is subject to the rigorous discipline of the sea, and all the conditions of his service

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[2] See Gilmore and Black, The Law of Admiralty, p. 316.

[3] 189 U. S. 158, 175.

[4] 321 U. S. 96.

> constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers." 321 U. S. 96, at 103.

With the nature of the duty thus defined, it remained for two other decisions of the Court to amplify its scope. *Seas Shipping Co.* v. *Sieracki* and *Pope & Talbot* v. *Hawn*[5] made clear that the shipowner could not escape liability for unseaworthiness by delegating to others work traditionally done by members of the crew. Whether their calling be labeled "stevedore," "carpenter," or something else, those who did the "type of work" traditionally done by seamen, and were thus related to the ship in the same way as seamen "who had been or who were about to go on a voyage," were entitled to a seaworthy ship. See 346 U. S., at 413.

Neither these decisions nor the policy that underlies them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way "the type of work" traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was "dead" with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment—portable blowers, air hoses, gas masks, and tanks of carbon tetrachloride, all brought aboard the vessel for this special purpose, and none connected with a ship's seagoing operations.[6] Indeed, the work was so specialized that the repair yard engaged to overhaul the vessel was not itself equipped to perform it,

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[5] 328 U. S. 85 and 346 U. S. 406. See also *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396, and *Rogers* v. *United States Lines*, 347 U. S. 984.

[6] It was established that the ship's own ventilating system was entirely adequate to perform its intended function of ventilating the engine room while the ship was in regular operation.

but had to enlist the services of a subcontractor. A measure of how foreign was the decedent's work to that ordinarily performed by the ship's crew is that it could be performed only at a time when all the members of the crew were off the ship.

It avails nothing to say that the decedent was an "electrician," and that many modern ships carry electricians in their crew. *Pope & Talbot* v. *Hawn* explicitly teaches that such labels in this domain are meaningless. See 346 U. S., at 413. It is scarcely more helpful to indulge in the euphemism that the decedent was "cleaning" part of the ship, and to say that it is a traditional duty of seamen to keep their ship clean. The basic fact is, in the apt words of Judge Lumbard's dissenting opinion in the Court of Appeals, that the decedent "was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed." 251 F. 2d 708, at 715. To extend liability for unseaworthiness to the decedent here would distort the law of *Mahnich,* of *Hawn* and of *Sieracki* beyond recognition. We therefore hold that it was error to instruct the jury that the shipowner could be held liable in this case even if they should find that the shipowner had exercised reasonable care.[7]

As to the claim based upon negligence, for which the New Jersey Wrongful Death Act clearly gives a right of action,[8] we agree with the Court of Appeals that "the evidence created an issue that could be decided only by a verdict." The defendants owed a duty of exercising rea-

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[7] We do not reach the question, discussed in the *amicus curiae* brief of the United States, whether a shipowner can ever be liable for the unseaworthiness of a vessel "to a shore-based worker who performs labor on a ship which is not ready for a voyage but is out of navigation and docked in a private shipyard for its annual overhaul and repair."

[8] N. J. Stat. Ann. 2A:31–1; see *The Tungus* v. *Skovgaard, ante,* p. 588.

sonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use.

It follows from what has been said that a new trial will be required, for there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict.

Vacated and remanded.

[For concurring opinion of MR. JUSTICE FRANKFURTER, see *ante,* p. 597.]

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

On September 29, 1951, the pilot boat *New Jersey* was standing at a pier in the Jersey City repair yard of a marine overhaul and repair firm for its annual overhaul. The overhaul job was scheduled to take three weeks, and the 29th was the Saturday after the first week of work. Crew members participated in maintenance work on the vessel during this period, on a five-day-work-week basis. Cleaning the vessel's generators was the work scheduled for the 29th, and since the cleaning work was to be done with carbon tetrachloride, known to have toxic properties, a Saturday was chosen for the job to minimize the number of persons aboard the vessel. Walter Halecki, respondent's decedent, was an employee of an electrical firm doing the cleaning job as a subcontractor to the general overhaul contractor; he and another employee of the subcontractor came aboard and spent the day spraying the generators in the ship's engine room. Halecki did most of the work in the engine room. The men wore gas masks

and from time to time rest periods above decks were observed. At the end of the day, Halecki complained of an odd taste in his mouth, and he was thereafter admitted to a hospital where he died of carbon tetrachloride poisoning.

His widow commenced this action against the vessel's owners in the Federal District Court for the Southern District of New York, predicating jurisdiction on diversity of citizenship. The complaint alleged unseaworthiness of the vessel in that harmful concentrations of carbon tetrachloride were allowed to stand in the engine room, unremoved either by the vessel's ordinary ventilation system or by auxiliary equipment brought aboard the vessel by the workmen for the purpose. It further alleged negligence in the failure to use reasonable care in furnishing the decedent, as a business invitee, a safe place to work. The New Jersey Wrongful Death Act was pleaded by the plaintiff to support these claims. The case went to the jury on both grounds, and a general verdict was returned for the plaintiff; judgment thereon was affirmed by the Court of Appeals.

The Court today reverses, holding that the verdict, which must of course be supportable on each aspect in which the case was left to the jury, cannot be supported on the grounds of unseaworthiness. The Court, following its decision in *The Tungus* v. *Skovgaard, ante,* p. 588, holds that the basic source of law in this case, since it is a wrongful death case, is the law of New Jersey. My separate opinion in that case sets forth the basis on which I think that that holding is erroneous. The Court in the present case holds, apparently as a matter of federal law, that the vessel did not owe any duty of seaworthiness to the respondent's decedent. Paradox may be found in this after the Court's characterization of the governing law as state law, and there well may be confusion as to the precise role that federal law is to play in these maritime death

actions as a result of the Court's holding.[1] But in any event, since I view the unseaworthiness question as a matter of federal law, as apparently the Court does here, I shall set forth briefly the grounds on which I think it has clearly erred in the light of the decisions in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85; *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406, and *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396, none of which the Court today purports to overrule.

In *Seas Shipping Co.* v. *Sieracki,* the question was whether the duty of maintaining a seaworthy vessel extended to persons who performed the ship's service aboard the vessel but who were not employed directly by the shipowner. The Court concluded that this duty was "not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement." 328 U. S., at 95. The Court declared that the "liability arises as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent." *Id.,* at 97. The Court quoted with specific approval the language of the court below in that case: "when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances

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[1] Further paradox may be found in the Court's acceptance, without independent examination, of the view of the Court of Appeals for the Second Circuit as to the defenses available under the New Jersey Wrongful Death Act as applicable to the negligence claim here. The Court of Appeals held contributory negligence unavailable as an absolute defense. The usual reasons given for deferring to the Courts of Appeals on state law questions may not be entirely applicable to a circuit not embracing the State in question. In the *Tungus* case, *ante,* p. 588, the Court today affirms a judgment of the Court of Appeals for the Third Circuit (which includes New Jersey) leaving open this identical issue for the District Court. It would appear clear, in the light of the Court's disposition of this case, what the answer on this issue must be in the *Tungus* case.

of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights." *Ibid.* The Court stressed that the division of labor due to increased specialization did not operate to diminish the scope of the duty of maintaining a seaworthy vessel. The shipowner, it was said, "is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities." *Id.*, at 100.

In *Pope & Talbot, Inc.*, v. *Hawn,* the *Sieracki* doctrine was reaffirmed and applied in another fact situation, and it was pointed out that the protection of a shipboard worker by the duty of seaworthiness was not based on the title of the position he occupied in the doing of the shipboard work but "on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness." 346 U. S., at 413.

Today the Court holds that not all workers engaged in doing "ship's service" aboard a vessel are entitled to the warranty. It essays distinctions as to whether the ship's power is functioning at the time of the accident, whether the ship is ready for an immediate voyage.[2] It stresses

[2] A brief filed as *amicus curiae* by the United States urges that the doctrine of seaworthiness imports only a warranty of seaworthiness for a voyage, and that since the ship was not about to engage in a voyage, the duty was owed to no one at the time of the accident. This theory, like the Court's, would result in an unwarranted restriction of the *Sieracki* doctrine, particularly since there were crew members working aboard ship on a regular work week basis during the period in question who would be denied the doctrine's protection under the Government's theory. The Government's argument is based primarily on *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, where there was no issue of unseaworthiness and the vessels had been hauled up on land for the winter. In *Rogers* v. *United States Lines,* 347 U. S. 984, the duty of seaworthiness was held to be present in regard to a vessel which had completed a voyage and which was not shown to be about to embark on a new voyage.

that the work done by Halecki was specialized work on a modern vessel, of a sort which is now habitually contracted out. But it takes only a casual reference to the principles of the *Sieracki* decision to be reminded that the fact that a worker is doing specialized work on a modern vessel under a contract is no reason for exempting him from the scope of the seaworthiness duty's "humanitarian policy," 328 U. S., at 95; it is rather one of the very bases on which the *Sieracki* doctrine was bottomed. The Court refers to the extensive specialized equipment the contractor was required to bring aboard, but in *Petterson* this was, over dissent, rejected as a basis for distinction of *Sieracki,* 347 U. S. 396, 400. Nor would one think that the fact that the work being done posed dangers to a degree which made it desirable that the crew members not be present aboard the vessel militated against the existence of the seaworthiness duty. The duty was held in *Sieracki* to extend to others than members of the crew precisely to avoid the consequence that the shipowner would escape his responsibilities by contracting out dangerous work.

The Court declines to find that Halecki was engaged in ship's service of a sort that would entitle him to the warranty because the precise sort of work he was doing is one which is habitually contracted out. It rejects clear categorical analogies between Halecki's work and that historically done by crew members, with the observation that the work Halecki was doing was different because the vessel was modern, had complicated equipment, and required specialized treatment efficiently to perform the work on it. Thus the whole point of the *Sieracki* decision is turned around, and today's shipowner escapes his absolute duty because his vessel is modern and outfitted with complicated and dangerous equipment, and because a pattern of contracting out a sort of work on it has become established.

The Court gives no reason based in policy for its inversion of the *Sieracki* principle. I fear also that it gives no workable guide to the lower courts in this actively litigated field of federal law. They may now have the impression that some degree of specialization in the tasks performed by the injured shipboard worker disqualifies him from the scope of the shipowner's duty, but, further than that, there is left uncertain the extent to which the decisions of the lower courts based on the *Sieracki* and *Hawn* cases are now under a cloud.[3] And so confusion is left to breed further litigation in an already heavily litigated area of the law.

I would adhere to the principles of *Sieracki* and *Hawn* and affirm the judgment of the Court of Appeals.

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[3] Cases in which holdings of the lower courts have interpreted this Court's decisions in the *Sieracki* and *Hawn* cases as extending the duty of seaworthiness to independent contractors' employees substantially similarly circumstanced to Halecki include *Torres* v. *The Kastor*, 227 F. 2d 664 (C. A. 2d Cir.) (cleaning vessel of pitch to make it suitable for future voyages); *Read* v. *United States*, 201 F. 2d 758 (C. A. 3d Cir.) (reconversion of Liberty Ship into troop carrier; worker engaged in converting deep tanks); *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (C. A. 3d Cir.) (boiler cleaning company's employee cleaning accumulated rust and dirt from deep tank); *Pinion* v. *Mississippi Shipping Co.*, 156 F. Supp. 652 (D. C. E. D. La.) (plumbing repair contractor's helper carrying on home port repairs). See also *Pioneer S. S. Co.* v. *Hill*, 227 F. 2d 262, 263 (C. A. 6th Cir.) (vessel in winter lay-up; regular officers and crew not aboard; substantial repairs being effected; dictum that a shipfitter's helper "was probably within the broadened class of workers to whom the protection of the seaworthiness doctrine has now been extended"); *Imperial Oil, Ltd.*, v. *Drlik*, 234 F. 2d 4, 8 (C. A. 6th Cir.) (shipbuilding company employee engaged in repairing drydocked ship materially damaged by explosion; dictum that worker "would fall within the protection of the rule so extended"); *Lester* v. *United States*, 234 F. 2d 625 (C. A. 2d Cir.) (electrician working on general overhaul of drydocked vessel; extension of warranty assumed).

KERMAREC *v.* COMPAGNIE GENERALE TRANSATLANTIQUE.

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

No. 22. Argued November 13, 1958.—Decided February 24, 1959.

While visiting a seaman on board a vessel berthed at a pier in New York City, petitioner was injured by a fall down a stairway. Basing jurisdiction on diversity of citizenship, he brought an action for damages in a Federal District Court against the shipowner. He alleged unseaworthiness of the vessel and negligence of its crew. The jury returned a verdict for petitioner; but the District Court set it aside and dismissed the complaint. *Held:* Judgment vacated and case remanded to the District Court with instructions to reinstate the jury verdict and enter judgment accordingly. Pp. 626–632.

1. Since petitioner was injured aboard a ship upon navigable waters, the case is within full range of admiralty jurisdiction and is governed by the standards of maritime law; and the District Court erred in ruling that it was governed by New York law. Pp. 628–629.

2. The District Judge erred in instructing the jury that contributory negligence on petitioner's part would operate as a complete bar to recovery; he should have told the jury that petitioner's contributory negligence was to be considered only in mitigation of damages; but this error did not prejudice petitioner, because the jury found in his favor. P. 629.

3. The District Judge was correct in eliminating from the case the claim based on unseaworthiness, since petitioner was not a member of the ship's company nor of that broadened class of workmen to whom the admiralty law has latterly extended the absolute right to a seaworthy ship. P. 629.

4. Under maritime law, the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case. Pp. 629–632.

245 F. 2d 175, judgment vacated and case remanded to the District Court.

Edward J. Malament argued the cause for petitioner. With him on the brief was *Malcolm B. Rosow.*

George A. Garvey argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

On November 24, 1948, the respondent's vessel, the S. S. *Oregon,* was berthed at a pier in the North River, New York City. About noon on that day Joseph Kermarec came aboard to visit Henry Yves, a member of the ship's crew. The purpose of the visit was entirely personal, to pay a social call upon Yves and to give him a package to be delivered to a mutual friend in France. In accordance with customary practice permitting crew members to entertain guests aboard the vessel, Yves had obtained a pass from the executive officer authorizing Kermarec to come aboard.[1] As he started to leave the ship several hours later, Kermarec fell and was injured while descending a stairway.

On the theory that his fall had been caused by the defective manner in which a canvas runner had been

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[1] The pass contained the following language: "The person accepting this pass in consideration thereof assumes all risks of accidents, and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees, or otherwise, for any injury to his person or for any loss or injury to his property." The district judge instructed the jury that this attempted disclaimer could have no effect unless it had been made known to Kermarec. The evidence showed that Kermarec had not seen the pass. By its verdict the jury implicitly found that Kermarec had not been informed of the language appearing on it. Since that finding is not disputed here, we need not consider what effect the attempted disclaimer would have had if Kermarec had been aware of it. See *Moore* v. *American Scantic Line, Inc.*, 121 F. 2d 767. Compare 46 U. S. C. § 183c.

tacked to the stairway, Kermarec brought an action for personal injuries in the District Court for the Southern District of New York, alleging unseaworthiness of the vessel and negligence on the part of its crew. Federal jurisdiction was invoked by reason of the diverse citizenship of the parties, and a jury trial was demanded.

The district judge was of the view that the substantive law of New York was applicable. Accordingly, he eliminated the unseaworthiness claim from the case and instructed the jury that Kermarec was "a gratuitous licensee" who could recover only if the defendant had failed to warn him of a dangerous condition within its actual knowledge, and only if Kermarec himself had been entirely free of contributory negligence.[2]

The jury returned a verdict in Kermarec's favor. Subsequently the trial court granted a motion to set the verdict aside and dismiss the complaint, ruling that there

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[2] "With respect to the first issue of fact, namely, the alleged negligence of the defendant, you must bear in mind that the owner of a ship such as the defendant is subject to liability for bodily harm caused to a gratuitous licensee, such as the plaintiff, by any artificial condition on board the ship, only if both of the following conditions are present: (1) if the defendant knows of the unsafe condition and realizes that it involves an unreasonable risk to the plaintiff and has reason to believe that the plaintiff will not discover the condition or realize the risk; and (2) if the defendant invites or permits the plaintiff to enter or remain upon the ship without exercising reasonable care either to make the condition reasonably safe or to warn the plaintiff of the condition and risk involved therein.

"In short, in order that the plaintiff recover in this case, he must establish by a fair preponderance of the evidence that the defendant knew of the unsafe condition and invited the plaintiff aboard without either correcting the condition or warning him of it.

. . . . . .

"In connection with damages, if you find that the plaintiff's injuries were the proximate result of the defendant's negligence and the plaintiff's own contributory negligence, even in the slightest degree, then the plaintiff cannot recover at all."

had been a complete failure of proof that the shipowner had actually known that the stairway was in a dangerous or defective condition. A divided Court of Appeals affirmed. The opinion of that court does not make clear whether affirmance was based upon agreement with the trial judge that New York law was applicable, or upon a determination that the controlling legal principles would in any event be no different under maritime law. 245 F. 2d 175. Certiorari was granted to examine both of these issues. 355 U. S. 902.

The District Court was in error in ruling that the governing law in this case was that of the State of New York. Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. See *The Plymouth,* 3 Wall. 20; *Philadelphia, W. & B. R. Co.* v. *Philadelphia & Havre de Grace Steam Tugboat Co.,* 23 How. 209, 215; *The Commerce,* 1 Black 574, 579; *The Rock Island Bridge,* 6 Wall. 213, 215; *The Belfast,* 7 Wall. 624, 640; *Leathers* v. *Blessing,* 105 U. S. 626, 630; *The Admiral Peoples,* 295 U. S. 649, 651. If this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties. *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, 259. Where the plaintiff exercises the right conferred by diversity of citizenship to choose a federal forum, the result is no different, even though he exercises the further right to a jury trial. Whatever doubt may once have existed on that score was effectively laid to rest by *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406, 410–411. It thus becomes necessary to consider whether prejudice resulted from the court's application of the substantive law of New York.

In instructing the jury that contributory negligence on Kermarec's part would operate as a complete bar to recovery, the district judge was clearly in error. The jury should have been told instead that Kermarec's contributory negligence was to be considered only in mitigation of damages. *The Max Morris,* 137 U. S. 1; *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406, 408–409. It is equally clear, however, that this error did not prejudice Kermarec. By returning a verdict in his favor, the jury necessarily found that Kermarec had not in fact been guilty of contributory negligence "even in the slightest degree."

The district judge refused to submit the issue of unseaworthiness to the jury for the reason that an action for unseaworthiness is unknown to the common law of New York. Although the basis for its action was inappropriate, the court was correct in eliminating the unseaworthiness claim from this case. Kermarec was not a member of the ship's company, nor of that broadened class of workmen to whom the admiralty law has latterly extended the absolute right to a seaworthy ship. See *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96; *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85; *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406. Kermarec was aboard not to perform ship's work, but simply to visit a friend.

It is apparent, therefore, that prejudicial error occurred in this case only if the maritime law imposed upon the shipowner a standard of care higher than the duty which the district judge found owing to a gratuitous licensee under the law of New York. If, in other words, the shipowner owed Kermarec the duty of exercising ordinary care, then upon this record Kermarec was entitled to judgment, the jury having resolved the factual issues in his favor under instructions less favorable to him than should

have been given.[3] Stated broadly, the decisive issue is thus whether admiralty recognizes the same distinctions between an invitee and a licensee as does the common law.

It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew. *Leathers* v. *Blessing,* 105 U. S. 626; *The Max Morris,* 137 U. S. 1; *The Admiral Peoples,* 295 U. S. 649.[4] But this Court has never determined whether a different and lower standard of care is demanded if the ship's visitor is a person to whom the label "licensee" can be attached. The issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts. *The Lottawanna,* 21 Wall. 558; *The Max Morris,* 137 U. S. 1.[5]

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each.[6] Yet even

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[3] The record clearly justifies a finding that the canvas runner was defectively tacked to the stairway, and that this caused a dangerous condition of which the shipowner's agent would have known in the exercise of ordinary care. By its verdict, the jury found that much and more.

[4] Cf. *The Osceola,* 189 U. S. 158.

[5] Where there is no impingement upon legislative policy. Cf. *United States* v. *Atlantic Mut. Ins. Co.,* 343 U. S. 236; *Halcyon Lines* v. *Haenn Ship Corp.,* 342 U. S. 282.

[6] Random selection of almost any modern decision will serve to illustrate the point. *E. g., Chicago G. W. R. Co.* v. *Beecher,* 150

within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict.[7] As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances." [8]

For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality. *The Lottawanna,* 21 Wall. 558, at 575. The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system

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F. 2d 394 (licensee by express invitation; licensee by implied invitation; bare licensee).

[7] For example, the duty of an occupier toward a licensee under the law of New York, which the District Court thought applicable in the present case, appears far from clear. Compare *Fox* v. *Warner-Quinlan Asphalt Co.,* 204 N. Y. 240, 245, 97 N. E. 497, 498; *Mendelowitz* v. *Neisner,* 258 N. Y. 181, 184, 179 N. E. 378, 379; *Paquet* v. *Barker,* 250 App. Div. 771, 293 N. Y. S. 983 (2d Dept.); *Byrne* v. *New York C. & H. R. R. Co.,* 104 N. Y. 362, 10 N. E. 539; *Higgins* v. *Mason,* 255 N. Y. 104, 109, 174 N. E. 77, 79; *Ehret* v. *Village of Scarsdale,* 269 N. Y. 198, 208, 199 N. E. 56, 60; *Mayer* v. *Temple Properties,* 307 N. Y. 559, 563–564, 122 N. E. 2d 909, 911–913; *Friedman* v. *Berkowitz,* 206 Misc. 889, 136 N. Y. S. 2d 81.

[8] See Chief Judge Clark's dissenting opinion in the Court of Appeals. 245 F. 2d 175, at 180. A survey here of the thousands of judicial decisions in this area during the last hundred years is as unnecessary as it would be impossible. A recent critical review is to be found in 2 Harper and James, The Law of Torts, c. XXVII, *passim* (1956). See also, Prosser, Business Visitors and Invitees, 26 Minn. L. Rev. 573; Marsh, The History and Comparative Law of Invitees, Licensees and Trespassers, 69 L. Q. Rev. 182, 359.

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in that respect entirely alien to the law of the sea.[9] We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.[10] It follows that in the present case the judgment must be vacated and the case remanded to the District Court with instructions to reinstate the jury verdict and enter judgment accordingly.

It is so ordered.

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[9] This is not to say that concepts of status are not relevant in the law of maritime torts, but only that the meaningful categories are quite different. Membership in the ship's company, for example, a status that confers an absolute right to a seaworthy ship, is peculiar to the law of the sea. Such status has now been extended to others aboard "doing a seaman's work and incurring a seaman's hazards." *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, at 99.

[10] The inconsistent and diverse results reached by courts which have tried to apply to the facts of shipboard life common-law distinctions between licensees and invitees reinforce the conclusion here reached. As to a seaman crossing another vessel to reach the pier, see *Radoslovich* v. *Navigazione Libera Triestina, S. A.*, 72 F. 2d 367 (invitee); *Aho* v. *Jacobsen*, 249 F. 2d 309 (licensee); *Anderson* v. *The E. B. Ward, Jr.*, 38 F. 44 (invitee); *Griffiths* v. *Seaboard Midland Petroleum Corp.*, D. C. Md., 1933 A. M. C. 911 (invitee); see also *Lauchert* v. *American S. S. Co.*, 65 F. Supp. 703 (licensee). As to a guest of a passenger, see *McCann* v. *Anchor Line*, 79 F. 2d 338 (invitee); *Zaia* v. *"Italia" Societa Anonyma di Navigazione*, 324 Mass. 547, 87 N. E. 2d 183 (licensee); *The Champlain*, N. Y. Sup. Ct., 1934 A. M. C. 25 (invitee). See also *Metcalfe* v. *Cunard S. S. Co.*, 147 Mass. 66, 16 N. E. 701 (licensee).

The English courts appear to have differentiated between an invitee and a licensee in cases of personal injury on shipboard, without critical inquiry. See, *e. g.*, *Smith* v. *Steele*, L. R. 10 Q. B. 125 (1875) and *Duncan* v. *Cammell Laird & Co., Ltd.*, [1943] 2 All E. R. 621. These distinctions have after thorough study (Law Reform Committee, Third Report, Cmd. No. 9305 (1954)) been eliminated entirely from the English law by statutory enactment. Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, c. 31.

CASH *v.* CULVER, STATE PRISON CUSTODIAN.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 91. Argued January 22, 1959.—Decided February 24, 1959.

At a trial in a state court at which he was not represented by counsel, petitioner was convicted of burglary and sentenced to imprisonment for 15 years. No appeal was taken, and the State Supreme Court denied without a hearing a petition for habeas corpus which he filed later and in which he alleged, *inter alia,* that: He was 20 years old, uneducated and inexperienced in court trials. He was represented by counsel at an earlier trial for the same offense which resulted in a hung jury. He was then placed in solitary confinement, pending a new trial of which he was not notified until the day before it began. Meanwhile, his counsel had withdrawn from the case and his mother had made several unsuccessful attempts to obtain other counsel. At the trial, he was denied both the appointment of counsel for his defense and a continuance to enable him to obtain counsel. His conviction was based largely on the testimony of an alleged accomplice who pleaded guilty and testified for the State—not only regarding the crime for which petitioner was being tried but also regarding other alleged crimes. *Held:* If petitioner's allegations be true, he was denied the due process of law guaranteed by the Fourteenth Amendment; and it was incumbent on the state courts to determine what the true facts were. Pp. 633–638.

Reversed.

Irwin L. Langbein, acting under appointment by the Court, 357 U. S. 933, argued the cause and filed a brief for petitioner.

Edward S. Jaffry, Assistant Attorney General of Florida, argued the cause, *pro hac vice,* by special leave of the Court, for respondent. With him on the brief was *Richard W. Ervin,* Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner is serving a 15-year prison sentence imposed by a Florida court after conviction by a jury of

burglary.[1] He was not represented by counsel at the trial. No appeal was taken, and the Supreme Court of Florida denied without a hearing a petition for habeas corpus which he later filed.[2] Certiorari was granted to determine whether the circumstances alleged in the habeas corpus petition make this a case where the denial of counsel's assistance at the trial operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment. 357 U. S. 904. For reasons to be stated, we hold that this is such a case.

The record here consists only of the habeas corpus petition and the Florida Supreme Court's bare order of denial. With the case in that posture, the factual allegations of the petition must for present purposes be accepted as true. *Hawk* v. *Olson,* 326 U. S. 271, 273. Composed in the penitentiary, the petition, like many such documents, is heavily larded with irrelevant innuendoes, unsupported conclusions, and pretentious legalisms. Within its confines, however, are to be found allegations of a chain of events which we now relate.

On December 6, 1954, the petitioner, an uneducated farm boy of 20, was first tried by a jury on the burglary charge. At that trial he was represented by experienced counsel of his own choice. At the conclusion of the evidence, the jury was unable to agree on a verdict, and a mistrial resulted.

The petitioner was then immediately placed in solitary confinement, where he remained awaiting retrial. He first learned on the evening of February 20, 1955, that his new trial was to take place the next day. Only a few days earlier he had learned through a prison official that his former lawyer had withdrawn from the case. The

[1] A noncapital offense in Florida, punishable in this case by a maximum prison term of 20 years. Fla. Stat., 1955, § 810.01.

[2] The petition was originally filed in that court in accordance with state procedure explained in *Sneed* v. *Mayo,* 66 So. 2d 865, 874.

petitioner's mother on his behalf had tried to engage a number of other lawyers to represent him, but they had all refused, telling her that the fee she could offer was inadequate, and the time for preparation too short.

At the opening of the second trial the petitioner asked the court for a continuance to give him time to employ a new lawyer, or in the alternative that the court appoint counsel for him. In making these requests the petitioner called the trial judge's attention to his youth, his lack of education and courtroom experience, and the sudden withdrawal of prior counsel.[3] The requests were denied, and the trial proceeded at once, with the petitioner left to conduct his own defense.[4]

His co-defendant, Allen, an alleged accomplice, pleaded guilty and testified for the State. Allen stated, among other things, that he and the petitioner in the company of two others had burglarized stores, stolen a truck, and engaged in a running gun battle with police. He further testified that he (Allen) had "pulled a $180,000 robbery" in New Orleans with two of the petitioner's older brothers,

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[3] On this point the allegations of the petition are as follows: "Petitioner explained to the Court that he was not capable of representing himself, that he was only 20 years of age and was uneducated and had never heard a court trial except the one time he was tried on the same charge, and then he was represented by Mr. Carr, and that he did not know court procedure or how to conduct his defense, and told the court he had been closely confined in solitary at the Florida State Prison at Raiford, up until the night before, and therefore he had no opportunity to employ new counsel, since the Court had permitted his chosen counsel to abandon him in the face of trial, and it was an absolute necessity that the court grant a continuance, or, in the alternative, for the court to remedy the situation by appointing counsel to represent the petitioner."

[4] Under Florida law a trial court has an absolute duty to provide counsel only for an indigent defendant on trial for a capital offense. *Sneed* v. *Mayo,* 66 So. 2d 865, 872; *Johnson* v. *Mayo,* 158 Fla. 264, 28 So. 2d 585; Fla. Stat., 1955, § 909.21.

in which the petitioner had taken no part, and that one of these brothers had also participated in the crime for which the petitioner was on trial. Physical evidence was introduced, including a revolver stolen from the store the petitioner was charged with burglarizing, which had been found in Allen's possession. No evidence in the case except Allen's testimony connected Allen and the petitioner. It is not clear what, if any, objections were made to Allen's testimony, or whether he was cross-examined.[5]

On conviction, the petitioner, a first offender, was sentenced to the 15-year prison term he is now serving. Allen, an ex-convict, was sentenced to 10 years, but placed on probation. No charges were brought against the petitioner's brother or the fourth person named by Allen as a participant in the crime for which the petitioner was convicted.

In the 17 years that have passed since its decision in *Betts* v. *Brady*, 316 U. S. 455, this Court, by a traditional process of inclusion and exclusion has, in a series of decisions, indicated the factors which may render state criminal proceedings without counsel so apt to result in injustice as to violate the Fourteenth Amendment.[6] The

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[5] The habeas corpus petition incorporates, among other things, excerpts from a newspaper account of the trial, a form of pleading to which the Florida Attorney General makes no objection in the present case. An excerpt from this newspaper account reads as follows: "While making objections and inquiring of the Judge and witnesses, Cash appeared unsure of himself. On several occasions he would start a sentence, then stop to rephrase it or start on another subject. Before making objections Cash raised his hand to attract the attention of the Judge, then in a halting manner would make his statement."

[6] See *Rice* v. *Olson*, 324 U. S. 786; *Canizio* v. *New York*, 327 U. S. 82; *De Meerleer* v. *Michigan*, 329 U. S. 663; *Foster* v. *Illinois*, 332 U. S. 134; *Gayes* v. *New York*, 332 U. S. 145; *Bute* v. *Illinois*, 333 U. S. 640; *Wade* v. *Mayo*, 334 U. S. 672; *Gryger* v. *Burke*, 334

alleged circumstances of the present case so clearly make it one where, under these decisions, federal organic law required the assistance of counsel that it is unnecessary here to explore the outer limits of constitutional protection in this area.

"Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair," the Constitution requires that the accused must have legal assistance at his trial. *Uveges* v. *Pennsylvania,* 335 U. S. 437, 441. Of particular relevance here are the decisions of the Court which have held the appointment of counsel necessary to a fair trial because of the complexity of the proceedings. *Rice* v. *Olson,* 324 U. S. 786; *Gibbs* v. *Burke,* 337 U. S. 773; and see *Williams* v. *Kaiser,* 323 U. S. 471, 475–476.

All that stood between the petitioner and a verdict of acquittal was the testimony of Allen—an admitted accomplice. Although Florida law does not require corroboration of an accomplice's testimony to sustain a conviction, *Land* v. *State,* 59 So. 2d 370, the defendant has a right to demand that the trial judge instruct the jury that the "evidence of an accomplice should be received by the jury with great caution." *Varnum* v. *State,* 137 Fla. 438, 449, 188 So. 346, 351. The Florida decisions also establish the right to cross-examine an accomplice witness as to whether he is testifying under an agreement for leniency, and even

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U. S. 728; *Townsend* v. *Burke,* 334 U. S. 736; *Uveges* v. *Pennsylvania,* 335 U. S. 437; *Gibbs* v. *Burke,* 337 U. S. 773; *Quicksall* v. *Michigan,* 339 U. S. 660; *Palmer* v. *Ashe,* 342 U. S. 134; *Massey* v. *Moore,* 348 U. S. 105; *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116; *Moore* v. *Michigan,* 355 U. S. 155.

as to whether he believes that his testimony will be in his best interest. *Leavine* v. *State,* 109 Fla. 447, 147 So. 897; *Henderson* v. *State,* 135 Fla. 548, 555, 185 So. 625, 627 (concurring opinion). A layman would hardly be familiar with these rights.

Moreover, Allen's testimony concerning the petitioner's commission of other crimes and the commission of a crime by the petitioner's brother, who allegedly also participated in the burglary which was the subject of the trial, if not inadmissible in its entirety, certainly raised serious questions under Florida law. As the Florida Supreme Court has recently noted, "There are literally thousands of cases in this country discussing the admission of such evidence." *Padgett* v. *State,* 53 So. 2d 106, 108. The problems which this testimony raised were thus beyond the ken of a layman, and it was clearly the kind of testimony that could seriously damage a defendant in the eyes of a jury. Finally, the transcript of the petitioner's previous trial would have offered a lawyer opportunities for impeachment of prosecution witnesses, opportunities of which we cannot assume that a layman would be aware.[7]

For these reasons, the requirements of due process made necessary the assistance of a lawyer if the circumstances alleged in the habeas corpus petition are true. On the present record there is no way to test their truth. But the allegations themselves made it incumbent upon the Florida courts to determine what the true facts were.[8]

Reversed.

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[7] The very fact that the jury failed to convict at the first trial, when the petitioner was represented by counsel, is at least some practical indication of the difference a lawyer's help at the second trial might have made.

[8] Counsel has advised us that a transcript of the trial proceedings can be made available by the court reporter.

Per Curiam.

CITY OF MERIDIAN *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

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

No. 546. Decided February 24, 1959.

In a suit by appellee for a declaratory judgment, a Federal District Court held a Mississippi statute to be in conflict with both the State and Federal Constitutions. The Court of Appeals affirmed, and an appeal was taken to this Court under 28 U. S. C. § 1254 (2). Appellant moved to vacate the judgment of the Court of Appeals and remand the case to the District Court with instructions to vacate its judgment and convene a three-judge court to consider the case. *Held:* Without passing on the merits of that motion, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to hold the cause while the parties repair to a state tribunal for an authoritative declaration of applicable state law. Pp. 639–641.

256 F. 2d 83, judgment vacated and cause remanded to the District Court.

George M. Ethridge, Jr. and *Lester E. Wills* for appellant.

Charles B. Snow and *John A. Boykin, Jr.* for appellee.

Tally D. Riddell filed a brief on behalf of the City of Gulfport et al., as *amici curiae,* in support of appellant.

PER CURIAM.

Appellee instituted this suit for a declaratory judgment that a 1956 Mississippi statute imposing a charge on public utilities for the use of public streets and places does not apply to it, and, if it does, violates the Federal and State Constitutions. It was tried before a single district judge. After trial the district judge wrote an opinion (154 F. Supp. 736) and then entered a judgment which

declared the statute in conflict with the State and Federal Constitutions and thus beyond the power of the Mississippi Legislature to enact. The Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. 256 F. 2d 83. An appeal was taken to this Court pursuant to 28 U. S. C. § 1254 (2), providing for appeal of a decision of a Court of Appeals where appellant relies on a state statute held to be "invalid as repugnant to the Constitution, treaties or laws of the United States." Appellee moved to dismiss the appeal, contending that review by appeal does not lie because the Court of Appeals decision declaring the state statute unconstitutional was based on the Constitution of Mississippi as well as the Federal Constitution. Subsequently, appellant moved the Court to vacate the judgment of the Court of Appeals and remand the case to the District Court with instructions to vacate its judgment and convene a three-judge court under 28 U. S. C. §§ 2281 and 2284 to consider appellee's complaint. Appellee opposed the motion. Without passing judgment on the merits of that motion (cf. *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U. S. 977), we vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold the cause while the parties repair to a state tribunal for an authoritative declaration of applicable state law.

Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496. That is especially desirable where the questions of state law are enmeshed with federal questions. *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105. Here, the state law problems are delicate ones, the resolution of which is not without substantial difficulty—

certainly for a federal court. Cf. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483. In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily. *Railroad Comm'n* v. *Pullman Co., supra; Spector Motor Co.* v. *McLaughlin, supra,* 104–105. See *Leiter Minerals, Inc.,* v. *United States,* 352 U. S. 220, 228–229.

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

CHAFFIN ET AL. *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO.

No. 549. Decided February 24, 1959.

Appeal dismissed and certiorari denied.

Morris Lavine for appellants.

Aaron W. Reese for appellee.

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.

ANDERSON *v.* CORPORATION COMMISSION OF OKLAHOMA ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 576. Decided February 24, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 327 P. 2d 699.

Luther Bohanon and *Leon S. Hirsh* for appellant.

Ferrill Rogers, T. Murray Robinson and *C. E. Barnes* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

HANAUER ET AL. *v.* ELKINS, PRESIDENT OF THE UNIVERSITY OF MARYLAND, ET AL.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 580. Decided February 24, 1959.

Appeal dismissed.

Reported below: 217 Md. 213, 141 A. 2d 903.

O. E. Stone and *Robert B. Myers* for appellants.

C. Ferdinand Sybert, Attorney General of Maryland, and *Clayton A. Dietrich,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. *Hamilton* v. *Regents of the University of California et al.,* 293 U. S. 245.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

WEBB *v.* OHIO.

APPEAL FROM THE COURT OF APPEALS OF OHIO, MONTGOMERY COUNTY.

No. 427, Misc. Decided February 24, 1959.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Mathias H. Heck for appellee.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

UNITED STATES *v.* HALEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

No. 587. Decided February 24, 1959.

166 F. Supp. 336, reversed.

Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, R. L. Farrington, Neil Brooks and *Donald A. Campbell* for the United States.

William F. Billings, James P. Donovan and *Daniel L. O'Connor* for appellee.

PER CURIAM.

The judgment is reversed. *Wickard* v. *Filburn,* 317 U. S. 111.

LANDMAN ET AL. *v.* MIEDZINSKI, SHERIFF, ET AL.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 589. Decided February 24, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 218 Md. 3, 145 A. 2d 220.

F. Joseph Donohue and *Harold C. Faulkner* for appellants.

C. Ferdinand Sybert, Attorney General of Maryland, *Stedman Prescott, Jr.,* Deputy Attorney General, and *James H. Norris, Jr.* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

KLEIN *v.* LEE, ADJUDICATION OFFICER, ET AL.

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

No. 234, Misc. Decided February 24, 1959.

Certiorari granted; judgment vacated; and case remanded to District Court with directions to dismiss the complaint as moot.

Reported below: 254 F. 2d 188.

Petitioner *pro se.*

Solicitor General Rankin, Assistant Attorney General Doub and *Alan S. Rosenthal* for the United States.

PER CURIAM.

The motion to substitute Herbert E. McDonald as the party respondent in the place of V. O. Lee, retired, is granted. 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 Seventh Circuit is vacated, and the case is remanded to the District Court with directions to dismiss the complaint as moot.

CHAPMAN *v.* OHIO.

APPEAL FROM THE COURT OF APPEALS OF OHIO, FRANKLIN COUNTY.

No. 363, Misc. Decided February 24, 1959.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

RISER *v.* WARDEN, CALIFORNIA STATE PRISON.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 331, Misc. Decided February 24, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: See 47 Cal. 2d 566.

George T. Davis for appellant.

Stanley Mosk, Attorney General of California, *Clarence A. Linn,* Chief Assistant Attorney General, and *Arlo E. Smith,* 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.

JOHNSON *v.* OHIO.

APPEAL FROM THE COURT OF APPEALS OF OHIO, MONTGOMERY COUNTY.

No. 428, Misc. Decided February 24, 1959.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Mathias H. Heck for appellee.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 646 and 801 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.

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ORDERS FROM OCTOBER 3, 1958, THROUGH FEBRUARY 20, 1959.

OCTOBER 3, 1958.

Dismissal Under Rule 60.

No. 186. PERRICONE *v.* NEW YORK STATE COMMISSION AGAINST DISCRIMINATION ET AL. Appeal from the Court of Appeals of New York. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Evelyn E. West* was on the stipulation for the New York State Commission Against Discrimination, appellee. With her on a Motion to Dismiss or Affirm was *Milton Rosenberg*. Samuel W. Eager, appellee, *pro se*, was also on the stipulation. Reported below: 4 N. Y. 2d 874, 150 N. E. 2d 712.

OCTOBER 6, 1958.

Dismissal Under Rule 60.

No. 312. COMMERCIAL STEVEDORING CO., INC., *v.* A/S J. LUDWIG MOWINCKELS REDERI. 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. *Horace M. Gray* was on the stipulation for petitioner. With him on the petition was *Leo F. Hanan*. *James M. Estabrook* was on the stipulation for respondent. With him on a brief in opposition to the petition was *Francis X. Byrn*. Reported below: 256 F. 2d 227.

OCTOBER 13, 1958.

Miscellaneous Orders.

No. 66. SAN DIEGO BUILDING TRADES COUNCIL ET AL. *v.* GARMON ET AL. Certiorari, 357 U. S. 925, to the Su-

preme Court of California. The Solicitor General is invited to file a brief in this case setting forth the views of the United States. Reported below: 49 Cal. 2d 595, 320 P. 2d 473.

No. 130, October Term, 1957. FIDELITY-PHILADELPHIA TRUST CO. ET AL., EXECUTORS, *v.* SMITH, COLLECTOR OF INTERNAL REVENUE, 356 U. S. 274. The motion to retax costs is denied. *Robert T. McCracken* for movant-petitioners. *Solicitor General Rankin* for respondent.

No. 23. UNITED GAS PIPE LINE CO. *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL.;

No. 25. FEDERAL POWER COMMISSION *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL.; and

No. 26. TEXAS GAS TRANSMISSION CORP. ET AL. *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL. Certiorari, 355 U. S. 938, to the United States Court of Appeals for the District of Columbia Circuit. The motions for leave to file briefs of Amere Gas Utilities Co. et al. and Natural Gas Pipeline Co. of America et al., as *amici curiae,* are denied. Reported below: 102 U. S. App. D. C. 77, 250 F. 2d 402.

No. 25. FEDERAL POWER COMMISSION *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL. Certiorari, 355 U. S. 938, to the United States Court of Appeals for the District of Columbia Circuit. The motion for leave to file brief of Long Island Lighting Co., as *amicus curiae,* is denied. Reported below: 102 U. S. App. D. C. 77, 250 F. 2d 402.

No. 135. WOODY *v.* UNITED STATES. Certiorari, 357 U. S. 935, to the United States Court of Appeals for the Sixth Circuit. It is ordered that *Clarence O. Woolsey, Esquire,* of Springfield, Missouri, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 53. NEW YORK *v.* O'NEILL. Certiorari, 356 U. S. 972, to the Supreme Court of Florida. The motion for leave to file brief of the National Conference of Commissioners on Uniform State Laws, as *amicus curiae,* is granted. *James C. Dezendorf* and *Louis A. Kohn* for movant. Reported below: 100 So. 2d 149.

No. 56. UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION ET AL. *v.* HALECKI, ADMINISTRATRIX. Certiorari, 357 U. S. 903, to the United States Court of Appeals for the Second Circuit. The motion of the Solicitor General for leave to participate in oral argument is denied. MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE HARLAN joins, would grant the Government's motion for leave to participate in the oral argument of this case in view of the important public interest with which the Government is charged in carrying out the congressional policy for a government-owned merchant marine and in view of the confused state of the law dealing with the issues raised by this case. *Solicitor General Rankin* for the United States, movant. *Nathan Baker* for respondent in opposition to the motion. Reported below: 251 F. 2d 708.

No. 137. HEFLIN *v.* UNITED STATES. Certiorari, 357 U. S. 935, to the United States Court of Appeals for the Fifth Circuit. It is ordered that *Jerome A. Cooper, Esquire,* of Birmingham, Alabama, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case. Reported below: 251 F. 2d 69.

No. 320, Misc. PURITAN CHURCH BUILDING FUND ET AL. *v.* EDGERTON, CHIEF JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and motion to disqualify denied.

No. 153. GANGER ET AL. *v.* CITY OF MIAMI. Appeal from the Supreme Court of Florida. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Counsel are directed to discuss the question of whether the constitutional issues were raised and decided below. *Clyde A. Epperson* and *Thomas H. Anderson* for appellants. *Milton M. Ferrell* for appellee. Reported below: 101 So. 2d 116.

No. 167. SUN OIL CO. *v.* FEDERAL POWER COMMISSION;

No. 197. LONG ISLAND LIGHTING CO. ET AL. *v.* SUN OIL CO. ET AL.;

No. 201. LONG ISLAND LIGHTING CO. ET AL. *v.* BEL OIL CORP. ET AL.;

No. 202. BEL OIL CORP. *v.* FEDERAL POWER COMMISSION; and

No. 203. UNION OIL CO. OF CALIFORNIA ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. Motion of Long Island Lighting Co. et al. to be added as parties respondent and to correct and amend titles and captions in Nos. 167, 202 and 203 denied. *Martin A. Row* and *Robert E. May* for petitioner in No. 167. *David K. Kadane* for the Long Island Lighting Co., and *Vincent P. McDevitt* and *Samuel G. Miller* for the Philadelphia Electric Co., petitioners in Nos. 197 and 201 and movants in Nos. 167, 202 and 203. With them on the motion was *Edward S. Kirby* for the Public Service Electric & Gas Co., petitioner in Nos. 197 and 201. *Cullen R. Liskow* for petitioner in No. 202. *George D. Horning, Jr.* for the Union Oil Co. of California, petitioner in No. 203 and respondent in Nos. 197 and 201. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell, Howard E. Wahrenbrock* and *William W. Ross* for the Federal Power Commission, respondent in Nos. 167, 202 and 203. Reported below: 255 F. 2d 548, 557.

No. 122, October Term, 1957. IVANHOE IRRIGATION DISTRICT ET AL. *v.* MCCRACKEN ET AL.;

No. 123, October Term, 1957. MADERA IRRIGATION DISTRICT ET AL. *v.* STEINER ET AL.;

No. 124, October Term, 1957. MADERA IRRIGATION DISTRICT *v.* ALBONICO ET UX.; and

No. 125, October Term, 1957. SANTA BARBARA COUNTY WATER AGENCY *v.* BALAAM ET AL., 357 U. S. 275. Petition for rehearing and clarification of opinion denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

No. 86, Misc. TAYLOR *v.* ADAMOWSKI ET AL.;

No. 104, Misc. BOWMAN *v.* ALVIS, WARDEN;

No. 106, Misc. MITCHELL *v.* UNITED STATES;

No. 107, Misc. SMITH *v.* PEPERSACK, WARDEN;

No. 139, Misc. HARRISON *v.* SETTLE, WARDEN;

No. 151, Misc. LAMB *v.* CALIFORNIA;

No. 157, Misc. SILVESTRI *v.* HEINZE, WARDEN;

No. 163, Misc. MORGAN *v.* DOWD, WARDEN;

No. 164, Misc. GRIFFIN *v.* FLORIDA;

No. 174, Misc. BIEN *v.* RANDOLPH, WARDEN;

No. 178, Misc. PALMER *v.* ROGERS, ATTORNEY GENERAL, ET AL.;

No. 184, Misc. HYDER *v.* JOHNSTON, WARDEN;

No. 191, Misc. WAHL *v.* DOWD, WARDEN;

No. 194, Misc. STONEKING *v.* LOONEY, WARDEN; and

No. 202, Misc. NEAL *v.* UFFELMAN, SUPERINTENDENT, ILLINOIS SECURITY HOSPITAL. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se*. *Solicitor General Rankin* for respondents in No. 178, Misc., and respondent in No. 194, Misc.

No. 141, Misc. IN RE SANGUIGNI. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 8, Misc. LEWIS *v.* CULVER, DIRECTOR AND COORDINATOR, FLORIDA CORRECTIONAL INSTITUTIONS;

No. 23, Misc. BROWN *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY;

No. 28, Misc. MCCARTHY *v.* JACKSON, WARDEN;

No. 76, Misc. CORNELIOUS *v.* MARTIN, WARDEN; and

No. 152, Misc. WILSON *v.* BANMILLER, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied. Petitioners *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *David U. Tumin,* Assistant Attorney General, for respondent in No. 8, Misc. *A. S. Harrison, Jr.,* Attorney General of Virginia, and *Thomas M. Miller,* Assistant Attorney General, for respondent in No. 23, Misc. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent in No. 28, Misc.

No. 168, Misc. HUGHES ET AL. *v.* THORNTON, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 220, Misc. POWELL ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, ET AL. Motion for leave to file petition for writ of mandamus, prohibition or injunction denied. *Bertram Edises* and *A. L. Wirin* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Yeagley* and *Benjamin F. Pollack* for respondents.

Probable Jurisdiction Noted.

No. 72. UNITED STATES *v.* SHIREY. Appeal from the United States District Court for the Middle District of Pennsylvania. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Anderson,*

Beatrice Rosenberg and *J. F. Bishop* for the United States. *Sidney G. Handler* for appellee. Reported below: 168 F. Supp. 382.

No. 127. HARRISON, ATTORNEY GENERAL OF VIRGINIA, ET AL. *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. Appeal from the United States District Court for the Eastern District of Virginia. Probable jurisdiction noted. *Albertis S. Harrison, Jr.*, Attorney General of Virginia, *David J. Mays, Henry T. Wickham* and *J. Segar Gravatt* for appellants. *Robert L. Carter* and *Oliver W. Hill* for the National Association for the Advancement of Colored People, Inc., and *Thurgood Marshall* and *Spotswood W. Robinson, III*, for the NAACP Legal Defense and Educational Fund, Inc., appellees. With them on a motion to affirm were *Jack Greenberg* and *Constance Baker Motley*. Reported below: 159 F. Supp. 503.

No. 157. STEVENS, SUCCESSOR TO LAWLER, SECRETARY OF HIGHWAYS OF PENNSYLVANIA, ET AL. *v.* CREASY ET AL. Appeal from the United States District Court for the Western District of Pennsylvania. Probable jurisdiction noted. *Thomas D. McBride*, Attorney General of Pennsylvania, *Harry J. Rubin*, Deputy Attorney General, and *Leonard M. Mendelson* for appellants. *A. E. Kountz* and *Edward P. Good* for appellees. Reported below: 160 F. Supp. 404.

No. 252. SAFEWAY STORES, INC., *v.* OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., ET AL. Appeal from the Supreme Court of Oklahoma. Probable jurisdiction noted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *V. P. Crowe, Robert L. Clark, Ramsey Clark* and *William L. Keller* for appellant. *W. J. Holloway, Sr.* and *M. A. Ned Looney* for appellees. Reported below: 322 P. 2d 179.

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No. 94. BIBB, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF ILLINOIS, ET AL. *v.* NAVAJO FREIGHT LINES, INC., ET AL. Appeal from the United States District Court for the Southern District of Illinois. Probable jurisdiction noted. *Latham Castle,* Attorney General of Illinois, and *William C. Wines, Raymond S. Sarnow, A. Zola Groves* and *Richard W. Husted,* Assistant Attorneys General, for appellants. *David Axelrod* and *Carl L. Steiner* for the Navajo Freight Lines, Inc., et al., appellees. Reported below: 159 F. Supp. 385.

No. 210. UNITED STATES *v.* ATLANTIC REFINING CO. ET AL. Appeal from the United States District Court for the District of Columbia. Probable jurisdiction noted. MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman* and *W. Louise Florencourt* for the United States. *R. Sturgis Ingersoll* and *Bynum E. Hinton, Jr.* for the Arapahoe Pipe Line Co., *Hammond E. Shaffetz* and *Frederick M. Rowe* for the Service Pipe Line Co. et al., *Frank C. Bolton, Jr.* and *John E. McClure* for the Magnolia Pipe Line Co., *John J. Wilson* and *O. J. Dorwin* for the Texas Pipe Line Co. et al., *William F. Kenney* and *George S. Wolbert, Jr.* for the Shell Pipe Line Corp., *William Simon* for the Plantation Pipe Line Co., *R. L. Wagner* and *David T. Searls* for the Great Lakes Pipe Line Co., *Park Holland, Jr., Gentry Lee* and *Narvin R. Weaver* for the Cities Service Pipe Line Co., *Llewellyn C. Thomas, Caesar L. Aiello* and *G. B. Craighill, Jr.* for the Continental Pipe Line Co., *Nelson Jones* and *Joseph J. Smith, Jr.* for the Humble Pipe Line Co., *Joseph P. Walsh* and *Bynum E. Hinton, Jr.* for the Sinclair Pipe Line Co., *Arthur H. Dean, Roy H. Steyer* and *Hugh H. Obear* for the Interstate Oil Pipe Line Co. et al., and *Joseph P. Tumulty, Jr.* and *M. Joseph Matan* for the Tidal Pipe Line Co. et al., appellees.

Certiorari Granted. (*See also No. 84, ante, p. 40, No. 208, ante, p. 31, No. 31, Misc., ante, p. 42, and No. 82, Misc., ante, p. 48.*)

No. 76. KLOR'S, INCORPORATED, *v.* BROADWAY-HALE STORES, INC., ET AL. C. A. 9th Cir. Certiorari granted. *Maxwell Keith* and *Irvin Goldstein* for petitioner. *Moses Lasky* for the Broadway-Hale Stores, Inc., *Herbert W. Clark* for the Admiral Corporation et al., *Robert E. Burns* for the Zenith Radio Corporation, *Alvin H. Pelavin* for the Whirlpool-Seeger Corporation, *David B. Gideon* for the H. R. Basford Co., *Francis R. Kirkham* for the Radio Corporation of America, *H. W. Glensor* for the Leo J. Meyberg Co., *Nat Schmulowitz* for the Emerson Radio & Phonograph Corporation et al., *Marion B. Plant* for the Philco Corporation et al., *Malcolm T. Dungan* for the Rheem Manufacturing Co., *Everett A. Mathews* for the General Electric Co. et al., and *Philip S. Ehrlich* for Olympic Radio & Television, Inc., et al., respondents. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Henry Geller* filed a brief for the United States, as *amicus curiae,* urging that the petition for a writ of certiorari should be granted. Reported below: 255 F. 2d 214.

No. 88. SIMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. *W. W. Barron,* Attorney General of West Virginia, and *Fred H. Caplan,* Assistant Attorney General, for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Joseph Kovner* for the United States. Reported below: 252 F. 2d 434.

No. 178. THE MONROSA ET AL. *v.* CARBON BLACK EXPORT, INC. C. A. 5th Cir. Certiorari granted. *E. D. Vickery* for Navigazione Alta Italia, petitioner. *Carl G. Stearns* for respondent. Reported below: 254 F. 2d 297.

No. 92. SERVICE STORAGE & TRANSFER CO., INC., *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari granted. *Francis W. McInerny* for petitioner. *A. S. Harrison, Jr.*, Attorney General of Virginia, for respondent. Reported below: 199 Va. 797, 102 S. E. 2d 339.

No. 248. FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, *v.* WDAY, INCORPORATED. Supreme Court of North Dakota. Certiorari granted. *Edward S. Greenbaum, Morris L. Ernst, Harriet F. Pilpel, Nancy F. Wechsler* and *Albert J. Rosenthal* for petitioner. *Solicitor General Rankin* and *Warren A. Baker* filed a memorandum for the United States, as *amicus curiae*. Reported below: 89 N. W. 2d 102.

No. 68. T. I. M. E. INCORPORATED *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *W. D. Benson, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 252 F. 2d 178.

No. 96. DAVIDSON TRANSFER & STORAGE CO., INC., *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Bryce Rea, Jr.* and *Edgar Watkins* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 104 U. S. App. D. C. 72, 259 F. 2d 802.

No. 74. MILLS ET AL. *v.* LOUISIANA; and

No. 75. MILLS *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari granted. *Eugene Stanley* and *Albert B. Koorie* for petitioners in No. 74. *Milo B. Williams* for petitioner in No. 75.

No. 267. KELLY *v.* KOSUGA. C. A. 7th Cir. Certiorari granted. *Joseph W. Louisell* and *Ivan E. Barris* for petitioner. *Lee A. Freeman* for respondent. Reported below: 257 F. 2d 48.

No. 110. TAK SHAN FONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *William B. Mahoney* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 254 F. 2d 4.

No. 155. SOUTHWESTERN SUGAR & MOLASSES CO., INC., *v.* RIVER TERMINALS CORP. C. A. 5th Cir. Certiorari granted. *Clem H. Sehrt* for petitioner. *Carl G. Stearns* and *Selim B. Lemle* for respondent. Reported below: 253 F. 2d 922.

No. 161. MITCHELL, SECRETARY OF LABOR, *v.* KENTUCKY FINANCE CO., INC., ET AL. C. A. 6th Cir. Certiorari granted. *Solicitor General Rankin, Stuart Rothman, Bessie Margolin* and *Sylvia S. Ellison* for petitioner. *Harold H. Levin* for respondents. Reported below: 254 F. 2d 8.

No. 174. UNITED STATES *v.* EMBASSY RESTAURANT, INC., ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *George F. Lynch* for the United States. Reported below: 254 F. 2d 475.

No. 233. PETTY, ADMINISTRATRIX, *v.* TENNESSEE-MISSOURI BRIDGE COMMISSION. C. A. 8th Cir. Certiorari granted. *Charles W. Miles, III,* and *W. Morris Miles* for petitioner. *James M. Reeves* for respondent. Reported below: 254 F. 2d 857.

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No. 234. Federal Trade Commission *v.* Mandel Brothers, Inc. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Earl W. Kintner* and *James E. Corkey* for petitioner. *Anderson A. Owen* and *Samuel H. Horne* for respondent. Reported below: 254 F. 2d 18.

No. 246. Arroyo *v.* United States. C. A. 1st Cir. Certiorari granted. *Robert W. Meserve* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 256 F. 2d 549.

No. 269. Felter *v.* Southern Pacific Co. et al. C. A. 9th Cir. Certiorari granted. *Roland C. Davis, V. Craven Shuttleworth* and *Harry E. Wilmarth* for petitioner. *Clifton Hildebrand* for respondents. Reported below: 256 F. 2d 429.

No. 276. Robert C. Herd & Co., Inc., *v.* Krawill Machinery Corp. et al. C. A. 4th Cir. Certiorari granted. *George W. P. Whip* and *Robert E. Coughlan, Jr.* for petitioner. *William A. Grimes* for respondents. Reported below: 256 F. 2d 946.

No. 237. National Association of Securities Dealers, Inc., *v.* Variable Annuity Life Insurance Co. of America et al.; and

No. 290. Securities and Exchange Commission *v.* Variable Annuity Life Insurance Co. of America et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *John H. Dorsey* for petitioner in No. 237. *Solicitor General Rankin, Thomas G. Meeker, David Ferber* and *Pace Reich* for petitioner in No. 290. *James M. Earnest, Roy W.*

McDonald and *Malcolm Fooshee* for the Variable Annuity Life Insurance Co. of America, and *Benjamin H. Dorsey, Smith W. Brookhart* and *Ralph E. Becker* for the Equity Annuity Life Insurance Co., respondents. Reported below: 103 U. S. App. D. C. 197, 257 F. 2d 201.

No. 263. ABEL, ALIAS "MARK," ALIAS COLLINS, ALIAS GOLDFUS, *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to questions 1 and 2 presented by the petition for the writ which read as follows:

"1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

"2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?" *James B. Donovan* and *Thomas M. Debevoise, II,* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Yeagley, William F. Tompkins* and *Kevin T. Maroney* for the United States. Reported below: 258 F. 2d 485.

No. 285. UNITED STATES *v.* ISTHMIAN STEAMSHIP CO. C. A. 2d Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Herman Marcuse* for the United States. *Clement C. Rinehart* and *Walter P. Hickey* for respondent. Reported below: 255 F. 2d 816.

No. 218. PARSONS ET AL. *v.* SMITH, FORMER COLLECTOR OF INTERNAL REVENUE; and

No. 305. HUSS ET AL. *v.* SMITH, FORMER COLLECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari granted. *Sherwin T. McDowell* for petitioners in No. 218. *Walter Stein* for petitioners in No. 305. *Solicitor General Rankin* for respondent. *Edgar J. Goodrich* and *Lipman Redman* filed a brief for the Estate of Schumacher, as *amicus curiae,* in No. 218, in support of the petition. Reported below: No. 218, 255 F. 2d 595; No. 305, 255 F. 2d 599.

No. 81, Misc. GLUS *v.* BROOKLYN EASTERN DISTRICT TERMINAL. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. *John J. Seffern* for petitioner. Reported below: 253 F. 2d 957.

Certiorari Denied. (See also Nos. 64, 151, 167, 197, 201, 202 and 203, ante, pp. 37, 45 and 804; and Misc. Nos. 8, 23, 28, 33, 35, 76, 117, 144, and 152, ante, pp. 41, 46, 47, 48 and 806.)

No. 59. SCHLEICH, ALIAS RING, *v.* BUTTERFIELD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. *Ernest Goodman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for respondent. Reported below: 252 F. 2d 191.

No. 69. RUSH *v.* CITY OF MAPLE HEIGHTS. Supreme Court of Ohio. Certiorari denied. *John R. Vintilla* for petitioner. *Arthur Krause* for respondent. Reported below: 167 Ohio St. 221, 147 N. E. 2d 599.

No. 70. BRYAN *v.* SID W. RICHARDSON, INC. C. A. 5th Cir. Certiorari denied. *Oscar A. Mellin* and *E. Hastings Ackley* for petitioner. *Gillis A. Johnson* for respondent. Reported below: 254 F. 2d 191.

No. 71. WASSON ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Davis W. Morton, Jr.* for the United States. Reported below: 250 F. 2d 826.

No. 73. PADRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Melvin B. Lewis* 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 574.

No. 77. EVARTS *v.* WESTERN METAL FINISHING CO. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Don F. Tyler* for respondent. Reported below: 253 F. 2d 637.

No. 78. SOUTHERN COUNTIES GAS CO. OF CALIFORNIA *v.* UNITED STATES. Court of Claims. Certiorari denied. *Bates Booth* and *Irl Davis Brett* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 141 Ct. Cl. 28, 157 F. Supp. 934.

No. 81. WHITLOCK CORPORATION *v.* UNITED STATES. Court of Claims. Certiorari denied. *Julius Schein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 141 Ct. Cl. 758, 159 F. Supp. 602.

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No. 79. MASSICOT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Herve Racivitch* and *Guy Johnson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 254 F. 2d 58.

No. 82. DEBERNARDO *v.* ROGERS, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for respondent. Reported below: 102 U. S. App. D. C. 382, 254 F. 2d 81.

No. 83. BEARDSLEY ET AL. *v.* CONTINENTAL CASUALTY CO. C. A. 2d Cir. Certiorari denied. *Otto C. Sommerich, Benjamin Busch* and *Stuart Sprague* for petitioners. *Leslie D. Taggart* and *John Rex Allen* for respondent. Reported below: 253 F. 2d 702.

No. 85. MATCZAK ET AL., TRADING AS TYLERSPORT GARAGE, *v.* BYRNE, ADMINISTRATRIX. C. A. 3d Cir. Certiorari denied. *Philip W. Amram* for petitioners. *B. Nathaniel Richter* for respondent. Reported below: 254 F. 2d 525.

No. 89. MORGENSTERN CHEMICAL CO., INC., *v.* G. D. SEARLE & CO. C. A. 3d Cir. Certiorari denied. *Copal Mintz* for petitioner. *Bernard M. Shanley* for respondent. Reported below: 253 F. 2d 390.

No. 95. DE POVA *v.* CAMDEN FORGE CO. C. A. 3d Cir. Certiorari denied. *John F. Crane* for petitioner. *Harry Norman Ball* for respondent. Reported below: 254 F. 2d 248.

No. 93. COOK ET AL. *v.* BROTHERHOOD OF SLEEPING CAR PORTERS ET AL. Supreme Court of Missouri. Certiorari denied. *Victor Packman, Henry D. Espy* and *Joseph C. Waddy* for petitioners. *Clif Langsdale* for the Brotherhood of Sleeping Car Porters et al., and *George W. Holmes* for the Missouri Pacific Railroad Co., respondents. Reported below: 309 S. W. 2d 579.

No. 97. BENNETT *v.* THE MORMACTEAL ET AL. C. A. 2d Cir. Certiorari denied. *Louis R. Harolds* for petitioner. *Joseph M. Cunningham* and *Vernon S. Jones* for respondents. Reported below: 254 F. 2d 138.

No. 100. ALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Oehmann* and *Joseph F. Goetten* for the United States. Reported below: 255 F. 2d 851.

No. 102. JEOFFROY MFG., INC., ET AL. *v.* GRAHAM ET AL. C. A. 5th Cir. Certiorari denied. *W. W. Gibson* for petitioners. *Claude A. Fishburn* and *Orville O. Gold* for respondents. Reported below: 253 F. 2d 72.

No. 104. STROUD ET AL. *v.* BENSON, SECRETARY OF AGRICULTURE, ET AL. C. A. 4th Cir. Certiorari denied. *Jesse A. Jones* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Lionel Kestenbaum* for the Secretary of Agriculture, respondent. Reported below: 254 F. 2d 448.

No. 105. RUUD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William S. Holden* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Elizabeth Dudley* for the United States. Reported below: 256 F. 2d 460.

No. 103. REYNOLDS *v.* ROYAL MAIL LINES, LTD., ET AL. C. A. 9th Cir. Certiorari denied. *Ben Margolis* for petitioner. Reported below: 254 F. 2d 55.

No. 106. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* SWITCHMEN'S UNION OF NORTH AMERICA ET AL. C. A. 9th Cir. Certiorari denied. *Clifton Hildebrand* for petitioners. *Clifford D. O'Brien* for respondents. Reported below: 253 F. 2d 81.

No. 107. CARPENTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Stuart A. Culbertson* and *Thomas N. Griggs* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Robert S. Green* for the United States. Reported below: 251 F. 2d 775.

No. 108. DOANE AGRICULTURAL SERVICE, INC., *v.* COLEMAN. C. A. 6th Cir. Certiorari denied. *Emmett W. Braden* and *Walter P. Armstrong, Jr.* for petitioner. *Lee Winchester, Sr.* for respondent. Reported below: 254 F. 2d 40.

No. 109. REDDING PINE MILLS, INC., ET AL. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA ET AL. District Court of Appeal of California, Third Appellate District. Certiorari denied. *Laurence J. Kennedy* for petitioners. *Edmund G. Brown,* Attorney General of California, and *James E. Sabine* and *Irving H. Perluss,* Assistant Attorneys General, for respondents. Reported below: 157 Cal. App. 2d 40, 320 P. 2d 25.

No. 111. POND *v.* GENERAL ELECTRIC CO. C. A. 9th Cir. Certiorari denied. *Joseph F. Rank* for petitioner. *E. Avery Crary* for respondent. Reported below: 256 F. 2d 824.

No. 112. WOLFE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 256 F. 2d 434.

No. 113. GRADY, ADMINISTRATOR, *v.* IRVINE. C. A. 4th Cir. Certiorari denied. *Geo. E. Allen* for petitioner. *Wayt B. Timberlake, Jr.* for respondent. Reported below: 254 F. 2d 224.

No. 114. BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY & AGRICULTURAL & MECHANICAL COLLEGE ET AL. *v.* LUDLEY ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *George M. Ponder,* First Assistant Attorney General, *William P. Schuler,* Assistant Attorney General, and *Laurance W. Brooks* for petitioners. Reported below: 252 F. 2d 372.

No. 115. RIGGI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Anthony A. Calandra* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 256 F. 2d 57.

No. 117. WARE ET AL. *v.* BEACH. Supreme Court of Oklahoma. Certiorari denied. *Frank W. Files* and *John W. Cragun* for petitioners. *Chas. R. Gray, W. N. Palmer* and *Paul A. Comstock* for respondent. Reported below: 322 P. 2d 635.

No. 119. ROTH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Herbert Monte Levy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 255 F. 2d 440.

No. 118. J. C. PENNEY CO. *v.* THACKER. C. A. 5th Cir. Certiorari denied. *William L. Kerr* for petitioner. Reported below: 254 F. 2d 672.

No. 120. LOUISIANA STATE BOARD OF EDUCATION ET AL. *v.* LARK ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *George M. Ponder,* First Assistant Attorney General, and *William P. Schuler,* Assistant Attorney General, for petitioners. *Thurgood Marshall* for respondents. Reported below: 252 F. 2d 372.

No. 121. NECHES RIVER CONSERVATION DISTRICT *v.* SEEMAN, DIVISION ENGINEER, ET AL. C. A. 5th Cir. Certiorari denied. *J. Chrys Dougherty, Thomas Gibbs Gee, Robert J. Hearon, Jr.* and *Ireland Graves* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *David R. Warner* for respondents. Reported below: 252 F. 2d 327.

No. 122. ANDERSON ET AL. *v.* SEEMAN, DIVISION ENGINEER, ET AL. C. A. 5th Cir. Certiorari denied. *J. Chrys Dougherty, Thomas Gibbs Gee, Robert J. Hearon, Jr.* and *Ireland Graves* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *David R. Warner* for respondents. Reported below: 252 F. 2d 321.

No. 129. COMPTROLLER OF THE TREASURY OF MARYLAND *v.* GLENN L. MARTIN CO. (NOW KNOWN AS MARTIN COMPANY). Court of Appeals of Maryland. Certiorari denied. *C. Ferdinand Sybert,* Attorney General of Maryland, and *Charles B. Reeves, Jr.,* Assistant Attorney General, for petitioner. *William L. Marbury* for respondent. Reported below: 216 Md. 235, 140 A. 2d 288.

No. 123. Okemah National Bank *v.* Wiseman, District Director of Internal Revenue. C. A. 10th Cir. Certiorari denied. *C. E. Ram Morrison* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Joseph Kovner* for respondent. Reported below: 253 F. 2d 223.

No. 126. Missouri Pacific Railroad Co. *v.* United States. C. A. 5th Cir. Certiorari denied. *Roy L. Arterbury* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 250 F. 2d 805.

No. 128. Tellier *v.* United States. C. A. 2d Cir. Certiorari denied. *Frederick Bernays Wiener, Richard J. Burke,* and *J. Bertram Wegman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 255 F. 2d 441.

No. 130. Lemon *v.* Druffel, U. S. District Judge. C. A. 6th Cir. Certiorari denied. *Elmer I. Schwartz* for petitioner. *Strother Hynes* for respondent. Reported below: 253 F. 2d 680.

No. 131. Easter *v.* Dundalk Holding Co. et al. Court of Appeals of Maryland. Certiorari denied. Reported below: 215 Md. 549, 137 A. 2d 667.

No. 133. James et al., trading as Chicago Board Co., *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari denied. *Thomas J. Pearson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Earl W. Kintner* and *James E. Corkey* for respondent. Reported below: 253 F. 2d 78.

No. 138. SACKETT *v.* LOUISIANA STATE BAR ASSOCIATION. Supreme Court of Louisiana. Certiorari denied. *Maurice R. Woulfe* and *Richard A. Dowling* for petitioner. Reported below: 234 La. 762, 101 So. 2d 661.

No. 139. NATIONAL PLATE & WINDOW GLASS CO., INC., *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Louis Bender* and *Bernard Weiss* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Meyer Rothwacks* for the United States. Reported below: 254 F. 2d 92.

No. 140. EARLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Elmer Fried* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 254 F. 2d 384.

No. 143. SPECTOR *v.* PETE ET AL. District Court of Appeal of California, Fourth Appellate District, and Supreme Court of California. Certiorari denied. *Irl David Brett* for petitioner. Reported below: 157 Cal. App. 2d 432, 321 P. 2d 59.

No. 145. COMPTROLLER OF THE TREASURY OF MARYLAND *v.* RHEEM MANUFACTURING CO. Court of Appeals of Maryland. Certiorari denied. *C. Ferdinand Sybert,* Attorney General of Maryland, and *Charles B. Reeves, Jr.,* Assistant Attorney General, for petitioner. *William L. Marbury* for respondent. Reported below: 216 Md. 259, 140 A. 2d 301.

No. 148. FLORIDA EX REL. THOMAS *v.* CULVER, DIRECTOR, DIVISION OF CORRECTIONS OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. *Releford McGriff* for petitioner. Reported below: 253 F. 2d 507.

No. 146. AGHNIDES *v.* AGHNIDES. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. *Thomas F. Meehan* for petitioner. *Harold H. Levin* for respondent. Reported below: 4 App. Div. 2d 498, 167 N. Y. S. 2d 201.

No. 149. WREN *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. *Francis L. Bannon* for petitioner. *John J. O'Connell,* Attorney General of Washington, for respondent. Reported below: 51 Wash. 2d 759, 321 P. 2d 911.

No. 152. SECURITIES AND EXCHANGE COMMISSION *v.* INSURANCE SECURITIES INC. ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Rankin, Thomas G. Meeker* and *Aaron Levy* for petitioner. *Moses Lasky, Philip S. Ehrlich* and *Alfred Jaretzki, Jr.,* for respondents. Reported below: 254 F. 2d 642.

No. 154. NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PENNSYLVANIA, *v.* REPUBLIC OF CHINA ET AL. C. A. 4th Cir. Certiorari denied. *Martin P. Detels, George W. P. Whip, Ezra G. Benedict Fox, Vincent L. Leibell, Jr.* and *Eugene Gressman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States, and *Robert E. Kline, Jr., Ronald A. Capone* and *William A. Grimes* for the Republic of China et al., respondents. Reported below: 254 F. 2d 177.

No. 156. SHAYNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 255 F. 2d 739.

No. 150. WEGMANN *v.* MANNINO ET AL. C. A. 5th Cir. Certiorari denied. *Howard P. Rives* for petitioner. *Wm. C. McLean* for respondents. Reported below: 253 F. 2d 627.

No. 158. STECKENRIDER *v.* MICHIGAN. Recorder's Court for the City of Detroit, Michigan. Certiorari denied. *William G. Comb* for petitioner. *Paul L. Adams,* Attorney General of Michigan, *Samuel J. Torina,* Solicitor General, and *Samuel Brezner* for respondent.

No. 159. WOODALL ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *John B. Tittmann* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney* for the United States. Reported below: 255 F. 2d 370.

No. 162. FORD ET AL. *v.* UNITED GAS CORP. C. A. 5th Cir. Certiorari denied. *Aaron L. Ford* for petitioners. Reported below: 254 F. 2d 817.

No. 164. SADACCA *v.* NYLONET CORPORATION. C. A. 5th Cir. Certiorari denied. *Claude Pepper* and *Walter A. Apfelbaum* for petitioner. *David W. Dyer* and *Douglas D. Batchelor* for respondent. Reported below: 254 F. 2d 238.

No. 165. PARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. H. Kelsoe, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 255 F. 2d 86.

No. 170. SWORD ET AL. *v.* GULF OIL CORP. C. A. 5th Cir. Certiorari denied. *W. D. Girand* and *Warren E. Miller* for petitioners. *William L. Kerr* for respondent. Reported below: 251 F. 2d 829.

No. 168. WALKDEN, EXECUTOR, *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Robert Merkle* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for the United States. Reported below: 255 F. 2d 681.

No. 171. SIMPSON *v.* KANSAS CITY CONNECTING RAILWAY CO. Supreme Court of Missouri. Certiorari denied. *Walter A. Raymond* and *Ernest Hubbell* for petitioner. *Daniel L. Brenner* for respondent. Reported below: 312 S. W. 2d 113.

No. 172. KAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Howard Vogel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 255 F. 2d 476.

No. 173. FRIEDMAN ET UX., DOING BUSINESS AS CITY METAL SALVAGE CO., *v.* HILL. Supreme Court of Oklahoma. Certiorari denied. *John B. Ogden* for petitioners. *C. E. Ram Morrison* for respondent. Reported below: 325 P. 2d 434.

No. 176. ALKER *v.* GIRARD TRUST CORN EXCHANGE BANK ET AL., EXECUTORS. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Frank F. Truscott* for petitioner. *Edwin Booth* for respondents. Reported below: 392 Pa. 47, 139 A. 2d 901.

No. 181. MCNEILL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *R. G. de Quevedo* and *Wilton H. Wallace* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 251 F. 2d 863.

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No. 177. ALKER *v.* ESTATE OF RENTSCHLER. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Frank F. Truscott* for petitioner. *David F. Maxwell* for respondent. Reported below: 392 Pa. 46, 139 A. 2d 901.

No. 182. KILGORE *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *Wesley M. Walker, J. D. Todd, Jr.* and *Fletcher C. Mann* for petitioner. Reported below: 233 S. C. 6, 103 S. E. 2d 321.

No. 183. SOCARRAS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *David W. Walters* for petitioners. *Solicitor General Rankin* for the United States.

No. 193. LANGLEY *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Petitioner *pro se*. *Robert Y. Thornton,* Attorney General of Oregon, for respondent. Reported below: —— Ore. ——, 323 P. 2d 301.

No. 198. MINNESOTA *v.* ADAMS ET AL. Supreme Court of Minnesota. Certiorari denied. *Miles Lord,* Attorney General of Minnesota, *Melvin J. Peterson,* Deputy Attorney General, and *Victor J. Michaelson* and *Sydney Berde,* Special Assistant Attorneys General, for petitioner. *John D. Jenswold* for respondents. Reported below: 251 Minn. 521, 89 N. W. 2d 661.

No. 185. ARRINGTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States.

No. 188. HURST ET AL. *v.* GULF OIL CORP. C. A. 5th Cir. Certiorari denied. *W. D. Girand* and *Warren E. Miller* for petitioners. *William L. Kerr* for respondent. Reported below: 251 F. 2d 836.

No. 189. 222 EAST CHESTNUT STREET CORP. *v.* LASALLE NATIONAL BANK, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. *Joseph F. Elward* for petitioner. *Milton I. Shadur* for the LaSalle National Bank et al., respondents. Reported below: 253 F. 2d 484.

No. 190. TAORMINA CORPORATION ET AL. *v.* ESCOBEDO. C. A. 5th Cir. Certiorari denied. *Jackson Littleton* for petitioners. Respondent *pro se*. Reported below: 254 F. 2d 171.

No. 191. CITY BONDED MESSENGER SERVICE, INC., ET AL. *v.* CITY MESSENGER OF HOLLYWOOD, INC., DOING BUSINESS AS THE CITY MESSENGER AIR EXPRESS. C. A. 7th Cir. Certiorari denied. *Eli Mullin* for petitioners. *Harry G. Fins* and *David O. Kuh* for respondent. Reported below: 254 F. 2d 531.

No. 194. AMERICAN BEMBERG CORP. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Robert Ash* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Meyer Rothwacks* and *Joseph Kovner* for the United States. Reported below: 253 F. 2d 691.

No. 195. MISSOURI-KANSAS-TEXAS RAILROAD CO. OF TEXAS *v.* BUSH. Court of Civil Appeals of Texas, Third Supreme Judicial District. Certiorari denied. *Dan Moody* for petitioner. *Fentress Bracewell* for respondent. Reported below: 310 S. W. 2d 404.

No. 196. MACNEIL *v.* GRAY. C. A. 1st Cir. Certiorari denied. *Angus M. MacNeil* for petitioner.

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No. 199. AMERICAN UNION TRANSPORT, INC., *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George F. Galland* and *William J. Lippman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, E. Robert Seaver, Robert E. Mitchell* and *Edward Aptaker* for the United States and the Federal Maritime Board, and *Elmer C. Maddy* for the River Plate & Brazil Conferences et al., respondents. Reported below: 103 U. S. App. D. C. 229, 257 F. 2d 607.

No. 200. ILLINOIS EX REL. KEENAN *v.* MCGUANE ET AL. Supreme Court of Illinois. Certiorari denied. *L. Louis Karton* for petitioner. *Benjamin S. Adamowski* for respondents. Reported below: 13 Ill. 2d 520, 150 N. E. 2d 168.

No. 204. GIBRAN *v.* NATIONAL COMMITTEE OF GIBRAN ET AL. C. A. 2d Cir. Certiorari denied. *Victor House* for petitioner. *George G. Shiya* for the National Committee of Gibran, respondent. Reported below: 255 F. 2d 121.

No. 205. KIEFER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Robert S. Green* for the United States. Reported below: 103 U. S. App. D. C. 111, 255 F. 2d 189.

No. 207. GRANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Bert C. Cheatham* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 255 F. 2d 341.

No. 206. WHITE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Edgar Paul Boyko* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 254 F. 2d 137.

No. 209. ZAWADA *v.* PENNSYLVANIA SYSTEM BOARD OF ADJUSTMENT, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Lawrence J. Richette* for petitioner. *Allen S. Olmsted, 2nd, Walter Biddle Saul, Robert S. Marx* and *Ivar H. Peterson* for respondent. Reported below: 392 Pa. 207, 140 A. 2d 335.

No. 212. FAUBUS, GOVERNOR OF ARKANSAS, ET AL. *v.* UNITED STATES (AMICUS CURIAE) ET AL. C. A. 8th Cir. Certiorari denied. *Walter L. Pope* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States (Amicus Curiae). Reported below: 254 F. 2d 797.

No. 213. ALLIED CHEMICAL & DYE CORP. *v.* MCMAHON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Victor Futter* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *A. F. Prescott* for respondent. Reported below: 253 F. 2d 663.

No. 217. STROEHMANN BROTHERS CO. ET AL. *v.* HUBER BAKING CO. C. A. 2d Cir. Certiorari denied. *Roberts B. Larson* for the Stroehmann Brothers Co., and *Harold Greenwald* for the Quality Bakers of America Cooperative, Inc., petitioners. *Cyrus Austin* for respondent. Reported below: 252 F. 2d 945.

No. 211. ST. PAUL FIRE & MARINE INSURANCE CO. *v.* CHICAGO UNION STATION CO. C. A. 7th Cir. Certiorari denied. *Ernest Schein* for petitioner. *Erwin W. Roemer* and *James A. Velde* for respondent. Reported below: 253 F. 2d 441.

No. 214. MASTROS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 257 F. 2d 808.

No. 215. GOLDSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arthur D. Goldstein* and *Samuel Goldstein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States. Reported below: 256 F. 2d 581.

No. 216. NATIONAL BANK OF DETROIT *v.* WAYNE OAKLAND BANK ET AL. C. A. 6th Cir. Certiorari denied. *John Lord O'Brian, Charles A. Horsky, Robert E. McKean* and *Stanley L. Temko* for petitioner. *Solicitor General Rankin* for the Comptroller of the Currency, and *Sherwin A. Hill, Edward T. Goodrich, N. Barr Miller* and *Roy E. Brownell* for the Wayne Oakland Bank, respondents. Reported below: 249 F. 2d 445, 252 F. 2d 537.

No. 221. COSTELLO *v.* UNITED STATES; and

No. 224. CANNELLA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* and *Sidney M. Glazer* for petitioner in No. 221. *Bernard J. Mellman* for petitioner in No. 224. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 255 F. 2d 389.

No. 220. CHARLES K. HARRIS MUSIC PUBLISHING CO., INC., *v.* EDWARD B. MARKS MUSIC CORP. C. A. 2d Cir. Certiorari denied. *Maxwell Okun* for petitioner. *Harold Berkowitz* for respondent. Reported below: 255 F. 2d 518.

No. 222. MASON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Francis P. O'Neill* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 257 F. 2d 359.

No. 223. PEERLESS CASUALTY CO. ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF HOPPER BROTHERS QUARRIES. C. A. 8th Cir. Certiorari denied. *Thomas B. Roberts* for petitioners. Reported below: 255 F. 2d 137.

No. 226. GENERAL PUBLIC UTILITIES CORP. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Jerome R. Hellerstein* and *Victor Brudney* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Grant W. Wiprud* for the United States.

No. 227. SPAETH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William R. Pringle* for petitioner. Reported below: 254 F. 2d 924.

No. 229. PORTO RICO TELEPHONE CO. *v.* DESCARTES, SECRETARY OF THE TREASURY OF PUERTO RICO. C. A. 1st Cir. Certiorari denied. *George Jackson Eder* for petitioner. *Francisco Espinosa, Jr.*, Acting Attorney General of Puerto Rico, *Arturo Estrella* and *Carlos G. Latimer*, Assistant Attorneys General, and *Jose Trias Monge* for respondent. Reported below: 255 F. 2d 169.

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No. 228. JOHN McSHAIN, INC., *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles B. Murray, George F. Shea* and *Vincent P. McDevitt* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Geo. S. Leonard* and *Samuel D. Slade* for the United States. Reported below: 103 U. S. App. D. C. 328, 258 F. 2d 422.

No. 232. HILLS ET AL. *v.* EISENHART ET AL. C. A. 9th Cir. Certiorari denied. *Claude L. Dawson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *B. Jenkins Middleton* for respondents. Reported below: 256 F. 2d 609.

No. 236. IDAHO POWER CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *E. Roy Gilpin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Grant W. Wiprud* for the United States. Reported below: 142 Ct. Cl. 534, 161 F. Supp. 807.

No. 241. LYDDON & CO. (AMERICA) INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Harold Manheim, Meyer Grouf* and *Robert Braunschweig* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *L. W. Post* for the United States. Reported below: 141 Ct. Cl. 545, 158 F. Supp. 951.

No. 244. JONES BEACH STATE PARKWAY AUTHORITY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *G. Frank Dougherty, John P. McGrath* and *Jeremiah M. Evarts* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 255 F. 2d 329.

No. 231. McMahon *v.* City of Dubuque, Iowa. C. A. 8th Cir. Certiorari denied. *E. Marshall Thomas* for petitioner. *Brice W. Rhyne* and *T. H. Nelson* for respondent. Reported below: 255 F. 2d 154.

No. 238. Walters et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Charles S. Burdell* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 256 F. 2d 840.

No. 239. Romm *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. *Warren W. Grimes* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 255 F. 2d 698.

No. 243. Field *v.* Oberwortmann et al. Appellate Court of Illinois, First District. Certiorari denied. *Leonard L. Cowan* for petitioner. *Perry S. Patterson* for respondents. Reported below: 16 Ill. App. 2d 376, 148 N. E. 2d 600.

No. 245. Hanson *v.* United States. C. A. 6th Cir. Certiorari denied. *Carl J. Batter* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 254 F. 2d 359.

No. 247. Rosenfield, Administrator, *v.* United States. C. A. 3d Cir. Certiorari denied. *John Rogers Carroll* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Oehmann, L. W. Post* and *Louise Foster* for the United States. Reported below: 254 F. 2d 940.

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No. 249. McFarling et al. *v.* United States. C. A. 8th Cir. Certiorari denied. *Edward L. Wright* and *Robert F. Schlafly* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *William W. Goodrich* for the United States. Reported below: 256 F. 2d 89.

No. 251. Atlantic City Electric Co. *v.* United States. Court of Claims. Certiorari denied. *J. Marvin Haynes, N. Barr Miller, F. Eberhart Haynes, Oscar L. Tyree, Joseph H. Sheppard* and *Arthur H. Adams* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Grant W. Wiprud* for the United States. Reported below: 142 Ct. Cl. 519, 161 F. Supp. 811.

No. 254. United States ex rel. McCans *v.* Armour & Co. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Perry S. Patterson, Herbert J. Miller, Jr., George E. Leonard, Jr.* and *John P. Doyle* for respondent. Reported below: 102 U. S. App. D. C. 391, 254 F. 2d 90.

No. 255. Chase et al. *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *H. Clifford Allder* and *Kenneth D. Wood* for petitioners. Reported below: 103 U. S. App. D. C. 177, 256 F. 2d 891.

No. 256. Alaska Steamship Co. *v.* United States. Court of Claims. Certiorari denied. *J. Franklin Fort* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *John G. Laughlin, Jr.* for the United States. Reported below: 141 Ct. Cl. 399, 158 F. Supp. 361.

No. 253. McKenna *v.* Seaton, Secretary of the Interior, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert H. Rines, Samuel Nakasian* and *Nelson H. Shapiro* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Fred W. Smith* for the Secretary of the Interior, and *Marvin J. Sonosky* for deArmas, respondents. Reported below: 104 U. S. App. D. C. 50, 259 F. 2d 780.

No. 257. Schenley Distillers, Inc., et al. *v.* United States. C. A. 3d Cir. Certiorari denied. *Elder W. Marshall* and *Thomas E. Dewey* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Grant W. Wiprud* for the United States. Reported below: 255 F. 2d 334.

No. 259. Hvass *v.* Graven, U. S. District Judge, et al. C. A. 8th Cir. Certiorari denied. *Charles Alan Wright* and *Warren B. King* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for respondents. Reported below: 257 F. 2d 1.

No. 261. American National Bank of Jacksonville *v.* United States et al. C. A. 5th Cir. Certiorari denied. *W. Gregory Smith* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Oehmann* and *Robert N. Anderson* for the United States, and *Ray W. Richardson, Jr.* for the Title & Trust Co. of Florida, respondents. Reported below: 255 F. 2d 504.

No. 262. Dean Oil Co. *v.* American Oil Co. C. A. 3d Cir. Certiorari denied. *Melvin J. Koestler* for petitioner. *John C. Butler* and *Fred G. Stickel, Jr.* for respondent. Reported below: 254 F. 2d 816.

No. 260. BUCHANAN ET AL. *v.* EVANS ET AL. C. A. 3d Cir. Certiorari denied. *Joseph Donald Craven,* Attorney General of Delaware, *Frank O'Donnell, Jr.,* Chief Deputy Attorney General, and *F. Alton Tybout,* Deputy Attorney General, for petitioners. *Louis L. Reddings* for Evans et al., and *James M. Tunnell, Jr.* for the Local School Boards of the Districts of Milford, Seaford, Laurel and Greenwood, respondents. Reported below: 256 F. 2d 688.

No. 264. DELUCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Wm. Scott Stewart* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 256 F. 2d 487.

No. 265. MCNEIL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Elliott R. Katz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 255 F. 2d 387.

No. 268. SEABOARD AIR LINE RAILROAD CO. *v.* SARASOTA-FRUITVILLE DRAINAGE DISTRICT. C. A. 5th Cir. Certiorari denied. *Morris E. White* for petitioner. *Charles E. Early* for respondent. Reported below: 251 F. 2d 583, 255 F. 2d 622.

No. 275. PAN AMERICAN WORLD AIRWAYS, INC., *v.* CIVIL AERONAUTICS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry J. Friendly* and *Robert G. Barnard* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Franklin M. Stone* and *O. D. Ozment* for respondent. Reported below: 103 U. S. App. D. C. 156, 256 F. 2d 711.

No. 270. SWIFT & Co. *v.* UNITED STATES; and

No. 271. NATIONAL BISCUIT CO. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *David R. Owen* for petitioner in No. 270. *William L. Marbury* and *Fred E. Campbell* for petitioners in No. 271. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander, Marvin C. Taylor* and *Bernard Cedarbaum* for the United States. *E. M. Norton* and *M. R. Garstang* filed a brief for the National Milk Producers Federation, as *amicus curiae,* in support of the petition for writ of certiorari. Reported below: 257 F. 2d 787.

No. 277. FIRST NATIONAL CITY BANK OF NEW YORK *v.* GILLILLAND ET AL., CONSTITUTING THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *F. Gloyd Awalt, W. V. T. Justis* and *John A. Wilson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 103 U. S. App. D. C. 219, 257 F. 2d 223.

No. 279. MAGNOLIA PETROLEUM CO. *v.* CITIES SERVICE GAS CO. ET AL. C. A. 10th Cir. Certiorari denied. *Frank C. Bolton, Jr., William S. Richardson* and *John E. McClure* for petitioner. *Solicitor General Rankin* for the Federal Power Commission, and *Conrad C. Mount, O. R. Stites, Robert R. McCracken, Harry S. Littman* and *Jack Werner* for the Cities Service Gas Co., respondents. Reported below: 255 F. 2d 860.

No. 282. THOMPSON *v.* FIDELITY & CASUALTY CO. OF NEW YORK. Appellate Court of Illinois, Second District. Certiorari denied. Petitioner *pro se. Charles A. Thomas* for respondent. Reported below: 16 Ill. App. 2d 159, 148 N. E. 2d 9.

No. 274. TUG CORPORAL CORP. *v.* DWYER OIL TRANSPORT CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner. *Martin J. McHugh* for the Dwyer Oil Transport Co., Inc., and *Frank C. Mason* for the Matton Steamboat Co., Inc., et al., respondents. Reported below: 255 F. 2d 380.

No. 280. LUG-ALL COMPANY *v.* LITTLE MULE CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Harry Langsam* for petitioner. *Charles J. Merriam* and *Samuel B. Smith* for respondents. Reported below: 254 F. 2d 268.

No. 281. APPLEBY *v.* COLBY. Court of Appeals of Maryland. Certiorari denied. *Elizabeth R. Young* for petitioner. *Sheldon E. Bernstein* for respondent. Reported below: 217 Md. 35, 141 A. 2d 507.

No. 283. GREENE *v.* ART INSTITUTE OF CHICAGO ET AL. Appellate Court of Illinois, First District. Certiorari denied. Petitioner *pro se*. *William A. McSwain* for the Art Institute of Chicago, and *Kenneth F. Burgess, William H. Avery, Jr.* and *John C. Williams* for the Northern Trust Co., respondents. Reported below: 16 Ill. App. 2d 84, 147 N. E. 2d 415.

No. 284. TRIHEY, ADMINISTRATOR, *v.* TRANSOCEAN AIR LINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. *A. J. Blackman* for petitioner. *Joe Crider, Jr.* and *Henry E. Kappler* for the Transocean Air Lines, Inc., respondent. Reported below: 255 F. 2d 824.

No. 296. BURNS, DOING BUSINESS AS INTERNATIONAL ADVERTISING AGENCY, *v.* JAFFE ET AL. C. A. 7th Cir. Certiorari denied. *Jay E. Darlington* for petitioner. *Claude A. Roth* for Jaffe et al., and *Hubert L. Will* and *Wayland B. Cedarquist* for the Guarantee Reserve Life Insurance Co. of Hammond, Indiana, respondents.

No. 286. MAHER *v.* ELLSWORTH ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 103 U. S. App. D. C. 217, 257 F. 2d 221.

No. 287. RESERVE LIFE INSURANCE CO. *v.* MARR, EXECUTOR. C. A. 9th Cir. Certiorari denied. *Laidler B. Mackall* for petitioner. *Fielding H. Ficklen* for respondent. Reported below: 254 F. 2d 289.

No. 289. MARON, EXECUTOR, *v.* ROGERS, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harry W. Blair, Newell Blair* and *Hermine Herta Meyer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls* and *Irwin A. Seibel* for respondent. Reported below: 103 U. S. App. D. C. 244, 257 F. 2d 622.

No. 301. FLYNN *v.* TENNESSEE. Supreme Court of Tennessee, Middle Division. Certiorari denied. *W. E. Hendrix* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *James M. Glasgow,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 313 S. W. 2d 248.

No. 302. MATTHEWS, ADMINISTRATRIX, *v.* MATTHEWS, ADMINISTRATOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Theodore A. Brown* and *M. Wilhelmina Jackson* for petitioner. *William S. Thompson* for respondent. Reported below: 103 U. S. App. D. C. 293, 258 F. 2d 145.

No. 292. ACME SPECIALTIES CORP. *v.* BIBB, DIRECTOR OF DEPARTMENT OF PUBLIC SAFETY, ET AL. Supreme Court of Illinois. Certiorari denied. *James C. Murray* for petitioner. *Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondents. Reported below: 13 Ill. 2d 516, 150 N. E. 2d 132.

No. 293. IN RE COOPER. United States Court of Customs and Patent Appeals. Certiorari denied. *John A. Marzall* for petitioner. Reported below: 45 C. C. P. A. (Pat.) 923, 254 F. 2d 611.

No. 298. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* ARMOUR & CO. C. A. 7th Cir. Certiorari denied. *Robert H. Bierma* for petitioners. *Weymouth Kirkland, Howard Ellis, George E. Leonard, Jr.* and *Marcus Whiting* for respondent. Reported below: 254 F. 2d 719.

No. 299. CUBA RAILROAD CO. *v.* UNITED STATES. C. A. 2d. Cir. Certiorari denied. *Henry M. Marx* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Joseph Kovner* for the United States. Reported below: 254 F. 2d 280.

No. 303. COFER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Peyton Ford* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 256 F. 2d 221.

No. 314. REYNOLDS METALS CO. *v.* YTURBIDE ET AL. C. A. 9th Cir. Certiorari denied. *Gustav B. Margraf* for petitioner. *George W. Mead* for respondents. Reported below: 258 F. 2d 321.

No. 306. NEEMAN (FORMERLY DODGE) *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Lawrence R. Condon* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *L. W. Post* for respondent. Reported below: 255 F. 2d 841.

No. 316. MURRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Will O. Murrell, Jr.* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 253 F. 2d 267.

No. 333. O'ROURKE ET AL. *v.* SILL ET AL. Supreme Court of Michigan. Certiorari denied. Petitioners *pro se*. *Benjamin Kleinstiver* for respondents. Reported below: 352 Mich. 318, 89 N. W. 2d 463.

No. 384. TUSCARORA NATION OF INDIANS, ALSO KNOWN AS TUSCARORA INDIAN NATION, *v.* POWER AUTHORITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. *Arthur Lazarus, Jr.* and *Eugene Gressman* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Julius L. Sackman* for the Superintendent of Public Works of New York, and *Thomas F. Moore, Jr., Samuel I. Rosenman, Godfrey Goldmark, Henry S. Manley* and *John R. Davison* for the Power Authority of New York et al., respondents. Reported below: 257 F. 2d 885.

No. 258. ALLIED STEVEDORING CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Henry A. Lowenberg* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Jack M. Cotton* for the United States. Reported below: 258 F. 2d 104.

No. 80. MONTANA POWER CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *E. Roy Gilpin* and *Harry A. Poth, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Sheldon I. Fink* for the United States. Reported below: 141 Ct. Cl. 620, 159 F. Supp. 593.

No. 125. PLEASANT *v.* CLEVELAND BAR ASSOCIATION. Motion for leave to file brief of Cuyahoga County Bar Association, as *amicus curiae,* denied. Petition for writ of certiorari to the Supreme Court of Ohio denied. *William J. Corrigan* for petitioner. *S. Burns Weston* for respondent. Reported below: 167 Ohio St. 325, 148 N. E. 2d 493.

No. 219. UNITED STATES *v.* BREWSTER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. *Jerry N. Griffin, John K. Pickens* and *Donald S. Dawson* for respondents. Reported below: 103 U. S. App. D. C. 147, 255 F. 2d 899.

No. 250. BAUER-SMITH DREDGING CO., INC., *v.* TULLY ET AL. Motion for leave to file brief of National Association of River and Harbor Contractors, as *amicus curiae,* denied. Petition for writ of certiorari to the Court of Civil Appeals of Texas, Ninth Supreme Judicial District, denied. *T. G. Schirmeyer* for petitioner. *Ewell Strong* and *Geo. A. Weller* for respondents. Reported below: 305 S. W. 2d 805.

No. 225. ELEUTERI ET AL. *v.* FURMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *James M. Davis, Jr.* for petitioners. *David D. Furman,* Attorney General of New Jersey, for respondents. Reported below: 26 N. J. 506, 141 A. 2d 46.

No. 327. TERZICH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg, Julia P. Cooper* and *William J. Schafer, III,* for the United States. Reported below: 256 F. 2d 197.

No. 4, Misc. WILLIAMS *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied. Petitioner *pro se. Latham Castle,* Attorney General of Illinois, for respondent.

No. 9, Misc. DANIELS *v.* CULVER, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 10, Misc. CAMPBELL *v.* CULVER, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *Odis M. Henderson,* Assistant Attorney General, for respondent.

No. 14, Misc. HOWARD *v.* NEW YORK. Supreme Court of New York, Monroe County. Certiorari denied.

No. 15, Misc. DESIMONE *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 11, Misc. SIMS *v.* ALVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *William Saxbe,* Attorney General of Ohio, and *William M. Vance,* Assistant Attorney General, for respondent. Reported below: 253 F. 2d 114.

No. 12, Misc. GEPNER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *E. M. DeGeurin* and *George P. Blackburn,* Assistant Attorneys General, for respondent.

No. 16, Misc. SPEARS ET AL. *v.* WALTER ET AL. C. A. 5th Cir. Certiorari denied. *I. H. Spears* for petitioners.

No. 17, Misc. SICLARI *v.* FOLSOM, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondent. Reported below: 251 F. 2d 365.

No. 18, Misc. WARWICK ET AL. *v.* CULVER, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 19, Misc. MABEE *v.* MARTIN, WARDEN. County Court of Wyoming County, New York. Certiorari denied.

No. 20, Misc. SCHUER *v.* NEW YORK. County Court of Bronx County, New York. Certiorari denied.

No. 21, Misc. MAINIERI *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 972.

No. 25, Misc. SLEIGHTER *v.* BANMILLER, SUPERINTENDENT, EASTERN STATE PENITENTIARY. C. A. 3d Cir. Certiorari denied.

No. 26, Misc. DEMARA *v.* EMPLOYERS LIABILITY ASSURANCE CORP., LTD. C. A. 5th Cir. Certiorari denied. *Reynolds N. Cate* for petitioner. *Charles W. Barrow* for respondent. Reported below: 250 F. 2d 799.

No. 27, Misc. LEE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 4 N. Y. 2d 843, 150 N. E. 2d 241.

No. 29, Misc. LUSCHER *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 30, Misc. ANDERSON *v.* UNITED STATES. C. A. 5th 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 96.

No. 34, Misc. FIRESTONE *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 36, Misc. FRANKLIN *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 42, Misc. GREENE *v.* INDUSTRIAL COMMISSIONER OF NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, and *Paxton Blair*, Solicitor General, for respondent. Reported below: 4 N. Y. 2d 715, 148 N. E. 2d 315.

No. 37, Misc. FISH *v.* MARTIN, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 39, Misc. BOWLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States.

No. 41, Misc. SHIELS ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 7th Cir. Certiorari denied. Petitioners *pro se*. *S. R. Prince* for respondent. Reported below: 254 F. 2d 863.

No. 43, Misc. KONVALIN *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. Reported below: 165 Neb. 842, 87 N. W. 2d 570.

No. 44, Misc. MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 254 F. 2d 228.

No. 45, Misc. ROGERS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 46, Misc. BEARD *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se*. *C. Ferdinand Sybert,* Attorney General of Maryland, *Joseph S. Kaufman,* Assistant Attorney General, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent. Reported below: 216 Md. 302, 140 A. 2d 672.

No. 48, Misc. METZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 50, Misc. ROBINSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 51, Misc. GRAY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 52, Misc. JUELICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 53, Misc. BRIDGES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 259 F. 2d 611.

No. 60, Misc. EDWARDS *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. 152, 256 F. 2d 707.

No. 71, Misc. DUNN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 259 F. 2d 269.

No. 72, Misc. STOUT *v.* RIGG, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 252 Minn. 503, 90 N. W. 2d 910.

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No. 55, Misc. ELAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 250 F. 2d 582.

No. 56, Misc. NICHOLS *v.* MCGEE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. Supreme Court of California. Certiorari denied.

No. 57, Misc. LAVINE *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 59, Misc. WORLEY, ADMINISTRATRIX, ET AL. *v.* DUNN, TRUSTEE, ET AL. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin* for the United States, *Charles C. Trabue, Jr.* for Dunn et al., and *F. A. Berry* for the First American National Bank of Nashville, Tennessee, respondents. Reported below: 252 F. 2d 712.

No. 61, Misc. KIRKSEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 63, Misc. EDMOND *v.* MOORE-MCCORMACK LINES, INC. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Vernon S. Jones* for respondent. Reported below: 253 F. 2d 143.

No. 66, Misc. CULLEY *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 217 Md. 660, 143 A. 2d 61.

No. 67, Misc. WISE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 68, Misc. CRAWFORD *v.* CIRCUIT COURT OF LUCAS COUNTY ET AL. Supreme Court of Michigan. Certiorari denied.

No. 70, Misc. ROUSSEAU *v.* HURTADO, EXECUTRIX. District Court of Appeal of California, First Appellate District. Certiorari denied.

No. 74, Misc. BOMBARD *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 5 App. Div. 2d 923, 172 N. Y. S. 2d 1.

No. 75, Misc. JONES *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 254 F. 2d 393.

No. 79, Misc. COSIMO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 4 N. Y. 2d 833, 150 N. E. 2d 238.

No. 83, Misc. WILKINSON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 89, Misc. BEACH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Eugene Gressman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 88, Misc. HAMPTON *v.* DEBLAAY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 258 F. 2d 790.

No. 90, Misc. BLACKNEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Hymie Nussbaum* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 103 U. S. App. D. C. 187, 257 F. 2d 191.

No. 92, Misc. HAGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 256 F. 2d 34.

No. 98, Misc. POWELL *v.* ALABAMA. Court of Appeals of Alabama, Sixth Division. Certiorari denied. Reported below: 39 Ala. App. 423, 102 So. 2d 923.

No. 108, Misc. HANLEY *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. Reported below: 337 Mass. 384, 149 N. E. 2d 608.

No. 114, Misc. KOMINSKI *v.* DELAWARE. Supreme Court of Delaware. Certiorari denied. Reported below: 51 Del. —, 141 A. 2d 138.

No. 118, Misc. MITCHELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harold Leventhal* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 104 U. S. App. D. C. 57, 259 F. 2d 787.

No. 94, Misc. McDaniel *v.* Heinze, Warden. C. A. 9th Cir. Certiorari denied.

No. 95, Misc. Staples *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 96, Misc. Meers *v.* New York. Court of Appeals of New York. Certiorari denied. Reported below: 4 N. Y. 2d 898, 151 N. E. 2d 84.

No. 97, Misc. Donovan *v.* United States. C. A. 2d Cir. Certiorari denied. *Herbert Monte Levy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 252 F. 2d 788.

No. 101, Misc. Curry *v.* Ragan et al. C. A. 5th Cir. Certiorari denied. Reported below: 257 F. 2d 449.

No. 102, Misc. Graziano *v.* New York. Court of Appeals of New York. Certiorari denied. *Nathan Kestnbaum* for petitioner. *Frank S. Hogan* and *Harold Roland Shapiro* for respondent. Reported below: 4 N. Y. 2d 881, 150 N. E. 2d 768.

No. 103, Misc. Tate *v.* Banmiller, Warden. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 393 Pa. 496, 143 A. 2d 56.

No. 109, Misc. Hernandez *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 256 F. 2d 342.

No. 105, Misc. WATKINS *v.* SMYTH, SUPERINTENDENT, VIRGINIA PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 111, Misc. LATIMER *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 13 Ill. 2d 552, 150 N. E. 2d 603.

No. 112, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 115, Misc. ABNEY *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 119, Misc. MCCLANAHAN *v.* MICHIGAN. Recorder's Court of the City of Detroit, Michigan. Certiorari denied.

No. 121, Misc. POWERS *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 123, Misc. HOLLIS *v.* TEXAS. Supreme Court of Texas. Certiorari denied.

No. 124, Misc. WILLIAMS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 128, Misc. FLETCHER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 132, Misc. MOORE *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 130, Misc. SPANGLER *v.* DAILY, JUDGE, MARION CRIMINAL COURT. Supreme Court of Indiana. Certiorari denied. Reported below: 238 Ind. 704, 151 N. E. 2d 517.

No. 135, Misc. MCCOY *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se.* *C. Ferdinand Sybert,* Attorney General of Maryland, *Stedman Prescott, Jr.,* Deputy Attorney General, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent. Reported below: 216 Md. 332, 140 A. 2d 689.

No. 137, Misc. TRIGG *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 238 Ind. 260, 149 N. E. 2d 545.

No. 138, Misc. MCDANIEL ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 103 U. S. App. D. C. 144, 255 F. 2d 896.

No. 140, Misc. CHALUPOWITZ *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: 254 F. 2d 479.

No. 142, Misc. PERSON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 217 Md. 650, 141 A. 2d 743.

No. 153, Misc. TAHTINEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 50 Cal. 2d 127, 323 P. 2d 442.

No. 143, Misc. GREEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 256 F. 2d 483.

No. 146, Misc. BROWN *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 147, Misc. GRUBBS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 149, Misc. VIGDOR *v.* YOUNG ET AL., MEMBERS OF THE U. S. CIVIL SERVICE COMMISSION, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Eugene X. Murphy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondents. Reported below: 102 U. S. App. D. C. 414, 254 F. 2d 333.

No. 150, Misc. PENNSYLVANIA EX REL. PAYLOR *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Louis C. Glasso* for petitioner.

No. 154, Misc. PAPWORTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 256 F. 2d 125.

No. 159, Misc. HAMILTON *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 216 Md. 652, 140 A. 2d 891.

No. 158, Misc. BLISS *v.* NEW YORK. County Court of Wyoming County, New York. Certiorari denied.

No. 160, Misc. BANDER *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert H. Reiter* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 141 Ct. Cl. 373, 158 F. Supp. 564.

No. 161, Misc. SHOTKIN *v.* WEKSLER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 255 F. 2d 100.

No. 162, Misc. FALU *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 6 App. Div. 2d 688, 174 N. Y. S. 2d 945.

No. 166, Misc. GRIFFIN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 167, Misc. DESTEFANO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 175, Misc. HARRIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 187, Misc. SMITH *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Aaron Kravitch* and *Phyllis Kravitch* for petitioner. *Eugene Cook,* Attorney General of Georgia, and *E. Freeman Leverett,* Assistant Attorney General, for respondent. Reported below: 214 Ga. 314, 104 S. E. 2d 444.

No. 176, Misc. HAYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* and *Acting Assistant Attorney General Oehmann* for the United States. Reported below: 258 F. 2d 400.

No. 177, Misc. PETROLIA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 182, Misc. WORTH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 188, Misc. ARMPRIESTER *v.* UNITED STATES. C. A. 4th 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: 256 F. 2d 294.

No. 208, Misc. WOOLSEY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 209, Misc. BAILEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 211, Misc. PHILLIPS *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 13 Ill. 2d 552, 150 N. E. 2d 603.

No. 212, Misc. WILSON, RELATOR AND BEST FRIEND OF JEFFERSON, *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 256 F. 2d 536.

No. 216, Misc. RUBY ET UX. *v.* BOWLUS. Court of Appeals of Maryland. Certiorari denied. Reported below: 217 Md. 115, 140 A. 2d 513.

No. 218, Misc. MARTIN *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 219, Misc. SYPNIEWSKI *v.* BUCHKOE, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 91, Misc. GRAEBER *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Petition for writ of certiorari and other relief to the United States Court of Appeals for the Ninth Circuit denied. Reported below: 256 F. 2d 556.

No. 93, Misc. MATHISON *v.* UNITED STATES. Petition for writ of certiorari and other relief to the United States Court of Appeals for the Seventh Circuit denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 256 F. 2d 803.

No. 172, Misc. SMITH *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Petition for writ of certiorari and other relief to the Supreme Court of Washington denied.

No. 204, Misc. WALKER *v.* CALIFORNIA. Petition for writ of certiorari and other relief to the District Court of Appeal of California, Fourth Appellate District, denied. Reported below: 160 Cal. App. 2d 736, 325 P. 2d 594.

No. 99, Misc. TUSCANO *v.* TEXAS. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court.

Rehearing Denied. (*See also Nos. 122, 123, 124 and 125, October Term, 1957, ante, p. 805.*)

No. 29, October Term, 1957. UNITED STATES *v.* CENTRAL EUREKA MINING CO. ET AL., 357 U. S. 155;

No. 63, October Term, 1957. BEILAN *v.* BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA, 357 U. S. 399;

No. 165, October Term, 1957. LERNER *v.* CASEY ET AL., CONSTITUTING THE NEW YORK CITY TRANSIT AUTHORITY, 357 U. S. 468;

No. 107, October Term, 1957. HANSON, EXECUTRIX, ET AL. *v.* DENCKLA ET AL., 357 U. S. 235;

No. 117, October Term, 1957. LEWIS ET AL. *v.* HANSON, EXECUTRIX AND TRUSTEE, ET AL., 357 U. S. 235;

No. 178, October Term, 1957. CROOKER *v.* CALIFORNIA, 357 U. S. 433;

No. 419, October Term, 1957. EASTERN AIR LINES, INC., *v.* MOE, 357 U. S. 936;

No. 562, October Term, 1957. RUPP *v.* DICKSON, ACTING WARDEN, 357 U. S. 549;

No. 668, October Term, 1957. GORE *v.* UNITED STATES, 357 U. S. 386;

No. 947, October Term, 1957. PENNSYLVANIA ET AL. *v.* BOARD OF DIRECTORS OF CITY TRUSTS OF PHILADELPHIA ET AL., 357 U. S. 570;

No. 975, October Term, 1957. FARMER *v.* UNITED STATES ET AL., 357 U. S. 906;

No. 1002, October Term, 1957. FLORIDA EX REL. ARNOLD *v.* REVELS, CIRCUIT COURT JUDGE, 357 U. S. 925;

No. 1004, October Term, 1957. KNIGHT MORLEY CORP. *v.* NATIONAL LABOR RELATIONS BOARD, 357 U. S. 927;

No. 1037, October Term, 1957. KAMEN SOAP PRODUCTS CO., INC., *v.* UNITED STATES, 357 U. S. 939;

No. 1047, October Term, 1957. COSTELLO *v.* UNITED STATES, 357 U. S. 937. Petitions for rehearing denied.

No. 632, Misc., October Term, 1957. HARMON *v.* UNITED STATES, 357 U. S. 908;

No. 669, Misc., October Term, 1957. LESSER *v.* MARTIN, WARDEN, 357 U. S. 909;

No. 670, Misc., October Term, 1957. NICOL ET AL. *v.* NATIONAL SAVINGS & TRUST CO., EXECUTOR, 357 U. S. 909;

No. 672, Misc., October Term, 1957. MILLER *v.* TOWN OF SUFFIELD ET AL., 356 U. S. 978;

No. 702, Misc., October Term, 1957. SWITZER *v.* UNITED STATES, 357 U. S. 922;

No. 751, Misc., October Term, 1957. JORDAN *v.* ARIZONA, 357 U. S. 922;

No. 770, Misc., October Term, 1957. ROARK *v.* WEST ET AL., 357 U. S. 940;

No. 774, Misc., October Term, 1957. JONES *v.* UNITED STATES, 357 U. S. 932;

No. 777, Misc., October Term, 1957. CRABTREE *v.* UNITED STATES, 357 U. S. 901;

No. 781, Misc., October Term, 1957. LOZOYA *v.* RAMIREZ ET AL., 357 U. S. 941;

No. 799, Misc., October Term, 1957. PEABODY *v.* GULOTTA, DISTRICT ATTORNEY OF NASSAU COUNTY, NEW YORK, 357 U. S. 941;

No. 803, Misc., October Term, 1957. WOLF *v.* BROWNELL, ATTORNEY GENERAL, ET AL., 357 U. S. 942; and

No. 822, Misc., October Term, 1957. MILLER, ALIAS WARNER, *v.* ILLINOIS, 357 U. S. 943. Petitions for rehearing denied.

No. 543, Misc., October Term, 1957. CATO *v.* CALIFORNIA ET AL., 357 U. S. 932. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 483, October Term, 1957. SPEISER *v.* RANDALL, ASSESSOR OF CONTRA COSTA COUNTY, CALIFORNIA; and

No. 484, October Term, 1957. PRINCE *v.* CITY AND COUNTY OF SAN FRANCISCO, 357 U. S. 513. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 649, October Term, 1957. LOCAL 174 AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL. *v.* SELLES, 356 U. S. 975. Rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application.

No. 189, October Term, 1957. KNAPP *v.* SCHWEITZER, JUDGE OF THE COURT OF GENERAL SESSIONS, ET AL., 357 U. S. 371;

No. 305, October Term, 1957. LOCAL 140 SECURITY FUND *v.* HACK, TRUSTEE IN BANKRUPTCY, ET AL., 355 U. S. 833;

No. 892, October Term, 1957. BERGE *v.* NATIONAL BULK CARRIERS, INC., ET AL., 356 U. S. 958; and

No. 226, Misc., October Term, 1955. LISTER *v.* MCLEOD, WARDEN, 350 U. S. 917. Motions for leave to file petitions for rehearing denied.

OCTOBER 20, 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 Appeals for the District of Columbia Circuit beginning October 20, 1958, and ending June 30, 1959, and for such further time as may be required to complete unfinished business, 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. 5. HOTEL EMPLOYEES UNION, LOCAL No. 255, ET AL. *v.* SAX ENTERPRISES, INC., ET AL.; and

No. 6. HOTEL EMPLOYEES UNION, LOCAL No. 255, ET AL. *v.* LEVY ET AL., DOING BUSINESS AS SHERRY FRONTENAC HOTEL, ET AL. Certiorari, 355 U. S. 902, to the Supreme Court of Florida. Upon consideration of the suggestion of omission of parts of the record from the printed record, the Clerk is directed to print such parts as a supplemental record subject to further order of the Court as to the payment of costs incident thereto. The brief of the respondents is to be filed on or before November 1, and the cases are set for oral argument on November 10, next. *Thomas H. Anderson* and *Thomas H. Barkdull, Jr.* were on the suggestion of omission for respondents. *David E. Feller* was on a response for petitioners. Reported below: 93 So. 2d 591, 598.

No. 9. YOUNGSTOWN SHEET & TUBE CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO. Appeal from the Supreme Court of Ohio (probable jurisdiction noted, 355 U. S. 911); and

No. 44. UNITED STATES PLYWOOD CORP. *v.* CITY OF ALGOMA. Certiorari, 356 U. S. 957, to the Supreme Court of Wisconsin. The motion of the City of Algoma to strike brief, as *amici curiae,* of Bruce Bromley et al., is denied. *Edwin Larkin* for movant-respondent in No. 44. *Bruce Bromley* and *Roswell Magill,* as *amici curiae,* were on a reply to the motion to strike. Reported below: No. 9, 166 Ohio St. 122, 140 N. E. 2d 313; No. 44, 2 Wis. 2d 567, 87 N. W. 2d 481.

No. 235, Misc. ALVIDREZ *v.* HEINZE, WARDEN;

No. 241, Misc. LITCHFIELD *v.* TINSLEY, WARDEN; and

No. 281, Misc. WILLIAMS *v.* TINSLEY, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 15, October Term, 1957. PUBLIC SERVICE COMMISSION OF UTAH ET AL. *v.* UNITED STATES ET AL., 356 U. S. 421. The motion to allow and tax costs is granted to the extent of nine-elevenths of such costs which are hereby taxed against appellees exclusive of the United States and the Interstate Commerce Commission. MR. JUSTICE STEWART took no part in the consideration or decision of this motion. *E. R. Callister,* Attorney General of Utah, *Raymond W. Gee,* Assistant Attorney General, *Calvin L. Rampton* and *Keith Sohm* for movants-appellants. *Elmer B. Collins, Bryan P. Leverich, Ernest P. Porter, Peter W. Billings, Wood R. Worsley* and *A. U. Miner* were on a brief in opposition for the Denver & Rio Grande Western Railroad Co. et al., railroad appellees. Reported below: 146 F. Supp. 803.

No. 27. FOLSOM, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *v.* FLORIDA CITRUS EXCHANGE ET AL. Certiorari, 356 U. S. 911, to the United States Court of Appeals for the Fifth Circuit. The motion to substitute Arthur S. Flemming as the party petitioner for Marion B. Folsom is granted. *Solicitor General Rankin* for movant-petitioner. Reported below: 246 F. 2d 850.

No. 175. RALEY ET AL. *v.* OHIO. Appeal from the Supreme Court of Ohio. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Morse Johnson* and *Louis C. Capelle* for appellants. Reported below: 167 Ohio St. 295, 147 N. E. 2d 847.

No. 232, Misc. LA MANNA *v.* CALIFORNIA. 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.

No. 62, Misc. MORGAN *v.* OHIO. Appeal from the Supreme Court of Ohio. Motion for leave to proceed *in forma pauperis* granted. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and case transferred to appellate docket. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Ann Fagan Ginger* and *Thelma C. Furry* for appellant. Reported below: 167 Ohio St. 295, 147 N. E. 2d 847.

No. 173, Misc. ST. ELMO ET AL. *v.* CAMPBELL, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *George W. Crank* and *Harry G. Fins* for petitioners. *John C. Melaniphy* and *Sydney R. Drebin* for the Neighborhood Redevelopment Commission of the City of Chicago, and *William H. Dillon* for the South West Hyde Park Neighborhood Redevelopment Corporation.

Probable Jurisdiction Noted.

No. 278. FRANK *v.* MARYLAND. Appeal from the Criminal Court of Baltimore, Maryland. Probable jurisdiction noted. *Benjamin Lipsitz* for appellant. *C. Ferdinand Sybert,* Attorney General of Maryland, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent.

Certiorari Granted. (*See also Nos. 235, ante, p. 49, and 242, ante, p. 51.*)

No. 329. NATIONAL LABOR RELATIONS BOARD *v.* CABOT CARBON CO. ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Fannie M. Boyls* for petitioner. *M. Truman Woodward, Jr.* and *Richard C. Keenan* for respondents. Reported below: 256 F. 2d 281.

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Certiorari Denied. (*See also No. 125, Misc., ante, p. 54, and No. 232, Misc., supra.*)

No. 144. FORD MOTOR CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Clarence E. Dawson, William T. Gossett* and *L. Homer Surbeck* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Myron C. Baum* for the United States. Reported below: 140 Ct. Cl. 487, 156 F. Supp. 554.

No. 230. UNDERWOOD ET AL. *v.* MALONEY. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioners. *Charles A. Wolfe* and *J. Albert Woll* for respondent. Reported below: 256 F. 2d 334.

No. 304. DUBOIS, TRUSTEE, *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Josiah E. DuBois, Jr., pro se. Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *George F. Lynch* for the United States. Reported below: 255 F. 2d 706.

No. 308. MELLOTT ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Henry D. O'Connor* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for the United States. Reported below: 257 F. 2d 798.

No. 309. LANE INDUSTRIES, INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Michael Berman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 142 Ct. Cl. 712, 162 F. Supp. 443.

No. 240. BRINKLEY *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. *B. Nathaniel Richter* for petitioner. *Philip Price* and *Robert M. Landis* for respondent. Reported below: 254 F. 2d 598.

No. 311. GONDRON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *M. Gabriel Nahas, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 256 F. 2d 205.

No. 313. BEISTLINE *v.* CITY OF SAN DIEGO ET AL. C. A. 9th Cir. Certiorari denied. *Eli H. Levenson* for petitioner. *Aaron W. Reese* for the City of San Diego, and *Fred Kunzel* for the General Dynamics Corporation, respondents. Reported below: 256 F. 2d 421.

No. 315. I. C. SUTTON HANDLE FACTORY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. *Virgil D. Willis* and *Robert W. Cummins* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott* and *Dominick L. Manoli* for respondent. Reported below: 255 F. 2d 697.

No. 317. DAVIS, ADMINISTRATRIX, *v.* JONES, ADMINISTRATRIX, ET AL. C. A. 10th Cir. Certiorari denied. *W. F. Semple* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States, respondent. Reported below: 254 F. 2d 696.

No. 318. WILSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John C. Walters* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 255 F. 2d 686.

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No. 319. PACIFIC FAR EAST LINE, INC., *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Odell Kominers* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, E. Robert Seaver, Robert E. Mitchell, Edward Aptaker* and *Edward Schmeltzer* for the United States and the Federal Maritime Board, and *Alvin J. Rockwell* and *William R. Deming* for the Matson Navigation Co., respondents. Reported below: 103 U. S. App. D. C. 104, 255 F. 2d 182.

No. 324. GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Newell W. Ellison, Henry M. Hogan, Daniel M. Gribbon* and *Calvert Thomas* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Myron C. Baum* for the United States. Reported below: 142 Ct. Cl. 842, 163 F. Supp. 854.

No. 325. EVANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Arthur D. Klang* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 257 F. 2d 121.

No. 328. WEIN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Russell E. Parsons* and *Henry E. Kappler* for petitioner. Reported below: 50 Cal. 2d 383, 326 P. 2d 457.

No. 120, Misc. ARAN, DOING BUSINESS AS AUTO NURSE MANUFACTURING CO., *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Oehmann, I. Henry Kutz* and *Carolyn R. Just* for the United States. Reported below: 259 F. 2d 757.

No. 320. BRASIER *v.* JEARY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 256 F. 2d 474.

No. 330. ITEM COMPANY *v.* NEW ORLEANS NEWSPAPER GUILD. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* for petitioner. *George A. Dreyfous* for respondent. Reported below: 256 F. 2d 855.

No. 331. PROUTY ET AL. *v.* CITIZENS UTILITIES CO. C. A. 2d Cir. Certiorari denied. *Edwin W. Lawrence* and *Arthur L. Graves* for petitioners. *Jesse Climenko* and *Clifton G. Parker* for respondent. Reported below: 257 F. 2d 692.

No. 321. CARTELLONE, ALIAS PRINCE, *v.* LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Henry C. Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 255 F. 2d 101.

No. 334. SCIENTIFIC LIVING, INC., *v.* FEDERAL TRADE COMMISSION. C. A. 3d Cir. Certiorari denied. *Frank R. Cook* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Earl W. Kintner* and *James E. Corkey* for respondent. Reported below: 254 F. 2d 598.

No. 78, Misc. NELSON, ADMINISTRATOR, *v.* GREENE LINE STEAMERS, INC. C. A. 6th Cir. Certiorari denied. *W. Scott Miller, Jr.* for petitioner. *A. J. Deindoerfer* and *Joseph E. Stopher* for respondent. Reported below: 255 F. 2d 31.

No. 77, Misc. STEPPER *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 393 Pa. 1, 141 A. 2d 573.

No. 87, Misc. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 254 F. 2d 523.

No. 165, Misc. THOMPSON *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 179, Misc. WINSTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 180, Misc. KENNEDY *v.* MYERS, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 393 Pa. 535, 143 A. 2d 660.

No. 183, Misc. HAINES *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 393 Pa. 439, 143 A. 2d 661.

No. 198, Misc. PENNSYLVANIA EX REL. MURRAY *v.* KEENAN, SUPERINTENDENT, ALLEGHENY COUNTY WORKHOUSE. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Marjorie Hanson Matson* for petitioner.

No. 200, Misc. THOMPSON *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 193, Misc. GVARA *v.* KETTLE, SUPERINTENDENT, NORWICH STATE HOSPITAL. Superior Court of Connecticut, New London County. Certiorari denied.

No. 195, Misc. THOMAS *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 *Kirby W. Patterson* for the United States. Reported below: 103 U. S. App. D. C. 178, 256 F. 2d 892.

No. 197, Misc. ORR *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *John R. Snively* for petitioner.

No. 201, Misc. BURKHAMER *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Reported below: 143 W. Va. —, 103 S. E. 2d 777.

No. 122, Misc. BOBO *v.* CALIFORNIA ET AL. Petition for writ of certiorari and for other relief to the Supreme Court of California denied.

No. 189, Misc. BAILEY *v.* ARKANSAS. Petition for writ of certiorari to the Supreme Court of Arkansas denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. Reported below: — Ark. —, 313 S. W. 2d 388.

No. 222, Misc. BLACKMON *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

Rehearing Denied.

No. 958, October Term, 1957. MEADS *v.* UNITED STATES, 357 U. S. 905. Rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 963, October Term, 1957. FARNUM *v.* CONNECTICUT ET AL., 357 U. S. 919;

No. 716, Misc., October Term, 1957. FARNUM *v.* CONNECTICUT ET AL., 357 U. S. 916; and

No. 717, Misc., October Term, 1957. FARNUM *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS, 357 U. S. 916. Petition for rehearing and other relief denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 626, Misc., October Term, 1954. DAVIS *v.* SUMMERFIELD, POSTMASTER GENERAL, 349 U. S. 965. Motion for leave to file second petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

OCTOBER 27, 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 November 3, 1958, and ending June 30, 1959, and for such further time as may be required to complete unfinished business, 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. 415, October Term, 1957. COUNTY OF MARIN ET AL. *v.* UNITED STATES ET AL., 356 U. S. 412. The motion to allow and tax costs is granted to the extent of

three-fifths of such costs which are hereby taxed against appellees exclusive of the United States and the Interstate Commerce Commission. MR. JUSTICE STEWART took no part in the consideration or decision of this motion. *Spurgeon Avakian* for appellants. *Allan P. Matthew* for the Golden Gate Transit Lines et al., appellees. Reported below: 150 F. Supp. 619.

No. 339. SPEVACK *v.* STRAUSS ET AL. The motion for discovery in this case is denied. The motion for leave to use record in No. 641, October Term, 1957, and the motion to impound the record are granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit also granted. *Carleton U. Edwards, II, Joseph Y. Houghton* and *Bernard Margolius* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Herman Marcuse, Loren K. Olson* and *Roland A. Anderson* for respondents. Briefs of *amici curiae* in support of the petition for a writ of certiorari were filed by *Elisha Hanson, Arthur B. Hanson* and *Calvin H. Cobb, Jr.* for the American Chemical Society, and *Carlton S. Dargusch* and *Carlton S. Dargusch, Jr.* for the Engineers Joint Council, Inc. Reported below: 103 U. S. App. D. C. 204, 257 F. 2d 208.

No. 492, October Term, 1957. FLORA *v.* UNITED STATES, 357 U. S. 63. The Solicitor General is requested to file a response to the petition for rehearing in this case. MR. JUSTICE STEWART took no part in the consideration or decision of this matter. Reported below: 246 F. 2d 929.

Certiorari Granted. (*See also No. 349, ante, p. 55, and No. 339, supra.*)

No. 101. VITARELLI *v.* SEATON, SECRETARY OF THE INTERIOR, ET AL. United States Court of Appeals for the

District of Columbia Circuit. Certiorari granted. *Clifford J. Hynning* and *Allen S. Olmsted, 2nd*, for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondents. Reported below: 102 U. S. App. D. C. 316, 253 F. 2d 338.

No. 180. GREENE *v.* MCELROY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Carl W. Berueffy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *B. Jenkins Middleton* for respondents. Reported below: 103 U. S. App. D. C. 87, 254 F. 2d 944.

No. 347. COUNTY OF ALLEGHENY *v.* FRANK MASHUDA CO. ET AL. C. A. 3d Cir. Certiorari granted. *Maurice Louik* for petitioner. *Don Rose* for respondents. Reported below: 256 F. 2d 241.

Certiorari Denied.

No. 335. SUN OIL CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Martin A. Row* and *Robert E. May* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, B. Jenkins Middleton, Willard W. Gatchell* and *William W. Ross* for respondent. Reported below: 256 F. 2d 233.

No. 338. BISAILLON *v.* SURECK, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Howard K. Hoddick* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for respondent. Reported below: 257 F. 2d 435.

No. 336. WHEELER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Robert M. Taylor* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 256 F. 2d 745.

No. 337. MENDOZA *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Louis B. Fine* for petitioner. Reported below: 199 Va. 961, 103 S. E. 2d 1.

No. 342. WILSON ET AL. *v.* CITY OF LONG BRANCH ET AL. Supreme Court of New Jersey. Certiorari denied. *Theodore D. Parsons* and *William R. Blair, Jr.* for petitioners. *Edward F. Juska* and *Clarkson S. Fisher* for the City of Long Branch, respondent. *David D. Furman,* Attorney General of New Jersey, filed a brief as intervenor, opposing the petition. With him on the brief was *Stephen F. Lichtenstein,* Deputy Attorney General. Reported below: 27 N. J. 360, 142 A. 2d 837.

No. 345. MOODY *v.* KAGAN ET AL. Court of Civil Appeals of Texas, First Supreme Judicial District. Certiorari denied. *R. Dean Moorhead* for petitioner. *Harry Dow* for respondents. Reported below: 309 S. W. 2d 515.

No. 346. GIACONA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William F. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 257 F. 2d 450.

No. 354. SHARGAA *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *L. J. Cushman* for petitioner. Reported below: 102 So. 2d 809.

No. 348. RAINER *v.* UNITED STATES. Court of Claims. Certiorari denied. *Carl L. Shipley, Alex Akerman, Jr.* and *Samuel Resnicoff* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Robert S. Green* for the United States. Reported below: 142 Ct. Cl. ——.

No. 352. BEARD ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Carlos J. Badger* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *Davis W. Morton, Jr.* for the United States. Reported below: 260 F. 2d 81.

No. 353. RESERVE LIFE INSURANCE CO. *v.* NORTH. C. A. 4th Cir. Certiorari denied. *Stephen Ailes* for petitioner. *Charles P. Green* for respondent. Reported below: 255 F. 2d 240.

No. 355. CHARLES H. TOMPKINS CO. ET AL. *v.* LLOYD E. MITCHELL, INC., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *O. P. Easterwood, Jr.* and *Alan Johnstone* for petitioners. *Joseph Bernstein* for Lloyd E. Mitchell, Inc., and *Nicholas J. Chase* for Harry Alexander, Inc., et al., respondents. Reported below: 104 U. S. App. D. C. 20, 259 F. 2d 177.

No. 187. DEEN *v.* GULF, COLORADO & SANTA FE RAILWAY CO. Petition for writ of certiorari to the Supreme Court of Texas denied in view of the order entered this day in *Deen* v. *Hickman, ante,* p. 57. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *David C. McCord* and *Robert Lee Guthrie* for petitioner. *Luther Hudson* for respondent. Reported below: 158 Tex. ——, 312 S. W. 2d 933.

No. 356. STATE COMMISSION OF REVENUE AND TAXATION OF KANSAS *v.* GENERAL MOTORS CORP. ET AL. Supreme Court of Kansas. Certiorari denied. *Frank G. Theis* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *H. Eugene Heine, Jr.* for the United States, and *Henry M. Hogan* and *Donald K. Barnes* for the General Motors Corporation, respondents. Reported below: 182 Kan. 237, 320 P. 2d 807.

No. 357. AMERICAN LIFE & ACCIDENT INSURANCE CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 8th Cir. Certiorari denied. *A. Alvis Layne, Jr., T. S. L. Perlman* and *Kenneth Teasdale* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Earl W. Kintner* and *James E. Corkey* for respondent. Reported below: 255 F. 2d 289, 295.

No. 358. DE FONCE CONSTRUCTION CO., INC., ET AL. *v.* CITY OF MIAMI FOR USE AND BENEFIT OF COMPLETE MACHINERY & EQUIPMENT CO., INC. C. A. 5th Cir. Certiorari denied. *Sidney O. Raphael* for petitioners. *Harry Grossman* for respondent. Reported below: 256 F. 2d 425.

No. 359. MIDWEST MOTOR EXPRESS, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Joseph A. Maun* and *Ronald S. Hazel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Morton K. Rothschild* for respondent. Reported below: 251 F. 2d 405.

No. 343. COOPER, ADMINISTRATRIX, *v.* R. J. REYNOLDS TOBACCO CO. Motion for leave to amend petition granted. Petition for writ of certiorari to the United

States Court of Appeals for the First Circuit denied. *Edward A. Stern* for petitioner. *John L. Hall* and *Claude R. Branch* for respondent. Reported below: 256 F. 2d 464.

OCTOBER 29, 1958.

Dismissals Under Rule 60.

No. 340. DIVERSEY CORPORATION *v.* CHARLES PFIZER & Co., INC.; and

No. 344. CHARLES PFIZER & Co., INC., *v.* DIVERSEY CORPORATION. On petitions for writs of certiorari to the United States Court of Appeals for the Seventh Circuit. Dismissed by stipulation pursuant to Rule 60 of the Rules of this Court. *Charles J. Merriam* was on the stipulation for petitioner in No. 340 and respondent in No. 344. With him on the petition was *Samuel B. Smith*. *Arthur G. Connelly* for respondent in No. 340 and petitioner in No. 344. Reported below: 255 F. 2d 60.

NOVEMBER 10, 1958.

Miscellaneous Orders.

No. 371. NATIONAL BROADCASTING CO., INC., *v.* PHILCO CORPORATION. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The Solicitor General is invited to file a brief setting forth the views of the Federal Communications Commission in this case. Reported below: 103 U. S. App. D. C. 278, 257 F. 2d 656.

No. 273, Misc. WRIGHT *v.* DOWD, WARDEN;

No. 279, Misc. BRANCH *v.* ALVIS, WARDEN; and

No. 292, Misc. MULLINS *v.* ALVIS, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 246, Misc. OVERTON *v.* MISSOURI;
No. 257, Misc. POPE *v.* RAGEN, WARDEN;
No. 280, Misc. PATTERSON *v.* ALVIS, WARDEN;
No. 285, Misc. DAUGHERTY *v.* ALVIS, WARDEN;
No. 293, Misc. HOWARD *v.* TINSLEY, WARDEN;
No. 298, Misc. OUGHTON *v.* UNITED STATES; and
No. 307, Misc. ARLEN *v.* ATTORNEY GENERAL OF THE UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 269, Misc. CONLEY *v.* GREEN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION; and
No. 275, Misc. EINEDER *v.* BANNAN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied. MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

Certiorari Granted. (*See also No. 300, ante, p. 66.*)

No. 288. OKLAHOMA NATURAL GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *John S. Carlson, Norman A. Flaningam* and *Melvin Richter* for petitioner. *Solicitor General Rankin, Willard W. Gatchell* and *Howard E. Wahrenbrock* for the Federal Power Commission, *Clarence H. Ross* for the Natural Gas Pipeline Co. of America, *John J. Wilson* and *David T. Searls* for Oil Drilling, Inc., et al., and *Warren M. Sparks* for the Warren Petroleum Corporation, respondents. *Roger Arnebergh, John C. Banks, Peter Campbell Brown, J. Elliott Drinard, John C. Melaniphy, Charles S. Rhyne* and *J. Parker Connor* filed a brief for the Member Municipalities of the National Institute of Municipal Law Officers, as *amici curiae,* in support of the petition for a writ of certiorari. Reported below: 103 U. S. App. D. C. 256, 257 F. 2d 634.

No. 397. PENNSYLVANIA RAILROAD CO. *v.* DAY, ADMINISTRATOR. C. A. 3d Cir. Certiorari granted. *F. Morse Archer, Jr., John P. Hauch, Jr., John B. Prizer* and *Richard N. Clattenburg* for petitioner. *James M. Davis, Jr.* for respondent. Reported below: 258 F. 2d 62.

No. 363. BAKER ET AL. *v.* TEXAS & PACIFIC RAILWAY CO. Court of Civil Appeals of Texas, Fifth Supreme Judicial District. Certiorari granted. *Harvey L. Davis* for petitioners. *D. L. Case* for respondent. Reported below: 309 S. W. 2d 92.

No. 396. PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES, LOCAL 298, A. F. of L., ET AL. *v.* COUNTY OF DOOR ET AL. Supreme Court of Wisconsin. Certiorari granted. *Martin F. O'Donoghue* and *David Previant* for petitioners. Reported below: 4 Wis. 2d 142, 89 N. W. 2d 920.

No. 404. MELROSE DISTILLERS, INC., ET AL. *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted limited to question No. 1 presented by the petition for the writ which reads as follows:

"1. Can a Maryland corporation or a Delaware corporation be further criminally prosecuted (in a federal court for a federal offense) following its dissolution under the laws of the state of its creation occurring after indictment but before arraignment or plea, such dissolution timely appearing of record in the case?"

The Attorneys General of the States of Maryland and Delaware are invited to file briefs, as *amici curiae,* in this case if they are so advised.

Robert S. Marx and *Hilary W. Gans* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman* for the United States. Reported below: 258 F. 2d 726.

No. 380. COMMISSIONER OF INTERNAL REVENUE *v.* HANSEN ET UX. C. A. 9th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Meyer Rothwacks* for petitioner. Reported below: 258 F. 2d 585.

No. 381. COMMISSIONER OF INTERNAL REVENUE *v.* GLOVER. C. A. 8th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Meyer Rothwacks* for petitioner. Reported below: 253 F. 2d 735.

Certiorari Denied. (*See also No. 390 and Misc. No. 190, ante, p. 67, and Misc. Nos. 269, 273, 275, 279 and 292, supra.*)

No. 272. RESERVE LIFE INSURANCE CO. ET AL. *v.* BANKERS LIFE & CASUALTY CO. ET AL.; and

No. 377. HARTFORD ACCIDENT & INDEMNITY CO. *v.* RESERVE LIFE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. *James A. Dixon* for petitioners in No. 272. *M. F. Goldstein, B. D. Murphy* and *Robert E. Coll* for the Hartford Accident & Indemnity Co., petitioner in No. 377 and respondent in No. 272. *Charles F. Short, Jr.* and *Miller Walton* for the Bankers Life & Casualty Co., respondent. *Eugene Cook,* Attorney General, filed a brief for the State of Georgia, as *amicus curiae,* in support of the petition for a writ of certiorari in No. 377. Reported below: 257 F. 2d 377.

No. 365. FLEMING *v.* AETNA LIFE INSURANCE CO. ET AL. C. A. 10th Cir. Certiorari denied. *Glenn O. Young, Glenn A. Young* and *David Young* for petitioner. *Robert J. Woolsey* for the Aetna Life Insurance Co., *Sam T. Allen, III,* for Rettenmeyer, and *Raymond C. Jopling, Jr.* for Sprankle et al., respondents. Reported below: 255 F. 2d 577.

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No. 361. LUSTMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Gustave B. Garfield* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 258 F. 2d 475.

No. 360. JOINES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Judson E. Ruch* and *R. Palmer Ingram* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 258 F. 2d 471.

No. 368. TENORE ET AL., DOING BUSINESS AS RICO SALES CO., *v.* AMERICAN & FOREIGN INSURANCE CO. OF NEW YORK ET AL. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* for petitioners. *Donald N. Clausen, Herbert W. Hirsh* and *John P. Gorman* for respondents. Reported below: 256 F. 2d 791.

No. 369. R. H. MACY & CO., INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Roswell Magill* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Grant W. Wiprud* for the United States. Reported below: 255 F. 2d 884.

No. 370. HOLLAND *v.* HOLLAND. Supreme Court of Florida. Certiorari denied. *Louis Nizer* for petitioner. *William Gresham Ward* for respondent.

No. 373. CAMERON IRON WORKS, INC., *v.* LODGE No. 12, DISTRICT No. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS. C. A. 5th Cir. Certiorari denied. *John Leroy Jeffers* for petitioner. *Plato E. Papps* and *Chris Dixie* for respondent. Reported below: 257 F. 2d 467.

No. 388. PROGRESSIVE BUILDERS, INC., *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Emanuel Harris* and *Bernard J. Gallagher* for petitioner. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondent. Reported below: 103 U. S. App. D. C. 337, 258 F. 2d 431.

No. 374. HARMON *v.* HARMON. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se. Edmund G. Brown,* Attorney General of California, and *Clarence A. Linn,* Chief Assistant Attorney General, for respondent. Reported below: 160 Cal. App. 2d 47, 324 P. 2d 901.

No. 375. CIVIL AERONAUTICS BOARD *v.* ALASKA AIRLINES, INC., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, Franklin M. Stone* and *O. D. Ozment* for petitioner. *John E. Stephen, Daniel M. Gribbon, Robert L. Randall* and *George Lapham* for respondents. Reported below: 103 U. S. App. D. C. 225, 257 F. 2d 229.

No. 376. IN RE TEITELBAUM. Supreme Court of Illinois. Certiorari denied. *Abraham Teitelbaum, pro se. Charles Leviton, pro se,* filed a brief in opposition to the petition for a writ of certiorari. Reported below: 13 Ill. 2d 586, 150 N. E. 2d 873.

No. 379. BAUM, ADMINISTRATRIX, *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Justin Waitkus* for petitioner. *Charles G. Bomberger* and *John L. Rogers, Jr.* for respondent. Reported below: 256 F. 2d 753.

No. 385. LIVESAY INDUSTRIES, INC., ET AL. *v.* LIVESAY WINDOW CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. *Henry M. Sinclair* and *J. M. Flowers* for petitioners. *Ralph L. Chappel* and *Walter Humkey* for respondents. Reported below: 256 F. 2d 1.

No. 387. DELTA AIR LINES, INC., *v.* EDWARDS, ADMINISTRATOR. C. A. 5th Cir. Certiorari denied. *James N. Frazer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Joseph Kovner* for respondent. Reported below: 255 F. 2d 501.

No. 372. GINSBURG *v.* SULLIVAN, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied. *Paul Ginsburg, pro se. George B. Christensen* and *Thomas A. Reynolds* for respondents.

No. 389. CRAVENS ET AL. *v.* CITY OF AMARILLO. Court of Civil Appeals of Texas, Seventh Supreme Judicial District. Certiorari denied. *Cleo G. Clayton, Jr.* for petitioners. *W. W. Gibson* for respondent. Reported below: 309 S. W. 2d 903.

No. 393. FURNISH *v.* BOARD OF MEDICAL EXAMINERS OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. *Murray M. Chotiner* and *Russell E. Parsons* for petitioner. Reported below: 257 F. 2d 520.

No. 395. PITTSBURGH RAILWAYS CO. *v.* AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 85. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Charles Monroe Thorp, Jr.* for petitioner. *I. J. Gromfine, Bernard Cushman, Herman Sternstein* and *Frank R. Bolte* for respondent. Reported below: 393 Pa. 219, 142 A. 2d 734.

No. 399. ACCARDI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert R. Rainold* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 257 F. 2d 168.

No. 400. DOUGALL *v.* SPOKANE, PORTLAND & SEATTLE RAILWAY CO. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Charles A. Hart, Hugh L. Biggs* and *Cleveland C. Cory* for respondent. Reported below: 256 F. 2d 601.

No. 405. TAUSSIG *v.* AMERICAN NATIONAL BANK & TRUST CO. OF CHICAGO, FORMER TRUSTEE. C. A. 7th Cir. Certiorari denied. *Robert B. Johnstone* and *Myer H. Gladstone* for petitioner. *Weymouth Kirkland* and *Howard Ellis* for the American National Bank & Trust Co. of Chicago, *William H. Dillon* for the Chicago Title & Trust Co., *David Levinson* for the Northern Trust Co., and *Horace A. Young* for Saxelby, respondents. Reported below: 255 F. 2d 765.

No. 402. MONDAY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Henry K. Williams, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Fred E. Youngman* for respondent. Reported below: 252 F. 2d 789.

No. 403. LOESCH *v.* FEDERAL TRADE COMMISSION. C. A. 4th Cir. Certiorari denied. *Richard M. Welling* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, W. Louise Florencourt, Earl W. Kintner* and *James E. Corkey* for respondent. Reported below: 257 F. 2d 882.

No. 401. GEORGIA-PACIFIC CORPORATION *v.* UNITED STATES PLYWOOD CORP. C. A. 2d Cir. Certiorari denied. *John Vaughan Groner* and *Charles B. Smith* for petitioner. *W. O. Heilman* and *James M. Heilman* for respondent. Reported below: 258 F. 2d 124.

No. 408. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* UNITED STATES. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Miles Warner* and *Thomas M. Kerrigan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Henry Geller* for the United States. Reported below: 393 Pa. 537, 143 A. 2d 341.

No. 364. FOUTS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE WHITTAKER are of the opinion that certiorari should be granted. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Robert C. Knee* for Fouts, petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 258 F. 2d 402.

No. 366. DUPONT ET AL., TRUSTEES, *v.* CRUMMER COMPANY ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *John Lord O'Brian* and *Hugh B. Cox* for petitioners. *Richard W. Ervin,* Attorney General of Florida, and *Ralph M. McLane,* Assistant Attorney General, for Shafer et al., *Donald Russell* and *Clarence G. Ashby* for Ball et al., *Charles R. Scott* for the St. Joe Paper Co., and *H. M. Voorhis* and *W. H. Poe* for Leedy, Wheeler & Alleman, Inc., et al., petitioners. *Francis P. Whitehair, Chris Dixie* and *Warren E. Hall, Jr.* for respondents. Reported below: 255 F. 2d 425.

No. 367. VOCI *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 393 Pa. 404, 143 A. 2d 652.

No. 391. BENTON *v.* VINSON ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Thaddeus G. Benton* for petitioner. *Leo T. Kissam* for Searls, respondent. Reported below: 255 F. 2d 299.

No. 392. COSCIA *v.* WILLARD, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Philip F. Di Costanzo* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Robert S. Green* for the Deputy Commissioner, respondent. Reported below: 257 F. 2d 105.

No. 407. SULENTICH *v.* INTERLAKE STEAMSHIP CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *James A. Dooley* for petitioner. *Harlan L. Hackbert* for respondent. Reported below: 257 F. 2d 316.

No. 85, Misc. BELL *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. 383, 254 F. 2d 82.

No. 126, Misc. VAN PELT *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 131, Misc. RICHARDS *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. 145, Misc. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 170, Misc. DOWLING *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Carl E. F. Dally* for petitioner. *Will Wilson,* Attorney General of Texas, *George P. Blackburn, W. V. Geppert,* Assistant Attorneys General, and *Benjamin T. Woodall* for respondent. Reported below: 164 Tex. Cr. R. 650, 317 S. W. 2d 533.

No. 171, Misc. CEPERO *v.* PAN AMERICAN AIRWAYS, INC. C. A. 1st Cir. Certiorari denied.

No. 196, Misc. STEGALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Theodore G. Gilinsky* for the United States. Reported below: 259 F. 2d 83.

No. 205, Misc. BANKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 258 F. 2d 318.

No. 207, Misc. ADKINS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 215, Misc. CARPENTER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Daniel C. Ahern* and *Kevin J. Gillogly* for petitioner. Reported below: 13 Ill. 2d 470, 150 N. E. 2d 100.

No. 217, Misc. TOWNSEND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *George N. Leighton* for petitioner.

No. 221, Misc. OVERMAN *v.* WILKINSON, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for respondent. Reported below: 256 F. 2d 58.

No. 228, Misc. BARCLAY *v.* MARTIN, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 233, Misc. PRESS *v.* FALK, DIRECTOR, NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, ET AL. Supreme Court of New York, New York County, and Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. *James L. R. Costello* and *Seymour S. Brewer* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondents. Reported below: 4 App. Div. 2d 859, 1021, 167 N. Y. S. 2d 413, 169 N. Y. S. 2d 419.

No. 242, Misc. MORRISON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 6 App. Div. 2d 821, 176 N. Y. S. 2d 240.

No. 230, Misc. BIZZELL *v.* BIZZELL. Supreme Court of North Carolina. Certiorari denied. *Robert H. Reiter* and *Daniel Partridge, III,* for petitioner. *I. Beverly Lake* for respondent. Reported below: 247 N. C. 590, 101 S. E. 2d 668.

No. 238, Misc. LOVING *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 243, Misc. ESCALONA *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Reported below: 6 App. Div. 2d 684, 174 N. Y. S. 2d 947.

No. 245, Misc. MIDDLETON *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 248, Misc. LIVESAY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 256, Misc. KIRKRAND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 14 Ill. 2d 86, 150 N. E. 2d 788.

No. 259, Misc. WESTLEY *v.* CULVER, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 263, Misc. INMAN *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. 265, Misc. ANDERSON *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 258 F. 2d 479.

No. 270, Misc. SPENCER *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 271, Misc. HOCH *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 277, Misc. SMITH, ADMINISTRATRIX, *v.* REINAUER OIL TRANSPORT, INC. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *G. Philip Wardner* for respondent. Reported below: 256 F. 2d 646.

No. 286, Misc. GHASKIN *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. 288, Misc. TINES *v.* TENNESSEE. Supreme Court of Tennessee, Eastern Division. Certiorari denied. *Earl E. Leming* and *Jas. P. Brown* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *James M. Glasgow,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 315 S. W. 2d 111.

No. 303, Misc. LA BELLE *v.* STATE TAX COMMISSION OF MARYLAND. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se*. *C. Ferdinand Sybert,* Attorney General of Maryland, and *Stedman Prescott, Jr.,* Deputy Attorney General, for respondent. Reported below: 217 Md. 443, 142 A. 2d 560.

No. 297, Misc. IRBY *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. 312, Misc. JANOSKO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 5 App. Div. 2d 1005, 173 N. Y. S. 2d 1013, 6 App. Div. 2d 821, 176 N. Y. S. 2d 10.

No. 317, Misc. ANDREWS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 226, Misc. HENDERSON *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Ernest Goodman* for petitioner. Reported below: 256 F. 2d 363.

No. 247, Misc. BRINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

Rehearing Denied.

No. 102. JEOFFROY MFG., INC., ET AL. *v.* GRAHAM ET AL., *ante*, p. 817;

No. 98, Misc. POWELL *v.* ALABAMA, *ante*, p. 850;

No. 141, Misc. IN RE SANGUIGNI, *ante*, p. 805; and

No. 208, Misc. WOOLSEY *v.* TEXAS, *ante*, p. 856. Petitions for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

NOVEMBER 17, 1958.

Miscellaneous Orders.

No. 101. VITARELLI *v.* SEATON, SECRETARY OF THE INTERIOR, ET AL. Certiorari, 358 U. S. 871, to the United States Court of Appeals for the District of Columbia Circuit. The motion to substitute Barbara Bates Gunderson as a party respondent for Christopher H. Phillips is granted. *Clifford J. Hynning* for petitioner. *Solicitor General Rankin* for respondents. Reported below: 102 U. S. App. D. C. 316, 253 F. 2d 338.

No. 246. ARROYO *v.* UNITED STATES. Certiorari, 358 U. S. 812, to the United States Court of Appeals for the First Circuit. The motion of petitioner for leave to proceed *in forma pauperis* is granted. *Robert W. Meserve* for petitioner. Reported below: 256 F. 2d 549.

No. 378. ANONYMOUS NOS. 6 AND 7 *v.* ARKWRIGHT, SUPREME COURT JUSTICE OF NEW YORK. Appeal from the Court of Appeals of New York. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Raphael H. Weissman* for appellants. *Denis M. Hurley* for appellee. Reported below: 4 N. Y. 2d 1034, 152 N. E. 2d 651.

No. 316, Misc. ORTEGA *v.* RAGEN, WARDEN; and

No. 342, Misc. IN RE MEDLIN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 54, Misc. HORSLEY *v.* ALVIS, WARDEN. 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.

Certiorari Granted.

No. 326. In re Sawyer. C. A. 9th Cir. Certiorari granted. *John T. McTernan* for petitioner. *Herbert Y. C. Choy,* Attorney General of Hawaii, *Morio Omori,* Special Deputy Attorney General, and *A. William Barlow* for the Bar Association of Hawaii. Reported below: 260 F. 2d 189.

No. 362. Koller et al. *v.* United States. C. A. 3d Cir. Certiorari granted. *Robert H. Malis* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Robert S. Green* for the United States. Reported below: 255 F. 2d 865.

No. 414. Union Pacific Railroad Co. *v.* Price. C. A. 9th Cir. Certiorari granted. *E. C. Renwick, Malcolm Davis, Calvin M. Cory, W. R. Rouse* and *James A. Wilcox* for petitioner. *Samuel S. Lionel* for respondent. Reported below: 255 F. 2d 663.

No. 383. Marshall *v.* United States. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted limited to the first question presented by the petition for the writ which reads as follows:

"Whether a defendant in a criminal trial to a jury is denied a fair trial when members of the jury during the course of the trial read newspaper articles which state that the defendant has a record of two previous felony convictions and recite other defamatory matter."

Omer Griffin for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 258 F. 2d 94.

No. 398. LOUISIANA POWER & LIGHT CO. *v.* CITY OF THIBODAUX, LOUISIANA. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to questions 2 and 3 presented by the petition for the writ which read as follows:

"2. Does a United States District Court have the inherent power in a case at law to exercise the discretion of staying proceedings in order to control the progress of the cause before it in an orderly manner?

"3. Assuming that a United States District Court does have discretion to stay proceedings in order to control the progress of a law case before it in an orderly manner, did the District Court abuse that discretion?"

J. Blanc Monroe, Monte M. Lemann and *J. Raburn Monroe* for petitioner. *Louis Fenner Claiborne* for respondent. Reported below: 255 F. 2d 774.

Certiorari Denied. (See also No. 291, ante, p. 73, and Misc. No. 54, supra.)

No. 409. ESTATE OF IVERSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Joseph A. Maun* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 255 F. 2d 1, 257 F. 2d 408.

No. 412. RUSSELL *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Ivan Irwin* for petitioner.

No. 416. WILSON ET AL., EXECUTORS, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *George R. Fearon* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for the United States. Reported below: 257 F. 2d 534.

No. 413. MIYAKI *v.* ROBINSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Thomas Masuda* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for respondent. Reported below: 257 F. 2d 806.

No. 417. YURDIN ET AL. *v.* TOWN PLAN & ZONING COMMISSION OF THE TOWN OF FAIRFIELD ET AL. Supreme Court of Errors of Connecticut. Certiorari denied. *George A. Saden* for petitioners. *Norman K. Parsells* and *Irwin E. Friedman* for respondents. Reported below: 145 Conn. 416, 143 A. 2d 639.

No. 419. HODGES ET AL. *v.* HODGES, SHERIFF, ET AL. Court of Appeals of Kentucky. Certiorari denied. *Cleon K. Calvert* for petitioners. *Maxey B. Harlin, Jr.* for respondents. Reported below: 314 S. W. 2d 208.

No. 423. COOPER *v.* CALIFORNIA. Appellate Department of the Superior Court of California, Los Angeles County. Certiorari denied. *Edward Mosk* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 410. ST. LOUIS AMUSEMENT CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Russell Hardy, Sr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, John L. Fitzgerald* and *Richard A. Solomon* for the Federal Communications Commission, and *Ralph F. Colin* and *Ambrose Doskow* for the Columbia Broadcasting System, Inc., respondents. Reported below: 104 U. S. App. D. C. 45, 259 F. 2d 202.

No. 428. BERENDSON *v.* REDERIAKTIEBOLAGET VOLO. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *James M. Estabrook* and *David P. H. Watson* for respondent. Reported below: 257 F. 2d 136.

No. 431. SAVAGE *v.* HADLOCK ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Eugene X. Murphy* for petitioner. *John J. Donnelly* for respondents.

No. 433. RASLICH *v.* MICHIGAN. Circuit Court for Genesee County, Michigan. Certiorari denied. *James McTaggart* for petitioner. *Samuel J. Torina,* Solicitor General of Michigan, for respondent.

No. 227, Misc. FISHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *John Caughlan* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 254 F. 2d 302.

No. 274, Misc. MCGAHEE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 278, Misc. MONTALBANO *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 284, Misc. VAN SLYKE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 315, Misc. KOENIG *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 256 F. 2d 751.

No. 330, Misc. RICE *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

Rehearing Denied.

No. 328. WEIN *v.* CALIFORNIA, *ante*, p. 866. Rehearing denied.

No. 86. LINDER *v.* COLLINS ET AL., MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF WALLACE COUNTY, KANSAS, ET AL., *ante*, p. 44;

No. 106. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* SWITCHMEN'S UNION OF NORTH AMERICA ET AL., *ante*, p. 818;

No. 133. JAMES ET AL., TRADING AS CHICAGO BOARD CO., *v.* FEDERAL TRADE COMMISSION, *ante*, p. 821;

No. 150. WEGMANN *v.* MANNINO ET AL., *ante*, p. 824;

No. 173. FRIEDMAN ET UX., DOING BUSINESS AS CITY METAL SALVAGE CO., *v.* HILL, *ante*, p. 825;

No. 264. DELUCIA *v.* UNITED STATES, *ante*, p. 836;

No. 286. MAHER *v.* ELLSWORTH ET AL., *ante*, p. 839;

No. 41, Misc. SHIELS ET AL. *v.* BALTIMORE & OHIO RAILROAD CO., *ante*, p. 846;

No. 52, Misc. JUELICH *v.* UNITED STATES, *ante*, p. 847;

No. 70, Misc. ROUSSEAU *v.* HURTADO, EXECUTRIX, *ante*, p. 849; and

No. 123, Misc. HOLLIS *v.* TEXAS, *ante*, p. 852. Petitions for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

NOVEMBER 24, 1958.

Miscellaneous Orders.

No. 31. LANVIN PARFUMS, INC., *v.* UNITED STATES. Appeal from the United States District Court for the Southern District of New York. (Probable jurisdiction noted, 355 U. S. 951.) The motion of Jacob Rothman for leave to file brief, as *amicus curiae*, is granted. *Gustave B. Garfield* for movant. Reported below: 155 F. Supp. 77.

No. 311, Misc. WARD *v.* HERITAGE, WARDEN; and

No. 332, Misc. PARTRIDGE *v.* BUCHKOE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 186, Misc. ABERLIN *v.* SUGARMAN, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *Dora Aberlin* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Dunton F. Tynan,* Assistant Attorney General, for Hill et al., and *Peter Campbell Brown, pro se, Seymour B. Quel* and *Anthony Curreri* for the Corporation Counsel of New York City, respondents.

No. 254, Misc. HULLOM *v.* THORNTON. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 394. KINGSLEY INTERNATIONAL PICTURES CORP. *v.* REGENTS OF THE UNIVERSITY OF NEW YORK. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. *Ephraim London* and *Chester T. Lane* for appellant. *Charles A. Brind, Jr.* for appellees. Reported below: 4 N. Y. 2d 349, 151 N. E. 2d 197.

Certiorari Granted.

No. 406. FEDERAL TRADE COMMISSION *v.* SIMPLICITY PATTERN CO., INC.; and

No. 447. SIMPLICITY PATTERN CO., INC., *v.* FEDERAL TRADE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Earl W. Kintner, James E. Corkey* and *Alvin L. Berman* for the Federal Trade Commission. *William Simon, Robert L. Wald* and *David Vorhaus* for the Simplicity Pattern Co., Inc. Reported below: 103 U. S. App. D. C. 373, 258 F. 2d 673.

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No. 429. PATTERSON, GENERAL ADMINISTRATOR, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Jacob Rassner* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 258 F. 2d 702.

Certiorari Denied. (*See also No. 22, Misc., ante, p. 102.*)

No. 415. GASTON ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Robert S. Erdahl* and *Felicia Dubrovsky* for the United States.

No. 427. CRIMM *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *J. O. Hollis* for petitioner. Reported below: —— Miss. ——, 103 So. 2d 139.

No. 442. HYDE CORPORATION *v.* HUFFINES. Supreme Court of Texas. Certiorari denied. *T. S. Christopher* for petitioner. *Ogden K. Shannon, Jr.* for respondent. Reported below: 158 Tex. ——, 314 S. W. 2d 763.

No. 443. G & G FISHING MAGNETS, INC., ET AL. *v.* K & G OIL TOOL & SERVICE CO., INC., ET AL. Supreme Court of Texas. Certiorari denied. *Tom Arnold* for petitioners. *Cooper K. Ragan* and *Robert Eikel* for respondents. Reported below: 158 Tex. ——, 314 S. W. 2d 782.

No. 425. RUSTAD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITTAKER are of the opinion that certiorari should be granted. *John H. Dimond* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Robert S. Erdahl* for the United States. Reported below: 258 F. 2d 563.

No. 420. HATAHLEY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Norman M. Littell, Frederick Bernays Wiener* and *Dennis McCarthy* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 257 F. 2d 920.

No. 421. MALMENATO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Myer H. Gladstone* and *George N. Leighton* for petitioner. Reported below: 14 Ill. 2d 52, 150 N. E. 2d 806.

No. 100, Misc. ADAMS *v.* RIGG, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 252 Minn. 283, 89 N. W. 2d 898.

No. 113, Misc. GUGLIELMELLI *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. *Jacob W. Friedman* for petitioner. *Walter E. Dillon* for respondent. Reported below: 5 App. Div. 2d 815, 170 N. Y. S. 2d 986.

No. 136, Misc. SNELGROVE *v.* RUSHING, WARDEN, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. Will Wilson,* Attorney General of Texas, and *W. V. Geppert* and *George P. Blackburn,* Assistant Attorneys General, for respondents.

No. 181, Misc. SCOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 257 F. 2d 816.

No. 239, Misc. SCHWARTZBERG *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 253, Misc. DE LEVAY ET AL. *v.* ISBELL ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 262, Misc. MILLER *v.* LAINSON, WARDEN. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se*. *Norman A. Erbe,* Attorney General of Iowa, and *Hugh V. Faulkner* and *Don C. Swanson,* Assistant Attorneys General, for respondent.

No. 291, Misc. KENNEDY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 4 N. Y. 2d 962, 152 N. E. 2d 519.

No. 294, Misc. MORALES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. W. Gill* and *G. H. Schreiber* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 257 F. 2d 168.

No. 305, Misc. NIDY *v.* CULVER, DIRECTOR OF CORRECTIONS. Supreme Court of Florida. Certiorari denied.

No. 314, Misc. ALLEN *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Reported below: 52 Wash. 2d 609, 328 P. 2d 367.

No. 251, Misc. HORN *v.* WASHINGTON ET AL. Petition for writ of certiorari to the Supreme Court of Washington denied without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court. Reported below: 52 Wash. 2d 613, 328 P. 2d 159.

No. 340, Misc. FERRELL *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

Rehearing Denied.

No. 325. EVANS *v.* UNITED STATES, *ante*, p. 866. Rehearing denied.

No. 65. GEO. F. ALGER CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO, *ante*, p. 43;

No. 119. ROTH *v.* UNITED STATES, *ante*, p. 819;

No. 131. EASTER *v.* DUNDALK HOLDING CO. ET AL., *ante*, p. 821;

No. 166. GROCHOWIAK *v.* PENNSYLVANIA, *ante*, p. 47;

No. 176. ALKER *v.* GIRARD TRUST CORN EXCHANGE BANK ET AL., EXECUTORS, *ante*, p. 825;

No. 177. ALKER *v.* ESTATE OF RENTSCHLER, *ante*, p. 826;

No. 189. 222 EAST CHESTNUT STREET CORP. *v.* LASALLE NATIONAL BANK, TRUSTEE, ET AL., *ante*, p. 827;

No. 221. COSTELLO *v.* UNITED STATES, *ante*, p. 830;

No. 224. CANNELLA *v.* UNITED STATES, *ante*, p. 830;

No. 254. UNITED STATES EX REL. MCCANS *v.* ARMOUR & CO., *ante*, p. 834;

No. 270. SWIFT & CO. *v.* UNITED STATES, *ante*, p. 837;

No. 271. NATIONAL BISCUIT CO. ET AL. *v.* UNITED STATES, *ante*, p. 837; and

No. 161, Misc. SHOTKIN *v.* WEKSLER ET AL., *ante*, p. 855. Petitions for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

No. 446, October Term, 1957. MISSISSIPPI VALLEY BARGE LINE CO. *v.* T. L. JAMES & CO., INC., ET AL., 355 U. S. 871. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

DECEMBER 8, 1958.*

Miscellaneous Orders.

No. 10, Original. UNITED STATES *v.* LOUISIANA ET AL. The motion for leave to file reply brief of the State of Florida is granted. The joint motion for leave to file reply brief of the State of Louisiana et al. is granted. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of these motions. *Richard W. Ervin,* Attorney General, *J. Robert McClure,* First Assistant Attorney General, *Fred M. Burns, Robert J. Kelly, Irving B. Levenson,* Assistant Attorneys General, and *Spessard L. Holland,* for the State of Florida, were on both the joint motion and a separate motion for the State of Florida. Also on the joint motion were *Jack P. F. Gremillion,* Attorney General, *W. Scott Wilkinson, Victor A. Sachse, Edward M. Carmouche, John L. Madden,* Special Assistant Attorneys General, *Bailey Walsh, Hugh M. Wilkinson* and *Marc Dupuy, Jr.* for the State of Louisiana; *Will Wilson,* Attorney General, *James N. Ludlum,* First Assistant Attorney General, *James H. Rogers,* Assistant Attorney General, *James P. Hart, J. Chrys Dougherty* and *Robert J. Hearon, Jr.* for the State of Texas; *Joe T. Patterson,* Attorney General, and *John H. Price, Jr.,* Assistant Attorney General, for the State of Mississippi; *John Patterson,* Attorney General, *William G. O'Rear, Gordon Madison,* Assistant Attorneys General, and *E. K. Hanby,* Special Assistant Attorney General, for the State of Alabama; and *Guy Cordon* for the State of Florida.

No. 311. GONDRON ET AL. *v.* UNITED STATES, *ante,* p. 865. Motion to remand denied. Rehearing also denied.

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*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

No. 155. SOUTHWESTERN SUGAR & MOLASSES CO., INC., *v.* RIVER TERMINALS CORP. Certiorari, 358 U. S. 811, to the United States Court of Appeals for the Fifth Circuit. The motion for leave to file brief of T. L. James & Co., Inc., et al., as *amici curiae,* is denied. Reported below: 253 F. 2d 922.

No. 480. M. A. OWENS CO. *v.* GARGILL, TRUSTEE. The petitioner's motion for directions for production of record is denied. The petition for writ of certiorari to the United States Court of Appeals for the First Circuit is also denied. *Angus M. MacNeil* for petitioner.

No. 322, Misc. SOPER *v.* MICHIGAN. Motion for leave to file petition for writ of mandamus denied.

No. 318, Misc. SHELTON *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Solicitor General Rankin* for the United States.

No. 327, Misc. LEE *v.* JACKSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 435. LEV *v.* UNITED STATES;

No. 436. WOOL *v.* UNITED STATES; and

No. 437. RUBIN *v.* UNITED STATES. On petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit.

In No. 435 the petition for writ of certiorari is granted limited to questions 5, 6, and 7 presented by the petition for the writ which read as follows:

"5. Is it proper for a reviewing court to make an examination *in camera* of a sealed summary of a witness's prior statement to a government investigator furnished it by the prosecutor and of *ex parte* affidavits pertaining to the

summary in order to determine whether the summary is discoverable under the provisions of Title 18 U. S. C., Section 3500, when no claim is made that it contained irrelevant or extraneous matter?

"6. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of Title 18 U. S. C., Section 3500?

"7. Does Title 18 U. S. C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?"

In No. 436 the petition for writ of certiorari is granted limited to question 2 presented by the petition for the writ which reads as follows:

"2. Whether the rights of the petitioner were substantially prejudiced when the trial court denied the motion of the defendants to direct the Government to produce a statement which a witness for the Government had previously given to government agents, in direct violation of this Court's decision in *Jencks* v. *U. S.*, 353 U. S. 657."

In No. 437 the petition for writ of certiorari is granted.

The cases are consolidated and a total of three hours is allowed for oral argument. MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

Anthony Bradley Eben for petitioner in No. 435. *Albert H. Treiman* for petitioner in No. 436. *Isidor Enselman* for petitioner in No. 437. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 258 F. 2d 9.

No. 451. ROSENBERG *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted limited to question I presented by the petition for the writ which reads as follows:

"I. Is the rule of this Court in *Jencks* v. *United States*, 1957, 353 U. S. 657, a rule of mere procedure, or does it involve a defendant's constitutional rights? May a clear violation of this rule be harmless error? May the conceded error of a trial court in withholding from defense counsel prior statements of principal Government witnesses be excused because a Circuit Court finds that the defense was not hampered in cross-examination of those witnesses? Is it proper for a Circuit Court to determine what use defense counsel might have made of statements erroneously withheld?"

Bernard Tompkins for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 257 F. 2d 760.

No. 457. INGRAM ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Wesley R. Asinof* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 259 F. 2d 886.

No. 471. PALERMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Wyllys S. Newcomb* and *John A. Wells* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Lawrence K. Bailey* for the United States. Reported below: 258 F. 2d 397.

Certiorari Denied. (See also No. 434, ante, p. 129; No. 480, supra, and Misc. Nos. 214, ante, p. 130, and 260, ante, p. 132.)

No. 456. GREEN *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 327 P. 2d 704.

No. 351. BROWN PAPER MILL CO., INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Robert Ash* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 255 F. 2d 77.

No. 411. BARNARD-CURTISS COMPANY ET AL. *v.* UNITED STATES FOR THE USE AND BENEFIT OF D. W. FALLS CONSTRUCTION CO. ET AL.; and

No. 455. UNITED STATES FOR THE USE AND BENEFIT OF D. W. FALLS CONSTRUCTION CO. ET AL. *v.* BARNARD-CURTISS COMPANY ET AL. C. A. 10th Cir. Certiorari denied. *Darrell J. Skelton* for petitioners in No. 411. *John B. Tittmann* for the D. W. Falls Construction Co. et al. Reported below: 257 F. 2d 565.

No. 440. BEAN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Thurman Arnold* and *W. Morgan Hunter* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, David R. Warner* and *S. Billingsley Hill* for the United States. Reported below: 143 Ct. Cl. ——, 163 F. Supp. 838.

No. 441. TANZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James J. Silver* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Robert S. Erdahl* for the United States.

No. 444. PETROLITE CORPORATION, LTD., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Everett B. Laybourne* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *John G. Laughlin, Jr.* for the United States. Reported below: 142 Ct. Cl. 108, 161 F. Supp. 618.

No. 449. STACHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 258 F. 2d 112.

No. 450. WOLFSEN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Edward G. Chandler, Francis M. Shea, Lawrence J. Latto* and *Richard T. Conway* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *A. Donald Mileur* for the United States. Reported below: 142 Ct. Cl. 383, 162 F. Supp. 403.

No. 452. 222 EAST CHESTNUT STREET CORP. *v.* LAKEFRONT REALTY CORP. ET AL. C. A. 7th Cir. Certiorari denied. *Joseph F. Elward* for petitioner. *John S. Miller* and *Howard B. Bryant* for the Lakefront Realty Corporation et al., *Alban Weber* for the Northwestern University, and *John C. Melaniphy* and *Sydney R. Drebin* for the City of Chicago et al., respondents. Reported below: 256 F. 2d 513.

No. 459. MILLER ET AL. *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ALCOHOLIC CONTROL APPEALS BOARD. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 160 Cal. App. 2d 658, 325 P. 2d 601.

No. 473. AKERS ET AL., DOING BUSINESS AS AKERS CLEANERS, *v.* HANDLEY, GOVERNOR OF INDIANA, ET AL. Supreme Court of Indiana. Certiorari denied. *Gustav H. Dongus* for petitioners. *Edwin K. Steers,* Attorney General of Indiana, and *Lloyd C. Hutchinson,* Assistant Attorney General, for respondents. Reported below: 238 Ind. 288, 149 N. E. 2d 692.

No. 458. CERTAIN INTERESTS IN PROPERTY IN HILLSBOROUGH COUNTY, FLORIDA, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Chester H. Ferguson* and *John M. Allison* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 257 F. 2d 844.

No. 460. McDAVID *v.* FORD MOTOR CO. C. A. 4th Cir. Certiorari denied. *C. T. Graydon* for petitioner. *Nathaniel A. Turner* for respondent. Reported below: 259 F. 2d 261.

No. 461. FISHER ET AL. *v.* PRINTING DEVELOPMENTS, INC. Appellate Court of Illinois, First District. Certiorari denied. *Horace A. Young* for petitioners. *Cranston Spray* and *Robert C. Keck* for respondent. Reported below: 17 Ill. App. 2d 553, 151 N. E. 2d 108.

No. 462. McALLISTER LIGHTERAGE LINE, INC., *v.* JOHN T. CLARK & SON, INC. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner. *William L. F. Gardiner* for respondent. Reported below: 258 F. 2d 297.

No. 467. FLOWERS *v.* NANCE EXPLORATION CO. Court of Civil Appeals of Texas, Eighth Supreme Judicial District. Certiorari denied. Petitioner *pro se*. *William L. Kerr* for respondent. Reported below: 305 S. W. 2d 621.

No. 506. ZOOMAR, INC., *v.* PAILLARD PRODUCTS, INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Louis H. Shereff* for petitioner. *Edwin Levisohn* for respondent. Reported below: 258 F. 2d 527.

No. 478. KIAMIE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Theodore Kiendl, William R. Meagher* and *Philip C. Potter, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 258 F. 2d 924.

No. 477. INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS OF AMERICA, INC., AFL–CIO, ET AL. *v.* MADDEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Mozart G. Ratner* for petitioners. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board. Reported below: 259 F. 2d 312.

No. 484. GRADY COUNTY, GEORGIA, *v.* DICKERSON. C. A. 5th Cir. Certiorari denied. *Eugene Cook,* Attorney General of Georgia, *Paul Miller, E. J. Summerour, Lamar Murdaugh,* Assistant Attorneys General, *Ariel V. Conlin, John E. Hogg,* Deputy Assistant Attorneys General, and *Sol Altman* for petitioner. *Thomas Heyward Vann* for respondent. Reported below: 257 F. 2d 369.

No. 430. FLYING TIGER LINE, INC., *v.* PHILIPPINE AIR LINES, INC.; and

No. 469. PHILIPPINE AIR LINES, INC., *v.* ORLOVE, DOING BUSINESS AS H. ORLOVE CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of these applications. *Russell T. Mount* and *James F. Dwyer* for petitioner in No. 430. *Frank C. Fisher* and *Harry W. Colmery* for the Philippine Air Lines, Inc. *Arthur O. Louis* for respondent in No. 469. Reported below: 257 F. 2d 384.

No. 470. DEPARTMENT OF HIGHWAYS OF LOUISIANA *v.* UNITED GAS PIPE LINE CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *W. Crosby Pegues, Jr.* for petitioner. *John M. Madison* for respondent. Reported below: 258 F. 2d 357, 359.

No. 476. PRASHKER, EXECUTRIX, ET AL. *v.* BEECH AIRCRAFT CORP. ET AL. Motion for leave to file brief of Jean C. Cleminshaw, Trustee, as *amicus curiae,* denied. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *Harold Leshem* and *Lee S. Kreindler* for petitioners. *E. N. Carpenter, II, J. Welles Henderson, Jr.* and *Louis J. Finger* for the Beech Aircraft Corporation, and *Richard W. Galiher* for the Atlantic Aviation Corporation, respondents. Reported below: 258 F. 2d 602.

No. 481. TORRE *v.* GARLAND. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Mathias F. Correa* for petitioner. *Lionel S. Popkin* for respondent. Reported below: 259 F. 2d 545.

No. 24, Misc. SMITH *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. *Merle L. Silverstein* for petitioner. *John M. Dalton,* Attorney General of Missouri, for respondent. Reported below: 310 S. W. 2d 845.

No. 47, Misc. SMITH *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se.* *Frank S. Hogan* for respondent.

No. 58, Misc. STAPP *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 116, Misc. BACKUS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 127, Misc. ROGERS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 129, Misc. NIKLAUS *v.* NEBRASKA EX REL. BECK. Supreme Court of Nebraska. Certiorari denied. Reported below: 166 Neb. 94, 87 N. W. 2d 894.

No. 156, Misc. BROWN *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. 210, Misc. BERRY *v.* DISTRICT PAROLE BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for respondents.

No. 223, Misc. JOHNSON *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 224, Misc. LYONS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 256 F. 2d 749.

No. 169, Misc. McCune *v.* Adams, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 237, Misc. Moore *v.* Smyth, Superintendent, Virginia State Penitentiary. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 249, Misc. Cox *v.* Smyth, Superintendent, Virginia State Penitentiary. Supreme Court of Appeals of Virginia. Certiorari denied. *William Alfred Hall, Jr.* for petitioner.

No. 250, Misc. Gray *v.* Ellis, General Manager, Texas Prison System. C. A. 5th Cir. Certiorari denied. Reported below: 257 F. 2d 159.

No. 255, Misc. Hannon *v.* Missouri. Supreme Court of Missouri. Certiorari denied.

No. 264, Misc. Weber *v.* United States. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 256 F. 2d 119, 257 F. 2d 585.

No. 268, Misc. Williams *v.* New York. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 272, Misc. Winter *v.* Director, Department of Public Welfare of Baltimore City. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se*. *Hugo A. Ricciuti* and *Blanche G. Wahl* for respondent. Reported below: 217 Md. 391, 143 A. 2d 81.

No. 295, Misc. Vatelli *v.* California et al. Supreme Court of California. Certiorari denied.

No. 289, Misc. IN RE STAFFORD. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 160 Cal. App. 2d 110, 324 P. 2d 967.

No. 296, Misc. OWENS *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. 308, Misc. SHIPMAN *v.* RANDOLPH, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 341, Misc. GEORGE *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 343, Misc. MORGAN *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied.

Rehearing Denied. (*See also No. 311, ante, p. 902.*)

No. 46. PEURIFOY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 59;

No. 295. NEW ORLEANS CITY PARK IMPROVEMENT ASSOCIATION *v.* DETIEGE ET AL., *ante,* p. 54;

No. 308. MELLOTT ET AL. *v.* UNITED STATES, *ante,* p. 864;

No. 336. WHEELER *v.* UNITED STATES, *ante,* p. 873;

No. 352. BEARD ET UX. *v.* UNITED STATES, *ante,* p. 874;

No. 393. FURNISH *v.* BOARD OF MEDICAL EXAMINERS OF CALIFORNIA, *ante,* p. 882; and

No. 197, Misc. ORR *v.* ILLINOIS, *ante,* p. 869. Petitions for rehearing denied.

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No. 232. HILLS ET AL. *v.* EISENHART ET AL., *ante*, p. 832;

No. 333. O'ROURKE ET AL. *v.* SILL ET AL., *ante*, p. 841;

No. 101, Misc. CURRY *v.* RAGAN ET AL., *ante*, p. 851;

No. 154, Misc. PAPWORTH *v.* UNITED STATES, *ante*, p. 854; and

No. 216, Misc. RUBY ET UX. *v.* BOWLUS, *ante*, p. 856. Petitions for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

DECEMBER 15, 1958.*

Miscellaneous Orders.

No. 57. HOWARD *v.* LYONS ET AL. Certiorari, 357 U. S. 903, to the United States Court of Appeals for the First Circuit. Argued December 8–9, 1958. This case is restored to the calendar for reargument. *Solicitor General Rankin, Assistant Attorney General Doub, Paul A. Sweeney, Morton Hollander* and *Bernard Cedarbaum* for petitioner. *Claude L. Dawson* for respondents. Reported below: 250 F. 2d 912.

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;

No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and

No. 4, Original. NEW YORK *v.* ILLINOIS ET AL. Application having been made for a reopening and amendment of the decree of April 21, 1930, 281 U. S. 696, it is ordered that the defendants be allowed to and including January 19, 1959, in which to file a response or responses to the application. *Latham Castle*, Attorney General, for the State of Illinois, and *Russell W. Root* for the Metropolitan Sanitary District of Greater Chicago, movants-defendants.

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*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

No. 24. GUERLAIN, INC., *v.* UNITED STATES;

No. 30. PARFUMS CORDAY, INC., *v.* UNITED STATES; and

No. 31. LANVIN PARFUMS, INC., *v.* UNITED STATES. Appeals from the United States District Court for the Southern District of New York. (Probable jurisdiction noted, 355 U. S. 937, 951.) The motion to vacate the judgments is granted. The judgments are vacated and the cases remanded to the District Court to enable it to consider a motion to dismiss to be filed by the United States. *Chauncey B. Garver* and *Charles C. Parlin, Jr.* for appellant in No. 24. *Samuel I. Rosenman, Seymour D. Lewis* and *Joseph L. Hochman* for appellant in No. 30. *Simon H. Rifkind* and *Walter J. Derenberg* for appellant in No. 31. *Solicitor General Rankin* and *Ralph S. Spritzer* for the United States, movant-appellee. *Gustave B. Garfield* filed a brief for Rothman, as *amicus curiae*. Reported below: 155 F. Supp. 77.

No. 175. RALEY ET AL. *v.* OHIO. Appeal from the Supreme Court of Ohio. (Consideration of question of jurisdiction postponed to hearing on the merits, *ante*, p. 862.) The motion to strike portions of the designation of record is denied. MR. JUSTICE STEWART took no part in the consideration or decision of this motion. *Morse Johnson* and *Louis C. Capelle* for appellants. *C. Watson Hover* and *Carl B. Rubin* for movant-appellee. Reported below: 167 Ohio St. 295, 147 N. E. 2d 847.

No. 479. GRAND TRUNK WESTERN RAILROAD CO. *v.* JAMES, ADMINISTRATOR. Motion to amend petition for writ of certiorari as to question 1 presented by the motion granted. Petition for writ of certiorari to the Supreme Court of Illinois denied. *George B. Christensen* for petitioner. *James A. Dooley* for respondent. Reported below: 14 Ill. 2d 356, 152 N. E. 2d 858.

No. 14, Original. SCHUTTE *v.* NEBRASKA ET AL. The motion for leave to file petition is denied.

No. 65, Misc. ROARK *v.* ALVIS, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied. Petitioner *pro se*. *William Saxbe,* Attorney General of Ohio, and *William M. Vance,* Assistant Attorney General, for respondent.

No. 356, Misc. LUNDBERG *v.* BANNAN, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 370, Misc. ORDER OF RAILROAD TELEGRAPHERS ET AL. *v.* DUFFY ET AL., U. S. COURT OF APPEALS JUDGES, ET AL. Motion for leave to file petition for writ of mandamus denied. *Alex Elson, Lester P. Schoene, Brainerd Currie* and *Philip B. Kurland* for petitioners. *Solicitor General Rankin* for the Judges of the United States Court of Appeals for the Seventh Circuit, and *Carl McGowan* for the Chicago & North Western Railway Co., respondents.

Probable Jurisdiction Noted.

No. 229, Misc. LASSITER *v.* NORTHAMPTON COUNTY BOARD OF ELECTIONS. Appeal from the Supreme Court of North Carolina. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. *Herman L. Taylor* and *Samuel S. Mitchell* for appellant. *Malcolm B. Seawell,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for appellee. Reported below: 248 N. C. 102, 102 S. E. 2d 853.

Certiorari Granted.

No. 350. BARR *v.* MATTEO ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Bernard Cedarbaum* for petitioner. *Byron N. Scott* and *Richard A. Mehler* for respondents. Reported below: 103 U. S. App. D. C. 176, 256 F. 2d 890.

No. 488. SCALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. *Telford Taylor* and *McNeill Smith* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Yeagley* and *Philip R. Monahan* for the United States. Reported below: 260 F. 2d 21.

No. 489. PITTSBURGH PLATE GLASS CO. *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. In the trial of a federal criminal action, when the principal witness for the prosecution stated that he had testified three times before the indicting grand jury upon matters covered by his testimony at the trial, was it reversible error for the trial judge upon motion duly made to deny to the defendants, for use in cross examination, inspection of the transcripts of the grand jury testimony of that witness?"

Leland Hazard, Cyrus V. Anderson and *James B. Henry, Jr.* for petitioner.

Solicitor General Rankin, Assistant Attorney General Hansen and *Daniel M. Friedman* for the United States. Reported below: 260 F. 2d 397.

No. 482. NATIONAL LABOR RELATIONS BOARD *v.* FANT MILLING CO. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Frederick U. Reel* for petitioner. *O. B. Fisher* for respondent. Reported below: 258 F. 2d 851.

No. 491. GALAX MIRROR CO., INC., ET AL. *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted limited to question 1 presented by the petition for the writ which reads as follows:

"1. Whether the denial of defendants' motion at the trial for production of the relevant grand jury testimony of the principal Government witness for purposes of cross-examination constituted error."

H. Graham Morison for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman* for the United States. Reported below: 260 F. 2d 397.

No. 504. TAYLOR *v.* MCELROY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Joseph L. Rauh, Jr., John Silard, Harold A. Cranefield* and *Richard Lipsitz* for petitioner. *Solicitor General Rankin* for respondents.

No. 512. BAIRD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari granted. *W. Byron Sorrell, John C. Williamson, Lester M. Ponder* and *Thomas M. Scanlon* for petitioners. *Solicitor General Rankin* for respondent. Reported below: 256 F. 2d 918.

No. 80, Misc. SPANO *v.* NEW YORK. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Appeals of New York granted. *Rita D. Schechter* for petitioner. *Walter E. Dillon* and *Irving Anolik* for respondent. Reported below: 4 N. Y. 2d 256, 150 N. E. 2d 226.

No. 5, Misc. BURNS *v.* OHIO. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Ohio granted. MR. JUSTICE STEWART took no part in the consideration or decision of this application. Petitioner *pro se*. *C. Watson Hover* for respondent.

No. 213, Misc. NAPUE *v.* ILLINOIS. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Illinois granted. *George N. Leighton* for petitioner. Reported below: 13 Ill. 2d 566, 150 N. E. 2d 613.

Certiorari Denied. (*See also No. 479 and Misc. No. 65, supra.*)

No. 192. BARNARD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Daniel L. Brenner, William S. Hogsett, J. A. Dickinson, Edward F. Arn* and *Joseph H. McDowell* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg, Robert S. Erdahl* and *Theodore G. Gilinsky* for the United States. Reported below: 255 F. 2d 583.

No. 422. PERFECT BRASSIERE CO., INC., *v.* PERFECTFORM CORPORATION. C. A. 3d Cir. Certiorari denied. *Asher Blum* and *Milton Pollack* for petitioner. *S. Stephen Baker* for respondent. Reported below: 256 F. 2d 736.

No. 485. CROSLEY BROADCASTING CORP. *v.* WIBC, INC., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *D. M. Patrick* and *E. Barrett Prettyman, Jr.* for petitioner. *Solicitor General Rankin* and *John L. Fitzgerald* for the Federal Communications Commission, and *Thomas H. Wall, Earl R. Stanley* and *Harry T. Ice* for WIBC, Inc., respondents. Reported below: 104 U. S. App. D. C. 126, 259 F. 2d 941.

No. 486. CURD *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Llewellyn A. Luce* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *Fred E. Youngman* for respondents. Reported below: 257 F. 2d 347.

No. 496. ORDER OF RAILROAD TELEGRAPHERS ET AL. *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Alex Elson, Lester P. Schoene, Brainerd Currie* and *Philip B. Kurland* for petitioners. *Carl McGowan* for respondent.

No. 483. LADREY *v.* COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART IN THE DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *William B. Bryant, Joseph C. Waddy* and *William C. Gardner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Robert E. Green* for respondent. Reported below: 104 U. S. App. D. C. 239, 261 F. 2d 68.

No. 73, Misc. TUMMINELLO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *David Diamond* for respondent. Reported below: 5 App. Div. 2d 892, 173 N. Y. S. 2d 250.

No. 490. MEADOW BROOK CLUB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John H. Finn* and *William C. Mattison* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 259 F. 2d 41.

No. 148, Misc. HERRING *v.* ELLIS, GENERAL MANAGER, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *W. V. Geppert* and *George P. Blackburn,* Assistant Attorneys General, for respondents.

No. 244, Misc. BOYD *v.* BOMAR, WARDEN. Supreme Court of Tennessee, Middle Division. Certiorari denied. *John J. Hooker* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Henry C. Foutch,* Assistant Attorney General, for respondent. Reported below: 312 S. W. 2d 174.

No. 252, Misc. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 256 F. 2d 345.

No. 359, Misc. SCHLETTE *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 372, Misc. CULLEY *v.* WARDEN OF MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 218 Md. 639, 145 A. 2d 226.

No. 323, Misc. JETER *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. 324, Misc. ROUSSEAU ET UX. *v.* HURTADO ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied.

No. 326, Misc. JACKSON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 333, Misc. BOMBKA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 334, Misc. SMEREKA *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 344, Misc. UNITED STATES EX REL. THOMPSON *v.* PRICE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. *Joseph H. Ridge* for petitioner. *Frank P. Lawley, Jr.*, Deputy Attorney General of Pennsylvania, for respondents. Reported below: 258 F. 2d 918.

No. 348, Misc. MILES *v.* NEW YORK. County Court of Suffolk County, New York. Certiorari denied.

No. 2, Misc. WILSON *v.* FLORIDA. Petition for writ of certiorari to the Supreme Court of Florida denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *David U. Tumin*, Assistant Attorney General, for respondent.

No. 357, Misc. TUCKER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 367, Misc. SPAIN *v.* KENT COUNTY CIRCUIT COURT. Supreme Court of Michigan. Certiorari denied.

No. 13, Misc. JACKSON *v.* BANMILLER, SUPERINTENDENT, EASTERN STATE PENITENTIARY. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Eastern District, denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court.

No. 3, Misc. LOTZ *v.* OHIO. Petition for writ of certiorari to the Supreme Court of Ohio and for other relief denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 110, Misc. TABOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States.

Rehearing Denied.

No. 12, Original. CALIFORNIA *v.* WASHINGTON, *ante*, p. 64;

No. 320. BRASIER *v.* JEARY ET AL., *ante*, p. 867;

No. 372. GINSBURG *v.* SULLIVAN, U. S. DISTRICT JUDGE, ET AL., *ante*, p. 882;

No. 376. IN RE TEITELBAUM, *ante*, p. 881; and

No. 85, Misc. BELL *v.* UNITED STATES, *ante*, p. 885. Petitions for rehearing denied.

JANUARY 6, 1959.

Dismissal Under Rule 60.

No. 445. BERNSTEIN ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Morrison Shafroth* and *Charles Rosenbaum* were on the stipulation for petitioners. With them on the petition was *Raymond R. Dickey*. *Solicitor General Rankin* for the United States. Reported below: 256 F. 2d 697.

JANUARY 9, 1959.

Dismissal Under Rule 60.

No. 432. FUGIANI *v.* BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. *Joseph S. Hertogs* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 261 F. 2d 709.

JANUARY 12, 1959.*

Miscellaneous Orders.

No. 13, Original. NEW YORK *v.* NEW JERSEY ET AL. The motion for leave to file bill of complaint is denied. *Louis J. Lefkowitz,* Attorney General, *Paxton Blair,* Solicitor General, and *Ruth Kessler Toch,* Assistant Solicitor General, for the State of New York, plaintiff. *David D. Furman,* Attorney General, and *Charles J. Kehoe,* Deputy Attorney General, for the State of New Jersey, and *William S. Gaud* for the American Express Co., defendants.

*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were filed with the Clerk on this day and were not announced.

No. 203, Misc. EX PARTE LAMKIN, ALIAS LAMKINS. Court of Criminal Appeals of Texas. The petitioner's motion to dismiss the petition for writ of certiorari is granted. *Arthur Mitchell* for petitioner. Reported below: 165 Tex. Cr. R. 11, 312 S. W. 2d 670.

No. 466. COOKE ET AL. *v.* NORTH CAROLINA. Appeal from the Supreme Court of North Carolina. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *J. Alston Atkins, C. O. Pearson, Carter W. Wesley* and *James M. Nabrit, Jr.* for appellants. *Malcolm B. Seawell,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for appellee. Reported below: 248 N. C. 485, 103 S. E. 2d 846.

No. 499. KOTSAMPAS ET AL. *v.* UNITED STATES. Motion for leave to proceed on typewritten papers granted. Motion to defer consideration of petition for certiorari and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. MR. JUSTICE STEWART took no part in the consideration or decision of these applications. Petitioners *pro se. Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 257 F. 2d 64.

No. 346, Misc. MULLREED *v.* BANNAN, WARDEN;
No. 354, Misc. CARUSO *v.* MURPHY, WARDEN;
No. 376, Misc. WATKINS *v.* DOWD, WARDEN;
No. 380, Misc. SHANE *v.* RAGEN, WARDEN;
No. 400, Misc. RYAN *v.* TINSLEY, WARDEN; and
No. 401, Misc. HAUGABROK *v.* RANDOLPH, WARDEN.
Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 519. SMITH *v.* CALIFORNIA. Appeal from the Appellate Department of the Superior Court of California, Los Angeles County. Probable jurisdiction noted. *Stanley Fleishman* and *Sam Rosenwein* for appellant. *Roger Arnebergh* and *Philip E. Grey* for appellee. Reported below: 161 Cal. App. 2d Supp. 860, 327 P. 2d 636.

Certiorari Granted. (*See also No. 515 and Misc. Nos. 185 and 192, ante, pp. 280, 281, 276.*)

No. 518. ATLANTIC REFINING CO. ET AL. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL.; and

No. 536. TENNESSEE GAS TRANSMISSION CO. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL. C. A. 3d Cir. Certiorari granted. *Charles B. Ellard* and *Bernard A. Foster, Jr.* for the Atlantic Refining Co., *Gentry Lee* and *Mr. Foster* for the Cities Service Production Co., *Gene M. Woodfin* for the Continental Oil Co., and *Robert O. Koch* and *Mr. Woodfin* for the Tidewater Oil Co., petitioners in No. 518. *William C. Braden, Jr.*, *Harry S. Littman* and *Jack Werner* for petitioner in No. 536. *Kent H. Brown* for the Public Service Commission of New York, *Edward S. Kirby* for the Public Service Electric & Gas Co., and *David K. Kadane* for the Long Island Lighting Co., respondents. Reported below: 257 F. 2d 717.

No. 540. UNITED STATES *v.* SEABOARD AIR LINE RAILROAD CO. C. A. 4th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop* for the United States. *Eppa Hunton, IV,* and *Lewis Thomas Booker* for respondent. Reported below: 258 F. 2d 262.

No. 439. MAGENAU, ADMINISTRATOR, *v.* AETNA FREIGHT LINES, INC. C. A. 3d Cir. Certiorari granted. *Harry L. Shniderman* and *William W. Knox* for petitioner. *John E. Britton* and *William F. Illig* for respondent. Reported below: 257 F. 2d 445.

Certiorari Denied. (*See also Nos. 495 and 499, ante, pp. 278, 925.*)

No. 472. BOWLEY *v.* NEW JERSEY TURNPIKE AUTHORITY. Supreme Court of New Jersey. Certiorari denied. *James M. Davis, Jr.* for petitioner. *Grover C. Richman, Jr.* for respondent. Reported below: 27 N. J. 549, 143 A. 2d 558.

No. 474. GARDNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jack Hart* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 257 F. 2d 559.

No. 493. REISTROFFER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker, Sidney M. Glazer* and *Bernard J. Mellman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Theodore G. Gilinsky* for the United States. Reported below: 258 F. 2d 379.

No. 494. PURITAN CHURCH BUILDING FUND ET AL. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for respondents. Reported below: 103 U. S. App. D. C. 174, 256 F. 2d 888.

No. 492. COLEMAN ET AL. *v.* MOUNTAIN MESA URANIUM CORP. C. A. 10th Cir. Certiorari denied. *Albert W. Dilling* for petitioners. Reported below: 257 F. 2d 382.

No. 497. KORTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 260 F. 2d 633.

No. 498. STEDMAN MANUFACTURING CO. *v.* REDMAN ET AL. C. A. 4th Cir. Certiorari denied. *John Vaughan Groner, W. Brown Morton, Jr., Welch Jordan* and *Marvin E. Frankel* for petitioner. *Dexter N. Shaw, Telford Taylor* and *Thornton H. Brooks* for respondents. Reported below: 257 F. 2d 867.

No. 500. CROWELL-COLLIER PUBLISHING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Jay O. Kramer* for petitioner. *Solicitor General Rankin, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 259 F. 2d 860.

No. 502. LABORDE ET AL. *v.* TEXAS & PACIFIC RAILWAY CO. C. A. 5th Cir. Certiorari denied. *Camille F. Gravel, Jr.* for petitioners. *Frank H. Peterman* for respondent. Reported below: 257 F. 2d 587.

No. 505. COHEN *v.* PUBLIC HOUSING ADMINISTRATION ET AL. C. A. 5th Cir. Certiorari denied. *Thurgood Marshall, Constance Baker Motley* and *A. T. Walden* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the Public Housing Administration, and *Shelby Myrick, Sr.* for the Housing Authority of Savannah, respondents. Reported below: 257 F. 2d 73.

No. 507. ROSENBLOOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 259 F. 2d 500.

No. 508. MARKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *David G. Housman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 260 F. 2d 377.

No. 509. H. ROUW CO. *v.* MISSOURI PACIFIC RAILROAD CO. C. A. 5th Cir. Certiorari denied. *Sawnie B. Smith* for petitioner. *Harry L. Hall* for respondent. Reported below: 258 F. 2d 445.

No. 510. SYRES ET AL. *v.* OIL WORKERS INTERNATIONAL UNION, LOCAL NO. 23, ET AL. C. A. 5th Cir. Certiorari denied. *Roberson L. King* for petitioners. *Chris Dixie* for the Oil Workers International Union, Local 23, et al., and *Joseph H. Sperry, Quentin Keith* and *John E. Bailey* for the Gulf Oil Corporation, respondents. Reported below: 257 F. 2d 479.

No. 513. COURTNEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Maurice Edelbaum* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 257 F. 2d 944.

No. 523. BECKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Bruno Schachner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Lawrence K. Bailey* for the United States. Reported below: 259 F. 2d 869.

No. 516. SPRINGFIELD TELEVISION BROADCASTING CORP. ET AL. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James A. McKenna, Jr.* and *Vernon L. Wilkinson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, John L. Fitzgerald* and *Richard A. Solomon* for the United States and the Federal Communications Commission, and *Percy H. Russell* and *Aloysius B. McCabe* for the Travelers Broadcasting Service Corporation, respondents. Reported below: 104 U. S. App. D. C. 13, 259 F. 2d 170.

No. 517. WINNEBAGO TELEVISION CORP. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James A. McKenna, Jr.* and *Vernon L. Wilkinson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Hansen, Charles H. Weston, John L. Fitzgerald* and *Richard A. Solomon* for the United States and the Federal Communications Commission, and *Arthur W. Scharfeld* for Radio Wisconsin, Inc., respondents. Reported below: 103 U. S. App. D. C. 311, 258 F. 2d 163.

No. 529. ALABAMA BY-PRODUCTS CORP. *v.* PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *William Bew White* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 258 F. 2d 892.

No. 534. QUINN *v.* CALIFORNIA. Appellate Department of the Superior Court of California, County of Los Angeles. Certiorari denied. *A. L. Wirin, Fred Okrand* and *Jack B. Tenney* for petitioner.

No. 522. UNITED STATES EX REL. THOMPSON *v.* LENNOX, SHERIFF. C. A. 3d Cir. Certiorari denied. *Landon Gerald Dowdey* for petitioner. *David Berger* for respondent. *David D. Furman,* Attorney General, and *William L. Boyan,* Deputy Attorney General, filed a brief for the State of New Jersey, as *amicus curiae,* in support of the petition for a writ of certiorari. Reported below: 258 F. 2d 320.

No. 530. GOFF *v.* SEARS, ROEBUCK & Co. C. A. 7th Cir. Certiorari denied. *Louis G. Davidson, Brainerd Currie* and *Philip B. Kurland* for petitioner. *Robert B. Johnstone* for respondent. Reported below: 257 F. 2d 418.

No. 533. TANDARIC *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Pearl M. Hart* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 257 F. 2d 895.

No. 538. WEBB ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Assistant Attorney General Morton* and *S. Billingsley Hill* for the United States. Reported below: 256 F. 2d 669.

No. 539. INDUSTRIAL WAXES, INC., *v.* BROWN. C. A. 2d Cir. Certiorari denied. *Milton B. Ignatius* for petitioner. *Daniel L. Stonebridge* and *Wilbur E. Dow, Jr.* for respondent. Reported below: 258 F. 2d 800.

No. 547. BOHN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Carl W. Cummins, Sr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 260 F. 2d 773.

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No. 542. MEDBERRY *v.* PATTERSON, WARDEN, ET AL. Supreme Court of Colorado. Certiorari denied. *Samuel D. Menin* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John W. Patterson,* Assistant Attorney General, for respondents.

No. 544. SEABOARD MACHINERY CORP. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Leo L. Foster* and *Charles M. Trammell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 256 F. 2d 166.

No. 548. BARTA ET AL. *v.* OGLALA SIOUX TRIBE, PINE RIDGE RESERVATION, SOUTH DAKOTA, ET AL. C. A. 8th Cir. Certiorari denied. *Hubbard F. Fellows, John C. Farrar* and *Robert W. Gunderson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States, and *Richard Schifter* and *Eugene Gressman* for the Oglala Sioux Tribe et al., respondents. Reported below: 259 F. 2d 553.

No. 592. WABASH RAILROAD CO. *v.* WEHRLI. Supreme Court of Missouri. Certiorari denied. *Richard Wayne Ely* for petitioner. *Mark D. Eagleton* and *Eugene K. Buckley* for respondent. Reported below: 315 S. W. 2d 765.

No. 475. FRANKO *v.* MAHONING COUNTY BAR ASSOCIATION. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Eugene Gressman* for petitioner. *John H. Ranz* for respondent. Reported below: 168 Ohio St. 17, 151 N. E. 2d 17.

No. 503. GYNN *v.* GYNN. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *De Long Harris* for petitioner. *J. Virgil Cory* for respondent. Reported below: 168 Ohio St. 164, 151 N. E. 2d 560.

No. 511. DEEP SEA TANKERS, LTD., ET AL. *v.* THE LONG BRANCH ET AL. Motion of Canadian Shipowners Association for leave to file brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Charles S. Haight, Robert M. Julian* and *MacDonald Deming* for petitioners. *Vincent E. McGowan* for the Central Railroad Co. of New Jersey, and *Leo F. Hanan* for the Metropolitan Sand & Gravel Corporation, respondents. *Walter A. Darby, Jr.* filed a brief for the Canadian Shipowners Association, as *amicus curiae,* urging that a petition for writ of certiorari be granted. Reported below: 258 F. 2d 757.

No. 514. STATES STEAMSHIP CO. *v.* UNITED STATES ET AL. Motion of American Mail Line et al. for leave to file brief, as *amici curiae,* denied. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Erskine Wood, Erskine B. Wood, Stanley B. Long* and *Eugene Gressman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States, *Henry N. Longley, John Gordon Gearin* and *George Buland Campbell* for the Atlantic Mutual Insurance Co. et al., and *Charles B. Howard* for the Dominion of Canada, respondents. Reported below: 259 F. 2d 458.

No. 282, Misc. BILLS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Herbert K. Hyde* for petitioner.

No. 564. METROPOLITAN SAND & GRAVEL CORP. *v.* DEEP SEA TANKERS, LTD., ET AL. C. A. 2d Cir. Certiorari denied. *Leo F. Hanan* for petitioner. *Charles S. Haight, Robert M. Julian* and *MacDonald Deming* for respondents. Reported below: 258 F. 2d 757.

No. 527. SCHINE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Frank G. Raichle* and *David C. Diefendorf* for petitioners. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman* and *Henry Geller* for the United States. Reported below: 260 F. 2d 552.

No. 231, Misc. JAMES *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Petitioner *pro se. Miles Lord,* Attorney General of Minnesota, and *Charles E. Houston,* Solicitor General, for respondent. Reported below: 252 Minn. 243, 89 N. W. 2d 904.

No. 236, Misc. MOORE *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se. Thomas M. Miller,* Assistant Attorney General of Virginia, for respondent.

No. 240, Misc. MASON *v.* ALABAMA. Court of Appeals of Alabama. Certiorari denied. *Glen T. Bashore* for petitioner. *John Patterson,* Attorney General of Alabama, *Bernard F. Sykes,* Assistant Attorney General, and *George Young,* Special Assistant Attorney General, for respondent. Reported below: 39 Ala. App. 1, 103 So. 2d 337.

No. 287, Misc. VAN ELLA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se. Ralph De Vita* for respondent.

No. 290, Misc. McDERMOTT *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE Co. C. A. 3d Cir. Certiorari denied. *Philip Dorfman* for petitioner. Reported below: 255 F. 2d 562.

No. 299, Misc. RITCHIE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 301, Misc. CARRAWAY *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 309, Misc. RIVERA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 319, Misc. UNITED STATES EX REL. CUOMO *v.* FAY, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, *Samuel A. Hirshowitz*, Assistant Solicitor General, and *George K. Bernstein*, Assistant Attorney General, for respondents. Reported below: 257 F. 2d 438.

No. 329, Misc. CARRIER *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 335, Misc. DeCOTEAU *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 339, Misc. CRISPELL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 353, Misc. IN RE MORRIS. Supreme Court of California. Certiorari denied.

No. 360, Misc. WISEMAN *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se.* *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, *John W. Patterson* and *John B. Barnard, Jr.,* Assistant Attorneys General, for respondent.

No. 368, Misc. HUNT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 103 U. S. App. D. C. 309, 258 F. 2d 161.

No. 371, Misc. SEARS *v.* KLINGER, SUPERINTENDENT, CALIFORNIA MEN'S COLONY. Supreme Court of California. Certiorari denied.

No. 373, Misc. ROLIE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 375, Misc. SHEPHERD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin* for the United States.

No. 382, Misc. MOMAN *v.* RAGEN, WARDEN, ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 383, Misc. NEAL *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 384, Misc. BLAIR *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 394, Misc. KYLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert Satter* for petitioner. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States. Reported below: 257 F. 2d 559.

No. 395, Misc. GARDNER *v.* BANNAN, WARDEN, ET AL. Supreme Court of Michigan. Certiorari denied.

No. 396, Misc. NEAL *v.* UFFELMAN, SUPERINTENDENT, ILLINOIS SECURITY HOSPITAL. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 398, Misc. WILSON *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 459, Misc. BRUNER *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 84, Misc. BURMAN *v.* FLORIDA ET AL. Petition for writ of certiorari to the Supreme Court of Florida denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *Edward S. Jaffry*, Assistant Attorney General, for respondents.

No. 355, Misc. JACKSON *v.* ALVIS, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

Rehearing Denied.

No. 13. FEDERAL HOUSING ADMINISTRATION *v.* THE DARLINGTON, INC., *ante*, p. 84. Rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 28. HINKLE, ADMINISTRATRIX, ET AL. *v.* NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS, *ante*, p. 65;

No. 334. SCIENTIFIC LIVING, INC., *v.* FEDERAL TRADE COMMISSION, *ante*, p. 867;

No. 407. SULENTICH *v.* INTERLAKE STEAMSHIP CO., *ante*, p. 885;

No. 415. GASTON ET AL. *v.* UNITED STATES, *ante*, p. 898;

No. 434. UNIVERSAL TRADES, INC., *v.* PENNSYLVANIA, *ante*, p. 129;

No. 227, Misc. FISHER *v.* UNITED STATES, *ante*, p. 895;

No. 230, Misc. BIZZELL *v.* BIZZELL, *ante*, p. 888;

No. 248, Misc. LIVESAY *v.* TEXAS, *ante*, p. 888; and

No. 294, Misc. MORALES ET AL. *v.* UNITED STATES, *ante*, p. 900. Petitions for rehearing denied.

No. 143. SPECTOR *v.* PETE ET AL., *ante*, p. 822. Motion of Lorene Welmas McGlamary for leave to file brief and amended brief, as *amicus curiae*, in support of petition for rehearing granted. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this motion and application.

No. 760, Misc., October Term, 1957. SCHUMACHER *v.* GAYNOR, EXECUTOR, ET AL., 357 U. S. 941. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 816, October Term, 1957. NEW YORKER MAGAZINE, INC., *v.* GEROSA, COMPTROLLER OF THE CITY OF NEW YORK, ET AL., 356 U. S. 339. Motion for leave to file a second petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 77. EVARTS *v.* WESTERN METAL FINISHING CO., *ante*, p. 815; and

No. 296. BURNS, DOING BUSINESS AS INTERNATIONAL ADVERTISING AGENCY, *v.* JAFFE ET AL., *ante*, p. 838. Motions for leave to file petitions for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of these motions.

JANUARY 19, 1959.

Miscellaneous Orders.

No. 451. ROSENBERG *v.* UNITED STATES. Certiorari, 358 U. S. 904, to the United States Court of Appeals for the Third Circuit. The motion to withdraw the appearance of *Bernard Tompkins, Esquire,* as counsel for petitioner is granted. Reported below: 257 F. 2d 760.

No. 457. INGRAM ET AL. *v.* UNITED STATES. Certiorari, 358 U. S. 905, to the United States Court of Appeals for the Fifth Circuit. The motion to dispense with printing the record is granted. *Wesley R. Asinof* for movants-petitioners. Reported below: 259 F. 2d 886.

No. 581. BURNS *v.* OHIO. Certiorari, 358 U. S. 919, to the Supreme Court of Ohio. The motion for the appointment of counsel is granted and it is ordered that *Helen G. Washington,* of Washington, D. C., a member of the Bar of this Court, be, and she is hereby, appointed to serve as counsel for petitioner in this case. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 345, Misc. IN RE FIELD. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 553. COMMISSIONER OF INTERNAL REVENUE *v.* ACKER. C. A. 6th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for petitioner. Reported below: 258 F. 2d 568.

No. 558. UNITED STATES *v.* ROBINSON ET AL. Motion of respondents for leave to proceed on typewritten papers granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia Cooper* for the United States. *I. William Stempil* for respondents. Reported below: 104 U. S. App. D. C. 200, 260 F. 2d 718.

Certiorari Denied. (*See also Nos. 520, 521 and 537, ante, pp. 305, 306.*)

No. 543. HARMSEN *v.* FIZZELL ET AL. Supreme Court of Michigan. Certiorari denied. Reported below: 351 Mich. 86, 354 Mich. 60, 87 N. W. 2d 161, 92 N. W. 2d 631.

No. 545. ACKER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Charles K. Rice* and *Robert N. Anderson* for respondent. Reported below: 258 F. 2d 568.

No. 550. FUNKHOUSER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Jack M. Cotton* for the United States. Reported below: 260 F. 2d 86.

No. 565. DITTMEIER *v.* MISSOURI REAL ESTATE COMMISSION. Supreme Court of Missouri. Certiorari denied. *Malcolm I. Frank* for petitioner. *John M. Dalton*, Attorney General of Missouri, and *Robert R. Welborn*, Assistant Attorney General, for respondent. Reported below: 316 S. W. 2d 1.

No. 199, Misc. CLINTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 254 F. 2d 409.

No. 313, Misc. WILLIAMSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 255 F. 2d 512.

No. 358, Misc. HEFLIN *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 408, Misc. HENDRIX *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 412, Misc. ALVAREZ *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 416, Misc. GLENNON *v.* MURPHY, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 6 App. Div. 2d 1023, 178 N. Y. S. 2d 943.

No. 413, Misc. GLENN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 317 S. W. 2d 403.

No. 437, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 261 F. 2d 224.

No. 469, Misc. FLOWERS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 14 Ill. 2d 406, 152 N. E. 2d 838.

Rehearing Denied.

No. 23. UNITED GAS PIPE LINE CO. *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL.;

No. 25. FEDERAL POWER COMMISSION *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL.; and

No. 26. TEXAS GAS TRANSMISSION CORP. ET AL. *v.* MEMPHIS LIGHT, GAS AND WATER DIVISION ET AL., *ante*, p. 103. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 351. BROWN PAPER MILL CO., INC., *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 906; and

No. 289, Misc. IN RE STAFFORD, *ante*, p. 913. Petitions for rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these applications.

No. 461. FISHER ET AL. *v.* PRINTING DEVELOPMENTS, INC., *ante*, p. 908. Petition for rehearing and for other relief denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

JANUARY 26, 1959.

Miscellaneous Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE BURTON (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning February 2, 1959, and ending June 30, 1959, and for such further time as may be required to complete unfinished business, 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. 581. BURNS *v.* OHIO. Certiorari, 358 U. S. 919, to the Supreme Court of Ohio. The order of this Court of December 15, 1958, granting the petition for writ of certiorari is modified so as to limit the review in this Court to the question presented on page 2 of the petition for writ of certiorari which reads as follows:

"Whether in a prosecution for Burglary, the Due Process Clause, And The Equal Protection Clause, of the Fourteenth (14) Amendment to the United States Constitution are violated by the refusal of the Supreme Court of Ohio, to file the aforementioned legal proceedings, because Petitioner was unable to secure the costs."

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

No. 575. MEMORIAL NATIONAL HOME FOUNDATION *v.* BROWN, ATTORNEY GENERAL OF CALIFORNIA, ET AL. On petition for writ of certiorari to the District Court of Appeal of California, Second Appellate District. The motion of petitioner for leave to proceed on typewritten papers is granted. Pursuant to a stipulation of the parties, Stanley Mosk, present Attorney General of Cali-

fornia, is substituted as a party respondent for Brown. The petition for writ of certiorari in this case is denied. On the stipulation were *Dudley K. Wright* for petitioner, and *Stanley Mosk,* Attorney General of California, and *George M. Goffin,* Deputy Attorney General, for *Mosk,* and *George E. Wise* for the American Gold Star Mothers, Inc., respondents. Reported below: 158 Cal. App. 2d 448, 322 P. 2d 600.

No. 276, Misc. McWHORTER *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se.* *Solicitor General Rankin* for respondents.

Probable Jurisdiction Noted.

No. 556. UNITED STATES *v.* DEGE ET VIR. Appeal from the United States District Court for the Southern District of California. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg* for the United States.

Certiorari Granted. (*See also Nos. 468 and 572, ante, pp. 331, 332.*)

No. 557. NATIONAL LABOR RELATIONS BOARD *v.* INSURANCE AGENTS INTERNATIONAL UNION, AFL–CIO. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Frederick U. Reel* for petitioner. *Isaac N. Groner* for respondent. *Nahum A. Bernstein* filed a brief for the Prudential Insurance Company of America, as *amicus curiae,* urging that the petition for writ of certiorari be granted. Reported below: 104 U. S. App. D. C. 218, 260 F. 2d 736.

No. 573. UNITED STATES *v.* 93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. *J. Herzl Segal* for respondents. Reported below: 258 F. 2d 17.

Certiorari Denied. (*See also No. 575, supra.*)

No. 554. PREFORMED LINE PRODUCTS CO. *v.* WATSON, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Patrick H. Hume* and *C. Willard Hayes* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 103 U. S. App. D. C. 286, 257 F. 2d 664.

No. 566. LAUGHLIN *v.* HARRINGTON, COMMISSIONER OF INTERNAL REVENUE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Albert J. Ahern, Jr.* and *James J. Laughlin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for respondent. Reported below: 103 U. S. App. D. C. 179, 256 F. 2d 893.

No. 574. KOCH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Max Fink* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for the United States. Reported below: 264 F. 2d 334.

No. 496, Misc. UNITED STATES EX REL. ECKWERTH *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied. *Stephen C. Vladeck* for petitioner. Reported below: 261 F. 2d 511.

No. 371. NATIONAL BROADCASTING CO., INC., *v.* PHILCO CORPORATION. The motion of Gerity Broadcasting Co. for leave to file brief, as *amicus curiae,* is denied. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit also denied. *John F. Sonnett, Bernard G. Segal* and *Thomas E. Ervin* for petitioner. *Henry B. Weaver, Jr.* for respondent. At the invitation of the Court, 358 U. S. 876, *Solicitor General Rankin* filed a memorandum for the United States setting forth the views of the Federal Communications Commission in this case. Reported below: 103 U. S. App. D. C. 278, 257 F. 2d 656.

No. 497, Misc. CHAVEZ *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Edmund G. Brown,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent. Reported below: 50 Cal. 2d 778, 329 P. 2d 907.

No. 498, Misc. MOORE *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *W. Harold Flowers* for petitioner. Reported below: —— Ark. ——, 315 S. W. 2d 907.

No. 525. LEIFER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Hayden C. Covington* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States.

No. 568. INTERNATIO-ROTTERDAM, INC., *v.* RIVER BRAND RICE MILLS, INC. C. A. 2d Cir. Certiorari denied. *Frank Marcellino* for petitioner. *Phil E. Gilbert, Jr.* for respondent. Reported below: 259 F. 2d 137.

No. 577. 93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *J. Herzl Segal* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 258 F. 2d 17.

No. 629. LOCAL 107, HIGHWAY TRUCK DRIVERS AND HELPERS UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *v.* MCCLELLAN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward L. Carey* and *Walter E. Gillcrist* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *John G. Laughlin, Jr.* for respondents.

No. 569. GENERAL FOODS CORP. ET AL. *v.* STATE WHOLESALE GROCERS ET AL. The motion of the Great Atlantic & Pacific Tea Co. for leave to file brief, as *amicus curiae,* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *Edward R. Adams* for the General Foods Corporation et al., and *Lloyd M. McBride* and *John P. Ryan,* . for the Morton Salt Co., petitioners. *Robert Marks* and *William S. Kaplan* for respondents. *John T. Cahill, Lawrence J. McKay, Jerrold G. Van Cise* and *Thomas R. Mulroy* filed a brief for the Great Atlantic & Pacific Tea Co., as *amicus curiae,* in support of the petition for writ of certiorari. Reported below: 258 F. 2d 831.

No. 300, Misc. TRUMBLAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 256 F. 2d 615.

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No. 611. DELAWARE *v.* CURRAN ET AL. The motion of respondents for leave to proceed *in forma pauperis* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *Joseph Donald Craven,* Attorney General of Delaware, and *Richard J. Baker,* Deputy Attorney General, for petitioner. *Irving Morris* for respondents. Reported below: 259 F. 2d 707.

Rehearing Denied.

No. 27. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *v.* FLORIDA CITRUS EXCHANGE ET AL., *ante,* p. 153. Rehearing denied.

No. 453. BRIGGS, DOING BUSINESS AS WALT'S AUTO PARKS & GARAGES, *v.* CITY OF LOS ANGELES ET AL., *ante,* p. 205; and

No. 483. LADREY *v.* COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART IN THE DISTRICT OF COLUMBIA, *ante,* p. 920. Petitions for rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these applications.

FEBRUARY 20, 1959.

Dismissal Under Rule 60.

No. 288. OKLAHOMA NATURAL GAS CO. *v.* FEDERAL POWER COMMISSION ET AL. Certiorari, 358 U. S. 877, to the United States Court of Appeals for the District of Columbia Circuit. Writ of certiorari dismissed on motion of petitioner pursuant to Rule 60 of the Rules of this Court. *John S. Carlson, Norman A. Flaningam* and *Melvin Richter* for petitioner. Reported below: 103 U. S. App. D. C. 256, 257 F. 2d 634.

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Motor carriers—Certificates of convenience and necessity—Power to correct inadvertent ministerial error.—When Commission authorized railroad subsidiary to acquire operating rights of independent motor carriers and reserved right to impose restrictions to insure that the service would be auxiliary or supplementary to train service but Commission's staff inadvertently omitted reservation of such right from certificates of convenience and necessity, Commission had power to correct such inadvertent ministerial error. American Trucking Assns. v. Frisco Transportation Co., p. 133.

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1. *Supreme Court—Appeal—Question presented prematurely.*—Appeal dismissed because question whether Interstate Commerce Commission had jurisdiction under § 5 (d) of Administrative Procedure Act to declare *per diem* car-rental rates of railroads reasonable

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was prematurely presented by appeal from decision sustaining such jurisdiction but remanding matter to Commission for further proceedings which might make that question moot. Boston & Maine Railroad v. United States, p. 68.

2. *District courts—Declaratory Judgment Act—"Actual controversy."*—When Negro resident of city brought class suit under Declaratory Judgment Act to establish right of Negroes to ride on buses without being segregated on account of race, District Court erred in dismissing suit for want of "actual controversy." Evers v. Dwyer, p. 202.

3. *District courts—Law side—Claims based on general maritime law.*—Jurisdiction of claims based on general maritime law is not granted on the law side of federal district courts by 28 U. S. C. § 1331. Romero v. International Terminal Operating Co., p. 354.

4. *District courts—N. L. R. B.—Orders beyond Board's power.*—Federal District Court had jurisdiction of original suit to set aside determination of Board clearly violative of Act. Leedom v. Kyne, p. 184.

5. *State courts—Injunction—Labor agreements violative of state antitrust law.*—State court without jurisdiction to enjoin performance of collective-bargaining agreement between motor carriers and drivers' unions which violated state antitrust law. Teamsters Union v. Oliver, p. 283.

6. *State courts—Injunction—Peaceful picketing—Florida resort hotels.*—State courts without jurisdiction to enjoin peaceful organizational picketing of Florida resort hotels, though N. L. R. B. had declined jurisdiction. Hotel Employees v. Sax Enterprises, p. 270.

7. *State courts—Review of discretion exercised under Trading with the Enemy Act.*—State court without power to review discretion exercised by Attorney General in issuing vesting order under Trading with the Enemy Act. Rogers v. Calumet National Bank, p. 331.

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2. *National Labor Relations Act—Collective-bargaining agreements—Conflict with state antitrust law—Jurisdiction of state court to enjoin.*—When provision for minimum rental payments to driver-owners of trucking vehicles was part of collective-bargaining wage agreement between motor carriers and drivers' unions, state court had no jurisdiction to enjoin performance as violative of state antitrust law. Teamsters Union v. Oliver, p. 283.

3. *National Labor Relations Act—Determination by Board in excess of powers—Jurisdiction of District court.*—Federal District Court had jurisdiction of original suit to set aside determination of Board clearly violative of § 9 (b) (1) of Act. Leedom v. Kyne, p. 184.

4. *National Labor Relations Act—Board's refusal to assert jurisdiction—Hotel industry.*—Board without discretion to refuse to assert jurisdiction over hotel industry as a class. Hotel Employees v. Leedom, p. 99.

5. *Peaceful picketing—Resort hotels—Injunction—Jurisdiction of state courts.*—State courts without jurisdiction to enjoin peaceful organizational picketing of Florida resort hotels, though National Labor Relations Board had refused to take jurisdiction. Hotel Employees v. Sax Enterprises, p. 270.

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Remedy not exclusive—Suit in state court for damages permissible.—Though employer had accepted its coverage, nothing in Longshoremen's and Harbor Workers' Compensation Act prevented employee from suing in state court for damages, when permitted by state law. Hahn v. Ross Island Sand & Gravel Co., p. 272.

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