UNITED STATES REPORTS

VOLUME 360

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1958

JUNE 8 THROUGH JUNE 29, 1959

(END OF TERM)

WALTER WYATT
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1959

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington 25, D. C. - Price $5.75 (Buckram)

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.
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.

RETIRED

STANLEY REED, Associate Justice.
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.

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

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.)

*By order entered June 29, 1959, the Court temporarily assigned MR. JUSTICE BRENNAN to the Second Circuit. See *post*, p. 923.

TABLE OF CASES REPORTED

NOTE: Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on pages 901 *et seq.* are those in which orders were entered.

	Page
Adamowski, Hershey Mfg. Co. *v.*	717, 914
Adams, Keener *v.*	938
Aetna Freight Lines, Magenau *v.*	273
Alabama, Williams *v.*	923
Alabama *ex rel.* Patterson, N. A. A. C. P. *v.*	240
Alker, *In re*	908
Allegheny County *v.* Frank Mashuda Co.	185
Allen *v.* Columbia Gas System	907
Allen, Prince Edward County School Board *v.*	923
Allen *v.* Ragen	906
Allen *v.* Smyth	903
Allied Newspaper Carriers *v.* Evening News Co.	929
Alpar *v.* Perpetual Building Assn.	934
Alvarado Sales Co. *v.* Rubaloff	910
Alvis, Jones *v.*	922
Alvis, Nelson *v.*	913
Alvis, Smith *v.*	904
American Export Lines *v.* Gulf Italia Co.	902
American Life & Accident Ins. Co. *v.* Federal Trade Comm'n.	922
American Security & Trust Co., Kahn Co. *v.*	933
Anderson, Landes *v.*	927
Anderson *v.* United States	929
Andrews *v.* United States	904
Anonymous No. 6 *v.* Baker	287
Arkansas, Mitchell *v.*	913
Arkansas *ex rel.* Bennett, N. A. A. C. P. *v.*	909
Armstrong *v.* United States	939
Arnold *v.* Ben Kanowsky, Inc.	927
Atlantic Coast Line R. Co., Futch *v.*	935
Atlantic Refining Co. *v.* Public Service Comm'n	378
Atlantic Refining Co., United States *v.*	19
Atlas Transportation Co. *v.* United States	918
Baird *v.* Commissioner	446

	Page
Baker, Anonymous No. 6 *v.*	287
Baker *v.* United States	934
Baldwin *v.* United States	938
Balfour, Guthrie & Co., Dorn *v.*	918
Banks *v.* Johnston	940
Bannan, LundBerg *v.*	901
Barbour *v.* United States	905
Barenblatt *v.* United States	109
Barnes *v.* New York	938
Barr *v.* Matteo	564
Bartkus *v.* Illinois	907
Baumgartner's Electric Construction Co., DeVries *v.*	923
Becton *v.* Ragen	937
Bedno *v.* Fast	931
Beil, De Niro *v.*	912
Bellew *v.* Mississippi	473
Ben Kanowsky, Inc., Arnold *v.*	927
Bennett, Howell *v.*	905
Bennett, Johnson *v.*	937
Bennett, N. A. A. C. P. *v.*	471, 909
Bergeson *v.* Life Insurance Corp.	932
Berman *v.* West	916
Bibb, Hightower *v.*	912
Bibb, Ortega *v.*	314
Black *v.* City National Bank & Trust Co.	920
Board of Missions *v.* Koerner	912
Bobbitt *v.* Ellis	922
Bohn *v.* United States	907
Brennan *v.* W. A. Wills, Ltd.	902
Brewery & Beverage Drivers *v.* McLean Distributing Co.	917
Bricklayers Union No. 3 *v.* Cone Brothers Co.	904
Brinson *v.* Wilkinson	926
Broadus *v.* Clemmer	927
Broadus-Bey *v.* Diamond	939
Broch & Co., Federal Trade Comm'n *v.*	908
Bros Incorporated, Gibson-Stewart Co. *v.*	929
Brown *v.* Colorado	907
Brown *v.* United States	911
Brucker, Seneca Nation of Indians *v.*	909
Bryson *v.* United States	919
Bullock *v.* United States	909
Burger *v.* United States	940
Burke, Odell *v.*	926
Burns *v.* Ohio	252

Page
Cabot Carbon Co., Labor Board *v*. 203
Cage *v*. Texas. 917
California, Downs *v*. 922
California, Grace *v*. 940
California, Jackson *v*. 901
California, Petersen *v*. 314
California, Stinchcomb *v*. 938
California, Talley *v*. 928
California, Turville *v*. 939
California, Yates *v*. 920
California Adult Authority, Cantrell *v*. 921
California Adult Authority, Penney *v*. 922
Cantrell *v*. California Adult Authority. 921
Cantrell *v*. Nash. 938
Canty *v*. United States. 919
Carpenter *v*. United States. 936
Carroll *v*. Heinze. 913
Castellano *v*. Commission of Investigation. 930
Cavell, McMorris *v*. 937
Christy *v*. United States. 919
Cities Service Oil Co. *v*. New York City. 934
City National Bank & Trust Co., Black *v*. 920
City of. See name of City.
Civil Aeronautics Board, North Central Airlines *v*. 903
Clark *v*. Illinois. 940
Cleary *v*. United States. 936
Clemmer, Broadus *v*. 927
Clemmer, Triantafillos *v*. 926
Cofield *v*. United States. 472
Collector, Eisenberg *v*. 918
Collector of Internal Revenue. See Collector.
Colonial Chevrolet Corp., United States *v*. 716
Colorado, Brown *v*. 907
Columbia Gas System, Allen *v*. 907
Commissioner, Baird *v*. 446
Commissioner, General Retail Corp. *v*. 918
Commissioner *v*. Glover. 446
Commissioner *v*. Hansen. 446
Commissioner, Helms Bakeries *v*. 903
Commissioner, Schaeffer *v*. 917
Commissioner, Zeddies *v*. 910
Commissioner of Internal Revenue. See Commisioner.
Commissioners of the District of Columbia, Jones *v*. 940
Commission of Investigation, Castellano *v*. 930

	Page
Commission of Investigation, Miranda *v*.	930
Commission of Investigation, Riccobono *v*.	930
Common Pleas Court of Stark County, Corbett *v*.	907
Cone Brothers Contracting Co., Bricklayers Union No. 3 *v*.	904
Connecticut, Davies *v*.	921
Continental Gin Co. *v*. Murray Co.	911
Converse *v*. Mental Hygiene Department	905
Conway *v*. Dickson	926
Corbett *v*. Common Pleas Court	907
Corcoran *v*. Fay	915
Counts *v*. United States	920
County of. See name of County.	
County School Board of Prince Edward Co. *v*. Allen	923
Creasy, Martin *v*.	219
Cummings *v*. Tinsley	901
Cunningham *v*. Randolph	921
Curry *v*. United States	941
Dairy Distributors, Local Union 976 *v*.	909
Dancyger *v*. New Jersey	903
Daviditis *v*. National Bank of Mattoon	940
Davies *v*. Connecticut	921
Davis, Embry Brothers *v*.	910
Day, Pennsylvania R. Co. *v*.	548
DeGregory *v*. Wyman	717
Delaware, L. & W. R. Co. *v*. Siegrist	917
Del Bono *v*. United States	938
De Lucia *v*. United States	941
De Niro *v*. Ohio *ex rel*. Beil	912
DeVries *v*. Baumgartner's Electric Construction Co.	923
Diamond, Broadus-Bey *v*.	939
Dickson, Conway *v*.	926
District of Columbia, Mullen *v*.	940
District of Columbia Commissioners, Jones *v*.	940
Division of National Missions *v*. Koerner	912
Domico *v*. Illinois	904
Dorn *v*. Balfour, Guthrie & Co.	918
Dornblut *v*. United States	912
Dorsey, State Athletic Comm'n *v*.	940
Downs *v*. California	922
Doyle, Woolfson *v*.	903
Driscoll *v*. Missouri Supreme Court	931
Dunn, Worley *v*.	941
Eaton *v*. Price	246
Egitto *v*. Jackson	906

	Page
Eisenberg *v.* Smith	918
E. & J. Manufacturing Co., Everest & Jennings *v.*	902
Ellis, Bobbitt *v.*	922
Ellis, Loper *v.*	940
Ellis *v.* MacKenna	935
Elrick Rim Co. *v.* Reading Tire Machinery Co.	920
Embry Brothers, Inc., *v.* Davis	910
Engelsher *v.* Jacobs	902
Evening News Publishing Co., Allied Carriers *v.*	929
Everest & Jennings, Inc., *v.* E. & J. Mfg. Co.	902
Fant Milling Co., Labor Board *v.*	301
Farmers Educational & Coop. Union *v.* WDAY, Inc.	525
Fast, Bedno *v.*	931
Fast, King Optical Co. *v.*	931
Faulkner *v.* Ragen	921
Fay, Corcoran *v.*	915
Fay, Hicks *v.*	940
Fay, U. S. *ex rel.* Cuomo *v.*	926
Federal Power Commission *v.* Tuscarora Indian Nation	915
Federal Trade Comm'n, American Life & Accident Ins. Co. *v.*	922
Federal Trade Comm'n *v.* Henry Broch & Co.	908
Federal Trade Comm'n *v.* Simplicity Pattern Co.	55
Field *v.* United States	918
Flemming *v.* Nestor	915
Flora *v.* United States	922
Florida, Lewis *v.*	936
Florida Legislative Committee, Gibson *v.*	919
Florida Lime & Avocado Growers *v.* Jacobsen	915
Fogarty *v.* United States	919
Ford Motor Co. *v.* Park	251
Foster *v.* United States	912
Frank *v.* Maryland	914
Frank Mashuda Co., Allegheny County *v.*	185
Fromen *v.* United States	909
Furtak *v.* Gladden	907
Futch *v.* Atlantic Coast Line R. Co.	935
Galax Mirror Co. *v.* United States	395
Gallegos *v.* Hoy	935
Gaw, Higham *v.*	933
G. D. Searle & Co., Morgenstern Chemical Co. *v.*	908
General Developing Co. *v.* Quigley	937
General Retail Corp. *v.* Commissioner	918
George *v.* Michigan	906
Gershenson *v.* Hall	927

Page
Gibson *v.* Florida Legislative Committee 919
Gibson-Stewart Co. *v.* Wm. Bros. Co 929
Giguere, United States Steel Corp. *v.* 934
Gilmore *v.* United States 914
Gilson *v.* Keenan 926
Ginsburg *v.* Mutual Life Ins. Co 917
Gladden, Furtak *v.* 907
Glover, Commissioner *v.* 446
Gorska *v.* Pennsylvania Railroad Co 923
Grace *v.* California 940
Greene *v.* McElroy 474
Greene *v.* United States 933
Greenholtz, Starkweather *v.* 921, 926
Griffith *v.* Rhay 941
Grocery Drivers Union Local 848 *v.* Seven Up Co 907
Gulf Italia Co., American Export Lines *v.* 902
Gulf Oil Corp. *v.* Operating Engineers 914
Gundlach *v.* United States 904
Hall, Gershenson *v.* 927
Haney, Phoenix Insurance Co. *v.* 917
Hansen, Commissioner *v.* 446
Harris *v.* United States 922, 933
Harrison *v.* N. A. A. C. P. 167
Harter *v.* Illinois 901
Heard *v.* United States 906
Heinze, Carroll *v.* 913
Heinze, Jackson *v.* 937
Heinze, Montalbano *v.* 913
Heinze, Schmidt *v.* 921
Heinze, Wilson *v.* 901
Helms Bakeries *v.* Commissioner 903
Henry Broch & Co., Federal Trade Comm'n *v.* 908
Hershey Mfg. Co. *v.* Adamowski 717, 914
Hicks *v.* Fay 940
Higham *v.* Gaw 933
Hightower *v.* Bibb 912
Hine Pontiac, United States *v.* 715
Holloway *v.* Illinois 905
Horne *v.* United States 934
Howard *v.* Lyons 593
Howell *v.* Bennett 905
Hoy, Gallegos *v.* 935
Hughes, McGrath Corp. *v.* 931
Hunt *v.* Tinsley 927

Page
Hyde *v.* Lavallee 937
Illinois, Bartkus *v.* 907
Illinois, Clark *v.* 940
Illinois, Domico *v.* 904
Illinois, Harter *v.* 901
Illinois, Holloway *v.* 905
Illinois, McIntyre *v.* 917
Illinois *v.* Michigan 712
Illinois, Michigan *v.* 712
Illinois, Napue *v.* 264
Illinois, New York *v.* 712
Illinois, Streeter *v.* 935
Illinois, Wilson *v.* 935
Illinois, Wisconsin *v.* 712
Illinois Supreme Court, Simunich *v.* 914
Immigration and Naturalization Service, Gallegos *v.* 935
Indiana, Morphew *v.* 921
Industrial Accident Comm'n of California, Smith *v.* 904, 941
Ingram *v.* United States 672
In re. See name of party.
International Union. See name of trade.
Jackson *v.* California 901
Jackson, Egitto *v.* 906
Jackson *v.* Heinze 937
Jackson, Leventis *v.* 913
Jackson, Merrill *v.* 938
Jackson *v.* New York 938
Jacobs, Engelsher *v.* 902
Jacobsen, Florida Lime & Avocado Growers *v.* 915
Johnson *v.* Bennett 937
Johnson *v.* United States 929
Johnston, Banks *v.* 940
Johnston *v.* United States 935
John W. McGrath Corp. *v.* Hughes 931
Jones *v.* Alvis 922
Jones *v.* Commissioners of the District of Columbia 940
Jones *v.* Nash 936
Jordan *v.* Michigan 913
Judges of the Missouri Supreme Court, U. S. *ex rel.* Driscoll *v.* . 931
Justus *v.* Woodruff 901
Kahn Engineering Co. *v.* American Security Co 933
Kanowsky, Inc., Arnold *v.* 927
Kasper *v.* United States 932
Kearney *v.* United States 916

Page

Keating, Schlette *v*. . . . 906
Keenan, Gilson *v*. . . . 926
Keener *v*. Adams 938
Kelley *v*. Richmond 716
Kephart *v*. Randolph 913
Kilpatrick *v*. McCarrey 914
King Optical Co. *v*. Fast 931
Kingsley International Pictures Corp. *v*. Regents 684
Koerner, Division of National Missions *v*. . . . 912
Krohmer, United States Dredging Corp. *v*. . . . 932
Labor Board *v*. Cabot Carbon Co 203
Labor Board *v*. Fant Milling Co 301
Labor Board, Machinists Association *v*. . . . 916
Labor Board, Midwestern Instruments *v*. . . . 932
Labor Board, Perry *v*. . . . 931
La Manna, *In re* 938
Landes *v*. Anderson 927
Langlois, Lee *v*. . . . 920
Lassiter *v*. Northampton County Board of Elections 45
Lavallee, U. S. *ex rel.* Hyde *v*. . . . 937
Law *v*. United Fruit Co 932
Lee *v*. Langlois 920
Lee C. Moore Corp. *v*. Pryor 902
Lev *v*. United States 470
Leventis *v*. Jackson 913
Lewis *v*. Florida 936
Life Insurance Corp. of America, Bergeson *v*. . . . 932
Livingston, N. A. A. C. P. *v*. . . . 240
Local Lodge. For labor union, see name of trade.
Local Union. See also name of trade.
Local Union 976 *v*. Dairy Distributors, Inc 909
Loper *v*. Ellis 940
Los Angeles County, Nelson *v*. . . . 928
Louisiana, Mills *v*. . . . 230
Louisiana Power & Light Co. *v*. Thibodaux 25, 940
Louisville, Thompson *v*. . . . 916
Lowery *v*. Murphy 901
Lucas *v*. New York 906
LundBerg *v*. Bannan 901
Lyons, Howard *v*. . . . 593
Machinists Association *v*. Labor Board 916
Mac. See also Mc.
MacKenna, Ellis *v*. . . . 935
Madden, Perry *v*. . . . 931

Page
Magenau *v.* Aetna Freight Lines 273
Mahurin *v.* Nash 936
Marchese *v.* United States 930
Marshall *v.* United States 310
Martin *v.* Creasy 219
Maryland, Frank *v.* 914
Maryland, Reddick *v.* 930
Maryland and Virginia Milk Producers Assn. *v.* United States .. 927
Maryland and Virginia Milk Producers Assn., United States *v.* 927
Mashuda Co., Allegheny County *v.* 185
Matteo, Barr *v.* 564
Mc. See also Mac.
McCarrey, Kilpatrick *v.* 914
McCormick & Co., Inc., *v.* United States 916
McCraw *v.* New Mexico 901
McDaniel *v.* Rose 473
McDonald *v.* United States 911
McElroy, Greene *v.* 474
McElroy, Taylor *v.* 709
McGann *v.* United States 929
McGrath Corp. *v.* Hughes 931
McIntyre *v.* Illinois 917
McLean Distributing Co., Brewery & Beverage Drivers *v.* 917
McMorris *v.* Cavell 937
McWhorter *v.* United States 939
Mental Hygiene Department of California, Converse *v.* 905
Mercer *v.* Theriot 914
Merrill *v.* Jackson 938
Methodist Church Missions *v.* Koerner 912
Michigan, George *v.* 906
Michigan *v.* Illinois 712
Michigan, Illinois *v.* 712
Michigan, Jordan *v.* 913
Midwestern Instruments, Inc., *v.* Labor Board 932
Miles *v.* United States 904
Mills *v.* Louisiana 230
Miranda *v.* Commission of Investigation 930
Mississippi, Bellew *v.* 473
Mitchell *v.* Arkansas 913
Mitchell, Sherry Corine Corp. *v.* 934
Montalbano *v.* Heinze 913
Moore, Williams *v.* 911
Moore Corp. *v.* Pryor 902
Morgan *v.* Ohio 423

	Page
Morgenstern Chemical Co. *v.* Searle & Co.	908
Morphew *v.* Indiana	921
Mullen *v.* District of Columbia	940
Murphy, Lowery *v.*	901
Murphy, Stiehler *v.*	921
Murray Company, Continental Gin Co. *v.*	911
Mutual Benefit Life Ins. Co., Vant *v.*	923
Mutual Life Ins. Co., Ginsburg *v.*	917
Napue *v.* Illinois	264
Nash, Cantrell *v.*	938
Nash, Mahurin *v.*	936
Nash, U. S. *ex rel.* Jones *v.*	936
National Assn. for Colored People *v.* Alabama *ex rel.* Patterson.	240
National Assn. for Colored People *v.* Arkansas *ex rel.* Bennett. .	909
National Assn. for Colored People *v.* Bennett	471
National Assn. for Colored People, Harrison *v.*	167
National Assn. for Colored People *v.* Livingston	240
National Bank of Mattoon, Daviditis *v.*	940
National Labor Relations Board. See Labor Board.	
Nelson *v.* Alvis	913
Nelson *v.* Los Angeles County	928
Nestor, Flemming *v.*	915
New Jersey, Dancyger *v.*	903
Newman *v.* United States	905
New Mexico, McCraw *v.*	901
New York, Barnes *v.*	938
New York *v.* Illinois	712
New York, Jackson *v.*	938
New York, Lucas *v.*	906
New York, Pollino *v.*	906
New York, Spano *v.*	315
New York, Tribote *v.*	937
New York, Wolfe *v.*	913
New York City, Cities Service Oil Co. *v.*	934
93.970 Acres of Land, United States *v.*	328
Northampton County Board of Elections, Lassiter *v.*	45
North Carolina, Wagoner *v.*	901
North Central Airlines *v.* Civil Aeronautics Board	903
Odell *v.* Burke	926
Ohio, Burns *v.*	252
Ohio, Morgan *v.*	423
Ohio, Raley *v.*	423
Ohio *ex rel.* Beil, De Niro *v.*	912
Ohio *ex rel.* Eaton *v.* Price	246

Page
Oklahoma, Vassar *v*. 936
Oklahoma Retail Grocers Assn., Safeway Stores *v*. 334
Operating Engineers, Gulf Oil Corp. *v*. 914
Ortega *v*. Bibb. 314
Owen Laboratories, Inc., *v*. United States. 931
Owensboro on the Air *v*. United States. 911
Pae *v*. Stevens. 933
Palermo *v*. United States. 343
Park, Ford Motor Co. *v*. 251
Patterson, N. A. A. C. P. *v*. 240
Patterson *v*. United States. 914
Penney *v*. California Adult Authority. 922
Pennsylvania R. Co. *v*. Day. 548
Pennsylvania R. Co., Gorska *v*. 923
Perpetual Building Assn., Alpar *v*. 934
Perry *v*. Madden. 931
Petersen *v*. California. 314
Petite *v*. United States. 908
Phoenix Insurance Co. *v*. Haney. 917
Pitts *v*. United States. 919, 935
Pittsburgh Plate Glass Co. *v*. United States. 395
Place *v*. United States. 920
Plasterers Union *v*. Cone Brothers Co. 904
Polito *v*. Warden. 901
Pollino *v*. New York. 906
Porter *v*. United States. 906
Powell *v*. Washington Post Co. 930
Power Authority of New York *v*. Tuscarora Indian Nation. . . . 915
Power Authority of New York, Tuscarora Nation of Indians *v*. 923
Price, Ohio *ex rel*. Eaton *v*. 246
Price, Union Pacific R. Co. *v*. 601
Prince Edward County School Board *v*. Allen. 923
Pryor, Moore Corp. *v*. 902
Public Service Comm'n, Atlantic Refining Co. *v*. 378
Public Service Comm'n, Tennessee Gas Transmission Co. *v*. . . 378
Quigley, Rose *v*. 937
Ragen, Allen *v*. 906
Ragen, Becton *v*. 937
Ragen, U. S. *ex rel*. Faulkner *v*. 921
Raines, United States *v*. 926
Raley *v*. Ohio. 423
Randolph, Cunningham *v*. 921
Randolph, Kephart *v*. 913
Reading Tire Machinery Co., Elrick Rim Co. *v*. 920

	Page
Reddick *v.* Maryland	930
Regents of the University of New York, Kingsley Pictures *v.*	684
Rhay, Griffith *v.*	941
Rhay, Scott *v.*	921
Riccobono *v.* Commission of Investigation	930
Richmond, Kelley *v.*	716
River Terminals Corp., Southwestern Sugar & Molasses Co. *v.*	411
Rose, McDaniel *v.*	473
Rose *v.* Quigley	937
Rosenberg *v.* United States	367
Ross *v.* United States	939
Rubaloff, Alvarado Sales Co. *v.*	910
Rubin *v.* United States	470
Safeway Stores *v.* Oklahoma Retail Grocers Assn.	334
Sarner, *In re*	940
Sawyer, *In re*	622
Scales *v.* United States	924
Schaeffer *v.* Commissioner	917
Schine Chain Theatres, Webster Rosewood Corp. *v.*	912
Schlette *v.* Keating	906
Schmidt *v.* Heinze	921
Schnautz *v.* United States	910
School Board of Prince Edward County *v.* Allen	923
Sclafani *v.* United States	918
Scott *v.* Rhay	921
Searle & Co., Morgenstern Chemical Co. *v.*	908
Secretary of Army, Seneca Nation of Indians *v.*	909
Secretary of Health, Education, and Welfare *v.* Nestor	915
Secretary of Labor, Sherry Corine Corp. *v.*	934
Secretary of the Treasury, Landes *v.*	927
Sells *v.* United States	913
Seneca Nation of Indians *v.* Brucker	909
Seven Up Bottling Co., Grocery Drivers Union *v.*	907
Sherry Corine Corp. *v.* Mitchell	934
Siegrist, Delaware, L. & W. R. Co. *v.*	917
Simplicity Pattern Co. *v.* Federal Trade Comm'n	55
Simunich *v.* Supreme Court of Illinois	914
Smith *v.* Alvis	904
Smith, Eisenberg *v.*	918
Smith *v.* Industrial Accident Comm'n	904, 941
Smith *v.* United States	1, 910
Smyth, Allen *v.*	903
Southwestern Sugar & Molasses Co. *v.* River Terminals Corp.	411
Spano *v.* New York	315

Page
Spells *v.* United States 920
Starkweather *v.* Greenholtz 921, 926
State Athletic Comm'n *v.* Dorsey 940
State Farm Mutual Ins. Co., Yszara *v.* 932
Steelworkers, Whitfield *v.* 902
Stevens, Pae *v.* 933
Stiehler *v.* Murphy 921
Stinchcomb *v.* California 938
Streeter *v.* Illinois 935
Superior Court *v.* Washington *ex rel.* Yellow Cab Service 928
Supreme Court of Illinois, Simunich *v.* 914
Talley *v.* California 928
Taylor *v.* McElroy 709
Tennessee Gas Transmission Co. *v.* Public Service Comm'n 378
Texas, Cage *v.* 917
Texas, Valek *v.* 937
Theriot, Mercer *v.* 914
Thibodaux, Louisiana Power & Light Co. *v.* 25, 940
3963 Bottles *v.* United States 931
Thompson *v.* City of Louisville 916
Tinsley, Cummings *v.* 901
Tinsley, Hunt *v.* 927
Title *v.* United States 914
Trade Commission. See Federal Trade Comm'n.
Triantafillos *v.* Clemmer 926
Tribote *v.* New York 937
Turville *v.* California 939
Tuscarora Indian Nation, Federal Power Commission *v.* 915
Tuscarora Indian Nation, Power Authority of New York *v.* 915
Tuscarora Nation of Indians *v.* Power Authority of N. Y. 923
Union Pacific R. Co. *v.* Price 601
United Fruit Co., Law *v.* 932
United States, Anderson *v.* 929
United States, Andrews *v.* 904
United States, Armstrong *v.* 939
United States *v.* Atlantic Refining Co 19
United States, Atlas Transportation Co. *v.* 918
United States, Baker *v.* 934
United States, Baldwin *v.* 938
United States, Barbour *v.* 905
United States, Barenblatt *v.* 109
United States, Bohn *v.* 907
United States, Brown *v.* 911
United States, Bryson *v.* 919

509615 O–59–2

Page

United States, Bullock *v*. 909
United States, Burger *v*. 940
United States, Canty *v*. 919
United States, Carpenter *v*. 936
United States, Christy *v*. 919
United States, Cleary *v*. 936
United States, Cofield *v*. 472
United States *v*. Colonial Chevrolet Corp. 716
United States, Counts *v*. 920
United States, Curry *v*. 941
United States, Del Bono *v*. 938
United States, De Lucia *v*. 941
United States, Dornblut *v*. 912
United States, Field *v*. 918
United States, Flora *v*. 922
United States, Fogarty *v*. 919
United States, Foster *v*. 912
United States, Fromen *v*. 909
United States, Galax Mirror Co. *v*. 395
United States, Gilmore *v*. 914
United States, Greene *v*. 933
United States, Gundlach *v*. 904
United States, Harris *v*. 922, 933
United States, Heard *v*. 906
United States *v*. Hine Pontiac. 715
United States, Horne *v*. 934
United States, Ingram *v*. 672
United States, Johnson *v*. 929
United States, Johnston *v*. 935
United States, Kasper *v*. 932
United States, Kearney *v*. 916
United States, Lev *v*. 470
United States, Marchese *v*. 930
United States, Marshall *v*. 310
United States, McCormick & Co. *v*. 916
United States, McDonald *v*. 911
United States, McGann *v*. 929
United States, McWhorter *v*. 939
United States, Miles *v*. 904
United States *v*. Milk Producers Assn. 927
United States, Milk Producers Assn. *v*. 927
United States, Newman *v*. 905
United States *v*. 93.970 Acres of Land. 328
United States, Owensboro on the Air *v*. 911

Page
United States, Palermo *v*. 343
United States, Patterson *v*. 914
United States, Petite *v*. 908
United States, Pitts *v*. 919, 935
United States, Pittsburgh Plate Glass Co. *v*. 395
United States, Place *v*. 920
United States, Porter *v*. 906
United States *v*. Raines. 926
United States, Rosenberg *v*. 367
United States, Ross *v*. 939
United States, Rubin *v*. 470
United States, Scales *v*. 924
United States, Schnautz *v*. 910
United States, Sclafani *v*. 918
United States, Sells *v*. 913
United States, Smith *v*. 1, 910
United States, Spells *v*. 920
United States, 3963 Bottles *v*. 931
United States, Title *v*. 914
United States, Vega-Murrillo *v*. 936
United States, Wagner *v*. 936
United States, Wilkins *v*. 940
United States, Williams *v*. 939
United States, Wool *v*. 470
United States, Wyatt *v*. 908
United States, Younger *v*. 905
United States Dredging Corp. *v*. Krohmer. 932
U. S. *ex rel.* Cuomo *v*. Fay. 926
U. S. *ex rel.* Driscoll *v*. Missouri Supreme Court. 931
U. S. *ex rel.* Faulkner *v*. Ragen. 921
U. S. *ex rel.* Hyde *v*. Lavallee. 937
U. S. *ex rel.* Jones *v*. Nash. 936
United States Steel Corp. *v*. Giguere. 934
United Steelworkers of America, Whitfield *v*. 902
Uphaus *v*. Wyman. 72
Valek *v*. Texas. 937
Vant *v*. Mutual Benefit Life Ins. Co. 923
Vassar *v*. Oklahoma. 936
Vega-Murrillo *v*. United States. 936
Wagner *v*. United States. 936
Wagoner *v*. North Carolina. 901
Walker *v*. Washington. 911
Warden of Nevada State Penitentiary, Polito *v*. 901
Washington, Walker *v*. 911

	Page
Washington *ex rel.* Yellow Cab Service, Superior Court *v.*	928
Washington Post Co., Powell *v.*	930
Washington Superior Court *v.* Yellow Cab Service	928
W. A. Wills, Ltd., Brennan *v.*	902
WDAY, Inc., Farmers Union *v.*	525
Webster Rosewood Corp. *v.* Schine Chain Theatres	912
West, Berman *v.*	916
Whitfield *v.* United Steelworkers of America	902
Wilkins *v.* United States	940
Wilkinson, Brinson *v.*	926
Wm. Bros. Boiler & Mfg. Co., Gibson-Stewart Co. *v.*	929
Williams *v.* Alabama	923
Williams *v.* Moore	911
Williams *v.* United States	939
William T. Alvarado Sales Co. *v.* Rubaloff	910
Wills, Ltd., Brennan *v.*	902
Wilson *v.* Heinze	901
Wilson *v.* Illinois	935
Wisconsin *v.* Illinois	712
Wolfe *v.* New York	913
Woodruff, Justus *v.*	901
Wool *v.* United States	470
Woolfson *v.* Doyle	903
Worley *v.* Dunn	941
Wyatt *v.* United States	908
Wyman, DeGregory *v.*	717
Wyman, Uphaus *v.*	72
Yates *v.* California	920
Yellow Cab Service, Inc., Superior Court *v.*	928
Younger *v.* United States	905
Yszara *v.* State Farm Ins. Co	932
Zeddies *v.* Commissioner of Internal Revenue	910

TABLE OF CASES CITED

Page

Adams v. Home Owners' Loan Corp., 107 F. 2d 139 572
Adams v. Woburn, 174 F. 192 194
Adams Express Co. v. Croninger, 226 U. S. 491 420
Adamson v. California, 332 U. S. 46 237
Ades, In re, 6 F. Supp. 467 635
Adler v. Board of Education, 342 U. S. 485 108, 128
Aero Mayflower Transit Co. v. R. R. Comm'rs, 332 U. S. 495 688
Alabama Public Service Comm'n v. Southern R. Co., 341 U. S. 341 33, 189, 224, 226
Alabama State Federation of Labor v. McAdory, 325 U. S. 450 33, 189
Alberts v. California, 354 U. S. 476 690, 707, 708
Albertson v. Millard, 345 U. S. 242 33, 176, 189, 688
Alcorta v. Texas, 355 U. S. 28 269
Allegheny County v. Mashuda Co., 360 U. S. 185 31, 39
Allgeyer v. Louisiana, 165 U. S. 578 492, 513
American Communications Assn. v. Douds, 339 U. S. 382 127, 128, 151, 152, 175
American Federation of Labor v. Watson, 327 U. S. 582 33, 176, 189, 224, 227
American Federation of State Employees v. Dawkins, 268 Ala. 13 242
American Power Co. v. Securities & Exchange Comm'n, 329 U. S. 90 507

Page

Anniston Mfg. Co. v. Davis, 301 U. S. 337 508
Anonymous, Matter of, v. Arkwright, 5 App. Div. 2d 790 289, 290, 292, 294
Anonymous No. 6 v. Baker, 360 U. S. 287 325
Arizona v. California, 283 U. S. 423 132
Ashcraft v. Tennessee, 322 U. S. 143 272, 321
Ashdown v. Utah, 357 U. S. 426 321
Automatic Canteen Co. v. Federal Trade Comm'n, 346 U. S. 61 65, 70, 71
Automobile Club of Michigan v. Commissioner, 353 U. S. 180 467
Avery v. Alabama, 308 U. S. 444 326
Avery v. Georgia, 345 U. S. 559 272
Bailey v. Richardson, 86 U. S. App. D. C. 248 515
Bain, Ex parte, 121 U. S. 1 9
Baird v. Commissioner, 360 U. S. 446 715, 716
Baltimore & Ohio R. Co. v. Brady, 288 U. S. 448 618
Bank of America Assn. v. Parnell, 352 U. S. 29 333
Barenblatt v. United States, 360 U. S. 109 300, 584
Barkman v. Sanford, 162 F. 2d 592 6
Barnett v. Pennsylvania-Reading Lines, 245 F. 2d 579 558, 562, 563, 616
Barr v. Matteo, 360 U. S. 564 594, 598, 600
Barsky v. Board of Regents, 347 U. S. 442 153
Barsky v. United States, 83 U. S. App. D. C. 127 130, 156

Page

Bart v. United States, 349 U. S. 219 437
Bartkus v. Illinois, 359 U. S. 121 236, 300
Beauharnais v. Illinois, 343 U. S. 250 108, 698
Beilan v. Board of Public Education, 357 U. S. 399 128
Bensel, In re, 206 F. 369 194
Berger v. United States, 295 U. S. 78 407
Bergman v. United States, 253 F. 2d 933 375
Bernhardt v. Polygraphic Co., 350 U. S. 198 282
Berra v. United States, 351 U. S. 131 140
Berra v. United States, 221 F. 2d 590 234
Berryman v. Pullman Co., 48 F. Supp. 542 616, 619
Bethlehem Steel Co. v. N. Y. Labor Board, 330 U. S. 767 535
Biddle Purchasing Co. v. Federal Trade Comm'n, 96 F. 2d 687 68
Bi-Metallic Investment Co. v. Board of Equalization, 239 U. S. 441 101, 441
Bisso v. Inland Waterways Corp., 349 U. S. 85 414
Blau v. United States, 340 U. S. 159 235
Bolling v. Sharpe, 347 U. S. 497 554
Bonet v. Texas Co., 308 U. S. 463 640
Boom Co. v. Patterson, 98 U. S. 403 192
Booth v. Fletcher, 69 App. D. C. 351 591
Boston & Maine R. Co. v. Piper, 246 U. S. 439 416, 420
Bower v. Eastern Airlines, 214 F. 2d 623 616
Bowers v. Kerbaugh-Empire Co., 271 U. S. 170 461
Bradford v. Clark, 90 Me. 298 580
Bradley v. Fisher, 13 Wall. 335 569, 580, 639

Page

Bram v. United States, 168 U. S. 532 238
Bridges v. California, 314 U. S. 252 627, 668, 698
Broadmoor Land Co. v. Curr, 142 F. 421 194
Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co., 353 U. S. 30 558
Brotherhood of Railway Clerks v. Railway Express Agency, Inc., 238 F. 2d 181 557
Brown v. Allen, 344 U. S. 443 321
Brown v. Board of Education, 347 U. S. 483 175, 182
Brown v. Helvering, 291 U. S. 193 464
Brown v. Mississippi, 297 U. S. 278 321
Brown v. Shimabukuro, 73 App. D. C. 194 569
Brown v. Walker, 161 U. S. 591 235
Bruno v. United States, 308 U. S. 287 313
Bryant v. Zimmerman, 278 U. S. 63 175
Buchanan v. Warley, 245 U. S. 60 175
Bullock, In re, 103 F. Supp. 639 405
Burford v. Sun Oil Co., 319 U. S. 315 33, 41, 42, 189
Burns v. Ohio, 360 U. S. 252 562
Burroughs v. United States, 290 U. S. 534 175
Burstyn (Joseph), Inc., v. Wilson, 343 U. S. 495 684, 690, 700, 703, 705
Burton v. United States, 175 F. 2d 960 403, 407
Byars v. United States, 273 U. S. 28 233, 235
Byers v. Atchison, T. & S. F. R. Co., 129 F. Supp. 109 616
Byrd v. Blue Ridge Rural Cooperative, 356 U. S. 525 274, 278, 281, 285
California v. Taylor, 353 U. S. 553 535

Page

Cantwell v. Connecticut, 310 U. S. 296 81, 98, 141, 142, 175
Canty v. Alabama, 309 U. S. 629 321
Carlson v. Landon, 342 U. S. 524 128, 515
Carson v. Behlen, 136 F. Supp. 222 572
Carter v. Kubler, 320 U. S. 243 497
Cassell v. Texas, 339 U. S. 282 272
Castillo v. McConnico, 168 U. S. 674 665
Castle v. Hayes Freight Lines, 348 U. S. 61 237
Chambers v. Florida, 309 U. S. 227 160, 321
Chandler v. Fretag, 348 U. S. 3 294, 326, 327
Charleston Federal Savings Assn. v. Alderson, 324 U. S. 182 435
Chatterton v. Secretary of State for India, [1895] 2 Q. B. 189 581
Chicago v. Atchison, T. & S. F. R. Co., 357 U. S. 77 33, 37, 192, 196
Chicago v. Fieldcrest Dairies, 316 U. S. 168 28, 33, 176, 177, 189, 224, 227
Chicago v. Hutchinson, 15 F. 129 194
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226 226
Chicago, R. I. & P. R. Co. v. Stude, 346 U. S. 574 195
Chicago, R. I. & P. R. Co. v. 10 Parcels of Real Estate, 159 F. Supp. 140 194
Chicago & Southern Air Lines v. Waterman Corp., 333 U. S. 103 515
Chicot County v. Sherwood, 148 U. S. 529 193
Chin Yow v. United States, 208 U. S. 8 262
Cicenia v. LaGay, 357 U. S. 504 294, 320, 321, 324, 327
Cincinnati v. Vester, 281 U. S. 439 194
City. See name of city.

Page

Claassen v. United States, 142 U. S. 140 115
Clearfield Trust Co. v. United States, 318 U. S. 363 333, 597
Clinton v. Missouri Pacific R. Co., 122 U. S. 469 194
Cohens v. Virginia, 6 Wheat. 264 39
Colpoys v. Gates, 73 App. D. C. 193 584
Commercial Pictures Corp. v. Board of Regents, 305 N. Y. 336 703
Commercial Pictures Corp. v. Regents, 346 U. S. 587 703
Commissioner v. Court Holding Co., 324 U. S. 331 461
Commissioner v. Estate of Church, 335 U. S. 632 41
Commissioner v. Glover, 360 U. S. 446 715, 716
Commissioner v. Hansen, 360 U. S. 446 715, 716
Commissioner v. Wilcox, 327 U. S. 404 234
Commissioner of Internal Revenue. See Commissioner.
Commissioners of Lafayette County v. St. Louis S. W. R. Co., 257 U. S. 547 194
Communist Party v. Subversive Activities Control Board, 351 U. S. 115 661
Conley v. Gibson, 355 U. S. 41 332
Cooper v. Aaron, 358 U. S. 1 271
Cooper v. O'Connor, 69 App. D. C. 100 569, 573
Cornell Steamboat Co. v. United States, 321 U. S. 634 417
Corn Products Rfg. Co. v. Federal Trade Comm'n, 144 F. 2d 211 67, 71
Costello v. United States, 350 U. S. 359 399
Counselman v. Hitchcock, 142 U. S. 547 235, 238
Craig v. Harney, 331 U. S. 367 627

Page

Crancer v. Lowden, 315 U. S. 631 414
Creasy v. Lawler, 8 Pa. D. & C. 2d 535 222
Creasy v. Stevens, 160 F. Supp. 404 223
Creswill v. Knights of Pythias, 225 U. S. 246 272
Crooker v. California, 357 U. S. 433 294, 320, 321, 324, 325, 327
Crowell v. Benson, 285 U. S. 22 100
Curran v. Delaware, 259 F. 2d 707 269
Dahlberg v. Pittsburgh & L. E. R. Co., 138 F. 2d 121 557, 559
Davidson v. New Orleans, 96 U. S. 97 697
Davis v. Beason, 133 U. S. 333 51
Davis v. Schnell, 81 F. Supp. 872 53
Davis v. Wechsler, 263 U. S. 22 272
Dawkins v. Lord F. Paulet, L. R. 5 Q. B. 94 (1869) 581
DeArnaud v. Ainsworth, 24 App. D. C. 167 572, 582
De Busk v. Harvin, 212 F. 2d 143 572
DeCastro v. Board of Commissioners, 322 U. S. 451 640
Deepwater R. Co. v. Western Pocahontas Co., 152 F. 824 194
De Jonge v. Oregon, 299 U. S. 353 98, 146, 147
Dennis v. United States, 341 U. S. 494 80, 128, 130, 150, 175, 630, 632, 698
Dent v. West Virginia, 129 U. S. 114 492, 513
Dewey v. Des Moines, 173 U. S. 193 437
Dick v. New York Life Ins. Co., 359 U. S. 437 284
Dickson v. Earl of Wilton, 1 F. & F. 419 (1859) 581
Direct Sales Co. v. United States, 319 U. S. 703 678, 680

Page

Dismuke v. United States, 297 U. S. 167 507
Doremus v. Board of Education, 342 U. S. 429 259
Doud v. Hodge, 350 U. S. 485 717
Douglas v. Willcuts, 296 U. S. 1 466
Dreyer v. Illinois, 187 U. S. 71 77
Dumont Laboratories v. Carroll, 184 F. 2d 153 699
East Tennessee, V. & G. R. Co. v. Southern Telegraph Co., 112 U. S. 306 194
Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711 550, 561 563, 604, 611, 612, 617
Elizabeth Arden, Inc., v. Federal Trade Comm'n, 156 F. 2d 132 67, 71
Ellerd v. Southern Pacific R. Co., 241 F. 2d 541 558, 616
Ellis v. Davis, 109 U. S. 485 193
Emspak v. United States, 349 U. S. 190 437
Endo, Ex parte, 343 U. S. 283 505, 507
Erie R. Co. v. Tompkins, 304 U. S. 64 40, 280
Estate. See name of estate.
Ex parte. See name of party.
Far East Conference v. United States, 342 U. S. 570 420
Farmers Educational Union v. WDAY, Inc., 360 U. S. 525 592
Farr v. Valentine, 38 App. D. C. 413 572, 582
Farris v. Alaska Airlines, 113 F. Supp. 907 616
Fawcus Machine Co. v. United States, 282 U. S. 375 24
Federal Maritime Board v. Isbrandtsen Co., 356 U. S. 481 421
Federal Power Comm'n v. Hope Natural Gas Co., 320 U. S. 591 388

Page

Federal Trade Comm'n v. American Tobacco Co., 274 U. S. 543 281
Federal Trade Comm'n v. Morton Salt Co., 334 U. S. 37 63
Feiner v. New York, 340 U. S. 315 153, 272
Feldman v. United States, 322 U. S. 487 233, 235, 236, 238, 239
Felix v. Westinghouse Radio Stations, 89 F. Supp. 740 528, 531
Fikes v. Alabama, 352 U. S. 191 321
Fishblatt v. Atlantic City, 174 F. 196 194
Fiske v. Kansas, 274 U. S. 380 628
Flaxer v. United States, 358 U. S. 147 137, 439
Floyd v. Barker, 12 Co. Rep. 23 580
Forsyth v. Hammond, 166 U. S. 506 44, 197
Francis v. Southern Pacific Co., 333 U. S. 445 282
Frank v. Maryland, 359 U. S. 360 248, 249, 300
Franklin v. Harper, 205 Ga. 779 52
Franzen v. Chicago, M. & St. P. R. Co., 278 F. 370 194
Fujimoto v. United States, 251 F. 2d 342 634, 654
Funk v. United States, 290 U. S. 371 353
Furness, Withy & Co. v. Yang-Tsze Ins. Assn., 242 U. S. 430 284
Futhey v. Atchison, T. & S. F. R. Co., 96 F. Supp. 864 616
Gaines v. Fuentes, 92 U. S. 10 192
Gallegos v. Nebraska, 342 U. S. 55 321
Galvan v. Press, 347 U. S. 522 128
Gardner v. New Jersey, 329 U. S. 565 282
Garner v. Board of Public Works, 341 U. S. 716 128

Page

Gebardi v. United States, 287 U. S. 112 680
General Box Co. v. United States, 351 U. S. 159 282
General Committee v. M-K-T R. Co., 320 U. S. 323 619
Georgia Power Co. v. Brooks, 207 Ga. 406 562
Gerende v. Board of Supervisors, 341 U. S. 56 128, 149
Gidley v. Lord Palmerston, 3 B. & B. 275 (1822) 581
Gitlow v. New York, 268 U. S. 652 83, 98
Glass v. Ickes, 73 App. D. C. 3 570, 582
Goesaert v. Cleary, 335 U. S. 464 340
Gordon v. United States, 344 U. S. 414 354, 408
Government & Civic Employees v. Windsor, 353 U. S. 364 177, 178
Government Employees Organizing Comm. v. Windsor, 353 U. S. 364 33, 189, 224
Grant v. Secretary of State for India, L. R. 2 C. P. D. 445 (1877) 581
Great A. & P. Tea Co. v. Federal Trade Comm'n, 106 F. 2d 667 67, 71
Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293 33, 189, 227
Green v. United States, 356 U. S. 165 81
Greene v. McElroy, 360 U. S. 474 709, 710
Greenwood v. Atchison, T. & S. F. R. Co., 129 F. Supp. 105 616
Greenwood v. Cobbey, 26 Neb. 449 580
Gregoire v. Biddle, 177 F. 2d 579 572, 588
Griffin v. Illinois, 351 U. S. 12 257, 262, 562
Groban, In re, 352 U. S. 330 292, 295, 298, 325
Grosjean v. American Press Co., 297 U. S. 233 175

Page

Grunewald v. United States, 353 U. S. 391 679
Guinn v. United States, 238 U. S. 347 46, 50, 182
Hagner v. United States, 285 U. S. 427 9
Hague v. C. I. O., 307 U. S. 496 181
Hale v. Henkel, 201 U. S. 43 9
Haley v. Ohio, 332 U. S. 596 272, 321
Hancock v. Mitchell, 83 W. Va. 156 599
Hannegan v. Esquire, 327 U. S. 146 508
Harmon v. Brucker, 355 U. S. 579 619
Harris v. South Carolina, 338 U. S. 68 321
Harrison v. N. A. A. C. P., 360 U. S. 167 228, 471
Harrison Sheet Steel Co. v. Labor Board, 194 F. 2d 407 212
Hawks v. Hamill, 288 U. S. 52 33, 189
Hecker v. Illinois Central R. Co., 231 Ill. 574 562
Helvering v. Lazarus & Co., 308 U. S. 252 461
Helvering v. Stuart, 317 U. S. 154 281
Herndon v. Lowry, 301 U. S. 242 137, 147
Herzog v. United States, 226 F. 2d 561 403, 407
Hess v. Reynolds, 113 U. S. 73 193
Hill v. Florida, 325 U. S. 538 535
Hillsborough v. Cromwell, 326 U. S. 620 282
Hirabayashi v. United States, 320 U. S. 81 516
Holt v. United States, 218 U. S. 245 312
Home v. Bentinck, 2 B. & B. 130 (1820) 581
Houston Post Co. v. United States, 79 F. Supp. 199 528, 531, 539
Howard v. Lyons, 360 U. S. 593 577, 586
Howell, In re, 10 N. J. 139 669

Page

Huddleston v. Dwyer, 322 U. S. 232 282
Hughes v. United States, 342 U. S. 353 23
Hyde v. Stone, 20 How. 170 192
Hysler v. Florida, 315 U. S. 411 271
Indiana Metal Products Corp. v. Labor Board, 202 F. 2d 613 211, 212
In re. See name of party.
I. C. C. v. United States, 289 U. S. 385 618
Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239 665
Ivie v. Minton, 75 Ore. 483 580
Japanese Immigrant Case, 189 U. S. 86 507
Jay v. Boyd, 351 U. S. 345 515
Jencks v. United States, 353 U. S. 657 345, 346, 350, 360, 361, 368, 374, 375, 398, 407, 408, 925
Johnson v. Commissioner, 233 F. 2d 952 450
Johnson v. Pennsylvania, 340 U. S. 881 321
Johnson v. United States, 318 U. S. 189 438
Johnson v. Zerbst, 304 U. S. 458 262
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 108, 146, 493, 497
Jones v. Commonwealth, 97 F. 2d 335 269
Jones v. Kennedy, 73 App. D. C. 292 572
Jones v. Securities & Exchange Comm'n, 298 U. S. 1 123
Jordan v. De George, 341 U. S. 223 137
Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787 528, 531, 543
Kanakanui v. United States, 244 F. 923 333
Kansas City v. Nennegan, 152 F. 249 194

Page

Kansas City & T. R. Co. v. Interstate Lumber Co., 37 F. 3 194
Kaw Valley Drainage Dist. v. Metropolitan Water Co., 186 F. 315 194
Keighly v. Bell, 4 F. & F. 763 (1866) 581
Kelly v. Nashville, C. & St. L. R. Co., 75 F. Supp. 737 616
Kent v. Dulles, 357 U. S. 116 140, 507, 509
Kern-Limerick, Inc., v. Scurlock, 347 U. S. 110 272
Kerotest Mfg. Co. v. C–O–Two Fire Equipment Co., 342 U. S. 180 29
KFAB Broadcasting Co. v. Sorensen, 290 U. S. 599 528
Kilbourn v. Thompson, 103 U. S. 168 84, 101, 102, 133, 143, 154, 162, 569
King v. Skinner, Lofft 55 580
Kingsley Books v. Brown, 354 U. S. 436 690
Kirby v. Chicago & N. W. R. Co., 106 F. 551 194
Kirby v. United States, 174 U. S. 47 362, 497
Kissell v. Motor Age Transit Lines, 357 Pa. 204 275
Kline v. Burke Construction Co., 260 U. S. 226 198
Klor's, Inc., v. Broadway-Hale Stores, 359 U. S. 207 68
Knapp v. Schweitzer, 357 U. S. 371 231, 232, 235, 239, 425
Knauff v. Shaughnessy, 338 U. S. 537 515
Kohl v. United States, 91 U. S. 367 28, 35, 332, 333
Korematsu v. United States, 323 U. S. 214 516
Kotteakos v. United States, 328 U. S. 750 377
Krulewitch v. United States, 336 U. S. 440 631, 632, 633, 634, 679
Labor Board v. American Furnace Co., 158 F. 2d 376 212

Page

Labor Board v. Associated Machines, 219 F. 2d 433 212
Labor Board v. General Shoe Corp., 192 F. 2d 504 212
Labor Board v. I. & M. Electric Co., 318 U. S. 9 307
Labor Board v. Jones & Laughlin, 301 U. S. 1 308
Labor Board v. Matthews & Co., 156 F. 2d 706 211, 212, 214
Labor Board v. Nelson Mfg. Co., 120 F. 2d 444 212
Labor Board v. Newport News Shipbuilding Co., 308 U. S. 241 212
Labor Board v. Pennsylvania Greyhound Lines, 303 U. S. 261 212
Labor Board v. Pittsburgh S. S. Co., 340 U. S. 498 281, 309
Labor Board v. Sharples Chemicals, Inc., 209 F. 2d 645 212
Labor Board v. Standard Coil Products Co., 224 F. 2d 465 212
Labor Board v. Stow Mfg. Co., 217 F. 2d 900 212
Lamb v. Sutton, 164 F. Supp. 928 528, 531, 533
Lance's Appeal, 55 Pa. 16 187
Lane v. Wilson, 307 U. S. 268 183, 262
Lang v. Wood, 67 App. D. C. 287 572
Lanzetta v. New Jersey, 306 U. S. 451 137, 438
Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387 284
Lee v. Madigan, 358 U. S. 228 364
Lee v. Mississippi, 332 U. S. 742 321
Leedom v. Kyne, 358 U. S. 184 619
Lehigh Valley R. Co. v. Clark, 207 F. 717 560
Leiter Minerals v. United States, 352 U. S. 220 28, 33, 36, 189

Page

Lerner v. Casey, 357 U. S. 468 128
Leyra v. Denno, 347 U. S. 556 272, 321, 323
Lisenba v. California, 314 U. S. 219 321, 323
Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397 418
Lomax v. Texas, 313 U. S. 544 321
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685 34
Louisiana Power & Light Co. v. Thibodaux, 360 U. S. 25 225, 227, 228
Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U. S. 516 414
Lucas v. American Code Co., 280 U. S. 445 467
Lutwak v. United States, 344 U. S. 604 679
Lyons v. Oklahoma, 322 U. S. 596 321
Mac. See also Mc.
Macbeath v. Haldimand, 1 T. R. 172 (1786) 581
MacGregor v. State Mutual Co., 315 U. S. 280 281
Mackin v. United States, 117 U. S. 348 9
Madigan v. United States, 142 Ct. Cl. 641 566
Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239 26, 36, 194
Malinski v. New York, 324 U. S. 401 272, 321, 324
Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123 436
Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379 260
Markham v. Allen, 326 U. S. 490 41
Martin v. Hunter's Lessee, 1 Wheat. 304 245, 271
Martin's Adm'r v. B. & O. R. Co., 151 U. S. 673 194
Masciale v. United States, 356 U. S. 386 311

Page

Mason v. Missouri, 179 U. S. 328 50
Mason City & Fort Dodge R. Co. v. Boynton, 204 U. S. 570 194
Matter of. See name of party.
Matthews v. Rodgers, 284 U. S. 521 176
Mattox v. United States, 156 U. S. 237 497
McCarthy v. Arndstein, 262 U. S. 355 238
McClellan v. Carland, 217 U. S. 268 41, 193
McCray v. United States, 195 U. S. 27 132
McGrain v. Daugherty, 273 U. S. 135 84, 107, 111, 112, 133
McNabb v. United States, 318 U. S. 332 17, 313, 403
McPherson v. Blacker, 146 U. S. 1 51
Meeker v. Lehigh Valley R. Co., 236 U. S. 412 559, 561
Mellon v. Brewer, 57 App. D. C. 126 570, 582
Meredith v. Winter Haven, 320 U. S. 228 27, 36, 37, 38, 40, 192
Meridian v. Southern Bell Tel. Co., 358 U. S. 639 33, 189
Mesarosh v. United States, 352 U. S. 1 269
Michel v. Louisville & N. R. Co., 188 F. 2d 224 616
Michelson v. United States, 335 U. S. 469 313
Miles v. Illinois Central R. Co., 315 U. S. 698 237
Miles v. McGrath, 4 F. Supp. 603 572
Miller (Leslie), Inc., v. Arkansas, 352 U. S. 187 237
Mills v. Denny, 245 Iowa 584 579
Mineral Range R. Co. v. Detroit & L. S. Copper Co., 25 F. 515 194

Page

Minneapolis & St. Louis R. Co. v. Bombolis, 241 U. S. 211 237
Missouri v. Dockery, 191 U. S. 165 665
Mooney v. Holohan, 294 U. S. 103 269
Moore v. Illinois Central R. Co., 312 U. S. 630 553, 556, 607, 609, 620
Morgan v. United States, 304 U. S. 1 497
Motes v. United States, 178 U. S. 458 497
Murdock v. Memphis, 20 Wall. 590 441
Nardone v. United States, 308 U. S. 338 355
NAACP v. Alabama, 357 U. S. 449 78, 80, 82, 84, 95, 97, 103, 127, 141, 166, 177, 178, 425
National Labor Relations Board. See Labor Board.
National Licorice Co. v. Labor Board, 309 U. S. 350 306, 307, 309
Near v. Minnesota, 283 U. S. 697 83, 690, 694, 697, 698, 699, 701
Nebraska v. United States, 164 F. 2d 866 333
Nelson v. Wyman, 99 N. H. 33 100, 101
New York ex rel. Whitman v. Wilson, 318 U. S. 688 269
Niemotko v. Maryland, 340 U. S. 268 272
Nixon v. Condon, 286 U. S. 73 183
Nixon v. Herndon, 273 U. S. 536 183
Norris v. Alabama, 294 U. S. 587 316
Northern Pacific R. Co. v. United States, 356 U. S. 1 68
O'Donoghue v. United States, 289 U. S. 516 639
Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U. S. 292 497

Page

Old Colony Trust Co. v. Commissioner, 279 U. S. 716 466
Oliver, In re, 333 U. S. 257 295, 497
Oliver Bros. v. Federal Trade Comm'n, 102 F. 2d 763 67
Order of Railway Conductors v. Pitney, 326 U. S. 561 550
Pacemaker Corp. v. Labor Board, 260 F. 2d 880 212
Pacific Railroad Removal Cases, 115 U. S. 1 194
Palakiko, Application of, 39 Haw. 167 629
Palakiko v. Harper, 209 F. 2d 75 629
Palermo v. United States, 360 U. S. 343 369
Palko v. Connecticut, 302 U. S. 319 98
Palmer v. Hoffman, 318 U. S. 109 281
Panama Refining Co. v. Ryan, 293 U. S. 388 140
Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U. S. 507 392
Paraiso v. United States, 207 U. S. 368 663
Parker v. Illinois Central R. Co., 108 F. Supp. 186 558, 616
Parker v. Lester, 227 F. 2d 708 500
Parker (Charles) Co. v. Silver City Crystal Co., 142 Conn. 605 528, 531, 533, 543
Payne v. Arkansas, 356 U. S. 560 272, 321, 324
Pennekamp v. Florida, 328 U. S. 331 627
Pennsylvania v. Nelson, 350 U. S. 497 75, 76, 99, 425
Pennsylvania v. Williams, 294 U. S. 176 33, 189
Pennsylvania R. Co. v. Day, 360 U. S. 548 621
Pennsylvania R. Co. v. Minds, 250 U. S. 368 283

Page

People v. DenUyl, 318 Mich. 645 238
People v. Savvides, 1 N. Y. 2d 554 269
People v. Sholem, 238 Ill. 203 562
People v. Winters, 333 U. S. 507 705
People ex rel. Karlin v. Culkin, 248 N. Y. 465 291
People ex rel. McDonald v. Keeler, 99 N. Y. 463 292
Pereira v. United States, 347 U. S. 1 678
Perkins v. Lukens Steel Co., 310 U. S. 113 514
Persing v. Citizens Traction Co., 294 Pa. 230 286
Peters v. Hobby, 349 U. S. 331 492, 507, 509, 513, 515
Peterson, Ex parte, 253 U. S. 300 282
Philadelphia Clay Co. v. York Clay Co., 241 Pa. 305 187, 191
Philadelphia Co. v. Stimson, 223 U. S. 605 493
Phillips Petroleum Co. v. Wisconsin, 347 U. S. 672 390
Pioneer Coal Co. v. Cherrytree & D. R. Co., 272 Pa. 43 191
Pitney v. Washington, 240 U. S. 387 339
Pope v. Williams, 193 U. S. 621 50
Powell v. Alabama, 287 U. S. 45 320, 325, 327
Powell v. Pennsylvania, 127 U. S. 678 492, 513
Propper v. Clark, 337 U. S. 472 40, 191, 282
Public Service Comm'n v. Wycoff Co., 344 U. S. 237 228
Public Service Comm'n of N. Y. v. Federal Power Comm'n, 257 F. 2d 717 382
Public Utilities Comm'n of California v. United States, 355 U. S. 534 33, 37, 192, 196
Pyle v. Kansas, 317 U. S. 213 269

Page

Quinn v. United States, 349 U. S. 155 238, 436, 437
Radio Station WOW v. Johnson, 326 U. S. 120 75, 544
Ragan v. Merchants Transfer Co., 337 U. S. 530 282
Railroad Comm'n v. Pullman Co., 284 U. S. 521 176
Railroad Comm'n v. Pullman Co., 312 U. S. 496 27, 28, 32, 33, 176, 179, 189, 202, 224, 281
Railroad Co. v. Lockwood, 17 Wall. 357 418
Railroad Trainmen v. Chicago River & Ind. R. Co., 353 U. S. 30 550, 609, 612
Railway Conductors v. Southern R. Co., 339 U. S. 255 551
Ramsey v. Chesapeake & O. R. Co., 75 F. Supp. 740 558, 616
Rast v. Van Deman & Lewis Co., 240 U. S. 342 339
Rea v. United States, 350 U. S. 214 236
Regents of the University System of Georgia v. Carroll, 338 U. S. 586 545
Regina v. Hicklin, L. R. 3 Q. B. 360 693
Reilly v. Pinkus, 338 U. S. 269 497
Reitz v. Mealey, 314 U. S. 33 281
Republic Natural Gas Co. v. Oklahoma, 334 U. S. 62 259
Reynolds v. Denver & R. G. W. R. Co., 174 F. 2d 673 558, 616
Rippey v. Texas, 193 U. S. 504 665
Risty v. Chicago, R. I. & P. R. Co., 270 U. S. 378 41, 194
Robinson v. United States, 144 F. 2d 392 7, 15
Rochester Telephone Corp. v. United States, 307 U. S. 125 618
Rollinger v. United States, 208 F. 2d 109 234

Page

Roth v. United States, 354 U. S. 476 272, 686, 696, 698, 707, 708
Roviaro v. United States, 353 U. S. 53 115
Rutkin v. United States, 343 U. S. 130 234
San Diego Trades Council v. Garmon, 359 U. S. 236 535
Sawyer's Petition, In re, 229 F. 2d 805 269
Schaeffer v. Commissioner, 258 F. 2d 861 450
Schechter Poultry Corp. v. United States, 295 U. S. 495 140
Schenck v. United States, 249 U. S. 47 175
Schira v. Commissioner, 240 F. 2d 672 234
Schmidt v. United States, 115 F. 2d 394 399
Schneider v. Irvington, 308 U. S. 147 141, 142, 145
Schneiderman v. United States, 320 U. S. 118 150
Schnell v. Davis, 336 U. S. 933 183
Schware v. Bar Examiners, 353 U. S. 232 83, 492, 513
Scull v. Virginia, 359 U. S. 344 137, 138, 141, 425, 437, 507
Searl v. School District No. 2, 124 U. S. 197 194
Secretary of Agriculture v. United States, 350 U. S. 162 417
Security Flour Mills Co. v. Commissioner, 321 U. S. 281 463, 467
Service v. Dulles, 354 U. S. 363 509
Service Storage & T. Co. v. Virginia, 359 U. S. 171 237
Seshadri v. District Magistrate, 41 A. I. R. (Sup. Ct.) 747 698
Shaughnessy v. Mezei, 345 U. S. 206 515
Shields v. Utah Idaho R. Co., 305 U. S. 177 619

Page

Shipman v. DuPre, 339 U. S. 321 33, 176, 189
Shutte v. Thompson, 15 Wall. 151 283
Sibbald v. United States, 12 Pet. 488 245
Sinclair v. United States, 279 U. S. 263 439
Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667 282
Skiriotes v. Florida, 313 U. S. 69 666
Slochower v. Board of Education, 350 U. S. 551 492, 513
Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239 550, 553, 556, 620
Smith v. Allwright, 321 U. S. 649 51, 183
Smith v. Higgins, 16 Gray (Mass.) 251 580
Smith v. O'Brien, 66 App. D. C. 387 572
Smith v. Texas, 311 U. S. 128 272
Smith v. United States, 337 U. S. 137 238
Smith v. United States, 223 F. 2d 750 4
Smith v. United States, 238 F. 2d 925, 240 F. 2d 347 5
Smith v. United States, 250 F. 2d 842 6
Sorensen v. Wood, 123 Neb. 348 528, 531
Sorrells v. United States, 287 U. S. 435 438
South Carolina v. Bailey, 289 U. S. 412 272
South Dakota Cent. R. Co. v. Chicago, M. & St. P. R. Co., 141 F. 578 194
Southern Pacific Co. v. Schuyler, 227 U. S. 601 272
Southern R. Co. v. Virginia, 290 U. S. 190 497
Southgate Brokerage Co. v. Federal Trade Comm'n, 150 F. 2d 607 67
Spalding v. Vilas, 161 U. S. 483 570, 573, 578, 582, 583, 585, 587

Page

Spann v. School Directors, 381 Pa. 338 191
Spartanburg v. Cudd, 132 S. C. 264 562
Spector Motor Co. v. McLaughlin, 323 U. S. 101 33, 176, 189, 224, 227
Speiser v. Randall, 357 U. S. 513 84, 107, 153
Spiegel, Estate of, v. Commissioner, 335 U. S. 701 41, 282
Spies v. United States, 317 U. S. 492 676, 678, 680, 682
Spring City Foundry Co. v. Commissioner, 292 U. S. 182 463, 464
Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368 33, 189
Standard Oil Co. v. Federal Trade Comm'n, 340 U. S. 231 66
Stark v. Wickard, 321 U. S. 288 619
State. See also name of State.
State v. Grisafulli, 135 Ohio St. 87 253
State ex rel. Dawson v. Roberts, 165 Ohio St. 341 261
State ex rel. Wanamaker v. Miller, 164 Ohio St. 174 256, 261
Staub v. City of Baxley, 355 U. S. 313 98
Steele v. General Mills, 329 U. S. 433 282
Stein v. New York, 346 U. S. 156 321, 324
Sterling v. Constantin, 287 U. S. 378 272
Stone v. Smith, 159 Mass. 413 52
Stroble v. California, 343 U. S. 181 272, 321
Sugar Creek, P. B. & P. C. R. Co. v. McKell, 75 F. 34 194
Sun Oil Co. v. Dalzell Towing Co., 287 U. S. 291 418
Superior Films v. Department of Education, 346 U. S. 587 697

Page

Sutton v. Johnstone, 1 T. R. 493 580
Sutton v. Leib, 342 U. S. 402 282
Suydam v. Broadnax, 14 Pet. 67 192
Swearingen v. United States, 161 U. S. 446 688, 705
Sweeney v. Higgins, 117 Me. 415 599
Sweezy v. New Hampshire, 354 U. S. 234 73, 76, 77, 82, 83, 85, 87, 99, 100, 127, 129, 140, 141, 166, 424, 425, 434, 435
Switchmen's Union v. Mediation Board, 320 U. S. 297 608, 619
Syracuse, The, 12 Wall. 167 417
Tanner v. Gault, 20 Ohio App. 243 580
Tanner v. Little, 240 U. S. 369 339
Taylor v. Glotfelty, 201 F. 2d 51 572, 582
Taylor v. McElroy, 360 U. S. 709 513
Tenney v. Brandhove, 341 U. S. 367 133, 575, 579
Terminal Warehouse v. Pennsylvania R. Co., 297 U. S. 500 618
Terry v. Adams, 345 U. S. 461 183
Testa v. Katt, 330 U. S. 386 237
Texas Trailercoach, Inc., v. Commissioner, 251 F. 2d 395 450, 461
Thomas v. Arizona, 356 U. S. 390 321
Thomas v. Collins, 323 U. S. 516 98, 175, 321, 690
Thornhill v. Alabama, 310 U. S. 88 137, 690
Tigner v. Texas, 310 U. S. 141 341
Tinkoff v. Campbell, 86 F. Supp. 331 572
Toomer v. Witsell, 334 U. S. 385 33, 37, 189, 192, 196
Toth v. Quarles, 350 U. S. 11 9
Toucey v. New York Life Ins. Co., 314 U. S. 118 198

Page

Transcontinental & Western Air v. Koppal, 345 U. S. 653 556, 620
Tressler v. Commissioner, 228 F. 2d 356 466
Truax v. Raich, 239 U. S. 33 492, 513
Tungus, The, v. Skovgaard, 358 U. S. 588 191
Turner v. Pennsylvania, 338 U. S. 62 321
Twining v. New Jersey, 211 U. S. 78 237, 438
Tyler v. Judges, 179 U. S. 405 259
Tyler v. Magwire, 17 Wall. 253 245
Tyree v. Harrison, 100 Va. 540 599
Ullmann v. United States, 350 U. S. 422 235
Union Bank v. Jolly's Adm'rs, 18 How. 503 192
Union Pacific R. Co. v. Price, 360 U. S. 601 552, 558, 561, 563
Union Terminal R. Co. v. Chicago, B. & Q. R. Co., 119 F. 209 194
United Gas Pipe Line Co. v. Mobile Corp., 350 U. S. 332 389, 392
United States. See also U. S. ex rel.
United States v. Alper, 156 F. 2d 222 403, 405, 407, 409
United States v. Amazon Chemical Corp., 55 F. 2d 254 405
United States v. American Medical Assn., 26 F. Supp. 429 399
United States v. Angelet, 255 F. 2d 383 399
United States v. Birdsall, 233 U. S. 223 575
United States v. Burnison, 339 U. S. 87 688
United States v. Calamaro, 354 U. S. 351 234, 675, 680, 681

Page

United States v. Cardiff, 344 U. S. 174 438
United States v. Classic, 313 U. S. 299 51
United States v. Colgate & Co., 250 U. S. 300 64
United States v. Consolidated Laundries, 159 F. Supp. 860 409
United States v. Cotter, 60 F. 2d 689 404
United States v. Debrow, 346 U. S. 374 9
United States v. Dennis, 183 F. 2d 201 129
United States v. Falcone, 311 U. S. 205 678
United States v. Falcone, 109 F. 2d 579 635
United States v. Gerlach Live Stock Co., 339 U. S. 725 282
United States v. Gill, 55 F. 2d 399 6
United States v. Grunewald, 162 F. Supp. 621 404, 407
United States v. Harriss, 347 U. S. 612 174, 175, 178
United States v. H. J. K. Theatre Corp., 236 F. 2d 502 403, 407
United States v. Interstate Commerce Comm'n, 337 U. S. 426 552, 559, 560, 563, 615, 618
United States v. Iozia, 104 F. Supp. 846 234
United States v. Johnson, 319 U. S. 503 399
United States v. Josephson, 165 F. 2d 82 156
United States v. Kahriger, 345 U. S. 22 676, 681
United States v. Limehouse, 285 U. S. 424 688
United States v. Lovett, 328 U. S. 303 108, 155, 156
United States v. Macdaniel, 7 Pet. 1 575
United States v. Miller, 317 U. S. 369 333

Page

United States v. 19,573.59 Acres of Land, 70 F. Supp. 610 333
United States v. Nugent, 346 U. S. 1 515
United States v. Parker, 103 F. 2d 857 7, 15
United States v. Parrino, 180 F. 2d 613 7, 15
United States v. Phellis, 257 U. S. 156 462
United States v. Prince, 264 F. 2d 850 375
United States v. Procter & Gamble, 356 U. S. 677 399, 400, 402, 404
United States v. Rabinowich, 238 U. S. 78 679
United States v. Remington, 191 F. 2d 246 403
United States v. Reynolds, 345 U. S. 1 515
United States v. Rose, 215 F. 2d 617 399, 403, 405
United States v. Rumely, 345 U. S. 41 97, 98, 121, 127, 140, 141, 178, 508, 523
United States v. San Geronimo Co., 154 F. 2d 78 331
United States v. Schneiderman, 106 F. Supp. 731 362
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 68, 399, 400, 403, 404
United States v. Spangelet, 258 F. 2d 338 399, 401, 410
United States v. Stromberg, 268 F. 2d 256 667
United States v. Turner, 175 F. 2d 644 331
United States v. Wampler, 5 F. Supp. 796 234
United States v. Witkovich, 353 U. S. 194 118
U. S. ex rel. Almeida v. Baldi, 195 F. 2d 815 269
U. S. ex rel. Montgomery v. Ragen, 86 F. Supp. 382 269
U. S. ex rel. Thompson v. Dye, 221 F. 2d 763 269
United States to use of Parravicino v. Brunswick, 63 App. D. C. 65 572

Page

Universal Camera Corp. v. Labor Board, 340 U. S. 474 309
Uphaus v. Wyman, 360 U. S. 72 166, 300
Upshur County v. Rich, 135 U. S. 467 194
Vernon v. Alabama, 313 U. S. 547 321
Vescio v. Pennsylvania Electric Co., 336 Pa. 502 286
Vitarelli v. Seaton, 359 U. S. 535 509, 513
Wabash R. Co. v. Duncan, 170 F. 2d 38 194
Wan v. United States, 266 U. S. 1 238
Wanamaker v. Supreme Court of Ohio, 350 U. S. 881 261
Ward v. Texas, 316 U. S. 547 272, 321
Washington Terminal Co. v. Boswell, 75 U. S. App. D. C. 1 563, 612, 616, 619
Watkins v. United States, 354 U. S. 178 82, 83, 84, 102, 107, 113, 116, 123, 124, 126, 127, 137, 138, 140, 141, 142, 156, 166, 424, 425, 434, 507
Watts v. Indiana, 338 U. S. 49 321
Weaver v. Pennsylvania R. Co., 141 F. Supp. 214 616
Weber v. Lane, 99 Mo. App. 69 580
Weiss v. Stearn, 265 U. S. 242 462
Western New York & P. R. Co. v. Penn Refining Co., 137 F. 343 560
West Pontiac, Inc., v. Commissioner, 257 F. 2d 810 450
West River Bridge Co. v. Dix, 6 How. 507 34
West Virginia Board of Education v. Barnette, 319 U. S. 624 140, 148
White v. Ragen, 324 U. S. 760 269
White v. Texas, 310 U. S. 530 321

Page

Whitfield v. Ohio, 297 U. S. 431 115
Whitney v. California, 274 U. S. 357 689
Wieman v. Updegraff, 344 U. S. 183 79, 83, 94
Williams v. Green Bay & W. R. Co., 326 U. S. 549 41
Williams v. Mississippi, 170 U. S. 213 50
Williams v. United States, 341 U. S. 97 9, 282
Williams Live Stock Co. v. Delaware, L. & W. R. Co., 285 F. 795 194
Wilson, Ex parte, 114 U. S. 417 9, 10
Winger v. Aires, 371 Pa. 242 187
Winters v. New York, 333 U. S. 507 137
Wong Yang Sung v. McGrath, 339 U. S. 33 508
Woolfolk v. Driver, 186 Va. 174 178
Wyman v. Uphaus, 100 N. H. 436 101
Yarbrough, Ex parte, 110 U. S. 651 51
Yaselli v. Goff, 12 F. 2d 396 569
Yates v. United States, 354 U. S. 298 99, 130, 178, 632, 634
Yick Wo v. Hopkins, 118 U. S. 356 50
Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 937 247

TABLE OF STATUTES CITED

(A) STATUTES OF THE UNITED STATES.

Page

1789, Sept. 24, c. 20, 1 Stat. 73 ..... 25, 252, 273
1793, Mar. 2, c. 22, § 5, 1 Stat. 333..... 185
1865, Mar. 3, c. 89, 13 Stat. 504 684
1870, May 31, c. 114, 16 Stat. 140..... 167
1871, Apr. 20, c. 22, 17 Stat. 13 ..... 167, 252
1873, Mar. 3, c. 258, 17 Stat. 598 684
1875, Mar. 3, c. 137, 18 Stat. 470 ..... 167, 219
1887, Feb. 4, c. 104, 24 Stat. 379. (See also Act of Aug. 9, 1935, c. 498, 49 Stat. 543, and Act of Sept. 18, 1940, c. 722, 54 Stat. 898.) 19, 273, 411, 548, 601
1888, Apr. 24, c. 194, 25 Stat. 94 328
1890, July 2, c. 647, § 1, 26 Stat. 209..... 395
Aug. 18, c. 797, 26 Stat. 316 328
1893, Feb. 13, c. 105, § 3, 27 Stat. 445..... 411
1903, Feb. 11, c. 544, 32 Stat. 823 19
Feb. 19, c. 708, 32 Stat. 847 19
1906, June 29, c. 3591, 34 Stat. 584. (See also Act of Feb. 4, 1887, c. 104, 24 Stat. 379.).. 548
1913, Oct. 22, c. 32, 38 Stat. 208 564
1914, Sept. 26, c. 311, 38 Stat. 717 55

Page

1914, Oct. 15, c. 323, § 2, 38 Stat. 730. (See also Act of June 19, 1936, c. 592, 49 Stat. 1526.) 55
1916, Aug. 29, c. 417, 39 Stat. 556..... 328
1919, Oct. 29, c. 89, 41 Stat. 324 1
1926, May 20, c. 347, § 3, 44 Stat. 577. (See also Act of June 21, 1934, c. 691, 48 Stat. 1185.) 548, 601
1927, Feb. 23, c. 169, §§ 18, 29, 44 Stat. 1162... 525
1932, June 22, c. 271, 47 Stat. 326..... 1
1934, June 19, c. 652, 48 Stat. 1064 ..... 525, 684
June 21, c. 691, 48 Stat. 1185. (See also Act of May 20, 1926, c. 347, 44 Stat. 577.).. 548, 601
June 27, c. 868, 48 Stat. 1283 548
1935, July 5, c. 372, § 2, 49 Stat. 449. (See also Act of June 23, 1947, c. 120, 61 Stat. 136.) 203, 301
Aug. 9, c. 498, 49 Stat. 543. (See also Act of Feb. 4, 1887, c. 104, 24 Stat. 379, and Act of Sept. 18, 1940, c. 722, 54 Stat. 898.) 273, 411
1936, June 19, c. 592, 49 Stat. 1526. (See also Act of Oct. 15, 1914, c. 323, 38 Stat. 730.).. 55

Page

1937, June 24, c. 382, 50 Stat. 307 548
1938, June 21, c. 556, 52 Stat. 821. (See also Act of Feb. 7, 1942, c. 49, 56 Stat. 83.)..... 378
June 25, c. 676, § 16, 52 Stat. 1060..... 601
1939, Aug. 2, c. 410, 53 Stat. 1147 474
1940, June 28, c. 439, 54 Stat. 670 .... 72, 109, 622, 924
Sept. 18, c. 722, 54 Stat. 898. (See also Act of Feb. 4, 1887, c. 104, 24 Stat. 379, and Act of Aug. 9, 1935, c. 498, 49 Stat. 543.) 411
1941, Sept. 20, c. 412, § 114, 55 Stat. 687..... 446
1942, Feb. 7, c. 49, 56 Stat. 83. (See also Act of June 21, 1938, c. 556, 52 Stat. 821.)..... 378
1943, July 12, c. 218, § 304, 57 Stat. 431..... 109
1944, Oct. 3, c. 479, 58 Stat. 765 328
1946, June 11, c. 324, 60 Stat. 237 601
Aug. 2, c. 753, 60 Stat. 812 ..... 109, 474
1947, June 23, c. 120, 61 Stat. 136. (See also Act of July 5, 1935, c. 372, 49 Stat. 449.).. 203
June 30, c. 163, 61 Stat. 193 564
July 26, c. 343, 61 Stat. 495 474
Aug. 5, c. 493, 61 Stat. 774 328
1948, Feb. 19, c. 65, 62 Stat. 21 474
June 25, c. 645, 62 Stat. 683 672
1949, Aug. 10, c. 412, 63 Stat. 578 474
1950, Sept. 6, c. 896, 64 Stat. 595 564
Sept. 23, c. 1024, § 2, 64 Stat. 987..... 109

Page

1953, Apr. 30, 67 Stat. 638.. 474
Aug. 7, c. 345, 67 Stat. 462 378
1954, Aug. 16, c. 736, 68A Stat. 3. (See Internal Revenue Code of 1954.) 672
Aug. 24, c. 886, § 5, 68 Stat. 775..... 72
1956, Aug. 10, c. 1041, 70A Stat. 1. (See also U. S. Code, Title 10.) 328
1957, Sept. 2, Pub. L. 85–269, 71 Stat. 595.... 343, 395
1958, Sept. 2, Pub. L. 85–861, 72 Stat. 1437..... 328
Internal Revenue Code of 1939, §§ 41–42..... 446
Internal Revenue Code of 1954, §§ 4401, 4411, 4412, 4421, 7201, 7203, 7272... 672
Judicial Code. (See also 28 U. S. C.) § 40..... 1
Revised Statutes.
§ 359 564
§ 1979 252
U. S. Code.
Title 2, § 192..... 109
Title 5,
§ 54 564
§ 171 et seq..... 474
§ 309 564
§ 1009 601
Title 10,
§§ 2304, 2306..... 474
§§ 2663, 2667..... 328
Title 15,
§ 13 55
§ 29 19
§ 717 et seq..... 378
Title 18,
§ 371 672
§ 798 474
§§ 1201, 2312..... 1
§ 2314 367
§ 2385 .... 72, 109, 622
§§ 3141, 3235, 3432.. 1
§ 3500 ... 343, 367, 395
Title 21, §§ 331, 353... 310

Page

U. S. Code—Continued.
Title 26,
§§ 41–42 446
§§ 4412, 6107, 6806.. 672
Title 28,
§ 41 601
§ 42 923
§ 1253 ..... 167, 219
§ 1254 310
§ 1257 ..... 45, 72, 252, 287, 334, 423
§ 1292 411
§ 1293 622
§ 1331 ..... 167, 219
§ 1332 ..... 25, 167, 185, 219
§ 1343 ..... 167, 219
§ 1441 ..... 25, 185
§ 1651 252
§ 1652 273
§ 2103 ..... 287, 423
§ 2108 622
§ 2201 219
§ 2255 1
§ 2281 ..... 167, 219
§ 2283 185
§ 2284 219
§ 2680 ..... 474, 564
Title 29,
§ 151 et seq..... 203
§§ 158, 160, 161.... 301
§ 216 601
Title 34, § 522..... 328
Title 42,
§ 1981 167
§ 1983 ..... 167, 252
Title 43, §§ 1331–1343.. 378
Title 45,
§ 151 et seq..... 548
§ 153 ..... 548, 601
§ 228 548
Title 46, §§ 181 – 196, 1300–1315 411
Title 47, §§ 151, 307, 315, 326..... 525
Title 49,
§ 6 19
§ 16 ..... 548, 601
§ 20 411
§§ 41, 43, 45 19
§ 315 273
§ 319 411
§ 901 et seq..... 411

Page

U. S. Code—Continued.
Title 50,
§ 171 328
§ 783 474
§ 844 72
Title 50, App., §§ 1612, 1613, 1620, 1632..... 328
Administrative Procedure Act 601
Armed Service Procurement Act of 1947..... 474
Civil Rights Act..... 167, 252
Clayton Act..... 55
Communications Act... 525, 684
Communist Control Act.... 72
Dyer Act..... 1
Elkins Act..... 19
Fair Labor Standards Act.. 601
Federal Trade Commission Act 55
General Appropriation Act of 1951..... 564
Harter Act..... 411
Hatch Act..... 474
Internal Security Act of 1950 109
Interstate Commerce Act... 19, 273, 411, 548, 601
Jencks Act..... 343, 395
Judiciary Act (First)..... 25
Kidnapping Act..... 1
Labor Management Relations Act. (See also National Labor Relations Act.) 203
Legislative Reorganization Act of 1946..... 109, 474, 564
Motor Carrier Act. (See also Interstate Commerce Act.) 273, 411
National Labor Relations Act 203, 301
National Motor Vehicle Theft Act..... 1
National Security Act..... 474
Natural Gas Act..... 378
Radio Act of 1927..... 525
Railroad Retirement Act... 548
Railway Labor Act.... 548, 601
Reorganization Plan No. 6.. 474
Revenue Act of 1941..... 446
Robinson-Patman Act..... 55
Rules of Decision Act..... 273

	Page
Sherman Act	395
Smith Act	72, 109, 622, 924
Subversive Activities Control Act	109
Surplus Property Act	328
Taft-Hartley Act	203
Thomas Amendment	564
Tort Claims Act. (See also Legislative Reorganization Act of 1946.)	474, 564
Transportation Act of 1940. (See also Interstate Commerce Act and Motor Carrier Act.)	411
Urgent Deficiency Appropriation Act, 1943	109
Wagner Act. (See also National Labor Relations Act.)	203

(B) Statutes of the States and Territories.

Alabama.	
Constitution	167
Code, 1940, Tit. 17, § 32	45
Arizona.	
Rev. Stat., § 16–101	45
California.	
Election Code, § 220	45
Connecticut.	
Gen. Stat., § 9–12	45
Delaware.	
Code Ann., Tit. 15, § 1701	45
Florida.	
Constitution	25
Georgia.	
Code, § 26–6502	672
Code Ann., §§ 34–117, 34–120	45
Louisiana.	
Constitution	25
Act 111 of 1900	25
Rev. Stat., 1950, Tit. 13, §§ 4231–4246	25
Rev. Stat., Tit. 18, § 31	45
Rev. Stat., 1950, Part III, Tit. 19, § 101	25
Declaratory Judgment Act	25
Maine.	
Rev. Stat., c. 3, § 2	45
Massachusetts.	
Gen. L. Ann., c. 51, § 1	45
Mississippi.	
Constitution	45
Code Ann., § 3213	45
New Hampshire.	
Laws, 1951, c. 193; 1953, c. 307; 1955, c. 197	72
Rev. Stat. Ann., §§ 55:10–55:12	45
Rev. Stat. Ann., cc. 353, 491, 588	72
Subversive Activities Act	72
New York.	
Const., Art. I, § 6	287
8 N. Y. Laws Ann., § 1–242	287
16 N. Y. Laws Ann., § 122	684
29 N. Y. Laws Ann., § 90	287
39 N. Y. Laws Ann., §§ 100–103	684
Education Law, §§ 122, 124, 129	684
Civil Practice Act	684
Civil Rights Law	287
Election Code, § 150	45
Judiciary Law	287
Penal Law, §§ 100–103	684
Code Crim. Pro., § 301	315
North Carolina.	
Const., Art. VI, §§ 1, 4, 5	45
Act of 1957, § 163–28	45
Laws 1957, c. 287, pp. 277, 278	45
Gen. Stats., §§ 163–28, 163–31.2, 163–32	45
North Dakota.	
Rev. Stats., 1943, c. 14–02	525

	Page
Ohio.	
Const., Art. I, § 10	423
Const., Art. IV, § 2	252
Gen. Code, § 1512	252
§§ 12137, 12845	423
Rev. Code, § 101.44	423
§§ 2503, 2907, 2953	252
Page's Rev. Code, 1954, § 3737.13	287
Oklahoma.	
Stat., Tit. 15, § 598.1 et seq	334
Stat. Ann., Tit. 26, § 61	45
Unfair Sales Act	334
Oregon.	
Rev. Stat., § 247.131	45
Pennsylvania.	
1945, May 29, P. L. 1108, § 1 et seq	219
1947, June 10, P. L. 481	219
1957, May 31, P. L. 234	219
36 Purdon's Stat. Ann., § 2391.1 et seq	219
Pennsylvania—Continued.	
Purdon's Stat. Ann., 1952, Tit. 77	273
Limited Access Highways Act	219
Workmen's Compensation Act	273
South Carolina.	
Code, § 23–62	45
Texas.	
Civ. Stat., Art. 2226	601
Virginia.	
Acts 1956, cc. 31–36	167
Code, § 24–68	45
Code, 1950, §§ 8–578 to 8–585	167
Code, 1958, §§ 54–74, 54–78, 54–79	167
Code, 1958 Supp., §§ 18–349.9 to 18–349.37	167
Washington.	
Rev. Code, § 29.07.070	45
Wisconsin.	
Stat. Ann., § 103.39 (3)	601
Wyoming.	
Comp. Stat. Ann., § 31–113	45

(C) Foreign.

India.	
Constitution, § 19 (2)	684

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1958.

SMITH *v.* UNITED STATES.

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

No. 90. Argued January 21, 1959.—Decided June 8, 1959.

Since a violation of the Federal Kidnapping Act, 18 U. S. C. § 1201, may be punishable by death, if the victim was not liberated unharmed and if the jury so recommends, petitioner's prosecution for a violation of that Act by information, instead of indictment, violated Rule 7 (a) of the Federal Rules of Criminal Procedure, which provides that "An offense which may be punishable by death shall be prosecuted by indictment," and his conviction was invalid—even though he waived indictment and it was not alleged or proved that the victim was harmed. Pp. 2–10.

(a) The statute, 18 U. S. C. § 1201, creates the single offense of transporting a kidnapping victim across state lines, which *may* be punished by death if sufficient evidence of harm to the victim is introduced at the trial; and such an offense must be prosecuted by indictment. Pp. 8–9.

(b) The substantial safeguards to the accused provided by the requirement that such an offense be prosecuted by indictment cannot be eradicated on the theory that noncompliance is a mere technical departure from the rules. P. 9.

(c) Under Rule 7 (a), the United States Attorney did not have authority to file an information in this case, and the waivers made by petitioner were not binding and did not confer power on the convicting court to hear the case. P. 10.

250 F. 2d 842, reversed.

William B. Moore, Jr. argued the cause for petitioner. With him on the brief was *Marion Rushton.*

Leon Silverman argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Kirby W. Patterson.*

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

The petitioner seeks relief under 28 U. S. C. § 2255 from his conviction and sentence for violation of the Federal Kidnapping Act, 18 U. S. C. § 1201. Briefly, the kidnapping charge grew out of the following facts: Petitioner, a young man of twenty-six, and two seventeen-year-old boys, while in custody under state charges, escaped from a Florida jail on November 12, 1949. They were almost immediately pursued by men and bloodhounds through swampy everglade terrain. On November 14, 1949, they allegedly pre-empted an automobile and seized its owner forcing him to accompany them into the State of Alabama where they released the victim without harming him and subsequently abandoned the car. On November 18, 1949, the defendants were arrested by federal authorities in a hiding place under the floor of a building. Petitioner claimed that he was weak from lack of food and sleep and that his back had been injured in the course of the escape. The defendants were taken promptly before the United States Commissioner where they were charged with transporting a kidnapping victim across state boundaries.

On the following day, petitioner was interviewed at length by a government agent concerning both the kidnapping offense and his prior record. There was a conflict in the evidence concerning what transpired at this interview. The petitioner testified that he was promised leniency if he would plead guilty and that he was assured

that the juveniles would be given no more than four years' imprisonment if they pleaded guilty. The Government offered evidence to the effect that no promises were made. In any event, on Monday morning, November 21, 1949, petitioner and his codefendants were brought by the government agent to the office of the United States Attorney where a discussion ensued concerning waivers of indictments, counsel, and venue, and pleas of guilty to an information which the United States Attorney proposed to file.

While that conference was proceeding, the government agent who had previously interviewed petitioner had a private out-of-court audience and conference with the district judge in his chambers at which, in the absence of the defendants, he discussed the contemplated proceedings with the judge and informed him about the alleged kidnapping offense and other alleged crimes of petitioner. Soon thereafter, and, in the words of the Court of Appeals, "[a]fter the judge's mind had become thoroughly conditioned by this interview with, and the disclosures made to him by, [the government agent] regarding the defendants," there followed in open court "a stilted and formal colloquy consisting of brief and didactic statements by the judge" that the defendants could have a lawyer if they wished and could have their cases submitted to a grand jury. 238 F. 2d 925, 927, n. 5. The defendants, including petitioner, stated that they did not wish to have an attorney and were willing to waive indictment and be prosecuted under an information to be filed by the prosecutor. The information was immediately filed and the defendants waived counsel and venue.[1] They then imme-

[1] 18 U. S. C. § 3235 provides:

"The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience."

[*Footnote 1 continued on p. 4.*]

diately pleaded guilty to the information and stated that they wanted to be sentenced promptly before their parents knew of their predicaments. The judge then sentenced petitioner to thirty years in the penitentiary and the two seventeen-year-old accomplices to fifteen years each. No appeals were taken.[2]

Because of these precipitous and telescoped proceedings, the case has had a long and troublesome history in the Court of Appeals for the Fifth Circuit. It has been three times before that court. Soon after the sentence was imposed, petitioner filed his initial application under § 2255 to vacate the judgment. The application was denied without a hearing and no appeal was taken. In March 1954 petitioner filed a second, similar application which was likewise denied without a hearing, but on appeal the Court of Appeals determined that petitioner's allegations required a hearing. *Smith* v. *United States,* 223 F. 2d 750. After the hearing was held, the District Court again dismissed the application. 137 F. Supp. 222. Again the Court of Appeals reversed, this time finding that petitioner had been deprived of due process by the summary manner in which the Government had pro-

---

The Federal Rules of Criminal Procedure, Rule 18, provide:

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

The offense of which petitioner was accused was committed in Dothan, Alabama, which was within the Southern Division of the District Court. The proceedings against petitioner were held in Montgomery, Alabama, which is located in another county in Alabama in the Northern Division of that court.

[2] This left petitioner with a substantial sentence still pending in Florida under the charge for which he was in custody when he escaped. In addition, petitioner was apparently still in jeopardy of state prosecution for escaping.

ceeded against him.[3] *Smith* v. *United States,* 238 F. 2d 925, 930. First the court remanded the cause "with directions to grant the motion, to set aside the conviction and sentence, and to proceed further and not inconsistently" with the opinion. 238 F. 2d, at 931. On rehearing, however, the court modified its directions as follows:

> "The judgment is reversed and the cause is remanded with directions to set aside the conviction and sentence and to proceed further and not inconsistently herewith, including, if the district judge is of the opinion that the ends of justice require it, permitting the defendant to withdraw his waiver of counsel and his plea of guilty and to stand trial." 240 F. 2d 347.

On the remanded proceedings, the District Court resentenced petitioner, but refused him permission to withdraw his waivers and guilty plea. The Court of Appeals

---

[3] The Court of Appeals stated, at 238 F. 2d 930:

"When it comes to the controlling question, however, which the motion presents, whether under the undisputed facts the defendant was denied due process in the taking of waivers and plea, and the imposition of sentence the matter stands quite differently, and because it is clear that it was not accorded to him, the judgment appealed from must be reversed.

"This is so, because, considering the inordinate speed, the incontinent haste, with which the defendants were brought up for hearing and the trial moved on apace, the fact that the government prosecuting agent and the district judge, before the defendant had made any waivers or pleaded in the cause, conferred privately in chambers with regard to defendants' guilt and the punishment to be imposed therefor, in connection with both what was said and done and what was left unsaid and undone by the judge in taking the waivers and the plea and sentencing the defendant, we are left in no doubt that the movant was not accorded, but was denied, due process, and that the judgment against, and sentence imposed upon him may not stand."

affirmed this decision, *Smith* v. *United States,* 250 F. 2d 842, over the dissent of Judge Rives who believed that the court's action in setting aside the conviction on justified due process grounds necessarily required the vacation of the plea of guilty. 250 F. 2d 842, 843–844. He also dissented on the ground that kidnapping under 18 U. S. C. § 1201 is a capital offense, which, pursuant to the Federal Rules of Criminal Procedure, Rule 7 (a), requires prosecution by indictment regardless of a defendant's waiver, and that prosecution by information in the instant proceeding had not conferred on the convicting court jurisdiction to try petitioner's case. We granted certiorari because of the serious due process and statutory questions raised. 357 U. S. 904. But in view of our belief that the indictment point is dispositive of the case in petitioner's favor, we find it unnecessary to reach the due process questions presented.

The precise question at issue, therefore, is whether petitioner's alleged violation of the Kidnapping Act had to be prosecuted by indictment. A number of statutory and constitutional provisions and the information charging petitioner are relevant to this inquiry. The Fifth Amendment provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," except in cases not pertinent here. But the command of the Amendment may be waived under certain circumstances,[4] and the Federal Rules of Criminal Procedure, Rule 7 (a), provide as follows:

> "An offense which *may* be punished by death *shall be* prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by

---

[4] *Barkman* v. *Sanford,* 162 F. 2d 592; *United States* v. *Gill,* 55 F. 2d 399.

> indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court." (Emphasis added.)

These enactments become particularly pertinent in view of the language of 18 U. S. C. § 1201, the statute under which petitioner was convicted, which provides in part that:

> "(a) Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

The charging part of the information against petitioner stated that he "did knowingly transport in interstate commerce . . . a person, to wit, Alan W. Spearman, Jr., who had been unlawfully seized, kidnapped, abducted, and carried away and held for the safe conduct of the three defendants . . . ." The charge did not state whether Spearman was released harmed or unharmed.

It has been held by two Courts of Appeals that indictments similar in terms to the charge here were sufficient to support capital punishments despite the absence of allegations that the kidnapping victims were released harmed. *United States* v. *Parrino,* 180 F. 2d 613; *Robinson* v. *United States,* 144 F. 2d 392. Cf. *United States* v. *Parker,* 103 F. 2d 857. Petitioner contends that these holdings dispose of his case because they make clear that the statute creates a single offense of kidnapping which *may* be punished by death if the prosecution, at trial, shows that the victim was released in a harmed condi-

tion. The Government claims, however, that whether a specific kidnapping constitutes a capital offense requires examination of the evidence to determine whether the victim was released harmed or unharmed; in other words, that the statute creates two offenses: kidnapping without harm, which is punishable by a term of years, and kidnapping with harm, which is punishable by death. Further, the Government contends that the mere filing of an information by the United States Attorney eliminated the capital element of the crime.

The Courts of Appeals which have been concerned with the statute have uniformly construed it to create the single offense of transporting a kidnapping victim across state lines. We agree with this construction. Under the statute, that offense is punishable by death if certain proof is introduced at trial. When an accused is charged, as here, with transporting a kidnapping victim across state lines, he is charged and will be tried for an offense which *may* be punished by death. Although the imposition of that penalty will depend on whether sufficient proof of harm is introduced during the trial, that circumstance does not alter the fact that the offense itself is one which *may* be punished by death and thus must be prosecuted by indictment. In other words, when the offense as charged is sufficiently broad to justify a capital verdict, the trial must proceed on that basis, even though the evidence later establishes that such a verdict cannot be sustained because the victim was released unharmed. It is neither procedurally correct nor practical to await the conclusion of the evidence to determine whether the accused is being prosecuted for a capital offense. For the trial judge must make informed decisions prior to trial which will depend on whether the offense may be so punished. He must decide, among other things, whether the accused has the right to obtain a list of veniremen and government witnesses, 18 U. S. C. § 3432,

whether venue is properly set, 18 U. S. C. § 3235, whether the accused has the benefit of twenty rather than ten peremptory challenges, Federal Rules of Criminal Procedure, Rule 24 (b), whether indictment rather than information is necessary, Federal Rules of Criminal Procedure, Rule 7, and who may bail the accused. 18 U. S. C. § 3141.

This Court has, in recent years, upheld many convictions in the face of questions concerning the sufficiency of the charging papers. Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused. *E. g., Hagner* v. *United States,* 285 U. S. 427; *Williams* v. *United States,* 341 U. S. 97; *United States* v. *Debrow,* 346 U. S. 374. This has been a salutary development in the criminal law. But the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules. The use of indictments in all cases warranting serious punishment was the rule at common law. *Ex parte Wilson,* 114 U. S. 417; *Mackin* v. *United States,* 117 U. S. 348. The Fifth Amendment made the rule mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings. *Ex parte Bain,* 121 U. S. 1; *Hale* v. *Henkel,* 201 U. S. 43; *Toth* v. *Quarles,* 350 U. S. 11, 16. Rule 7 (a) recognizes that this safeguard may be waived, but only in those proceedings which are noncapital. To construe the provisions of the Rule loosely to permit the use of informations where, as here, the charge states a capital offense, would do violence to that Rule and would make vulnerable to summary treatment those accused of one of our most serious crimes. We cannot do this in view of the traditional canon of construction which calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved.

It is urged that this result will fail to protect substantial rights of defendants in other cases. We see no merit in that contention, particularly where the opposite conclusion would deprive defendants of the protection of a grand jury indictment as required by the Constitution and Rule 7 (a). Under our holding, there is no reason to believe that a defendant in a case such as this would be surprised on his trial by any possible trickery of the prosecution. If there is no allegation of harm in the indictment, the discovery proceedings afforded in capital cases and the provisions of Rule 7 (f) authorizing bills of particulars will enable the defendant to acquaint himself with the scope of the trial and the criminal transaction to be proved. It is further suggested that it might be in the interests of the defendant to have the benefit of the speed that can be mustered by the filing of an information instead of an indictment. While justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed. It is well to note that in this very case the inordinate speed that was generated through the filing of the information caused many of the difficulties which led the court below to conclude that petitioner had been deprived of due process of law. Moreover, if, contrary to sound judicial administration in our federal system, arrest and incarceration are followed by inordinate delay prior to indictment, a defendant may, under appropriate circumstances, invoke the protection of the Sixth Amendment.

Under our view of Rule 7 (a), the United States Attorney did not have authority to file an information in this case and the waivers made by petitioner were not binding and did not confer power on the convicting court to hear the case. Cf. *Ex parte Wilson, supra.* The judgment and conviction are reversed and the case is remanded to the District Court with instructions to dismiss the information.

It is so ordered.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, concurring in part and dissenting in part.

Johnny Ray Smith, presently an inmate of Alcatraz, began his career of crime as a juvenile. Soon thereafter he escaped from the Federal Correctional Institution at Tallahassee, Florida. At age 26 he had twice been convicted of violations of the Dyer Act, 18 U. S. C. § 2312, was serving 25 years in a Florida prison for armed robbery, and had seriously wounded an officer while fleeing from the scene of the latter crime. He, with two juvenile inmates, escaped the Florida prison, burglarized a house, stole a shotgun, and allegedly kidnaped Alan W. Spearman, Jr., at shotgun point, while the latter was sitting in his company's automobile. They forced Spearman to accompany them in the car across the Florida line into Alabama. There, after the release of Spearman, they abandoned the car and were later arrested in their hiding place under a building. Each admitted guilt and asked for a speedy trial. Smith advised the United States Commissioner, the Federal Bureau of Investigation, the prosecutor and the district judge that he did not want a lawyer; he waived indictment and venue, pleaded guilty to an information charging kidnaping and threw himself on the mercy of the court in these words:

> "Well, your Honor, I would like for you to take under consideration that there was no viciousness in connection with this abduction of this boy. We were nice to him and did not harm him any way and we wanted transportation and did not harm him any at all."

Smith received a 30-year sentence; the juveniles 15 years each. He was sent to Alcatraz and from there has prosecuted a series of motions under 28 U. S. C. § 2255, appearing twice to testify in the District Court of Florida.

The Court of Appeals has considered his case three times and he is now here attacking his sentence on two points: (1) Can a kidnaping charge, where the kidnaped person is released unharmed, be prosecuted by information; and, (2) Is due process violated when the trial judge, before a guilty plea is entered and outside the presence of the accused or his counsel, confers with an FBI agent concerning the facts of the charge and the prior record of the accused? The Court, without reaching the second question, says that kidnaping can be prosecuted only by indictment and that a charge in the general words of the statute is sufficient.

In attempting to do what it believes to be a great right the Court in reality does a great wrong to the administration of justice. The most serious result is that the Court's procedure allows the United States Attorney to secure an indictment for a capital offense without the grand jury's knowing that he is doing so. This deprives kidnaping defendants of the very protection of the Fifth Amendment that the Court professes to be enforcing. The Court also clouds the meaning of Rule 7 (b) as to waiver of indictment by carving noncapital kidnaping offenses out of its specific permissive terms.

Both the Fifth Amendment and Rule 7 (a) require capital offenses to be prosecuted by indictment. Kidnaping is not such an offense unless "the kidnaped person has not been liberated unharmed." 18 U. S. C. § 1201 (a). It is reasonable to say that before one can be prosecuted for the capital offense he must be charged with it, namely, kidnaping where "the kidnaped person has not been liberated unharmed." To do otherwise does not place him on notice of the offense for which he is to be tried. The Court, however, holds that § 1201 (a) creates a "single offense . . . [which] is punishable by death if certain proof is introduced at trial." It reasons that this makes every kidnaping a capital case requiring

grand jury action. But it does not require that the grand jury consider whether "the kidnaped person has not been liberated unharmed" and so allege in the indictment. Thus the grand jury is deprived of any knowledge of the element of the offense that makes it capital. Hence a grand jury in complete ignorance of the facts as to harm suffered by the victim at the time of release is required to return an indictment which will support the death penalty if proof of such harm is shown at the trial. This puts the law as to capital cases into the hands of the prosecutor, not the grand jury, where both the Fifth Amendment and Rule 7 (a) have lodged it. Nor does it strengthen the grand jury, to use the words of the Court, as a "substantial safeguard against oppressive and arbitrary proceedings." On the contrary, the Court's reference to discovery proceedings after indictment as a means for acquainting a defendant "with the scope of the trial and the criminal transaction to be proved" clearly shows the fallacy of its position. The grand jury should have this information before it returns a capital charge, otherwise, none should exist under the indictment. By this reasoning, the Court deprives the defendant of the safeguard of proper grand jury proceedings as required by the Constitution in capital cases.

Moreover, as the Court says, "[i]t is neither procedurally correct nor practical to await the conclusion of the evidence to determine whether the accused is being prosecuted for a capital offense." Despite this language, the opinion requires just that since it does not compel the indictment to charge "a capital offense." I would require capital kidnaping cases to be prosecuted by indictment charging specifically that the kidnaped person was not liberated unharmed.

Turning to the procedural point under Rule 7 (a) and (b) we should remember it was this Court that adopted these Rules of Criminal Procedure, certified them to the

Congress, which added its sanction, and then promulgated them. They are simple and clear. Rule 7 (a) provides that an offense "which may" be punished by death must begin by indictment, while a noncapital offense may be prosecuted by information, if indictment is waived. Rule 7 (b) repeats that an offense "which may" receive a sentence for a term of years "may be" begun by information "if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment." In filing the information under the Kidnaping Act, the Government forecloses itself from seeking the death penalty. The Fifth Amendment, as well as Rule 7 (a), would prevent it from reneging on this bargain. The only possible sentence would, therefore, be one for a term of years. Moreover, Smith knew this full well, as is shown by his own testimony. Not only had the United States Attorney so advised but the United States Commissioner and the district judge had clearly told Smith of the law in the matter. His request at sentencing points up his understanding thereof. The record also indicates that the requirements of Rule 7 (b) were scrupulously followed.

The Court, however, superimposes a new rule in kidnaping cases by requiring that they be begun only by indictment. This deprives such defendants not only of the beneficent provisions of Rule 7 (b) but subjects them to greater jeopardy in that the United States Attorney may insist on the death penalty at trial. This leaves open for play all of the evils that flesh is heir to, including the ambitions or disfavor of the prosecutor, the animosity of the victim or his malingerings from the kidnaping as well as other postindictment speculations. In rural districts where the grand jury only meets twice a year it would also place considerable hardship on a

defendant waiting for a grand jury to be empaneled.[1] He receives no credit for the time so served and puts the Federal Government to the expense of incarceration in the local jail on a per diem basis. Nor would the calling of a special grand jury solve the problem. It would not only be very expensive to the Government but burdensome to those called to serve, likewise taking the time of the court from other pressing matters, either in its own district or in others that suffer from congested dockets. On the other hand, following Rule 7 (b) would fully protect society. The defendant would be on notice of the charge against him and would receive the full enjoyment of all of his rights.[2] And, finally, the prosecutor would not be able, at his whim, to superinduce the death penalty on an otherwise noncapital case. In short, justice would be done.

It is true that three Courts of Appeals have passed on this statute. However, none of those cases is dispositive of the issue here. In *Robinson* v. *United States,* 144 F. 2d 392, 396, the indictment alleged that the accused did "beat, injure, bruise and harm [Mrs. Stoll] . . . and did not liberate her unharmed." It is, therefore, entirely inapposite since the indictment specifically alleged a capital offense. *United States* v. *Parker,* 103 F. 2d 857, in

---

[1] The Court says that "a defendant may, under appropriate circumstances, invoke the protection of the Sixth Amendment" where "arrest and incarceration are followed by inordinate delay prior to indictment . . . ." Such has never been the case heretofore where capital cases are held awaiting the statutory meeting of the next grand jury. This strange doctrine can only cause additional confusion in the effective enforcement of the kidnaping statute.

[2] The Court in holding that proceeding by information "would deprive defendants of the protection of a grand jury indictment as required by the Constitution and Rule 7 (a)" overlooks the fact that neither the Constitution nor that Rule requires kidnaping to be charged by indictment where the victim is released unharmed.

construing the then § 40 of the Judicial Code requiring trial of capital cases to be "had in the county where the offense was committed, where that can be done without great inconvenience," only decided that the application for change of venue was addressed to the sound discretion of the court, which "was not abused." It specifically held that "[w]hether such averments [that the victim had been released in a harmed condition] were necessary [in the indictment] to support a demand for the imposition of the death penalty we need not decide . . . ." *Id.*, at 861. The court concluded that "since the evidence taken at the trial established that he was liberated . . . in a sound and unharmed condition," *ibid.*, the case, in any event, was not one in which the death penalty could be imposed. The last case mentioned by the majority is *United States* v. *Parrino,* 180 F. 2d 613. That case involved the statute of limitations and the issue involved here was not, as the court said, "relevant to . . . whether the second indictment was found in time." *Id.*, at 615. The Government contended that if the case was "capital" the indictment might be returned at any time. The court held that there was no information in the record as to the condition of the victim at the time of his release. Although it agreed with the Government "that it was not necessary to allege that the victim was not released 'unharmed' in order that the jury might recommend the death penalty," it held that "the accused has to be adequately advised of it [released harmed], since the jury must pass upon it, [and that] it will be enough if he gets the information in season from any source." *Ibid.* Certainly the case is not dispositive of the issue here. In fact it supports the proposition that "the accused must be adequately advised . . . in season" if the Government claims the victim was released "harmed." I say that "adequately advised in season" would be certain only if

such an allegation was made in the indictment. Whether from a technical standpoint that makes two offenses of the crime of "kidnaping" is, therefore, not material. In my view, it does create two such offenses, (1) where the kidnaped person has not been released unharmed, and (2) where he has been liberated unharmed. In either event we should follow the mandate of the Fifth Amendment and Rule 7 and under our power of supervision over federal courts require in the future such procedural safeguards as are outlined herein.

This brings me to the second contention. I shall discuss the facts briefly. The "inordinate speed" which the Court says was present here was not generated by the Government but by the petitioner himself. The record clearly shows his anxiety to have the case concluded and fails to indicate any objection on his part to the immediate imposition of sentence. The disposition of cases on information and plea in four to five days, as occurred here, is normal in the federal system. I therefore put no credence in this claim. However, the record does indicate that at the instance of an Assistant United States Attorney a Special Agent of the Federal Bureau of Investigation called upon the trial judge in his chambers and talked at some length about Smith's background as well as his connection with the kidnaping. This was before Smith had signed any waivers or entered any plea. Neither Smith nor any one representing him was present at the interview. The record shows this contact not to have been covertly made, for at the time of sentence the trial judge in open court told Smith that it had occurred. I do not reach the due process contention, for it appears to me that our duty of supervision over the administration of justice in the federal courts, *McNabb* v. *United States,* 318 U. S. 332 (1943), requires reversal because of this interview. In a criminal case, such a private conference

must be deemed presumptively prejudicial where, in violation of Fed. Rules Crim. Proc., 32 (c)(1),[3] it was conducted prior to the plea.

For these reasons I would reverse the judgment with instructions that Smith be allowed to withdraw his guilty plea and stand trial on the information.

---

[3] Rule 32 (c)(1), Fed. Rules Crim. Proc., provides:

"(c) Presentence Investigation

"(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty."

UNITED STATES *v.* ATLANTIC REFINING CO. ET AL.

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

No. 210. Argued April 22, 1959.—Decided June 8, 1959.

A suit by the Government under the Interstate Commerce Act and the Elkins Act against appellees and several other major oil companies and their common carrier pipeline subsidiaries, charging that the pipelines were granting illegal transportation rebates to their shipper-owners under the guise of paying dividends, was settled in 1941 by a consent decree which allowed each shipper-owner to receive only a dividend equal to "its share of 7 percentum (7%) of the valuation" of the common carrier pipeline's property. From then until 1957 appellees, with the acquiescence of the Government, computed allowable dividends by taking 7% of the total valuation of the pipeline's property and giving each owner a proportion of this sum equal to the percentage of stock it owned. In 1957 the Government brought this suit, contending that, despite the language of the decree, only 7% of that part of the valuation of a pipeline's property which remained after deducting the amount owed to creditors could be paid as dividends to stockholders. The trial court rejected the Government's interpretation. *Held:* The judgment is affirmed. Pp. 20–24.

Affirmed.

Robert A. Bicks argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Hansen* and *Daniel M. Friedman.*

David W. Peck and *David T. Searls* argued the cause for appellees. On the brief of appellees were *Arthur H. Dean, David W. Peck, Roy H. Steyer, Frederick L. Ballard, Jr.* and *Charles I. Thompson, Jr.* for Arapahoe Pipe Line Co., *Park Holland, Jr., Gentry Lee* and *Narvin B. Weaver* for Cities Service Pipe Line Co., *Llewellyn C.*

Thomas for Continental Pipe Line Co., *John J. Wilson, R. L. Wagner* and *David T. Searls* for Great Lakes Pipe Line Co., *Nelson Jones* and *Joseph J. Smith, Jr.* for Humble Pipe Line Co., *Arthur H. Dean, David W. Peck, Roy H. Steyer* and *Hugh H. Obear* for Interstate Oil Pipe Line Co. et al., *Frank C. Bolton, Jr.* and *John E. McClure* for Magnolia Pipe Line Co., *William Simon* for Plantation Pipe Line Co., *Ben A. Harper* for Pure Oil Co., *Hammond E. Chaffetz, Cecil L. Hunt* and *Frederick M. Rowe* for Service Pipe Line Co., *William F. Kennedy* and *George S. Wolbert, Jr.* for Shell Pipe Line Corp., *Joseph P. Walsh, Nat J. Harben, Charles I. Thompson, Jr.* and *Bynum E. Hinton, Jr.* for Sinclair Pipe Line Co., and *John J. Wilson* and *O. J. Dorwin* for Texas Pipe Line Co. et al.

Mr. Justice Black delivered the opinion of the Court.

The Elkins Act, 32 Stat. 847, as amended, 49 U. S. C. §§ 41, 43, and the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. § 6 (7), make it unlawful for a common carrier to grant rebates to individual shippers by any device whatsoever, or to discriminate in favor of any shipper directly or indirectly. In 1941 the United States brought a complaint against appellees and several other major oil companies and their common carrier pipeline subsidiaries claiming that the pipelines were granting illegal transportation rebates to their shipper-owners under the guise of paying dividends. Although the Government charged that no dividends at all could lawfully be granted in the same year in which a shipper-owner sent products over a pipeline, the suit was settled in late 1941 by a consent decree containing a provision which allowed a shipper-owner to receive a dividend equal to "its share of 7 percentum (7%) of the valuation" of the common carrier pipeline's property. Any dividend

in excess of this figure, however, was forbidden.[1] That provision of the decree is before us for interpretation today.

From 1941 to 1957 appellees computed allowable dividends by taking 7% of the valuation of pipeline property and then giving each owner a proportion of this sum equal to the percentage of stock it owned. In 1957, however, the Government brought this suit against appellees claiming that the pipelines were giving, and the shipper-owners were receiving, dividends in excess of those allowed by the decree. The Government did not contest the valuation figures used, but argued, despite the language of the decree, that only a part of 7% of the valuation could actually be made available as dividends to stockholders. The total allowable "dividends," it claimed, would have to be shared between stockholders and creditors. The stockholder's (shipper-owner's) "share" of the carrier valuation, so the argument ran, was to be the proportion which stock-investment in the carrier bore to the carrier's total invested capital (including debt owed to third persons). Seven percent stockholder-dividends could only be computed out of this "share" of the sum, and could then be distributed to each shipper-owner in proportion to its individual stock interest. Only in this way, the Government contended, could the consent decree's aim of preventing disguised rebates be accomplished. For only in this way would dividends be limited to a "fair" sum: 7% of the current value of what each owner had invested in its subsidiary. The trial court rejected the Government's interpretation, and the United States brought a direct appeal under 32 Stat. 823, as amended, 15 U. S. C. § 29, 49 U. S. C. § 45.

---

[1] This consent decree is discussed in detail in Hearings, Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., Part I.

On consideration of the language and the history of this decree we agree with the trial court. If the decree had meant to limit dividends to 7% of the current value of a parent company's actual investment in a subsidiary, as the Government claims, one can hardly think of less appropriate language in which to couch the restriction. Admittedly, by reading the word "share" to refer to a proportion of total capitalization rather than to the percentage of stock owned by a parent company, the language can be made to support the United States' contention.[2] But that is surely a strained construction, and cannot be reconciled with the consistent reading given to the decree, by both the United States and appellees, from the date it was entered until 1957—about 16 years.

In 1942, less than a year after the decree was issued, the United States consented to a supplemental order affecting one of the pipeline companies. This order approved a plan of recapitalization for the pipeline which would at least have been highly suspect under the reading the Government today gives the decree. Significantly the supplemental order, which was agreed to by the official who had represented the Government in drafting the original decree, expressly stated that the plan did not violate that judgment.

There are also other indications that the Government's interpretation of the decree did not, originally, differ from

---

[2] Assuming a carrier has an I. C. C. "valuation" of $10,000,000, $2,000,000 of which represents stock investments of $1,000,000 by each of two shipper oil companies, and $8,000,000 of which represents debt because of money borrowed by the carrier from others, on the appellee-companies' interpretation of the decree, each of the two shipper-owners would be entitled to "dividends" of one-half ($1,000,000/$2,000,000) of 7% of $10,000,000 or $350,000. On the Government's new interpretation instead, each shipper-owner's "share" would be one-tenth ($1,000,000/$10,000,000) of 7% of $10,000,000 or $70,000, this being 7% of each one's actual investment of $1,000,000 in the company.

the one appellees urge today. For example, the 1941 decree required annual reports from each pipeline showing total earnings available to owners or stockholders and actual dividends paid. For 16 years the reports made by the pipelines indicated that the dividends were not computed on the basis of 7% of the current value of the owners' investment but on the total valuation of the carriers' properties. For that 16 years the Government accepted this interpretation without challenge. Yet today it renounces this long-standing acquiescence and claims that the decree imposed limits it had not previously sought to enforce.

The Government contends that the interpretation it now offers would more nearly effectuate "the basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike." This may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues.[3] And we agree with the District Court that accepting the Government's present interpretation would do just that. Cf. *Hughes* v. *United States,* 342 U. S. 353.

We do not decide the case on any question of laches or estoppel, nor do we comment on any possible modifications of the decree which might appropriately be made under Clause X of the judgment, which continues the jurisdiction of the District Court. We merely hold that where the language of a consent decree in its normal meaning supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew

[3] The consent decree reads: "[A]ll parties hereto [have] severally consented to the entry of this final judgment herein without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue and in final settlement of all claims herein in issue. . . ."

up and administered the decree from the start; [4] and where the trial court concludes that this interpretation is in fact the one the parties intended, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place. Accordingly, the judgment below is

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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

---

[4] Cf. *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; "contemporaneous construction by those charged with the administration of the act . . . are . . . entitled to respectful consideration, and will not be overruled except for weighty reasons."

LOUISIANA POWER & LIGHT CO. *v.* CITY OF THIBODAUX.

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

No. 398. Argued April 2, 1959.—Decided June 8, 1959.

The authority of respondent City of Thibodaux to expropriate the property of petitioner Power and Light Company was challenged in an eminent domain proceeding in the District Court, which had jurisdiction based on diversity of citizenship. Petitioner answered respondent's reliance upon a Louisiana statute by citing an opinion of the Louisiana Attorney General advising that a Louisiana city was without power to effect a similar expropriation. The District Judge, on his own motion, ordered that further proceedings be stayed until the Louisiana Supreme Court had been afforded an opportunity to interpret the theretofore judicially uninterpreted Act. *Held:* The District Court properly exercised the power it had in this case to stay proceedings pending a prompt state court construction of a state statute of dubious meaning. Pp. 25–31.

255 F. 2d 774, reversed.

J. Raburn Monroe argued the cause for petitioner. With him on the brief were *J. Blanc Monroe, Monte M. Lemann, Malcolm L. Monroe* and *Andrew P. Carter.*

Louis Fenner Claiborne argued the cause for respondent. With him on the brief was *Remy Chiasson.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The City of Thibodaux, Louisiana, filed a petition for expropriation in one of the Louisiana District Courts, asserting a taking of the land, buildings, and equipment of petitioner Power and Light Company. Petitioner, a Florida corporation, removed the case to the United States District Court for the Eastern District of Louisiana on the basis of diversity of citizenship. After a pre-trial conference in which various aspects of the case were dis-

cussed, the district judge, on his own motion, ordered that "Further proceedings herein, therefore, will be stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret Act 111 of 1900," the authority on which the city's expropriation order was based. 153 F. Supp. 515, 517–518. The Court of Appeals for the Fifth Circuit reversed, holding that the procedure adopted by the district judge was not available in an expropriation proceeding, and that in any event no exceptional circumstances were present to justify the procedure even if available. 255 F. 2d 774. We granted certiorari, 358 U. S. 893, because of the importance of the question in the judicial enforcement of the power of eminent domain under diversity jurisdiction.[1]

In connection with the first decision in which a closely divided Court considered and upheld jurisdiction over an eminent domain proceeding removed to the federal courts on the basis of diversity of citizenship, *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 257, Mr. Justice Holmes made the following observation:

> "The fundamental fact is that eminent domain is a prerogative of the State, which on the one hand may be exercised in any way that the State thinks fit, and on the other may not be exercised except by an authority which the State confers."

While this was said in the dissenting opinion, the distinction between expropriation proceedings and ordinary diversity cases, though found insufficient to restrict diversity jurisdiction, remains a relevant and important consideration in the appropriate judicial administration of such actions in the federal courts.

---

[1] In the petition for certiorari there was also raised the question of the appealability of the District Court's order. In our grant of the writ we eliminated this question by limiting the scope of review. 358 U. S. 893.

We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law. Thus in *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 499, it was said:

> "Had we or they [the lower court judges] no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination."

On the other hand, we have held that the mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of state court action. *Meredith* v. *Winter Haven*, 320 U. S. 228, 236.[2] But

[2] The issue in *Meredith* v. *Winter Haven*, 320 U. S. 228, is, of course, decisively different from the issue now before the Court. Here the issue is whether an experienced district judge, especially conversant with Louisiana law, who, when troubled with the construction which Louisiana courts may give to a Louisiana statute, himself initiates the taking of appropriate measures for securing construction of this doubtful and unsettled statute (and not at all in response to any alleged attempt by petitioner to delay a decision by that judge), should be jurisdictionally disabled from seeking the controlling light of the Louisiana Supreme Court. The issue in *Winter Haven* was not that. It was whether jurisdiction must be surrendered to the state court. At the very outset of his opinion Mr. Chief Justice Stone stated this issue:

"The question is whether the Circuit Court of Appeals, on appeal from the judgment of the District Court, rightly declined to exercise its jurisdiction on the ground that decision of the case on the merits turned on questions of Florida constitutional and statutory law which the decisions of the Florida courts had left in a state of uncertainty." 320 U. S., at 229.

In *Winter Haven* the Court of Appeals directed the action to be dismissed. In this case the Court of Appeals denied a conscientious exercise by the federal district judge of his discretionary power merely to stay disposition of a retained case until he could get controlling light from the state court.

where the issue touched upon the relationship of City to State, *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, or involved the scope of a previously uninterpreted state statute which, if applicable, was of questionable constitutionality, *Leiter Minerals, Inc.*, v. *United States*, 352 U. S. 220, 229, we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination.

These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism. We have drawn upon the judicial discretion of the chancellor to decline jurisdiction over a part or all of a case brought before him. See *Railroad Comm'n* v. *Pullman Co., supra.* Although an eminent domain proceeding is deemed for certain purposes of legal classification a "suit at common law," *Kohl* v. *United States*, 91 U. S. 367, 375–376, it is of a special and peculiar nature. Mr. Justice Holmes set forth one differentiating characteristic of eminent domain: it is intimately involved with sovereign prerogative. And when, as here, a city's power to condemn is challenged, a further aspect of sovereignty is introduced. A determination of the nature and extent of delegation of the power of eminent domain concerns the apportionment of governmental powers between City and State. The issues normally turn on legislation with much local variation interpreted in local settings. The considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court.

The special nature of eminent domain justifies a district judge, when his familiarity with the problems of local law so counsels him, to ascertain the meaning of a disputed state statute from the only tribunal empowered to speak definitively—the courts of the State under whose statute eminent domain is sought to be exercised—rather than himself make a dubious and tentative forecast. This course does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition. Eventually the District Court will award compensation if the taking is sustained. If for some reason a declaratory judgment is not promptly sought from the state courts and obtained within a reasonable time, the District Court, having retained complete control of the litigation, will doubtless assert it to decide also the question of the meaning of the state statute. The justification for this power, to be exercised within the indicated limits, lies in regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a State.

It would imply an unworthy conception of the federal judiciary to give weight to the suggestion that acknowledgment of this power will tempt some otiose or timid judge to shuffle off responsibility. "Such apprehension implies a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 185. Procedures for effective judicial administration presuppose a federal judiciary composed of judges well-equipped and of sturdy character in whom may safely be vested, as is already, a wide range of judicial discretion, subject to appropriate review on appeal.

In light of these considerations, the immediate situation quickly falls into place. In providing on his own motion for a stay in this case, an experienced district judge was responding in a sensible way to a quandary about the power of the City of Thibodaux into which he was placed by an opinion of the Attorney General of Louisiana in which it was concluded that in a strikingly similar case a Louisiana city did not have the power here claimed by the City. A Louisiana statute apparently seems to grant such a power. But that statute has never been interpreted, in respect to a situation like that before the judge, by the Louisiana courts and it would not be the first time that the authoritative tribunal has found in a statute less than meets the outsider's eye. Informed local courts may find meaning not discernible to the outsider. The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours.

Caught between the language of an old but uninterpreted statute and the pronouncement of the Attorney General of Louisiana, the district judge determined to solve his conscientious perplexity by directing utilization of the legal resources of Louisiana for a prompt ascertainment of meaning through the only tribunal whose interpretation could be controlling—the Supreme Court of Louisiana. The District Court was thus exercising a fair and well-considered judicial discretion in staying proceedings pending the institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana.

The judgment of the Court of Appeals is reversed and the stay order of the District Court reinstated. We assume that both parties will cooperate in taking prompt

and effective steps to secure a declaratory judgment under the Louisiana Declaratory Judgment Act, La. Rev. Stat., 1950, Tit. 13, §§ 4231–4246, and a review of that judgment by the Supreme Court of Louisiana. By retaining the case the District Court, of course, reserves power to take such steps as may be necessary for the just disposition of the litigation should anything prevent a prompt state court determination.

Reversed.

MR. JUSTICE STEWART, concurring.

In a conscientious effort to do justice the District Court deferred immediate adjudication of this controversy pending authoritative clarification of a controlling state statute of highly doubtful meaning. Under the circumstances presented, I think the course pursued was clearly within the District Court's allowable discretion. For that reason I concur in the judgment.

This case is totally unlike *County of Allegheny* v. *Mashuda Co.*, decided today, *post*, p. 185, except for the coincidence that both cases involve eminent domain proceedings. In *Mashuda* the Court holds that it was error for the District Court to dismiss the complaint. The Court further holds in that case that, since the controlling state law is clear and only factual issues need be resolved, there is no occasion in the interest of justice to refrain from prompt adjudication.

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

Until today, the standards for testing this order of the District Court sending the parties to this diversity action to a state court for decision of a state law question might have been said to have been reasonably consistent with the imperative duty of a District Court, imposed by Congress under 28 U. S. C. §§ 1332 and 1441, to render

prompt justice in cases between citizens of different States. To order these suitors out of the federal court and into a state court in the circumstances of this case passes beyond disrespect for the diversity jurisdiction to plain disregard of this imperative duty. The doctrine of abstention, in proper perspective, is an extraordinary and narrow exception to this duty, and abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve one of two important countervailing interests: either the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question, or the avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships.

These exceptional circumstances provided until now a very narrow corridor through which a District Court could escape from its obligation to decide state law questions when federal jurisdiction was properly invoked. The doctrine of abstention originated in the area of the federal courts' duty to avoid, if possible, decision of a federal constitutional question. This was *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496. There this Court held that the District Court should have stayed its hand while state issues were resolved in a state court when an injunction was sought to restrain the enforcement of the order of a state administrative body on the ground that the order was not authorized by the state law and was violative of the Federal Constitution. The Court reasoned that if the state courts held that the order was not authorized under state law there could be avoided "the friction of a premature constitutional adjudication." 312 U. S., at 500. Numerous decisions since then have sanctioned abstention from deciding cases involving a federal constitutional issue where a state court determination of state law might moot the issue or put the case in a

different posture. See, *e. g., City of Meridian* v. *Southern Bell Tel. & Tel. Co.,* 358 U. S. 639; *Government Employees Organizing Comm.* v. *Windsor,* 353 U. S. 364; *Leiter Minerals, Inc.,* v. *United States,* 352 U. S. 220; *Albertson* v. *Millard,* 345 U. S. 242; *Shipman* v. *DuPre,* 339 U. S. 321; *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368; *American Federation of Labor* v. *Watson,* 327 U. S. 582; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450; *Spector Motor Service, Inc.,* v. *McLaughlin,* 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 168.[1] Abstention has also been sanctioned on grounds of comity with the States—to avoid a result in "needless friction with state policies." *Railroad Comm'n of Texas* v. *Pullman* Co., 312 U. S. 496, 500. Thus this Court has upheld an abstention when the exercise by the federal court of jurisdiction would disrupt a state administrative process, *Burford* v. *Sun Oil Co.,* 319 U. S. 315; *Pennsylvania* v. *Williams,* 294 U. S. 176, interfere with the collection of state taxes, *Toomer* v. *Witsell,* 334 U. S. 385, 392; *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies, *Alabama Public Service Comm'n* v. *Southern R. Co.,* 341 U. S. 341; *Hawks* v. *Hamill,* 288 U. S. 52.

But neither of the two recognized situations justifying abstention is present in the case before us. The suggestion that federal constitutional questions lurk in the background is so patently frivolous that neither the District Court, the Court of Appeals, nor this Court considers it to be worthy of even passing reference. The

---

[1] But when questions of state law are not cloudy the District Court should decide them, even though such a course necessitates decision of a federal constitutional issue. *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77; *Public Utilities Comm'n of California* v. *United States,* 355 U. S. 534; *Toomer* v. *Witsell,* 334 U. S. 385.

Power and Light Company's only contention under the Federal Constitution is that the expropriation of its property would violate the Due Process and Impairment of the Obligation of Contract Clauses, even though just compensation is paid for it, because the property sought to be taken is operated by the company under a franchise granted by the Parish and confirmed by the City. This claim is utterly without substance. *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685; *West River Bridge Co.* v. *Dix,* 6 How. 507. Certainly the avoidance of such a constitutional issue cannot justify a federal court's failure to exercise its jurisdiction. To hold the contrary would mean that a party could defeat his adversary's right to a federal adjudication simply by alleging a frivolous constitutional issue. Furthermore, no countervailing interest would be served by avoiding decision of such an issue.

The Court therefore turns the holding on the purported existence of the other situation justifying abstention, stating the bald conclusion that: "The considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court." But the fact of the matter is that this case does not involve the slightest hazard of friction with a State, the indispensable ingredient for upholding abstention on grounds of comity, and one which has been present in all of the prior cases in which abstention has been approved by this Court on that ground. First of all, unlike all prior cases in which abstention has been sanctioned on grounds of comity, the District Court has not been asked to grant injunctive relief which would prohibit state officials from acting. This case involves an

action at law,[2] initiated by the City and removed to the District Court under 28 U. S. C. § 1441. Clearly decision of this case, in which the City itself is the party seeking an interpretation of its authority under state law, will not entail the friction in federal-state relations that would result from decision of a suit brought by another party to enjoin the City from acting. Secondly, this case does not involve the potential friction that results when a federal court applies paramount federal law to strike down state action. Aside from the patently frivolous constitutional question raised by the Power Company, the District Court in adjudicating this case would be applying state law precisely as would a state court. Far from disrupting state policy, the District Court would be applying state policy, as embodied in the state statute, to the facts of this case. There is no more possibility of conflict with the State in this situation than there is in the ordinary negligence or contract case in which a District Court applies state law under its diversity jurisdiction. A decision by the District Court in this case would not interfere with Louisiana administrative processes, prohibit the collection of state taxes, or otherwise frustrate the execution of state domestic policies. Quite the reverse, this action is part of the process which the City must follow in order to carry out the State's policy of expropriating private property for public uses. Finally, in this case the State of Louisiana, represented by its constituent organ the City of Thibodaux, urges the District Court to adjudicate the state law issue. How, conceivably, can the Court justify the abdication of responsibility to exercise jurisdiction on the ground of avoiding interference and conflict with the State when the State itself desires the federal court's adjudication? It is obvious that the abstention in this case was for the convenience of the District Court, not for

[2] Expropriation proceedings such as this one are recognized to be suits at law. *Kohl* v. *United States*, 91 U. S. 367, 376.

the State. The Court forgets, in upholding this abstention, that "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience." *Meredith* v. *Winter Haven,* 320 U. S. 228, 234.

The Court of Appeals, in my view, correctly considered, in reversing the action of the District Court, that there is not shown a semblance of a countervailing interest which meets the standards permitting abstention. The standard utilized by the Court of Appeals in reviewing the District Court's order was not whether the district judge abused his discretion in staying the proceedings; rather it was whether he had any discretion to abstain from deciding this case in which the federal court's jurisdiction was properly invoked. This approach was correct in light of the teaching of all prior cases, which delimit the narrow area in which abstention is permissible and hold that jurisdiction must be exercised in all other situations. It would obviously wreak havoc with federal jurisdiction if the exercise of that jurisdiction was a matter for the *ad hoc* discretion of the District Court in each particular case.

Despite the complete absence of the necessary showing to justify abstention, the Court supports its holding simply by a reference to a dissenting opinion in which it was said "that eminent domain is a prerogative of the State." [3] Thus the Court attempts to carve out a new

[3] *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239, 257. The District Court did not rest its actions on this theory, but relied upon *Leiter Minerals, Inc.,* v. *United States,* 352 U. S. 220, as authority for the stay order. That decision, which came down shortly before the District Court's order in this case, modified an order of the same district judge and provided for a reference to the Louisiana courts of a question of Louisiana law because the state court's interpretation of state law might well have mooted a federal constitutional issue or cast it in a different posture. The simple fact that there is no constitutional question of any substance to avoid in this case makes *Leiter* inapposite.

area in which, even though an adjudication by the federal court would not require the decision of federal constitutional questions, nor create friction with the State, the federal courts are encouraged to abnegate their responsibilities in diversity cases. In doing so the Court very plainly has not made a responsible use of precedent. First of all, not only does the Court cite no cases where abstention has been approved in the absence of a showing of one of the only two countervailing interests heretofore required to justify abstention, but the Court ignores cases in which this Court has refused to refer state law questions to state courts even though that course required a federal constitutional decision which resulted in affirmative prohibitions against the State from carrying out sovereign activities. Surely eminent domain is no more mystically involved with "sovereign prerogative" than a city's power to license motor vehicles, *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77, a State's power to regulate fishing in its waters, *Toomer* v. *Witsell,* 334 U. S. 385, its power to regulate intrastate trucking rates, *Public Utilities Comm'n of California* v. *United States,* 355 U. S. 534, and a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts without a prior state court determination of the relevant state law. Furthermore, the decision in *Meredith* v. *Winter Haven,* 320 U. S. 228, long recognized as a landmark in this field, is squarely contrary to today's holding. For there the petitioners sought in a Federal District Court an injunction prohibiting the City of Winter Haven from redeeming certain bonds without paying deferred interest charges on them. The only issues in the case were whether the City was authorized under the Florida Constitution and statutes to issue the bonds without a referendum, and, if the bonds were not validly issued, what recovery the bondholders were entitled to receive. Federal jurisdic-

tion was based solely on diversity of citizenship. Although there was present the obvious irritant to state-federal relations of a federal court injunction against City officials, which is not present in this case, this Court in *Winter Haven* held that it was incumbent on the Federal District Court to perform its duty and adjudicate the case. I am unable to see a distinction, so far as concerns non-interference with the exercise of state sovereignty, between decision as to the City of Winter Haven's authority under Florida's statutes and constitution to issue deferred-interest bonds without a referendum, and decision as to the City of Thibodaux's authority under Louisiana's statutes and constitution to expropriate the Power and Light Company's property. Since the Court suggests no adequate basis of distinction between the two cases, it should frankly announce that *Meredith* v. *Winter Haven* is overruled, for no other conclusion is reasonable.[4]

In the second place, the Court, in its opinion, omits mention of the host of cases, many in this Court, which

[4] It is true that this Court in *Meredith* v. *Winter Haven* was reviewing an order dismissing federal jurisdiction, whereas the District Court order in this case retains jurisdiction pending the state court determination. However, it is significant that the Court in *Winter Haven,* rather than remanding the case with instructions that the District Court retain jurisdiction but abstain from deciding the state law issues, ordered the District Court to adjudicate those issues. It is perfectly clear that *Winter Haven* did not turn on any difference between an abstention and a dismissal, nor on the fact that it was a Court of Appeals rather than a District Court which initially decided to refrain from adjudicating the state issues. Neither did it turn on this Court's ideas about the competence or experience of the judges below. *Meredith* v. *Winter Haven* rested squarely on the Court's conclusion that, no matter how intimately related to a State's sovereignty a case is, the District Court must adjudicate it if jurisdiction is properly invoked and that adjudication would not entail decision of a serious constitutional question or disruption of state policy.

have approved the decision by a federal court of precisely the same kind of state eminent domain question which the District Court was asked by the City of Thibodaux to decide in this case. Years of experience in federal court adjudication of state eminent domain cases have conclusively demonstrated that this practice does not entail the hazard of friction in federal-state relations. See *County of Allegheny* v. *Mashuda Co., post,* p. 185. The Court, despite the lesson taught by this experience and despite the fact that it is impossible to show any actual friction that might develop from a federal court adjudication in this case, rests its holding on a conclusive presumption that friction will develop because of "the special nature of eminent domain." This presumption is totally at war with the Court's holding today in *County of Allegheny* v. *Mashuda Co.,* which orders a District Court to exercise its diversity jurisdiction even though such a course will require decision as to the power of a County under the state law of eminent domain to expropriate certain property. Thus the Court's decision is explicable to me for two other reasons, neither of which is articulated in the Court's opinion, probably because both are wholly untenable.

The first is that the only real issue of law in the case, the interpretation of Act 111, presents a difficult question of state law. It is true that there are no Louisiana decisions interpreting Act 111, and that there is a confusing opinion of the State's Attorney General on the question. But mere difficulty of construing the state statute is not justification for running away from the task. "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." *Cohens* v. *Virginia,* 6 Wheat. 264, 404. Difficult questions of state law to which the federal courts cannot give definitive answers arise every day in federal courts

509615 O–59–6

throughout the land. Chief Justice Stone, in his opinion for the Court in *Meredith* v. *Winter Haven,* 320 U. S. 228, settled that this difficulty can never justify a failure to exercise jurisdiction. The Chief Justice said:

> "But we are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
>
> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. . . . When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act." 320 U. S., at 234–235.

The cases are legion, since *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, in which the federal courts have adjudicated diversity cases by deciding issues of state law, difficult and easy, without relevant state court decisions on the point in issue. And this Court has many times, often over dissents urging abstention, decided doubtful questions of state law when properly before us. *Propper* v.

Clark, 337 U. S. 472; *Commissioner* v. *Estate of Church,* 335 U. S. 632; *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701; *Williams* v. *Green Bay & Western R. Co.,* 326 U. S. 549, 553–554; *Markham* v. *Allen,* 326 U. S. 490; *Risty* v. *Chicago, R. I. & P. R. Co.,* 270 U. S. 378; *McClellan* v. *Carland,* 217 U. S. 268.

The second possible reason explaining the Court's holding is that it reflects a distaste for the diversity jurisdiction. But distaste for diversity jurisdiction certainly cannot be reason to license district judges to retreat from their responsibility. The roots of that jurisdiction are inextricably intertwined with the roots of our federal system. They stem from Art. III, § 2 of the Constitution and the first Judiciary Act, the Act of 1789, 1 Stat. 73, 78.[5] I concede the liveliness of the controversy over the utility or desirability of diversity jurisdiction, but it has stubbornly outlasted the many and persistent attacks against it and the attempts in the Congress to curtail or eliminate it.[6] Until Congress speaks otherwise, the federal judiciary has no choice but conscientiously to render justice for litigants from different States entitled to have their controversies adjudicated in the federal courts. "Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigation,—these are matters which are not my concern as a judge. They are the concern of those

---

[5] See, for a discussion of this subject, Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483; Yntema and Jaffin, Preliminary Analysis of Concurrent Jurisdiction, 79 U. of Pa. L. Rev. 869, 873–876; Frank, Historical Basis of the Federal Judicial System, 13 Law & Contemp. Prob. 3, 22–28.

[6] See *Burford* v. *Sun Oil Co.,* 319 U. S. 315, 337–338 (dissenting opinion); Hart and Wechsler, The Federal Courts and the Federal System, 893–894.

whose business it is to legislate, not mine." *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 337 (dissenting opinion).

Not only has the Court departed from any precedential basis for its action, but the decision encourages inefficiency in administration of the federal courts and leads to unnecessary delay, waste and added expense for the parties. This is particularly the stark truth in the instant case. The City of Thibodaux brought this proceeding in a Louisiana court to expropriate lands of the Power and Light Company for public purposes. The Power and Light Company, a Florida corporation, removed the action to the District Court, as was its privilege under 28 U. S. C. § 1441. The crucial issue in the case is whether Louisiana Act 111 of 1900 empowers the City to exercise the State's right of eminent domain.[7] Because the District Court rebuffed the City's plea to decide its authority under Act 111, and this Court sustains the District Court, the City must go back to the state court, not in the action originally

---

[7] The Act, now § 101 of Part III of Title 19 of the Louisiana Revised Statutes of 1950, provides in pertinent part:

"Any municipal corporation of Louisiana may expropriate any electric light, gas, or waterworks plant or property whenever such a course is thought necessary for the public interest by the mayor and council of the municipality. When the municipal council cannot agree with the owner thereof for its purchase, the municipal corporation through the proper officers may petition the judge of the district court in which the property is situated, describing the property necessary for the municipal purpose, with a detailed statement of the buildings, machinery, appurtenances, fixtures, improvements, mains, pipes, sewers, wires, lights, poles and property of every kind, connected therewith, and praying that the property described be adjudged to the municipality upon payment to the owner of the value of the property plus all damages sustained in consequence of the expropriation. Where the same person is the owner of both gas, electric light, and water works plants, or of more than one of any one kind of plant, the municipal corporation may not expropriate any one of the plants without expropriating all of the plants owned by the same person."

brought there by the City, but in a new action to be initiated under Louisiana's declaratory judgment law. The Power and Light Company, which escaped a state court decision by removing the City's action to the District Court, is now wholly content with the *sua sponte* action of the District Court. This is understandable since the longer decision is put off as to the City's power to expropriate its property, the longer the Power and Light Company will enjoy the possession of it. Resolution of the legal question of the City's authority, already delayed over two years due to no fault of the City, will be delayed, according to the City's estimate in its brief, a minimum of two additional years before a decision may be obtained from the State Supreme Court in the declaratory judgment action. Even if the City obtains a favorable decision, the City must suffer still further delay while the case comes back to the District Court for a decision upon the amount of damages to be paid the Power and Light Company. Thus at best the District Court will finally dispose of this case only after prolonged delay and considerable additional expense for the parties. Moreover, it is possible that the State Supreme Court will, for one reason or another, conclude that it will not render the parties this advisory opinion. All of this delay should have been avoided, and would have been, had the District Court performed what I think was its plain duty, and decided the question of the City's power when that question was ripe for decision a few months after the case was removed to the District Court. I think it is more than coincidence that both in this case and in *Mashuda* the party supporting abstention is the one presently in possession of the property in question. I cannot escape the conclusion in these cases that delay in the reaching of a decision is more important to those parties than the tribunal which ultimately renders the decision. The Court today upholds a procedure which encourages such delay

and prevents "that promptness of decision which in all judicial actions is one of the elements of justice." *Forsyth* v. *Hammond,* 166 U. S. 506, 513. One must regret that this Court's departure from the long-settled criteria governing abstention should so richly fertilize the Power and Light Company's strategy of delay which now has succeeded, I dare say, past the fondest expectation of counsel who conceived it. It is especially unfortunate in that departure from these criteria fashions an opening wedge for District Courts to refer hard cases of state law to state courts in even the routine diversity negligence and contract actions.

I would affirm the judgment of the Court of Appeals.

LASSITER *v.* NORTHAMPTON COUNTY BOARD OF ELECTIONS.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 584. Argued May 18–19, 1959.—Decided June 8, 1959.

1. A State may, consistently with the Fourteenth and Seventeenth Amendments, apply a literacy test to all voters irrespective of race or color. *Guinn* v. *United States,* 238 U. S. 347. Pp. 50–53.
2. The North Carolina requirement here involved, which is applicable to members of all races and requires that the prospective voter "be able to read and write any section of the Constitution of North Carolina in the English language," does not on its face violate the Fifteenth Amendment. Pp. 53–54.

248 N. C. 102, 102 S. E. 2d 853, affirmed.

Samuel S. Mitchell argued the cause for appellant. With him on the brief were *Herman L. Taylor* and *James R. Walker, Jr.*

I. Beverly Lake argued the cause and filed a brief for appellee.

Malcolm B. Seawell, Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, filed a brief for the State of North Carolina, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This controversy started in a Federal District Court. Appellant, a Negro citizen of North Carolina, sued to have the literacy test for voters prescribed by that State declared unconstitutional and void. A three-judge court was convened. That court noted that the literacy test was part of a provision of the North Carolina Constitution that also included a grandfather clause. It said that

the grandfather clause plainly would be unconstitutional under *Guinn* v. *United States,* 238 U. S. 347. It noted, however, that the North Carolina *statute* which enforced the registration requirements contained in the State Constitution had been superseded by a 1957 Act and that the 1957 Act does not contain the grandfather clause or any reference to it. But being uncertain as to the significance of the 1957 Act and deeming it wise to have all administrative remedies under that Act exhausted before the federal court acted, it stayed its action, retaining jurisdiction for a reasonable time to enable appellant to exhaust her administrative remedies and obtain from the state courts an interpretation of the statute in light of the State Constitution. 152 F. Supp. 295.

Thereupon the instant case was commenced. It started as an administrative proceeding. Appellant applied for registration as a voter. Her registration was denied by the registrar because she refused to submit to a literacy test as required by the North Carolina statute.[1] She appealed to the County Board of Elections. On the *de novo* hearing before that Board appellant again refused to take the literacy test and she was again denied registration for that reason. She appealed to the Superior Court which sustained the Board against the claim that the requirement of the literacy test violated the Fourteenth, Fifteenth, and Seventeenth Amendments of the Federal Constitution. Preserving her federal question, she appealed to the North Carolina Supreme Court which affirmed the lower court. 248 N. C. 102, 102 S. E. 2d 853.

---

[1] This Act, passed in 1957, provides in § 163–28 as follows:

"Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section."

Sections 163–28.1, 163–28.2, and 163–28.3 provide the administrative remedies pursued in this case.

The case came here by appeal, 28 U. S. C. § 1257 (2), and we noted probable jurisdiction. 358 U. S. 916.

The literacy test is a part of § 4 of Art. VI of the North Carolina Constitution. That test is contained in the first sentence of § 4. The second sentence contains a so-called grandfather clause. The entire § 4 reads as follows:

> "Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any state in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under section 2 of this article."

Originally Art. VI contained in § 5 the following provision:

> "That this amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and to make them so dependent upon each other, that the whole shall stand or fall together."

But the North Carolina Supreme Court in the instant case held that a 1945 amendment to Article VI freed it of the indivisibility clause. That amendment rephrased § 1 of Art. VI to read as follows:

> "Every person born in the United States, and every person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote . . . ."

That court said that "one of those qualifications" was the literacy test contained in § 4 of Art. VI; and that the 1945 amendment "had the effect of incorporating and adopting anew the provisions as to the qualifications required of a voter as set out in Article VI, freed of the indivisibility clause of the 1902 amendment. And the way was made clear for the General Assembly to act." 248 N. C., at 112, 102 S. E. 2d 860, 861.

In 1957 the Legislature rewrote General Statutes §163–28 as we have noted.[2] Prior to that 1957 amendment § 163–28 perpetuated the grandfather clause contained in § 4 of Art. VI of the Constitution and § 163–32 established a procedure for registration to effectuate it.[3] But

---

[2] Note 1, *supra*.

[3] Section 163–32 provided:

"Every person claiming the benefit of section four of article six of the Constitution of North Carolina, as ratified at the general election on the second day of August, one thousand nine hundred, and who shall be entitled to register upon the permanent record for registration provided for under said section four, shall prior to December first, one thousand nine hundred and eight, apply for registration to the officer charged with the registration of voters as prescribed by law in each regular election to be held in the State for members of the General Assembly, and such persons shall take and subscribe before such officer an oath in the following form, viz.:

"I am a citizen of the United States and of the State of North Carolina; I am — years of age. I was, on the first day of January, A. D. one thousand eight hundred and sixty-seven, or prior to said date, entitled to vote under the constitution and laws of the state

the 1957 amendment contained a provision that "All laws and clauses of laws in conflict with this Act are hereby repealed." [4] The federal three-judge court ruled that this 1957 amendment eliminated the grandfather clause from the statute. 152 F. Supp., at 296.

The Attorney General of North Carolina, in an *amicus* brief, agrees that the grandfather clause contained in Art. VI is in conflict with the Fifteenth Amendment. Appellee maintains that the North Carolina Supreme Court ruled that the invalidity of that part of Art. VI does not impair the remainder of Art. VI since the 1945 amendment to Art. VI freed it of its indivisibility clause. Under that view Art. VI would impose the same literacy test as that imposed by the 1957 statute and neither would be linked with the grandfather clause which, though present in print, is separable from the rest and void. We so read the opinion of the North Carolina Supreme Court.

Appellant argues that that is not the end of the problem presented by the grandfather clause. There is a provision in the General Statutes for permanent registration in some counties.[5] Appellant points out that

---

of ————, in which I then resided (or, I am a lineal descendant of ————, who was, on January one, one thousand eight hundred and sixty-seven, or prior to that date, entitled to vote under the constitution and laws of the state of ————, wherein he then resided."

[4] N. C. Laws 1957, c. 287, pp. 277, 278.

[5] Section 163–31.2 provides:

"In counties having one or more municipalities with a population in excess of 10,000 and in which a modern loose-leaf and visible registration system has been established as permitted by G. S. 163–43, with a full time registration as authorized by G. S. 163–31, such registration shall be a permanent public record of registration and qualification to vote, and the same shall not thereafter be cancelled and a new registration ordered, either by precinct or countywide, unless such registration has been lost or destroyed by theft, fire or other hazard."

although the cut-off date in the grandfather clause was December 1, 1908, those who registered before then might still be voting. If they were allowed to vote without taking a literacy test and if appellant were denied the right to vote unless she passed it, members of the white race would receive preferential privileges of the ballot contrary to the command of the Fifteenth Amendment. That would be analogous to the problem posed in the classic case of *Yick Wo* v. *Hopkins,* 118 U. S. 356, where an ordinance unimpeachable on its face was applied in such a way as to violate the guarantee of equal protection contained in the Fourteenth Amendment. But this issue of discrimination in the actual operation of the ballot laws of North Carolina has not been framed in the issues presented for the state court litigation. Cf. *Williams* v. *Mississippi,* 170 U. S. 213, 225. So we do not reach it. But we mention it in passing so that it may be clear that nothing we say or do here will prejudice appellant in tendering that issue in the federal proceedings which await the termination of this state court litigation.

We come then to the question whether a State may consistently with the Fourteenth and Seventeenth Amendments apply a literacy test to all voters irrespective of race or color. The Court in *Guinn* v. *United States, supra,* at 366, disposed of the question in a few words, "No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted."

The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope* v. *Williams,* 193 U. S. 621, 633; *Mason* v. *Missouri,* 179 U. S. 328, 335, absent of course the discrimination which the Constitution con-

demns. Article I, § 2 of the Constitution in its provision for the election of members of the House of Representatives and the Seventeenth Amendment in its provision for the election of Senators provide that officials will be chosen "by the People." Each provision goes on to state that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough,* 110 U. S. 651, 663–665; *Smith* v. *Allwright,* 321 U. S. 649, 661–662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States* v. *Classic,* 313 U. S. 299, 315. While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of "the right to vote," the right protected "refers to the right to vote as established by the laws and constitution of the State." *McPherson* v. *Blacker,* 146 U. S. 1, 39.

We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (*Davis* v. *Beason,* 133 U. S. 333, 345–347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show.[6] Lit-

[6] World Illiteracy at Mid-Century, Unesco (1957).

eracy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. Cf. *Franklin* v. *Harper,* 205 Ga. 779, 55 S. E. 2d 221, appeal dismissed 339 U. S. 946. It was said last century in Massachusetts that a literacy test was designed to insure an "independent and intelligent" exercise of the right of suffrage.[7] *Stone* v.

[7] Nineteen States, including North Carolina, have some sort of literacy requirement as a prerequisite to eligibility for voting. Five require that the voter be able to read a section of the State or Federal Constitution and write his own name. Arizona Rev. Stat. § 16–101; Cal. Election Code § 220; Del. Code Ann., Tit. 15, § 1701; Me. Rev. Stat., c. 3, § 2; Mass. Gen. L. Ann., c. 51, § 1. Five require that the elector be able to read and write a section of the Federal or State Constitution. Ala. Code, 1940, Tit. 17, § 32; N. H. Rev. Stat. Ann. §§ 55:10–55:12; N. C. Gen. Stat. § 163–28; Okla. Stat. Ann., Tit. 26, § 61; S. C. Code § 23–62. Alabama also requires that the voter be of "good character" and "embrace the duties and obligations of citizenship" under the Federal and State Constitutions. Ala. Code, Tit. 17, § 32 (1955 Supp.).

Two States require that the voter be able to read and write English. N. Y. Election Code § 150; Ore. Rev. Stat. § 247.131. Wyoming (Wyo. Comp. Stat. Ann. § 31–113) and Connecticut (Conn. Gen. Stat. § 9–12) require that the voter read a constitutional provision in English, while Virginia (Va. Code § 24–68) requires that the voting application be written in the applicant's hand before the registrar and without aid, suggestion or memoranda. Washington (Wash. Rev. Code § 29.07.070) has the requirement that the voter be able to read and speak the English language.

Georgia requires that the voter read intelligibly and write legibly a section of the State or Federal Constitution. If he is physically unable to do so, he may qualify if he can give a reasonable interpretation of a section read to him. An alternative means of qualifying is provided: if one has good character and understands the duties and obligations of citizenship under a republican government, and he

Smith, 159 Mass. 413–414, 34 N. E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.

Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot. No such influence is charged here. On the other hand, a literacy test may be unconstitutional on its face. In *Davis* v. *Schnell,* 81 F. Supp. 872, aff'd 336 U. S. 933, the test was the citizen's ability to "understand and explain" an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy. We cannot make the same inference here. The present requirement, applicable to members of all races, is that the prospective voter "be able to read and write any section of the Constitution of North Carolina in the English

---

can answer correctly 20 of 30 questions listed in the statute (*e. g.,* How does the Constitution of Georgia provide that a county site may be changed?, what is treason against the State of Georgia?, who are the solicitor general and the judge of the State Judicial Circuit in which you live?) he is eligible to vote. Geo. Code Ann. §§ 34–117, 34–120.

In Louisiana one qualifies if he can read and write English or his mother tongue, is of good character, and understands the duties and obligations of citizenship under a republican form of government. If he cannot read and write, he can qualify if he can give a reasonable interpretation of a section of the State or Federal Constitution when read to him, and if he is attached to the principles of the Federal and State Constitutions. La. Rev. Stat., Tit. 18, § 31.

In Mississippi the applicant must be able to read and write a section of the State Constitution and give a reasonable interpretation of it. He must also demonstrate to the registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government. Miss. Code Ann. § 3213.

language." That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot.

Affirmed.

FEDERAL TRADE COMMISSION *v.* SIMPLICITY PATTERN CO., INC.

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

No. 406. Argued April 21, 1959.—Decided June 8, 1959.*

In this case the Federal Trade Commission found that one of the Nation's largest manufacturers of dress patterns discriminated in favor of its larger customers by furnishing to them services and facilities not accorded to competing smaller customers on proportionally equal terms, in violation of § 2 (e) of the Clayton Act, as amended by the Robinson-Patman Act, and it ordered the manufacturer to cease and desist from doing so. *Held:* The Commission's order is sustained. Pp. 56–71.

(a) Though the manufacturer's larger customers sold the patterns for a profit while its smaller customers sold them as an accommodation to purchasers of their fabrics, and no specific injury to competition in patterns was shown, the record justified the Commission's finding that they were competitors. Pp. 62–64.

(b) Given competition between the two classes of customers, neither absence of competitive injury nor the presence of "cost-justification" is available as a defense to a charge of violating § 2 (e) of the Act. Pp. 64–71.

103 U. S. App. D. C. 373, 258 F. 2d 673, affirmed in part and reversed in part.

Charles H. Weston argued the causes for the Federal Trade Commission. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Hansen, Earl W. Kintner* and *James E. Corkey.*

William Simon argued the causes for the Simplicity Pattern Co., Inc. With him on the briefs were *Robert L. Wald, David Vorhaus* and *Sidney Greenman.*

---

*Together with No. 447, *Simplicity Pattern Co., Inc.*, v. *Federal Trade Commission,* also on certiorari to the same Court.

509615 O–59–7

MR. JUSTICE CLARK delivered the opinion of the Court.

This case presents, for the first time in this Court, issues relating to the availability of certain defenses to a prima facie violation of § 2 (e) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526.[1] The Federal Trade Commission has

[1] The complaint was in two counts, the first being under the Federal Trade Commission Act. This count was dismissed. The second count, which is the only one before us, involves certain subsections of § 2 of the Clayton Act, 15 U. S. C. § 13. For ready reference we quote § 2 in its entirety:

"(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided*

found that Simplicity Pattern Co., Inc., one of the Nation's largest dress pattern manufacturers, discriminated in favor of its larger customers by furnishing to them services and facilities not accorded to competing

---

further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally

smaller customers on proportionally equal terms. The Commission held that neither the presence of "cost justification" nor the absence of competitive injury may constitute a defense to a § 2 (e) violation.

The Court of Appeals found that competition existed between the larger and smaller customers of Simplicity and, with one judge dissenting, held that an absence of competitive injury would not constitute a "justification" rebutting a prima facie showing of a § 2 (e) violation. Through a different majority,[2] however, it remanded the case on the "cost justification" defense under § 2 (b), holding that Simplicity might rebut the prima facie case by showing that the discriminations in services and facilities were justified by differences in Simplicity's costs in dealing with the two classes of customers. 103 U. S. App. D. C. 373, 258 F. 2d 673. The Commission, in No. 406, and Simplicity, in No. 447, filed cross-petitions for certiorari which we consider together. We granted both petitions because of the fundamental significance of these issues in the application of an important Act of Congress. 358 U. S. 897. We have concluded that, given competition between the two classes of customers, neither absence of competitive injury nor the presence of "cost justification"

---

equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[2] Judge Washington dissented on the "cost-justification" issue, while Judge Burger was in dissent on the competitive injury question.

defeats enforcement of the provisions of § 2 (e) of the Act. The action of the Commission in issuing the cease-and-desist order is, therefore, affirmed.

Simplicity manufactures and sells tissue patterns which are used in the home for making women's and children's wearing apparel. Its volume of pattern sales, in terms of sales units, is greater than that resulting from the combined effort of all other major producers.[3] The patterns are sold to some 12,300 retailers, with 17,200 outlets. For present purposes, these customers can be divided roughly into two categories. One, consisting largely of department and variety stores, comprises only 18% of the total number of customers, but accounts for 70% of the total sales volume. The remaining 82% of the customers are small stores whose primary business is the sale of yard-good fabrics.

About 600 different patterns are made available to Simplicity's customers. New patterns are added at the rate of 40 per month, while three times annually the obsolete designs are discontinued so as to maintain the number of designs at a relatively constant level. The different designs are displayed in a catalogue which is changed monthly in order to reflect the changes in available designs. The patterns themselves are stored and displayed in steel cabinets. The catalogues and storage cabinets are both furnished by Simplicity.

The variety stores handle and sell a multitude of relatively low-priced articles. Each article, including dress patterns, is sold for the purpose of returning a profit and would be dropped if it failed to do so. The fabric stores, on the other hand, are primarily interested in selling yard goods; they handle patterns at no profit or even at a loss

[3] In dollar volume, Simplicity's percentage-of-industry total is somewhat lower, due to the fact that its prices are among the lowest in the industry.

as an accommodation to their fabric customers and for the purpose of stimulating fabric sales. These differences in motive are reflected in the manner in which each type of store handles its patterns. The variety stores devote the minimum amount of display space consistent with adequate merchandising—consisting usually of nothing more than a place on the counter for the catalogues, with the patterns themselves stored underneath the counter in the steel cabinets furnished by Simplicity. In contrast, the fabric stores usually provide tables and chairs where the customers may peruse the catalogues in comfort and at their leisure.

The retail prices of Simplicity patterns are uniform at 25¢, 35¢, or 50¢. Similarly, Simplicity charges a uniform price, to all its customers, of 60% of the retail price. However, in the furnishing of certain services and facilities Simplicity does not follow this uniformity. It furnishes patterns to the variety stores on a consignment basis, requiring payment only as and when patterns are sold—thus affording them an investment-free inventory. The fabric stores are required to pay cash for their patterns in regular course. In addition, the cabinets and the catalogues are furnished to variety stores free while the fabric stores are charged therefor, the catalogues averaging from $2 to $3 each. Finally, all transportation costs in connection with its business with variety stores are paid by Simplicity but none is paid on fabric-store transactions.

The free services and facilities thus furnished variety store chains are substantial in value. As to four variety store chains, the catalogues which Simplicity furnished free in 1954 were valued at $128,904; the cabinets furnished free which those stores had on hand at the end of 1954 were valued at over $500,000; and their inventory of Simplicity's patterns at the end of 1954 was valued at

more than $1,775,000, each of these values being based on Simplicity's usual sales price. Simplicity's president testified that it would cost over $2,000,000 annually to give its other customers the free transportation, free catalogues, and free cabinets furnished to variety stores.[4]

[4] It should be noted that Simplicity has apparently acted entirely in good faith. While the services and facilities described in the body of the opinion are admittedly furnished free only to the variety stores, Simplicity asserts that other services and facilities are furnished only to the smaller customers. These claimed services include: A staff of 12 young ladies travels throughout the country giving fashion shows and sewing demonstrations in schools, 4–H Clubs and the like. These demonstrations are coordinated through the local fabric stores to assist the latter in pushing sales both of patterns and of fabrics. Large promotional posters, portraying fabrics and fashion trends, are furnished monthly to the fabric stores. "Flyers," or brochures, designed, printed and distributed by Simplicity solely for the small merchant, tell him (in the words of Simplicity's president) "what the proper sources of supply are in New York, what the trends are, how to trim his windows, how to run certain aspects of his department and a great deal of other material." A monthly publication called the "Simplicity Pattern Book" is sold through fabric stores at an annual loss to Simplicity of over $100,000. The publication is designed to "glamorize and dramatize for the consumer and for the merchant the textiles and trends throughout the country."

These services and facilities are apparently available to the variety stores, but are not used by them because of their method of doing business. Thus, Simplicity claims that the fabric stores receive services and facilities, valued by Simplicity at more than $1,000,000 annually, which in fact if not in law are not used by the variety stores. The parties did not explore, before the Commission, the possibility that this tailoring of services and facilities to meet the different needs of two classes of customers in fact constituted "proportionally equal terms." And, of course, this point was not raised in the Court of Appeals or in this Court. We note in passing, however, that the Commission has indicated a willingness to give a relatively broad scope to the standard of proportional equality under §§ 2 (d) and 2 (e). See *Lever Brothers Co.*, 50 F. T. C. 494, 512 (1953). ("[§ 2 (d)] does not prohibit a seller from paying for services of various types." A "plan providing payment for promotional

Simplicity does not dispute these findings. Assuming that the existence of competition between purchasers is a necessary element in a § 2 (e) prosecution, it insists that no real competition in patterns exists between the variety and the fabric stores. It also contends that even if competition is present its conduct may be justified by a showing that no competitive injury resulted or, alternatively, that the discriminations are not unlawful if it could be shown that the differential treatment was only reflective of the differences in its costs in dealing with the two types of customers.

1. Existence of Competition.

The unanimous conclusion of the Examiner, the Commission, and the Court of Appeals on this point was, as stated by the Court of Appeals, that the variety and fabric stores, "operating in the same cities and in the same shopping area, often side by side, were competitors, purchasing from Simplicity at the same price and then at like prices retailing the identical product to substantially the same segment of the public." 103 U. S. App. D. C., at 377, 258 F. 2d, at 677. Simplicity argues that "motivation" controls and that since the variety store sells for a profit and the fabric store for accommodation that the competition is minuscule. But the existence of competition does not depend on such motives. Regardless of the necessity the fabric stores find in the handling of patterns it does not remove their incentive to sell those on hand, especially when cash is tied up in keeping patterns on the

---

services and facilities . . . must be honest in its purpose and fair and reasonable in its application.") See also *Procter & Gamble Distributing Co.*, 50 F. T. C. 513 (1953); *Colgate-Palmolive-Peet Co.*, 50 F. T. C. 525 (1953); Report of the Attorney General's National Committee to Study the Antitrust Laws 189–190 (1955). Since the issue is not properly before us, we of course do not pass on it.

shelves. The discriminatory terms under which they are obliged to handle them increase their losses. Furthermore, Simplicity not only takes advantage of the captive nature of the fabric stores in not granting them these advantages but compounds the damage by creating a sales outlet in the variety stores through the granting of these substantial incentives to engage in the pattern business. Without such partial subsidization the variety stores might not enter into the pattern trade at all.

Nor does it follow that the failure here to show specific injury to competition in patterns is inconsistent with a finding that competition in fact exists.[5] It may be, as Simplicity argues, that the sale of patterns is minuscule in the over-all business of a variety store, but the same is true of thousands of other items. While the giving of discriminatory concessions to a variety store on any one isolated item might cause no injury to competition with a fabric store in its over-all operation, that fact does not render nonexistent the actual competition between them in patterns. It remains, and, because of the discriminatory concessions, causes further losses to the fabric store. As this Court said in *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 49 (1948),

> "There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods consti-

[5] Simplicity argues that the Examiner "affirmatively found an absence of competitive injury." This view was apparently adopted by the Court of Appeals. 103 U. S. App. D. C., at 378, 258 F. 2d, at 678. We do not so read the record, however. What the Examiner said was that "there is *no showing* of competitive injury." (Emphasis added.)

tuted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

2. Application of the Justification Defenses of § 2 (b).

Simplicity contends that an absence of competitive injury constitutes a defense under the justification provisions of § 2 (b) and further that it should have been permitted, under that subsection, to dispel its discrimination in services and facilities by a showing of lower costs in its transactions with the variety stores. We agree with the Commission that the language of the Act, when considered in its entirety, will not support this construction.

Section 2 (a) makes unlawful price discriminations

> "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . . ."

This price discrimination provision is hedged with qualifications. An exception is made for price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery." Care was taken that price changes are not outlawed where made in response to changing market conditions. Finally, § 2 (a) codifies the rule of *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), protecting the right of a person in commerce to select his "own customers in bona fide transactions and not in restraint of trade."

Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations.[6] Subsection (c) applies to the payment or receipt of commissions or brokerage allowances "except for services rendered." Subsection (d) prohibits the payment by a seller to a customer for any services or facilities furnished by the latter, unless "such payment . . . is available on proportionally equal terms to all other [competing] customers." Subsection (e), which as noted is the provision applicable in this case, makes it unlawful for a seller

> "to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale . . . by . . . furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

In terms, the proscriptions of these three subsections are absolute. Unlike § 2 (a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition.[7] Similarly, none has any built-in defensive matter, as does § 2 (a). Simplicity's contentions boil down to an argument that the exculpatory provisions which Congress has made expressly applicable only to price discriminations are somehow included as "justifications" for

---

[6] Subsection (f) is a corollary to § 2 (a), making it unlawful "knowingly to induce or receive" a price discrimination barred by the latter. See *Automatic Canteen Co.* v. *Federal Trade Comm'n*, 346 U. S. 61 (1953).

[7] Simplicity concedes this, in effect, but argues that it should be allowed under § 2 (b) to "justify" the § 2 (e) violation by making an affirmative showing of *absence* of competitive injury.

discriminations in services or facilities by § 2 (b),[8] which provides that

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made *by showing justification* shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (Emphasis added.)

We hold that the key word "justification" can be read no more broadly than to allow rebuttal of the respective offenses in one of the ways expressly made available by Congress. Thus, a discrimination in prices may be rebutted by a showing under any of the § 2 (a) provisos, or under the § 2 (b) proviso[9]—all of which by their terms

---

[8] In allowing a showing of "cost-justification" under § 2 (b), the Court of Appeals negated any inference that it was thereby importing "§ 2 (a) criteria as matters of defense to a Section 2 (e) charge." Rather, it held that "the justification to be shown under the first clause of § 2 (b) as to a § 2 (e) charge of discrimination in 'facilities furnished' to various *customers,* [would] depend upon the facts in a particular case." 103 U. S. App. D. C., at 381, 258 F. 2d, at 681. (Italics in the original.) On this theory, the limits of the justification which could be shown would be established by litigation, on a case-to-case basis.

[9] See *Standard Oil Co.* v. *Federal Trade Comm'n,* 340 U. S. 231 (1951).

apply to price discriminations. On the other hand, the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the § 2 (b) proviso. We cannot supply what Congress has studiously omitted.[10]

Simplicity's arguments to the contrary are based essentially on the ground that it would be "bad law and bad economics" to make discriminations unlawful even where they may be accounted for by cost differentials or where there is no competitive injury.[11] Entirely aside from the fact that this Court is not in a position to review the economic wisdom of Congress, we cannot say that the legislative decision to treat price and other dis-

---

[10] The Courts of Appeals, prior to this case, had uniformly rejected the argument that § 2 (e) violations were subject to a cost-justification defense or required a showing of adverse effect on competition. *Elizabeth Arden, Inc.*, v. *Federal Trade Comm'n*, 156 F. 2d 132 (C. A. 2d Cir. 1946) (competitive injury); *Corn Products Refining Co.* v. *Federal Trade Comm'n*, 144 F. 2d 211, 219 (C. A. 7th Cir. 1944), aff'd on other grounds 324 U. S. 726 (competitive injury); *Southgate Brokerage Co.* v. *Federal Trade Comm'n*, 150 F. 2d 607, 610 (C. A. 4th Cir. 1945) (dictum as to competitive injury); *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Comm'n*, 106 F. 2d 667 (C. A. 3d Cir. 1939) (dictum as to cost-justification); *Oliver Bros., Inc.*, v. *Federal Trade Comm'n*, 102 F. 2d 763, 767 (C. A. 4th Cir. 1939) (dictum as to competitive injury). It does not appear that any Court of Appeals had previously been asked to decide whether an absence of competitive injury could constitute a "justification" under § 2 (b).

[11] Compare the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955). The Committee recognized that as of that date subsections (c), (d) and (e) had been uniformly interpreted as not requiring a showing of competitive injury, and as not allowing a cost-justification defense. Pp. 187–193. It expressed disagreement with the desirability of this result, in view of what it deemed the "broader antitrust objectives," and recommended that § 2 (c) be changed by legislation and § 2 (d) and (e) by "interpretive reform." P. 193.

criminations differently is without a rational basis. In allowing a "cost justification" for price discriminations and not for others, Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings.[12] *Biddle Purchasing Co.* v. *Federal Trade Comm'n,* 96 F. 2d 687, 692 (C. A. 2d Cir. 1938). And, with respect to the absence of competitive injury requirements, it suffices to say that the antitrust laws are not strangers to the policy of nipping potentially destructive practices before they reach full bloom. Cf. *Klor's, Inc.,* v. *Broadway-Hale Stores,* 359 U. S. 207 (1959).[13]

Our conclusions are further confirmed by the historical setting of the Robinson-Patman amendments to § 2 of the Clayton Act. As originally worded in 1914 (38 Stat. 730), § 2 applied only to price discriminations, and then only where the effect of such discrimination was "to substantially lessen competition or tend to create a monopoly in any line of commerce."[14] Furthermore, a proviso

---

[12] During congressional debates on the bill, there were continual references to the subsection (c), (d) and (e) practices as "secret" discriminations. See, *e. g.,* 80 Cong. Rec. 8126, 8127, 8132, 8135, 8137, 8226.

[13] Compare *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1 (1958); *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940), which contain examples of *per se* violations under the Sherman Act. It is not without significance that earlier versions of both the House and Senate bills would have outlawed even *price* discriminations without regard to their effect upon competition. H. R. 8442, 74th Cong., 1st Sess.; S. 3154, 74th Cong., 1st Sess.

[14] This language was retained in § 2 (a) under the Robinson-Patman Act amendment, and the following was added, "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

excepted price discriminations based on "differences in the . . . quantity of the commodity sold," regardless of whether the differences in quantity resulted in corresponding cost differentials.

A lengthy investigation conducted in the 1930's by the Federal Trade Commission disclosed that several large chain buyers were effectively avoiding § 2 by taking advantage of gaps in its coverage. Because of their enormous purchasing power, these chains were able to exact price concessions, based on differences in quantity, which far exceeded any related cost savings to the seller. Consequently, the seller was forced to raise prices even further on smaller quantity lots in order to cover the concessions made to the large purchasers. Comparable competitive advantages were obtained by the large purchasers in several ways other than direct price concessions. Rebates were induced for "brokerage fees," even though no brokerage services had been performed. "Advertising allowances" were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. Some sellers furnished special services or facilities to the chain buyers. Lacking the purchasing power to demand comparable advantages, the small independent stores were at a hopeless competitive disadvantage.[15]

The Robinson-Patman amendments were enacted to eliminate these inequities. The exception to price discriminations based on quantitative differences was limited to those making "only due allowance for differences in . . . cost." As noted above, false brokerage allowances and the paying for or furnishing of nonproportional services or facilities were banned outright. The portion

---

[15] Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess.

of § 2 (b) preceding the proviso, on which Simplicity relies, was inserted in the House bill for the sole purpose of laying down "directions with reference to procedure including a statement with respect to burden of proof." [16] It was clearly not intended to have any independent substantive weight of its own.[17]

We hold, therefore, that neither "cost-justification" nor an absence of competitive injury may constitute "justifi-

---

[16] H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 16.

[17] As reported out of Committee, the equivalent of § 2 (b) (which was § 2 (e) in the House bill) applied only to price discriminations. During the floor debate, Congressman McLaughlin introduced an amendment which would add "or services or facilities furnished" at appropriate places in the subsection. He said, "Mr. Chairman, this is a committee amendment agreed to unanimously by the committee. . . . It simply allows a seller to meet not only competition in price of other competitors but also competition in services and facilities furnished." 80 Cong. Rec. 8225. The amendment was adopted without further comment. Throughout the debate, what reference there was to this subsection (other than to the proviso) was to the effect that it was a "procedural" or "burden of proof" provision. See, *e. g.*, 80 Cong. Rec. 8110, 9414, 9418. Congressman Patman, referring to it as a "burden of proof" provision, said "Let me analyze that for you. What does that mean? It means exactly the rule of law today. It is a restatement of existing law. So far as I am concerned you can strike it out. It makes no difference." 80 Cong. Rec. 8231. This statement, coming from one of the authors of the bill, makes it clear beyond peradventure that the provision in question was not intended to operate as a source of substantive defenses. See also *Automatic Canteen Co.* v. *Federal Trade Comm'n, supra,* 346 U. S., at 78.

The history of the Senate bill is not helpful. As reported out of Committee, it contained neither a provision comparable to § 2 (b) nor one comparable to § 2 (e). S. Rep. No. 1502, 74th Cong., 2d Sess. A provision identical to § 2 (b) was adopted as a floor amendment at a time when the bill did not in terms even cover the furnishing of services and facilities. 80 Cong. Rec. 6435–6436. The short debate on the amendment is not enlightening.

cation" of a prima facie § 2 (e) violation.[18] The judgment of the Court of Appeals must accordingly be reversed insofar as it set aside and remanded the Commission's order and affirmed as to the remainder.

It is so ordered.

---

[18] While both of these questions have been presented to us in terms of the "justification" clause of § 2 (b), we are equally convinced that the competitive injury and cost-differential clauses of § 2 (a) cannot be read *directly* into § 2 (e). *Elizabeth Arden, Inc.*, v. *Federal Trade Comm'n, supra,* note 10; *Corn Products Refining Co.* v. *Federal Trade Comm'n, supra,* note 10; *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Comm'n, supra,* note 10. It is true that, in reference to the cost-differential clause, we have said, "Time and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes." *Automatic Canteen Co.* v. *Federal Trade Comm'n, supra,* 346 U. S., at 72. But the contexts of the statements referred to show that the benefits were to be made available in *price* differentials or not at all. See, *e. g.*, 80 Cong. Rec. 8106–8107, 8111–8112, 8114, 8127–8128, 8137, 9415; H. R. Rep. No. 2287, 74th Cong., 2d Sess. See also notes 12 and 13, *supra.*

509615 O–59–8

UPHAUS *v.* WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 34. Argued November 17–18, 1958.—Decided June 8, 1959.

In an investigation conducted by the Attorney General of New Hampshire on behalf of the State Legislature under a resolution directing him to investigate violations of the State Subversive Activities Act and to determine whether "subversive persons" were then in the State, appellant, who is Executive Director of a corporation organized under the laws of the State and operating a summer camp in the State, testified concerning his own activities but refused to comply with subpoenas *duces tecum* calling for the production of the names of all persons who attended the camp during 1954 and 1955. Pursuant to state procedure, he was brought before a state court. There he did not plead the privilege against self-incrimination but claimed that the investigation was beyond the power of the State, that the resolution was too vague, that the documents sought were not relevant to the inquiry, and that to compel him to produce them would violate his rights of free speech and association. These claims were decided against him and, persisting in his refusal, he was adjudged guilty of civil contempt and ordered committed to jail until he complied with the order. *Held:* The judgment and sentence are sustained. Pp. 73–82.

(a) The New Hampshire Subversive Activities Act of 1951 and the resolution authorizing and directing the State Attorney General to investigate violations thereof have not been superseded by the Smith Act, as amended. *Pennsylvania* v. *Nelson*, 350 U. S. 497, distinguished. Pp. 76–77.

(b) The right of the State to require the production of corporate papers of a state-chartered corporation to determine whether corporate activities violate state policy stands unimpaired either by the Smith Act or by *Pennsylvania* v. *Nelson*, *supra*. P. 77.

(c) On the record in this case, the nexus between the corporation, its summer camp and subversive activities which might threaten the security of the State justifies the investigation; the State's interests in self-preservation outweigh individual rights in associational privacy; and the Due Process Clause of the Fourteenth Amendment does not preclude the State from compelling

production of the names of the guests. *Sweezy* v. *New Hampshire*, 354 U. S. 234, and *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, distinguished. Pp. 77–81.

(d) Since the demand for the documents was a legitimate one, the judgment of contempt for refusal to produce them is valid; and the sentence of imprisonment until appellant produces them does not constitute such cruel and unusual punishment as to be a denial of due process. Pp. 81–82.

101 N. H. 139, 136 A. 2d 221, affirmed.

Royal W. France and *Leonard B. Boudin* argued the cause for appellant. With them on the brief were *Hugh H. Bownes* and *Victor Rabinowitz.*

Louis C. Wyman, Attorney General of New Hampshire, argued the cause for appellee. With him on the brief was *Dort S. Bigg.*

Nathan Witt and *John M. Coe* filed a brief for the National Lawyers Guild, as *amicus curiae,* urging reversal.

Mr. Justice Clark delivered the opinion of the Court.

This case is here again on appeal from a judgment of civil contempt entered against appellant by the Merrimack County Court and affirmed by the Supreme Court of New Hampshire. It arises out of appellant's refusal to produce certain documents before a New Hampshire legislative investigating committee which was authorized and directed to determine, *inter alia,* whether there were subversive persons or organizations present in the State of New Hampshire. Upon the first appeal from the New Hampshire court, 100 N. H. 436, 130 A. 2d 278, we vacated the judgment and remanded the case to it, 355 U. S. 16, for consideration in the light of *Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957). That court reaffirmed its former decision, 101 N. H. 139, 136 A. 2d 221, deeming *Sweezy* not to control the issues in the instant case. For

reasons which will appear, we agree with the Supreme Court of New Hampshire.

As in *Sweezy*, the Attorney General of New Hampshire, who had been constituted a one-man legislative investigating committee by Joint Resolution of the Legislature,[1] was conducting a probe of subversive activities in the State. In the course of his investigation the Attorney General called appellant, Executive Director of World Fellowship, Inc., a voluntary corporation organized under the laws of New Hampshire and maintaining a summer camp in the State. Appellant testified concerning his own activities, but refused to comply with two subpoenas *duces tecum* which called for the production of certain corporate records for the years 1954 and 1955. The information sought consisted of: (1) a list of the names of all the camp's nonprofessional employees for those two summer seasons; (2) the correspondence which appellant had carried on with and concerning those persons who came to the camp as speakers; and (3) the names of all persons who attended the camp during the same periods of time. Met with appellant's refusal, the Attorney General, in accordance with state procedure, N. H. Rev. Stat. Ann., c. 491, §§ 19, 20, petitioned the Merrimack County Court to call appellant before it and require compliance with the subpoenas.

In court, appellant again refused to produce the information. He claimed that by the Smith Act,[2] as con-

---

[1] "*Resolved by the Senate and House of Representatives in General Court convened:*

"That the attorney general is hereby authorized and directed to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state. . . ." N. H. Laws, 1953, c. 307.

The investigation authorized by this resolution was continued by N. H. Laws, 1955, c. 197.

[2] 18 U. S. C. § 2385 (1956).

strued by this Court in *Pennsylvania* v. *Nelson,* 350 U. S. 497 (1956), Congress had so completely occupied the field of subversive activities that the States were without power to investigate in that area. Additionally, he contended that the Due Process Clause precluded enforcement of the subpoenas, first, because the resolution under which the Attorney General was authorized to operate was vague and, second, because the documents sought were not relevant to the inquiry. Finally, appellant argued that enforcement would violate his rights of free speech and association.

The Merrimack County Court sustained appellant's objection to the production of the names of the nonprofessional employees. The Attorney General took no appeal from that ruling, and it is not before us. Appellant's objections to the production of the names of the camp's guests were overruled, and he was ordered to produce them. Upon his refusal, he was adjudged in contempt of court and ordered committed to jail until he should have complied with the court order. On the demand for the correspondence and the objection thereto, the trial court made no ruling but transferred the question to the Supreme Court of New Hampshire. That court affirmed the trial court's action in regard to the guest list. Concerning the requested production of the correspondence, the Supreme Court entered no order, but directed that on remand the trial court "may exercise its discretion with respect to the entry of an order to enforce the command of the subpoena for the production of correspondence." 100 N. H., at 448, 130 A. 2d, at 287. No remand having yet been effected, the trial court has not acted upon this phase of the case, and there is no final judgment requiring the appellant to produce the letters. We therefore do not treat with that question. 28 U. S. C. § 1257. See *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 123–124 (1945). We now pass to a consideration of the sole

question before us, namely, the validity of the order of contempt for refusal to produce the list of guests at World Fellowship, Inc., during the summer seasons of 1954 and 1955. In addition to the arguments appellant made to the trial court, he urges here that the "indefinite sentence" imposed upon him constitutes such cruel and unusual punishment as to be a denial of due process.

Appellant vigorously contends that the New Hampshire Subversive Activities Act of 1951 [3] and the resolution creating the committee have been superseded by the Smith Act, as amended.[4] In support of this position appellant cites *Pennsylvania* v. *Nelson, supra.* The argument is that *Nelson,* which involved a prosecution under a state sedition law, held that "Congress has intended to occupy the field of sedition." This rule of decision, it is contended, should embrace legislative investigations made pursuant to an effort by the Legislature to inform itself of the presence of subversives within the State and possibly to enact laws in the subversive field. The appellant's argument sweeps too broad. In *Nelson* itself we said that the "precise holding of the court . . . is that the Smith Act . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*" (Italics supplied.) 350 U. S., at 499. The basis of *Nelson* thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made clear that a State could proceed with prosecutions for sedition against the State itself; that it can legitimately investigate in this area follows *a fortiori.* In *Sweezy* v. *New Hampshire, supra,* where the same contention was made

[3] N. H. Rev. Stat. Ann., 1955, c. 588, §§ 1–16.

[4] Note 2, *supra.*

as to the identical state Act, it was denied *sub silentio*. Nor did our opinion in *Nelson* hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened "sabotage or attempted violence of all kinds." In footnote 8 of the opinion it is pointed out that the State had full power to deal with internal civil disturbances. Thus registration statutes, *quo warranto* proceedings as to subversive corporations, the subversive instigation of riots and a host of other subjects directly affecting state security furnish grist for the State's legislative mill. Moreover, the right of the State to require the production of corporate papers of a state-chartered corporation in an inquiry to determine whether corporate activity is violative of state policy is, of course, not touched upon in *Nelson* and today stands unimpaired, either by the Smith Act or the *Nelson* opinion.

Appellant's other objections can be capsuled into the single question of whether New Hampshire, under the facts here, is precluded from compelling the production of the documents by the Due Process Clause of the Fourteenth Amendment. Let us first clear away some of the underbrush necessarily surrounding the case because of its setting.

First, the academic and political freedoms discussed in *Sweezy* v. *New Hampshire, supra,* are not present here in the same degree, since World Fellowship is neither a university nor a political party. Next, since questions concerning the authority of the committee to act as it did are questions of state law, *Dreyer* v. *Illinois,* 187 U. S. 71, 84 (1902), we accept as controlling the New Hampshire Supreme Court's conclusion that "[t]he legislative history makes it clear beyond a reasonable doubt that it [the Legislature] did and does desire an answer to these questions." 101 N. H., at 140, 136 A. 2d, at 221–222. Finally, we assume, without deciding, that Uphaus had sufficient standing to assert any rights of the guests whose

identity the committee seeks to determine. See *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449 (1958). The interest of the guests at World Fellowship in their associational privacy having been asserted, we have for decision the federal question of whether the public interests overbalance these conflicting private ones. Whether there was "justification" for the production order turns on the "substantiality" of New Hampshire's interests in obtaining the identity of the guests when weighed against the individual interests which the appellant asserts. *National Association for the Advancement of Colored People* v. *Alabama, supra.*

What was the interest of the State? The Attorney General was commissioned [5] to determine if there were any subversive persons [6] within New Hampshire. The obvious starting point of such an inquiry was to learn what persons were within the State. It is therefore clear that the requests relate directly to the Legislature's area of interest, *i. e.,* the presence of subversives in the State, as announced in its resolution. Nor was the demand of the subpoena burdensome; as to time, only a few months of each of the two years were involved; as to place, only the camp conducted by the Corporation; nor as to the lists of names, which included about 300 each year.

---

[5] Note 1, *supra.*

[6] Section 1 of the Subversive Activities Act, N. H. Rev. Stat. Ann., 1955, c. 588, §§ 1–16, defines "subversive person":

" 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization."

Moreover, the Attorney General had valid reason to believe that the speakers and guests at World Fellowship might be subversive persons within the meaning of the New Hampshire Act. The Supreme Court of New Hampshire found Uphaus' contrary position "unrelated to reality." Although the evidence as to the nexus between World Fellowship and subversive activities may not be conclusive, we believe it sufficiently relevant to support the Attorney General's action. The New Hampshire definition of subversive persons was born of the legislative determination that the Communist movement posed a serious threat to the security of the State. The record reveals that appellant had participated in "Communist front" activities and that "[n]ot less than nineteen speakers invited by Uphaus to talk at World Fellowship had either been members of the Communist Party or had connections or affiliations with it or with one or more of the organizations cited as subversive or Communist controlled in the United States Attorney General's list." 100 N. H., at 442, 130 A. 2d, at 283. While the Attorney General's list is designed for the limited purpose of determining fitness for federal employment, *Wieman* v. *Updegraff,* 344 U. S. 183 (1952), and guilt by association remains a thoroughly discredited doctrine, it is with a legislative investigation—not a criminal prosecution—that we deal here. Certainly the investigatory power of the State need not be constricted until sufficient evidence of subversion is gathered to justify the institution of criminal proceedings.

The nexus between World Fellowship and subversive activities disclosed by the record furnished adequate justification for the investigation we here review. The Attorney General sought to learn if subversive persons were in the State because of the legislative determination that such persons, statutorily defined with a view toward the Communist Party, posed a serious threat to the security

of the State. The investigation was, therefore, undertaken in the interest of self-preservation, "the ultimate value of any society," *Dennis* v. *United States,* 341 U. S. 494, 509 (1951). This governmental interest outweighs individual rights in an associational privacy which, however real in other circumstances, cf. *National Association for the Advancement of Colored People* v. *Alabama, supra,* were here tenuous at best. The camp was operating as a public one, furnishing both board and lodging to persons applying therefor. As to them, New Hampshire law requires that World Fellowship, Inc., maintain a register, open to inspection of sheriffs and police officers.[7] It is contended that the list might be "circulated throughout the states and the Attorney Generals throughout the states have cross-indexed files, so that any guest whose name is mentioned in that kind of proceeding immediately becomes suspect, even in his own place of residence." Record, p. 7. The record before us, however, only reveals a report to the Legislature of New Hampshire made by the Attorney General in accordance with the requirements of the resolution. We recognize, of course, that compliance with the subpoena will result in exposing the fact that the persons therein named were guests at World Fellowship. But so long as a committee must report to its legislative

---

[7] Since 1927, there has been in effect the following statute in New Hampshire:

"All hotel keepers and all persons keeping public lodging houses, tourist camps, or cabins shall keep a book or card system and cause each guest to sign therein his own legal name or name by which he is commonly known. Said book or card system shall at all times be open to the inspection of the sheriff or his deputies and to any police officer. . . ." N. H. Rev. Stat. Ann., 1955, c. 353, § 3.

The Attorney General represents that the public camp of World Fellowship, Inc., is clearly within the purview of this statute. Although the lists sought were more extensive than those required by the statute, it appears that most of the names were recorded pursuant to it.

parent, exposure—in the sense of disclosure—is an inescapable incident of an investigation into the presence of subversive persons within a State. And the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy of persons who, at least to the extent of the guest registration statute, made public at the inception the association they now wish to keep private. In the light of such a record we conclude that the State's interest has not been "pressed, in this instance, to a point where it has come into fatal collision with the overriding" constitutionally protected rights of appellant and those he may represent. *Cantwell* v. *Connecticut,* 310 U. S. 296, 307 (1940).

We now reach the question of the validity of the sentence. The judgment of contempt orders the appellant confined until he produces the documents called for in the subpoenas. He himself admitted to the court that although they were at hand, not only had he failed to bring them with him to court, but that, further, he had no intention of producing them. In view of appellant's unjustified refusal we think the order a proper one. As was said in *Green* v. *United States,* 356 U. S. 165, 197 (1958) (dissenting opinion):

> "Before going any further, perhaps it should be emphasized that we are not at all concerned with the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees."

We have concluded that the committee's demand for the documents was a legitimate one; it follows that the judgment of contempt for refusal to produce them is valid.

We do not impugn appellant's good faith in the assertion of what he believed to be his rights. But three courts have disagreed with him in interpreting those rights. If appellant chooses to abide by the result of the adjudication and obey the order of New Hampshire's courts, he need not face jail. If, however, he continues to disobey, we find on this record no constitutional objection to the exercise of the traditional remedy of contempt to secure compliance.

Affirmed.

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

The Court holds today that the constitutionally protected rights of speech and assembly of appellant and those whom he may represent are to be subordinated to New Hampshire's legislative investigation because, as applied in the demands made on him, the investigation is rationally connected with a discernible legislative purpose. With due respect for my Brothers' views, I do not agree that a showing of any requisite legislative purpose or other state interest that constitutionally can subordinate appellant's rights is to be found in this record. Exposure purely for the sake of exposure is not such a valid subordinating purpose. *Watkins* v. *United States,* 354 U. S. 178, 187, 200; *Sweezy* v. *New Hampshire,* 354 U. S. 234; *NAACP* v. *Alabama,* 357 U. S. 449. This record, I think, not only fails to reveal any interest of the State sufficient to subordinate appellant's constitutionally protected rights, but affirmatively shows that the investigatory objective was the impermissible one of exposure for exposure's sake. I therefore dissent from the judgment of the Court.

I fully appreciate the delicacy of the judicial task of questioning the workings of a legislative investigation.

A proper regard for the primacy of the legislative function in its own field, and for the broad scope of the investigatory power to achieve legislative ends, necessarily should constrain the judiciary to indulge every reasonable intendment in favor of the validity of legislative inquiry. However, our frame of government also imposes another inescapable duty upon the judiciary, that of protecting the constitutional rights of freedom of speech and assembly from improper invasion, whether by the national or the state legislatures. See *Watkins* v. *United States, supra; Sweezy* v. *New Hampshire, supra; NAACP* v. *Alabama, supra.* Where that invasion is as clear as I think this record discloses, the appellant is entitled to our judgment of reversal.

Judicial consideration of the collision of the investigatory function with constitutionally protected rights of speech and assembly is a recent development in our constitutional law. The Court has often examined the validity under the Federal Constitution of federal and state statutes and executive action imposing criminal and other traditional sanctions on conduct alleged to be protected by the guarantees of freedom of speech and of assembly. The role of the state-imposed sanctions of imprisonment, fines and prohibitory injunctions directed against association or speech and their limitations under the First and Fourteenth Amendments has been canvassed quite fully, beginning as early as *Gitlow* v. *New York,* 268 U. S. 652, and *Near* v. *Minnesota,* 283 U. S. 697. And other state action, such as deprivation of public employment and the denial of admission to a profession, has also been recognized as being subject to the restraints of the Constitution. See, *e. g., Wieman* v. *Updegraff,* 344 U. S. 183; cf. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232.

But only recently has the Court been required to begin a full exploration of the impact of the governmental

investigatory function on these freedoms.[1] Here is introduced the weighty consideration that the power of investigation, whether exercised in aid of the governmental legislative power, see *Watkins* v. *United States, supra,* or in aid of the governmental power to adjudicate disputes, see *NAACP* v. *Alabama, supra,* is vital to the functioning of free governments and is therefore necessarily broad. But where the exercise of the investigatory power collides with constitutionally guaranteed freedoms, that power too has inevitable limitations, and the delicate and always difficult accommodation of the two with minimum sacrifice of either is the hard task of the judiciary and ultimately of this Court.

It was logical that the adverse effects of unwanted publicity—of exposure—as concomitants of the exercise of the investigatory power, should come to be recognized, in certain circumstances, as invading protected freedoms and offending constitutional inhibitions upon governmental actions. For in an era of mass communications and mass opinion, and of international tensions and domestic anxiety, exposure and group identification by the state of those holding unpopular and dissident views are fraught with such serious consequences for the individual as inevitably to inhibit seriously the expression of views which the Constitution intended to make free. Cf. *Speiser* v. *Randall,* 357 U. S. 513, 526. We gave expression to this truism in *NAACP* v. *Alabama:* "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many

[1] The two leading earlier cases relate generally to the congressional power to investigate, and were not required to explore it in the contexts of freedom of speech and of assembly. *Kilbourn* v. *Thompson,* 103 U. S. 168; *McGrain* v. *Daugherty,* 273 U. S. 135. See the opinion in the latter case, *ibid.,* at 175–176.

circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." 357 U. S., at 462.

Of course, the considerations entering into the weighing of the interests concerned are different where the problem is one of state exposure in the area of assembly and expression from where the problem is that of evaluating a state criminal or regulatory statute in these areas. Government must have freedom to make an appropriate investigation where there appears a rational connection with the lawmaking process, the processes of adjudication, or other essential governmental functions. In the investigatory stage of the legislative process, for example, the specific interest of the State and the final legislative means to be chosen to implement it are almost by definition not precisely defined at the start of the inquiry, and due allowance must accordingly be made. Also, when exposure is evaluated judicially as a governmental sanction, there should be taken into account the differences between it and the more traditional state-inflicted pains and penalties. True it is, therefore, that any line other than a universal subordination of free expression and association to the asserted interests of the State in investigation and exposure will be difficult of definition; but this Court has rightly turned its back on the alternative of universal subordination of protected interests, and we must define rights in this area the best we can. The problem is one in its nature calling for traditional case-by-case development of principles in the various permutations of circumstances where the conflict may appear. But guide lines must be marked out by the courts. "This is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause, and it is a task ultimately committed to this Court." *Sweezy* v. *New Hampshire,* 354 U. S. 234, 267 (concurring opinion). On the facts of this case I think

that New Hampshire's investigation, as applied to the appellant, was demonstrably and clearly outside the wide limits of the power which must be conceded to the State even though it be attended by some exposure. In demonstration of this I turn to the detailed examination of the facts which this case requires.

The appellant, Uphaus, is Executive Director of a group called World Fellowship which runs a discussion program at a summer camp in New Hampshire, at which the public is invited to stay. Various speakers come to the camp primarily for discussion of political, economic and social matters. The appellee reports that Uphaus and some of the speakers have been said by third persons to have a history of association with "Communist front" movements, to have followed the "Communist line," signed amnesty petitions and *amicus curiae* briefs, and carried on similar activities of a sort which have recently been viewed hostilely and suspiciously by many Americans. A strain of pacifism runs through the appellant's thinking, and the appellee apparently would seek to determine whether there should be drawn therefrom an inference of harm for our institutions; he conjectures, officially, whether "the advocacy of this so-called peace crusade is for the purpose of achieving a quicker and a cheaper occupation by the Soviet Union and Communism." There is no evidence that any activity of a sort that violates the law of New Hampshire or could in fact be constitutionally punished went on at the camp. What is clear is that there was some sort of assemblage at the camp that was oriented toward the discussion of political and other public matters. The activities going on were those of private citizens. The views expounded obviously were minority views. But the assemblage was, on its face, for purposes to which the First and Fourteenth Amendments give constitutional protection against incur-

sion by the powers of government. Cf. *Sweezy* v. *New Hampshire, supra,* at 249–251.

The investigation with which this case is concerned was undertaken under authority of a 1953 Resolution of the New Hampshire General Court, N. H. Laws 1953, c. 307, and extended by an enactment in 1955, N. H. Laws, 1955, c. 197. The Resolution directed the Attorney General of the State (appellee here) to make a "full and complete investigation" of "violations of the subversive activities act of 1951" [2] and to determine whether "subversive per-

[2] The Act was c. 193 of the Laws of New Hampshire, 1951. After an extensive preamble, § 1 provided various definitions, including definitions of "subversive organization" and "foreign subversive organization"; the definition of "subversive person," also provided, was: "any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization." For a discussion of the breadth of this definition, see *Sweezy* v. *New Hampshire, supra,* at 246–247.

Section 2 of the Act defines the crime of sedition. The definition is based on the quoted definition of "subversive person," except that the final "membership clause" is omitted and a "clear and present danger" test is introduced in regard to advocacy, abetting, advising and teaching. Assisting in the formation of a subversive organization or foreign subversive organization, managing one, contributing to its support, destroying its papers, or hiding its funds, "knowing said organization to be a subversive organization or a foreign subversive organization" also constitutes the offense, which is punishable by twenty years' imprisonment or a fine of $20,000, or both. Those who become or remain members of a subversive organization or a foreign subversive organization, after certain dates, "knowing said organization to be a subversive organization or a foreign subversive organization," under § 3, are liable to five years' imprisonment or a $5,000 fine, or both. Section 4 disqualifies those convicted under

509516 O–59–9

sons as defined in said act are presently located within the state." Under New Hampshire law, this constituted the Attorney General (who is ordinarily the chief law-enforcement official of the State) a one-man legislative committee. The sanctions of prosecution of individuals and dissolution of organizations for violation of the 1951 law seem to have been discarded, with the passage of the Resolution, in favor of the sanction of exposure. A provision of the 1951 Act providing for confidential treatment of material reflecting on individuals' loyalty was made inapplicable to the investigation the Attorney General was directed to conduct, and the Attorney General was authorized in sweeping terms to give publicity to the details of his investigation. A report to the Legislature of the fruits of the investigation was to be made on the first day of the 1955 legislative session; the 1955 extension called for a similar report to the 1957 session.[3] Efforts to obtain from the appellant the disclosures relative to World Fellowship in controversy here began during the period covered by the 1953 Resolution, but his final refusal and the proceeding for contempt under review here occurred during the extension.

The fruits of the first two years of the investigation were delivered to the Legislature in a comprehensive volume on January 5, 1955. The Attorney General urges this report on our consideration as extremely relevant to a consideration of the investigation as it relates to appellant. I think that this is quite the case; the report is an official indication of the nature of the investigation and is, in fact, the stated objective of the duty assigned by the Resolution to the Attorney General. It was with this

---

§ 2 or § 3 from public office or employment, and § 9 erects a similar disqualification in the case of all "subversive persons." Section 5 provides for the dissolution of subversive organizations and foreign subversive organizations functioning in New Hampshire.

[3] None appears to have been made.

report before it that the Legislature renewed the investigation, and it must be taken as characterizing the nature of the investigation before us. The report proper is divided into numerous sections. First is a series of general and introductory essays by various authors entitled "Pertinent Aspects of World Communism Today." Essays discuss "The Nature of the Russian Threat"; "The Role of the Communist Front Organizations"; "Some Important Aspects of Marxism and Marxism-Leninism"; "The Test of a Front Organization"; and "Communism vs. Religion." General descriptive matter on the Communist Party in New Hampshire follows. It hardly needs to be said that this introductory material would focus attention on the whole report in terms of "Communism" regardless of what was said about the individuals later named. Next comes a general section titled "Communist Influence in a Field of Education" which is replete with names and biographical material of individuals; a similar section on "Communist Influence in the Field of Labor"; and one more generically captioned "Organizations," in which various details as to the appellant, his organization, and others associated in it are presented. Last comes a section entitled "Individuals" in which biographical sketches of 23 persons are presented.

The introductory matter in the volume, to put the matter mildly, showed consciousness of the practical effect of the change of policy from judicial prosecution to exposure by the Attorney General of persons reported to be connected with groups charged to be "subversive" or "substantially Communist-influenced." Virtually the entire "Letter of Transmittal" of the Attorney General addressed itself to discussing the policy used in the report in disclosing the names of individuals. The Attorney General drew a significant distinction as to the names he would disclose: "Persons with past membership or affiliation with the Communist Party or substantially

Communist-influenced groups have not been disclosed in this report where those persons have provided assistance to the investigation. It is felt that no good reasons exist requiring a listing of names of cooperative witnesses in these categories." A "Foreword" declared that "[t]his report deals with a controversial subject," and, concentrating on the fact that the report contained an extensive list of persons, their addresses, and miscellaneous activities and associations attributed to them, made several disclaimers. The report was not to be considered an indictment of any individual, the Attorney General suitably pointing out that a grand jury was the only authority in New Hampshire having the formal power of indictment. Nor was it "the result of an inquisition. No witness in this investigation has ever, at any time, been treated other than courteously." Finally, the Attorney General stressed that "[t]he reporting of facts herein does NOT (nor should it be taken to by any reader) constitute a charge against any witness." He observed that "facts are facts . . . . Conclusions of opprobrium relative to any individual, while within the privilege of personal opinion, are neither recommended nor intended to be encouraged by any phraseology of this report." In fact, the listing of names might well contain the names of many innocent people, implied the Attorney General. This was permissible, he believed, because, as interpreted in the courts of New Hampshire, "the scope of relevant questioning in the investigation goes far beyond the requirements of individual felonious intention. In fact, the General Court has directed that inquiry be made to determine the extent of innocent or ignorant membership, affiliation or support of subversive organizations . . . ."

The report certainly is one that would be suggested by the quoted parts of the foreword. No opinion was, as a matter of course, expressed by the Attorney General as to whether any person named therein was in fact a

"subversive person" within the meaning of the statute. The report did not disclose whether any indictments under the 1951 Act would be sought against any person. Its sole recommendations for legislation were for a broad evidentiary statute to be applied in trials of persons under the State Act as "subversive," which cannot really be said to have been the fruit of the investigation, being copied from a then recent Act of Congress,[4] and which made apparently no change in the 1951 law's standard of guilt, and for an immunity measure calculated to facilitate future investigations. The report, once the introductory material on Communism is done with, contains primarily an assorted list of names with descriptions of what had been said about the named persons. In most cases, the caveat of the Attorney General that the information should not be understood as indicating a violation of the New Hampshire Subversive Activities Act was, to say the least, well-taken, in the light of the conduct ascribed to them. Many of the biographical summaries would strike a discerning analyst as very mild stuff indeed. In many cases, a positive diligence was demonstrated in efforts to add the names of individuals to a list and then render a Scotch verdict of "not proven" in regard to them. The most vivid example of this is the material relating to the appellant's group, World Fellowship. After some introductory pages, there comes extensive biographical material relating to the reported memberships, associations, advocacies, and signings of open letters on the part of certain speakers at the World Fellowship camp. A very few had admitted membership in the Communist Party, or had been "identified" as being members by third persons generally not named. Others were said to be or to have been members of "Communist influenced," "front," or "officially cited" groups. Some were said

[4] The Communist Control Act of 1954, § 5, c. 886, 68 Stat. 776, 50 U. S. C. § 844.

to have signed open letters and petitions against deportations, to have criticized the Federal Bureau of Investigation, to have given free medical treatment to Communist Party officials, and the like. Finally the report addresses itself to the remainder of the speakers: "Information easily available to this office does *not* indicate records of affiliation with or support of Communist causes on the part of these people. However, due to the burden of work imposed on the staff of the House Committee on Un-American Activities by thousands of such requests received from all over the country, it has not been possible to check each of these persons thoroughly. Inasmuch as no committee or public agency can hope to have all the information in its files concerning all subversive activity all over this country, it is not possible for this office to guarantee that the following individuals do not have such activity in their backgrounds. Therefore, it is necessary to report their identities to the General Court, with the explanation that based upon what information we have been able to assemble, the following individuals would appear at this time to be the usual contingent of 'dupes' and unsuspecting persons that surround almost every venture that is instigated or propelled by the 'perennials' and articulate apologists for Communists and Soviet chicanery, but of this fact we are not certain. This list does *not* include the many persons who were merely guests . . . ." The names of 36 persons with their addresses then followed.[5]

---

[5] Although the nature of the investigation of individuals is difficult to convey without reproduction of the full report, two individual write-ups from other sections of the book (the names are used in the report but not here) are illustrative.

A two-page item is entitled "The Matter of . . . [X]." It begins: "In recent years there has been opposition to legislative investigations in some academic circles. Charges have been made, usually without an accompanying scintilla of evidence, that 'hysteria' rules the country

The emphasis of the entire report is on individual guilt, individual near-guilt, and individual questionable behavior. Its flavor and tone, regardless of its introductory disclaimers, cannot help but stimulate readers

---

and that teachers are afraid to teach 'the truth' because of the 'witch hunters.' This line is repeated ad infinitum in the Communist 'Daily Worker.'

"In New Hampshire, during the course of this investigation, a case did arise where rumors were circulated concerning a teacher. . . ."

The report proceeds: "The teacher concerning whom the rumors were circulated was [X], a teacher in the [Y city] public school system. When the rumors concerning Mr. [X] came to the attention of this office, he was invited to testify. . . ."

The report relates that X appeared "voluntarily" and testified "fully" that he was not a member of any organization on the Attorney General's list, and never had been. "This office was prepared to make full investigation of the facts and to make public the results of such an investigation if it would effectuate the purposes of the current probe. [X] resigned and secured employment outside the state. Had [X] not decided to submit his resignation, such a course of action would have been taken, but facilities were not available for inquiring into moot problems. . . ."

The report, after noting that none of its available usual informants had anything damaging to say about X, concludes its discussion of this "matter": "It should be clear to factions who oppose per se any legislative investigation into subversion that such investigations can serve the purpose of insuring legitimate academic interests against unfounded rumor or gossip." We are left to conjecture whether Mr. X would subscribe to the Attorney General's conclusion.

An 11-page write-up is the story of Y, a Chief of Police in a New Hampshire municipality. Y admitted having been a Communist from 1936 till 1944, but said that he withdrew then, and currently regarded the Communist Party as something on a par with Hitler. A witness said that Y's name was on a secret Communist Party list after then. Pages of the details of inconclusive statements and counterstatements in this regard follow, including a "confrontation" of Chief Y and a witness in the Attorney General's office, at which were present the Board of Selectmen of the town for which he was Police Chief. The report then lists various "situations in which Chief [Y] was not able to be of assistance to this investigation" and finally comes to the "Conclusion": "Due to the conspiratorial,

to attach a "badge of infamy," *Wieman* v. *Updegraff*, 344 U. S. 183, 190–191, to the persons named in it. The authorizing Resolution requested that the Attorney General address himself to ascertaining whether there were "subversive persons" in New Hampshire, and the report indicates that this was interpreted as the making of lists of persons who were either classifiable in this amorphous category, or almost so, and the presenting of the result, as a public, official document, to the Legislature, and to the public generally. The main thrust of the Resolution itself was in terms of individual behavior—violation of the 1951 Act and the presence, in the State, of "subversive persons," were the objects of investigation. The collection of such data, and of data having some peripheral reference to it, with explicit detail as to names and places, was what the Attorney General set himself to doing in response to it. As the report itself stated, "A very considerable amount of questioning is absolutely essential to separate the wheat from the chaff in applying the legislative formula to individual conduct which involves that part of the spectrum very close to the line of subversive conduct. Only through such questioning is it possible to be able to report to the Legislature whether the activity of a given individual has been subversive or not subversive; whether or not intentionally so or knowingly so on his

---

clandestine, and currently underground nature of the Communist Party, as well as the inability to force witnesses to testify concerning subversive activities, the above conflicts in testimony here have not been resolved and are presented as they exist on the record, without further comment. . . ."

The usual individual biography is shorter and less detailed than this; many just state the individual's name and street address, set forth a reference to him in the Daily Worker or an "identification" with the Communist Party at some date or with a "front" group, and state that the subject invoked or took refuge in the privilege against self-incrimination when questioned before the Attorney General.

part." One must feel, on reading the report, that the first sentence—"A very considerable amount of questioning is absolutely essential . . . in applying the legislative formula to individual conduct which involves that part of the spectrum very close to the line of subversive conduct"—is a serious overstatement, because in the usual citation of a person in the report no expression of his innocence or guilt, or his precise coloration in the Attorney General's spectrum was given. But still the report was made in terms of the activity of named individuals. Of course, if the Attorney General had information relating to guilt under the statute, he was empowered to seek indictment and conviction of the offenders in criminal proceedings, in which of course the normal rights afforded criminal defendants and the normal limitations on state prosecution for conduct related to political association and expression, under the Constitution, would apply. The citation of names in the book does not appear to have any relation to the possibility of an orthodox or traditional criminal prosecution, and the Attorney General seems to acknowledge this. The investigation in question here was not one ancillary to a prosecution—to grand jury or trial procedure. If it had been, if a definite prosecution were undertaken, we would have that narrowed context in which to relate the State's demand for exposure. Cf. *NAACP* v. *Alabama, supra,* at 464–465. This process of relation is part and parcel of examining the "substantiality" of the State's interest in the concrete context in which it is alleged. But here we are without the aid of such a precise issue and our task requires that we look further to ascertain whether this legislative investigation, as applied in the demands made upon the appellant, is connected rationally with a discernible general legislative end to which the rights of the appellant and those whom he may represent can constitutionally be subordinated.

The Legislature, upon receiving the report, extended the investigation for a further two years. It was during this period that the refusals of the appellant to furnish information with which we are now concerned took place. The Attorney General had already published the names of speakers at the World Fellowship camp. Now he wanted the correspondence between Uphaus and the speakers. The Attorney General admitted that it was unlikely that the correspondence between Uphaus and the speakers was going to contain a damning admission of a purpose to advocate the overthrow of the government (presumably of New Hampshire) by force and violence. He said that it might indicate a sinister purpose behind the advocacy of pacifism—"the purpose of achieving a quicker and a cheaper occupation by the Soviet Union and Communism." The guest list, the nonavailability of which to the Attorney General was commented on in the passage from the 1955 report quoted above,[6] was also desired. Appellant's counsel, at the hearing in court giving rise to the contempt finding under review, protested that appellant did not want to allow the Attorney General to have the names to expose them. The Attorney General also wished the names of the nonprofessional help at the camp—the cooks and dishwashers and the like. It was objected that the cooks and dishwashers were hired from the local labor pool and that if such employment were attended by a trip to the Attorney General's office and the possibility of public exposure, help might become hard to find at the camp. This last objection was sustained in the trial court, but the other two inquiries were allowed and appellant's failure to respond to the one relating to the guest list was found contemptuous.

First. The Court seems to experience difficulty in discerning that appellant has any standing to plead the rights

[6] See p. 92, *supra.*

of free speech and association he does because the material he seeks to withhold may technically belong to World Fellowship, Inc., a corporation, and may relate to the protected activities of other persons, rather than those of himself. In *NAACP* v. *Alabama, supra,* a corporation was permitted to represent its membership in pleading their rights to freedom of association for public purposes. Here appellant, as a corporate officer if one will, seeks to protect a list of those who have assembled together for public discussion on the corporation's premises. Of course this is not technically a membership list, but to distinguish *NAACP* v. *Alabama* on this ground is to miss its point. The point is that if the members of the assemblage could only plead their assembly rights themselves, the very interest being safeguarded by the Constitution here could never be protected meaningfully, since to require that the guests claim this right themselves would "result in nullification of the right at the very moment of its assertion." *Id.,* at 459. I do not think it likely that anyone would deny the right of a bookseller (including a corporate bookseller) to decline to produce the names of those who had purchased his books. Cf. *United States* v. *Rumely,* 345 U. S. 41, 57 (concurring opinion), and the opinion below in that case, 90 U. S. App. D. C. 382, 197 F. 2d 166, 172.[7]

Second. In examining the right of the State to obtain this information from the appellant by compulsory

[7] The Court, apparently, draws some support from the New Hampshire lodging house registration statute for its conclusions about the lack of substantiality of the guests' interests in nondisclosure. Since the statute admittedly would not cover what the Attorney General desired to obtain and since the New Hampshire courts themselves did not rest on it, it is difficult to find any basis for this reliance. It would be time enough to deal with a production order based on that statute when it arose.

process, we must recollect what we so recently said in *NAACP* v. *Alabama:*

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Thomas* v. *Collins,* 323 U. S. 516, 530. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See *Gitlow* v. *New York,* 268 U. S. 652, 666; *Palko* v. *Connecticut,* 302 U. S. 319, 324; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Staub* v. *City of Baxley,* 355 U. S. 313, 321. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U. S., at 460–461.

And in examining the State's interest in carrying out a legislative investigation, as was said in a similar context in *United States* v. *Rumely, supra,* at 44, we must strive not to be "that 'blind' Court, against which Mr. Chief Justice Taft admonished in a famous passage, . . . that does not see what '[a]ll others can see and understand.' " The problem of protecting the citizen's constitutional rights from legislative investigation and exposure is a practical one, and we must take a practical, realistic approach to it.

Most legislative investigations unavoidably involve exposure of some sort or another. But it is quite clear

that exposure was the very core, and deliberately and purposefully so, of the legislative investigation we are concerned with here. The Legislature had passed a broad and comprehensive statute, which included criminal sanctions. That statute was, to say the least, readily susceptible of many applications in which it might enter a constitutional danger zone. See *Yates* v. *United States*, 354 U. S. 298, 319. And it could not be applied at all insofar as it amounted to a sanction for behavior directed against the United States. *Pennsylvania* v. *Nelson*, 350 U. S. 497. Therefore, indictment would be fraught with constitutional and evidentiary problems of an obvious and hardly subtle nature. This may suggest the reason why the pattern of application of the Subversive Activities statute in New Hampshire was not through the processes of indictment. The Resolution was cast in terms of an investigation of conduct restricted by this existing statute. The Resolution and the Attorney General's implementation of it reveal the making of a choice. The choice was to reach the end of exposure through the process of investigation, backed with the contempt power and the making of reports to the Legislature, of persons and groups thought to be somehow related to offenses under the statute or, further, to an uncertain penumbra of conduct about the proscribed area of the statute. And, as was said of the same investigation in *Sweezy* v. *New Hampshire*, *supra*, at 248: "[T]he program for the rooting out of subversion . . . [was] drawn without regard to the presence or absence of guilty knowledge in those affected." The sanction of exposure was applied much more widely than anyone could remotely suggest that even traditional judicial sanctions might be applied in this area.

One may accept the Court's truism that preservation of the State's existence is undoubtedly a proper purpose for legislation. But, in descending from this peak of abstraction to the facts of this case, one must ask the

question: What relation did this investigation of individual conduct have to legislative ends here? If bills of attainder were still a legitimate legislative end, it is clear that the investigations and reports might naturally have furnished the starting point (though only that) for a legislative adjudication of guilt under the 1951 Act. But what other legislative purpose was actually being fulfilled by the course taken by this investigation, with its overwhelming emphasis on individual associations and conduct?

The investigation, as revealed by the report, was overwhelmingly and predominantly a roving, self-contained investigation of individual and group behavior, and behavior in a constitutionally protected area. Its whole approach was to name names, disclose information about those named, and observe that "facts are facts." The New Hampshire Supreme Court has upheld the investigation as being a proper legislative inquiry, it is true. In *Nelson* v. *Wyman,* 99 N. H. 33, 38, 105 A. 2d 756, 763, it said: "No sound basis can exist for denying to the Legislature the power to so investigate the effectiveness of its 1951 act even though, as an incident to that general investigation, it may be necessary to inquire as to whether a particular person has violated the act. . . . When the investigation provided for is a general one, the discovery of a specific, individual violation of law is collateral and subordinate to the main object of the inquiry." In evaluating this, it must be admitted that maintenance of the separation of powers in the States is not, in and of itself, a concern of the Federal Constitution. *Sweezy* v. *New Hampshire, supra,* at 255; *Crowell* v. *Benson,* 285 U. S. 22, 57. But for an investigation in the field of the constitutionally protected freedoms of speech and assemblage to be upheld by the broad standards of relevance permissible in a legislative inquiry, some relevance to a

valid legislative purpose must be shown, and certainly the ruling made below, that under the state law the Legislature has authorized the inquiry, *Wyman* v. *Uphaus,* 100 N. H. 436, 445, 130 A. 2d 278, 285, does not conclude the issue here. The bare fact that the Legislature has authorized the inquiry does not mean that the inquiry is for a valid legislative end when viewed in the light of the federal constitutional test we must apply. Nor, while it is entitled to weight, is the determination by a state court that the inquiry relates to a valid legislative end conclusive. It is the task of this Court, as the Court recognizes in theory today, to evaluate the facts to determine if there actually has been demonstrated a valid legislative end to which the inquiry is related. With all due respect, the quoted observations of the New Hampshire Supreme Court in the case of *Nelson* v. *Wyman* bear little relationship to the course of the inquiry, as revealed by the report published after that decision. The report discloses an investigation in which the processes of law-making and law-evaluating were submerged entirely in exposure of individual behavior—in adjudication, of a sort, however much disclaimed, through the exposure process.[8] If an investigation or trial, conducted by any organ of the State, which is aimed at the application of sanctions to individual behavior is to be upheld, it must meet the traditional standards that the common law in this country has established for the application of sanctions to the individual, or a constitutionally permissible modification of them. Cf. *Kilbourn* v. *Thompson,* 103

[8] While as a general matter it is true that a State can distribute its governmental powers as it sees fit, as far as the Federal Constitution is concerned, it is also true that (regardless of what organ exercises the functions) different constitutional tests apply in examining state legislative and state adjudicatory powers. See *Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U. S. 441.

U. S. 168, 195. As a bare minimum there must be general standards of conduct, substantively constitutionally proper, applied to the individual in a fair proceeding with defined issues resulting in a binding, final determination. I had not supposed that a legislative investigation of the sort practiced here provided such a framework under the Constitution.

It is not enough to say, as the Court's position I fear may amount to, that what was taking place was an investigation and until the Attorney General and the Legislature had in all the data, the precise shape of the legislative action to be taken was necessarily unknown. Investigation and exposure, in the area which we are here concerned with, are not recognized as self-contained legislative powers in themselves. See *Watkins* v. *United States, supra,* at 200. Cf. *NAACP* v. *Alabama, supra.* Since this is so, it hardly fulfills the responsibility with which this Court is charged, of protecting the constitutional rights of freedom of speech and assembly, to admit that an investigation going on indefinitely in time, roving in subject matter, and cumulative in detail in this area can be in aid of a valid legislative end, on the theory that some day it may come to some point. Even the most abusive investigation, the one most totally committed to the constitutionally impermissible end of individual adjudication through publication, could pass such a test. At the stage of this investigation that we are concerned with, it continued to be a cumulative, broad inquiry into the specific details of past individual and associational behavior in the political area. It appears to have been a classic example of "a fruitless investigation into the personal affairs of individuals." *Kilbourn* v. *Thompson, supra,* at 195. Investigation appears to have been a satisfactory end product for the State, but it cannot be so for us in this case as we

evaluate the demands of the Constitution. Nor can we accept the legislative renewal of the investigation, or the taking of other legislative measures to facilitate the investigation, as being themselves the legislative justification of the inquiry. The report indicates that it so viewed them; in requesting legislation renewing the investigation and an investigation immunity statute, the Attorney General significantly stated that if the renewal legislation or some investigatory substitute were not passed, it "would mean no further investigation, no continuing check upon Communist activities . . . ." This is just to admit the continuing existence of the investigation as a self-contained justification for the inquiry. However much the State may be content to rely on the investigation as its own sanction, I think it perfectly plain that it cannot be regarded as a justification here. Nor can the faint possibility that an already questionably broad criminal statute might be further broadened, if constitutionally permissible, be considered the subordinating legislative purpose here, particularly in the light of what the investigation was in fact as revealed by its report. Of course, after further investigation and further reports, legislation of some sort might eventuate, or at least be considered. Perhaps it might be rejected because of serious doubts as to its constitutionality—which would, I think, underline the point I am making. But on such airy speculation, I do not see how we can say that the State has made any showing that this investigation, which on its surface has an overwhelming appearance of a simple, wide-ranging exposure campaign, presents an implementation of a subordinating lawmaking interest that, as the Court concedes, the State must be shown to have.

This Court's approach to a very similar problem in *NAACP* v. *Alabama, supra,* should furnish a guide to the proper course of decision here. There the State

demonstrated a definite purpose which was admittedly within its competence. That purpose was the ascertainment whether a foreign corporation was unlawfully carrying on local activities within Alabama's borders, because not qualified to do business in the manner required by state law. In a judicial proceeding having this as its express stated purpose, the State sought to obtain the membership list of the corporation. This Court carefully recognized the curbing of associational freedom that the disclosure called for by this inquiry would entail. It then analyzed the relationship between the inquiry and this purpose, and, concluding that there was no rational connection, it held the inquiry constitutionally impermissible. Here the situation is even more extreme; there is no demonstration at all of what the legislative purpose is, outside of the investigation of violations, suspicions of violations, and conduct raising some question of violation, of an existing statute.[9] It is anomalous to say, as I fear the Court says today, that the vaguer the State's interest is, the more laxly will the Court view the matter and indulge a presumption of the existence of a valid subordinating state interest. In effect, a roving investigation and exposure of past associations and expressions in the politi-

---

[9] Cf. the address of Mr. William T. Gossett, Vice-President and General Counsel of Ford Motor Company at the Annual Brotherhood Dinner, Detroit, Michigan, November 20, 1958, in which he said: "We must urge upon our law-makers a scrupulous exactness, particularly in the exercise of their investigative powers. When we are frustrated by the feeling that certain people—suspected subversives, gangsters or labor racketeers, for example—have flaunted society with impunity, it is tempting to pillory them through prolonged public exposure to hearsay testimony, intemperate invective and other forms of abuse. But to try by such means to destroy those whom we are unable to convict by due process of law may destroy instead the very safeguards that protect us all against tyranny and arbitrary power."

cal field is upheld because it might lead to some sort of legislation which might be sustained as constitutional, and the entire process is said to become the more defensible rather than the less because of the vagueness of the issues. The Court says that the appellant cannot argue against the exposure because this is an investigation and the exposure may make the investigation lead somewhere, possibly to legislative action. But this is just to say that an investigation, once under state law it is classified as "legislative," needs no showing of purpose beyond its own existence. A start must be made somewhere, and if the principles this Court has announced, and to which the Court today makes some deference, are to have any meaning, it must be up to the State to make some at least plausible disclosure of its lawmaking interest so that the relevance of its inquiries to it may be tested. Then the courts could begin to evaluate the justification for the impact on the individual's rights of freedom of speech and assembly. But here not only has the State failed to begin to elucidate such an interest; it has positively demonstrated, it appears to me, through its Resolution, the Attorney General's and the state courts' interpretation of it, and the Resolution's re-enactment, that what it is interested in is exposure, in lieu of prosecution, and nothing definable else.

The precise details of the inquiry we are concerned with here underlines this. The Attorney General had World Fellowship's speaker list and had already made publication of it in the fashion to which I have alluded. He had considerable other data about World Fellowship, Inc., which he had already published. What reason has been demonstrated, in terms of a legislative inquiry, for going into the matter in further depth? Outside of the fact that it might afford some further evidence as to the existence of "subversive persons" within the State, which I have

endeavored to show was not in itself a matter related to any legislative function except self-contained investigation and exposure themselves, the relevance of further detail is not demonstrated. But its damaging effect on the persons to be named in the guest list is obvious. And since the only discernible purpose of the investigation on this record is revealed to be investigation and exposure *per se,* and the relevance of the names to that purpose alone is quite apparent, this discloses the constitutional infirmity in the inquiry which requires us to strike down the adjudication of contempt in question here.

The Court describes the inquiry we must make in this matter as a balancing of interests. I think I have indicated that there has been no valid legislative interest of the State actually defined and shown in the investigation as it operated, so that there is really nothing against which the appellant's rights of association and expression can be balanced. But if some proper legislative end of the inquiry can be surmised, through what must be a process of speculation, I think it is patent that there is really no subordinating interest in it demonstrated on the part of the State. The evidence inquired about was simply an effort to get further details about an activity as to which there already were considerable details in the hands of the Attorney General. I can see no serious and substantial relationship between the furnishing of these further minutiae about what was going on at the World Fellowship camp and the process of legislation, and it is the process of legislation, the consideration of the enactment of laws, with which ultimately we are concerned. We have a detailed inquiry into an assemblage the general contours of which were already known on the one hand, and on the other the remote and speculative possibility of some sort of legislation—albeit legislation in a field where there are serious constitutional limitations. We

have this in the context of an inquiry which was in practice being conducted in its overwhelming thrust as a vehicle of exposure, and where the practice had been followed of publishing names on the basis of a "not proven" verdict. We are not asked to hold that the State cannot carry on such fact-finding at all, with or without compulsory process. Nor are we asked to hold that as a general matter compulsory process cannot be used to amass facts whose initial relevance to an ultimate legislative interest may be remote. Cf. *McGrain* v. *Daugherty,* 273 U. S. 135, 176–180.[10] We deal with a narrow and more subtle problem. We deal here with inquiries into the areas of free speech and assemblage where the process of compulsory disclosure itself tends to have a repressive effect. Cf. *Speiser* v. *Randall, supra.* We deal only with the power of the State to *compel* such a disclosure. We are asked, in this narrow context, only to give meaning to our statement in *Watkins* v. *United States, supra,* at 198, "that the mere semblance of a legislative purpose would not justify an inquiry in the face of the Bill of Rights." Here we must demand some initial showing by the State sufficient to counterbalance the interest in privacy as it relates to

---

[10] *McGrain* v. *Daugherty* found legislative justification in a congressional inquiry which presented a rather strong element of exposure of past wrongdoing, to be sure. But the possibility of legislation was much more real than is the case here, and the legislative subject matter—control and regulation of the structure and workings of an executive department—was one not fraught with the constitutional problems presented by legislation in the field of political advocacy and assembly. And the inquiry itself, most significantly, was not directed at private assembly and discussion, but at the conduct of a public official in office; it did not have the inhibitory effect on basic political freedoms that the inquiry we are here concerned with presents. Cf. *Watkins* v. *United States, supra,* at 200, n. 33. The *Daugherty* case is basically, then, one relating to the distribution of powers among branches of the Federal Government.

freedom of speech and assembly. On any basis that has practical meaning, New Hampshire has not made such a showing here. I would reverse the judgment of the New Hampshire Supreme Court.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would decide this case on the ground that appellant is being deprived of rights under the First and Fourteenth Amendments, for the reasons developed in *Adler* v. *Board of Education,* 342 U. S. 485, 508 (dissenting opinion); *Beauharnais* v. *Illinois,* 343 U. S. 250, 267, 284 (dissenting opinions). But they join MR. JUSTICE BRENNAN'S dissent because he makes clear to them that New Hampshire's legislative program resulting in the incarceration of appellant for contempt violates Art. I, § 10 of the Constitution which provides that "No State shall . . . pass any Bill of Attainder." See *United States* v. *Lovett,* 328 U. S. 303, 315–318, and cases cited; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 142–149 (concurring opinion).

BARENBLATT *v.* UNITED STATES.

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

No. 35. Argued November 18, 1958.—Decided June 8, 1959.

Summoned to testify before a Subcommittee of the House of Representatives Committee on Un-American Activities, which was investigating alleged Communist infiltration into the field of education, petitioner, formerly a graduate student and teaching fellow at the University of Michigan, refused to answer questions as to whether he was then or had ever been a member of the Communist Party. He disclaimed reliance upon the privilege against self-incrimination, but objected generally to the right of the Subcommittee to inquire into his "political" and "religious" beliefs or any "other personal or private affairs" or "associational activities" upon grounds set forth in a previously prepared memorandum, which was based on the First, Ninth, and Tenth Amendments, the prohibition against bills of attainder and the doctrine of separation of powers. For such refusal, he was convicted of a violation of 2 U. S. C. § 192, which makes it a misdemeanor for any person summoned as a witness by either House of Congress or a committee thereof to refuse to answer any question pertinent to the question under inquiry. He was fined and sentenced to imprisonment for six months. *Held:* Petitioner's conviction is sustained. Pp. 111–134.

1. In the light of the Committee's history and the repeated extensions of its life, as well as the successive appropriations by the House of Representatives for the conduct of its activities, its legislative authority and that of the Subcommittee to conduct the inquiry under consideration here is unassailable; and House Rule XI, 83d Congress, which defines the Committee's authority, cannot be said to be constitutionally infirm on the score of vagueness. *Watkins* v. *United States,* 354 U. S. 178, distinguished. Pp. 116–123.

(a) Rule XI has a "persuasive gloss of legislative history" which shows beyond doubt that, in pursuance of its legislative concerns in the domain of "national security," the House of Representatives has clothed the Committee with pervasive authority to investigate Communist activities in this country. Pp. 117–121.

(b) In the light of the legislative history, Rule XI cannot be construed so as to exclude the field of education from the Committee's compulsory authority. Pp. 121–123.

2. The record in this case refutes petitioner's contention that he was not adequately apprised of the pertinency of the Subcommittee's questions to the subject matter of the inquiry. *Watkins* v. *United States, supra,* distinguished. Pp. 123–125.

3. On the record in this case, the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and, therefore, the provisions of the First Amendment were not transgressed by the Subcommittee's inquiry into petitioner's past or present membership in the Communist Party. Pp. 125–134.

(a) Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown. Pp. 126–127.

(b) The investigation here involved was related to a valid legislative purpose, since Congress has wide power to legislate in the field of Communist activity in this Country and to conduct appropriate investigations in aid thereof. Pp. 127–129.

(c) Investigatory power in this domain is not to be denied Congress solely because the field of education is involved, and the record in this case does not indicate any attempt by the Committee to inquire into the content of academic lectures or discussions, but only to investigate the extent to which the Communist Party had succeeded in infiltrating into our educational institutions persons and groups committed to furthering the Party's alleged objective of violent overthrow of the Government. *Sweezy* v. *New Hampshire,* 354 U. S. 234, distinguished. Pp. 129–132.

(d) On the record in this case, it cannot be said that the true objective of the Committee and of the Congress was purely "exposure," rather than furtherance of a valid legislative purpose. Pp. 132–133.

(e) The record is barren of other factors which in themselves might lead to the conclusion that the individual interests at stake were not subordinate to those of the Government. P. 134.

102 U. S. App. D. C. 217, 252 F. 2d 129, affirmed.

Edward J. Ennis argued the cause for petitioner. With him on the brief were *Nanette Dembitz* and *David Scribner.*

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

Briefs of *amici curiae* urging reversal were filed by *Ralph F. Fuchs* and *Leo A. Huard* for the American Association of University Professors, and by *Nathan Witt* and *John M. Coe* for the National Lawyers Guild.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Once more the Court is required to resolve the conflicting constitutional claims of congressional power and of an individual's right to resist its exercise. The congressional power in question concerns the internal process of Congress in moving within its legislative domain; it involves the utilization of its committees to secure "testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." *McGrain* v. *Daugherty,* 273 U. S. 135, 160. The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate,

it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. And the Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case the relevant limitations of the Bill of Rights.

The congressional power of inquiry, its range and scope, and an individual's duty in relation to it, must be viewed in proper perspective. *McGrain* v. *Daugherty, supra;* Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 214; Black, Inside a Senate Investigation, 172 Harpers Monthly 275 (February 1936). The power and the right of resistance to it are to be judged in the concrete, not on the basis of abstractions. In the present case congressional efforts to learn the extent of a nation-wide, indeed world-wide, problem have brought one of its investigating committees into the field of education. Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls.

In the setting of this framework of constitutional history, practice and legal precedents, we turn to the particularities of this case.

We here review petitioner's conviction under 2 U. S. C. § 192 [1] for contempt of Congress, arising from his refusal to answer certain questions put to him by a Subcommittee of the House Committee on Un-American Activities during the course of an inquiry concerning alleged Communist infiltration into the field of education.

The case is before us for the second time. Petitioner's conviction was originally affirmed in 1957 by a unanimous panel of the Court of Appeals, 100 U. S. App. D. C. 13, 240 F. 2d 875. This Court granted certiorari, 354 U. S. 930, vacated the judgment of the Court of Appeals, and remanded the case to that court for further consideration in light of *Watkins* v. *United States,* 354 U. S. 178, which had reversed a contempt of Congress conviction, and which was decided after the Court of Appeals' decision here had issued. Thereafter the Court of Appeals, sitting *en banc,* reaffirmed the conviction by a divided court. 102 U. S. App. D. C. 217, 252 F. 2d 129. We again granted certiorari, 356 U. S. 929, to consider petitioner's statutory and constitutional challenges to his conviction, and particularly his claim that the judgment below cannot stand under our decision in the *Watkins* case.

Pursuant to a subpoena, and accompanied by counsel, petitioner on June 28, 1954, appeared as a witness before

[1] "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."

this congressional Subcommittee. After answering a few preliminary questions and testifying that he had been a graduate student and teaching fellow at the University of Michigan from 1947 to 1950 and an instructor in psychology at Vassar College from 1950 to shortly before his appearance before the Subcommittee, petitioner objected generally to the right of the Subcommittee to inquire into his "political" and "religious" beliefs or any "other personal and private affairs" or "associational activities," upon grounds set forth in a previously prepared memorandum which he was allowed to file with the Subcommittee.[2] Thereafter petitioner specifically declined to answer each of the following five questions:

> "Are you now a member of the Communist Party? [Count One.]
>
> "Have you ever been a member of the Communist Party? [Count Two.]
>
> "Now, you have stated that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party? [Count Three.]
>
> "Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan? [Count Four.]
>
> "Were you a member while a student of the University of Michigan Council of Arts, Sciences, and Professions?" [Count Five.]

In each instance the grounds of refusal were those set forth in the prepared statement. Petitioner expressly disclaimed reliance upon "the Fifth Amendment." [3]

---

[2] In the words of the panel of the Court of Appeals which first heard the case this memorandum "can best be described as a lengthy legal brief attacking the jurisdiction of the committee to ask appellant any questions or to conduct any inquiry at all, based on the First, Ninth and Tenth Amendments, the prohibition against bills of attainder, and the doctrine of separation of powers." 100 U. S. App. D. C., at 17, n. 4, 240 F. 2d, at 879, n. 4.

[3] We take this to mean the privilege against self-incrimination.

Following receipt of the Subcommittee's report of these occurrences the House duly certified the matter to the District of Columbia United States Attorney for contempt proceedings. An indictment in five Counts, each embracing one of petitioner's several refusals to answer, ensued. With the consent of both sides the case was tried to the court without a jury, and upon conviction under all Counts a general sentence of six months' imprisonment and a fine of $250 was imposed.

Since this sentence was less than the maximum punishment authorized by the statute for conviction under any one Count,[4] the judgment below must be upheld if the conviction upon any of the Counts is sustainable. See *Claassen* v. *United States,* 142 U. S. 140, 147; *Roviaro* v. *United States,* 353 U. S. 53; *Whitfield* v. *Ohio,* 297 U. S. 431. As we conceive the ultimate issue in this case to be whether petitioner could properly be convicted of contempt for refusing to answer questions relating to his participation in or knowledge of alleged Communist Party activities at educational institutions in this country, we find it unnecessary to consider the validity of his conviction under the Third and Fifth Counts, the only ones involving questions which on their face do not directly relate to such participation or knowledge.

Petitioner's various contentions resolve themselves into three propositions: First, the compelling of testimony by the Subcommittee was neither legislatively authorized nor constitutionally permissible because of the vagueness of Rule XI of the House of Representatives, Eighty-third Congress, the charter of authority of the parent Committee.[5] Second, petitioner was not adequately apprised of the pertinency of the Subcommittee's questions to the

[4] See Note 1, *supra.*

[5] H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 15, 18, 24. The Committee's charter appears as paragraph 17 (b) of Rule XI. References to the Rule throughout this opinion are intended to signify that paragraph.

subject matter of the inquiry. Third, the questions petitioner refused to answer infringed rights protected by the First Amendment.

SUBCOMMITTEE'S AUTHORITY TO COMPEL TESTIMONY.

At the outset it should be noted that Rule XI authorized this Subcommittee to compel testimony within the framework of the investigative authority conferred on the Un-American Activities Committee.[6] Petitioner contends that *Watkins* v. *United States, supra,* nevertheless held the grant of this power in all circumstances ineffective because of the vagueness of Rule XI in delineating the Committee jurisdiction to which its exercise was to be appurtenant. This view of *Watkins* was accepted by two of the dissenting judges below. 102 U. S. App. D. C., at 124, 252 F. 2d, at 136.

The *Watkins* case cannot properly be read as standing for such a proposition. A principal contention in *Watkins* was that the refusals to answer were justified because the requirement of 2 U. S. C. § 192 that the questions asked be "pertinent to the question under inquiry" had not been satisfied. 354 U. S., at 208–209. This Court reversed the conviction solely on that ground, holding that Watkins had not been adequately apprised of the subject matter of the Subcommittee's investigation or the per-

[6] "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 15, 18, 24. The Rule remains current in the same form. H. Res. 7, 86th Cong., 1st Sess., Cong. Rec., Jan. 7, 1959, p. 13.

tinency thereto of the questions he refused to answer. *Id.*, at 206–209, 214–215; and see the concurring opinion in that case, *id.*, at 216. In so deciding the Court drew upon Rule XI only as one of the facets in the total *mise en scène* in its search for the "question under inquiry" in that particular investigation. *Id.*, at 209–215. The Court, in other words, was not dealing with Rule XI at large, and indeed in effect stated that no such issue was before it, *id.*, at 209. That the vagueness of Rule XI was not alone determinative is also shown by the Court's further statement that aside from the Rule "the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves, might sometimes make the topic [under inquiry] clear." *Ibid.* In short, while *Watkins* was critical of Rule XI, it did not involve the broad and inflexible holding petitioner now attributes to it.[7]

Petitioner also contends, independently of *Watkins*, that the vagueness of Rule XI deprived the Subcommittee of the right to compel testimony in this investigation into Communist activity. We cannot agree with this contention, which in its furthest reach would mean that the House Un-American Activities Committee under its existing authority has no right to compel testimony in any circumstances. Granting the vagueness of the Rule, we may not read it in isolation from its long history in the House of Representatives. Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions. The Rule comes to us with a

[7] Had *Watkins* reached to the extent now claimed by petitioner a reversal of the judgment of the Court of Appeals, not a remand for further consideration, would have been required when this case first came to us.

"persuasive gloss of legislative history," *United States* v. *Witkovich,* 353 U. S. 194, 199, which shows beyond doubt that in pursuance of its legislative concerns in the domain of "national security" the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country.

The essence of that history can be briefly stated. The Un-American Activities Committee, originally known as the Dies Committee, was first established by the House in 1938.[8] The Committee was principally a consequence of concern over the activities of the German-American Bund, whose members were suspected of allegiance to Hitler Germany, and of the Communist Party, supposed by many to be under the domination of the Soviet Union.[9] From the beginning, without interruption to the present time, and with the undoubted knowledge and approval of the House, the Committee has devoted a major part of its energies to the investigation of Communist activities.[10] More particularly, in 1947 the Committee an-

---

[8] H. Res. 282, 75th Cong., 3d Sess., 83 Cong. Rec. 7568, 7586.

[9] See debate on the original authorizing resolution, 75th Cong., 3d Sess., 83 Cong. Rec. 7567, 7572–7573, 7577, 7583–7586.

[10] H. R. Rep. No. 2, 76th Cong., 1st Sess.; H. R. Rep. No. 1476, 76th Cong., 3d Sess.; H. R. Rep. No. 1, 77th Cong., 1st Sess.; H. R. Rep. No. 2277, 77th Cong., 2d Sess.; H. R. Rep. No. 2748, 77th Cong., 2d Sess.; H. R. Rep. No. 2233, 79th Cong., 2d Sess.; H. R. Rep. No. 2742, 79th Cong., 2d Sess.; Report of the Committee on Un-American Activities to the United States House of Representatives, 80th Cong., 2d Sess., December 31, 1948 (Committee Print); H. R. Rep. No. 1950, 81st Cong., 2d Sess.; H. R. Rep No. 3249, 81st Cong., 2d Sess.; H. R. Rep. No. 2431, 82d Cong., 2d Sess.; H. R. Rep. No. 2516, 82d Cong., 2d Sess.; H. R. Rep. No. 1192, 83d Cong., 2d Sess.; H. R. Rep. No. 57, 84th Cong., 1st Sess.; H. R. Rep. No. 1648, 84th Cong., 2d Sess.; H. R. Rep. No. 53, 85th Cong., 1st Sess.; H. R. Rep. No. 1360, 85th Cong., 2d Sess.

nounced a wide-range program in this field,[11] pursuant to which during the years 1948 to 1952 it conducted diverse inquiries into such alleged Communist activities as espionage; efforts to learn atom bomb secrets; infiltration into labor, farmer, veteran, professional, youth, and motion picture groups; and in addition held a number of hearings upon various legislative proposals to curb Communist activities.[12]

In the context of these unremitting pursuits, the House has steadily continued the life of the Committee at the

---

[11] The scope of the program was as follows:

"1. To expose and ferret out the Communists and Communist sympathizers in the Federal Government.

"2. To spotlight the spectacle of having outright Communists controlling and dominating some of the most vital unions in American labor.

"3. To institute a countereducational program against the subversive propaganda which has been hurled at the American people.

"4. Investigation of those groups and movements which are trying to dissipate our atomic bomb knowledge for the benefit of a foreign power.

"5. Investigation of Communist influences in Hollywood.

"6. Investigation of Communist influences in education.

"7. Organization of the research staff so as to furnish reference service to Members of Congress and to keep them currently informed on all subjects relating to subversive and un-American activities in the United States.

"8. Continued accumulation of files and records to be placed at the disposal of the investigative units of the Government and armed services." Report of the Committee on Un-American Activities to the United States House of Representatives, 80th Cong., 2d Sess., Dec. 31, 1948, 2–3 (Committee Print).

[12] Report of the Committee on Un-American Activities to the United States House of Representatives, 80th Cong., 2d Sess., December 31, 1948, 15–21 (Committee Print); H. R. Rep. No. 1950, 81st Cong., 2d Sess. 1–10; H. R. Rep. No. 3249, 81st Cong., 2d Sess. 5–6, 27–29; H. R. Rep. No. 2431, 82d Cong., 2d Sess. 6–9; H. R. Rep. No. 2516, 82d Cong., 2d Sess. 7–67, 69–73.

509615 O–59–11

commencement of each new Congress;[13] it has never narrowed the powers of the Committee, whose authority has remained throughout identical with that contained in Rule XI; and it has continuingly supported the Committee's activities with substantial appropriations.[14] Beyond this, the Committee was raised to the level of a standing committee of the House in 1945, it having been but a special committee prior to that time.[15]

In light of this long and illuminating history it can hardly be seriously argued that the investigation of Communist activities generally, and the attendant use of

---

[13] H. Res. 26, 76th Cong., 1st Sess., 84 Cong. Rec. 1098, 1128; H. Res. 321, 76th Cong., 3d Sess., 86 Cong. Rec. 532, 605; H. Res. 90, 77th Cong., 1st Sess., 87 Cong. Rec. 886, 899; H. Res. 420, 77th Cong., 2d Sess., 88 Cong. Rec. 2282, 2297; H. Res. 65, 78th Cong., 1st Sess., 89 Cong. Rec. 795, 810. See Note 15, *infra*.

[14] See, *e. g.*, H. Res. 510, 75th Cong., 3d Sess., 83 Cong. Rec. 8637, 8638 (1938); H. Res. 91, 77th Cong., 1st Sess., 87 Cong. Rec. 899 (1941); H. Res. 415, 78th Cong., 2d Sess., 90 Cong. Rec. 763 (1944); H. Res. 77, 80th Cong., 1st Sess., 93 Cong. Rec. 699, 700 (1947); H. Res. 152, 80th Cong., 1st Sess., 93 Cong. Rec. 3074 (1947); H. Res. 482, 81st Cong., 2d Sess., 96 Cong. Rec. 3941, 3944 (1950); H. Res. 119, 83d Cong., 1st Sess., 99 Cong. Rec. 1358–1359, 1361–1362 (1953); H. Res. 352, 84th Cong., 2d Sess., 102 Cong. Rec. 1585, 1718–1719 (1956); H. Res. 137, 86th Cong., 1st Sess., Cong. Rec., Jan. 29, 1959, p. 1286.

[15] H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15. In 1946 the Committee's charter was embodied in the Legislative Reorganization Act of 1946, 60 Stat. 812, 828. Since then the House has continued the life of the Committee by making the charter provisions of the Act part of the House Rules for each new Congress. H. Res. 5, 80th Cong., 1st Sess., 93 Cong. Rec. 38; H. Res. 5, 81st Cong., 1st Sess., 95 Cong. Rec. 10, 11; H. Res. 7, 82d Cong., 1st Sess., 97 Cong. Rec. 9, 17, 19; H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 15, 18, 24; H. Res. 5, 84th Cong., 1st Sess., 101 Cong. Rec. 11; H. Res. 5, 85th Cong., 1st Sess., 103 Cong. Rec. 47; H. Res. 7, 86th Cong., 1st Sess., Cong. Rec., Jan. 7, 1959, p. 13.

compulsory process, was beyond the purview of the Committee's intended authority under Rule XI.

We are urged, however, to construe Rule XI so as at least to exclude the field of education from the Committee's compulsory authority. Two of the four dissenting judges below relied entirely, the other two alternatively, on this ground. 102 U. S. App. D. C., at 224, 226, 252 F. 2d, at 136, 138. The contention is premised on the course we took in *United States* v. *Rumely,* 345 U. S. 41, where in order to avoid constitutional issues we construed narrowly the authority of the congressional committee there involved. We cannot follow that route here, for this is not a case where Rule XI has to "speak for itself, since Congress put no gloss upon it at the time of its passage," nor one where the subsequent history of the Rule has the "infirmity of *post litem motam,* self-serving declarations." See *United States* v. *Rumely, supra,* at 44–45, 48.

To the contrary, the legislative gloss on Rule XI is again compelling. Not only is there no indication that the House ever viewed the field of education as being outside the Committee's authority under Rule XI, but the legislative history affirmatively evinces House approval of this phase of the Committee's work. During the first year of its activities, 1938, the Committee heard testimony on alleged Communist activities at Brooklyn College, N. Y.[16] The following year it conducted similar hearings relating to the American Student Union and the Teachers Union.[17] The field of "Communist influences in education" was one of the items contained in the Com-

[16] Hearings before House Special Committee on Un-American Activities on H. Res. 282, 75th Cong., 3d Sess. 943–973.

[17] Hearings before House Special Committee on Un-American Activities on H. Res. 282, 76th Cong., 1st Sess. 6827–6911.

mittee's 1947 program.[18] Other investigations including education took place in 1952 and 1953.[19] And in 1953, after the Committee had instituted the investigation involved in this case, the desirability of investigating Communism in education was specifically discussed during consideration of its appropriation for that year, which after controversial debate was approved.[20]

In this framework of the Committee's history we must conclude that its legislative authority to conduct the inquiry presently under consideration is unassailable, and that independently of whatever bearing the broad scope of Rule XI may have on the issue of "pertinency" in a given investigation into Communist activities, as in *Watkins,* the Rule cannot be said to be constitutionally

---

[18] See Note 11, *supra.*

[19] Defense area hearings at Detroit in 1952 involved inquiries into Communist activities among the students and teachers in Michigan schools and universities. H. R. Rep. No. 2516, 82d Cong., 2d Sess. 10. Similar investigations were conducted by the Committee the same year in the Chicago defense area. *Id.,* at 28. In 1953 the Committee investigated alleged Communist infiltration into the public school systems in Philadelphia and New York, H. R. Rep. No. 1192, 83d Cong., 2d Sess. 2, 4.

[20] In the course of that debate a member of the Un-American Activities Committee, Representative Jackson, commented: "So far as education is concerned, if the American educators, and if the gentlemen who are objecting to the investigation of communism and Communists in education, will recognize a valid distinction, I want to point out this is not a blunderbuss approach to the problem of communism in education. We are not interested in textbooks. We are not interested in the classroom operations of the universities. We are interested instead in finding out who the Communists are and what they are doing to further the Communist conspiracy. I may say in that connection that we have sworn testimony identifying individuals presently on the campuses of this country, men who have been identified under oath as one-time members of the Communist Party. Is there any Member of this body who would say we should not investigate this situation?" 83d Cong., 1st Sess., 99 Cong. Rec. 1360.

infirm on the score of vagueness. The constitutional permissibility of that authority otherwise is a matter to be discussed later.

Pertinency Claim.

Undeniably a conviction for contempt under 2 U. S. C. § 192 cannot stand unless the questions asked are pertinent to the subject matter of the investigation. *Watkins* v. *United States, supra,* at 214–215. But the factors which led us to rest decision on this ground in *Watkins* were very different from those involved here.

In *Watkins* the petitioner had made specific objection to the Subcommittee's questions on the ground of pertinency; the question under inquiry had not been disclosed in any illuminating manner; and the questions asked the petitioner were not only amorphous on their face, but in some instances clearly foreign to the alleged subject matter of the investigation—"Communism in labor." *Id.,* at 185, 209–215.

In contrast, petitioner in the case before us raised no objections on the ground of pertinency at the time any of the questions were put to him. It is true that the memorandum which petitioner brought with him to the Subcommittee hearing contained the statement, "to ask me whether I am or have been a member of the Communist Party may have dire consequences. I might wish to . . . challenge the pertinency of the question to the investigation," and at another point quoted from this Court's opinion in *Jones* v. *Securities & Exchange Comm'n,* 298 U. S. 1, language relating to a witness' right to be informed of the pertinency of questions asked him by an administrative agency.[21] These statements cannot,

[21] "The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer." 298 U. S., at 26.

however, be accepted as the equivalent of a pertinency objection. At best they constituted but a contemplated objection to questions still unasked, and buried as they were in the context of petitioner's general challenge to the power of the Subcommittee they can hardly be considered adequate, within the meaning of what was said in *Watkins, supra,* at 214–215, to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection.

We need not, however, rest decision on petitioner's failure to object on this score, for here "pertinency" was made to appear "with undisputable clarity." *Id.,* at 214. First of all, it goes without saying that the scope of the Committee's authority was for the House, not a witness, to determine, subject to the ultimate reviewing responsibility of this Court. What we deal with here is whether petitioner was sufficiently apprised of "the topic under inquiry" thus authorized "and the connective reasoning whereby the precise questions asked relate[d] to it." *Id.,* at 215. In light of his prepared memorandum of constitutional objections there can be no doubt that this petitioner was well aware of the Subcommittee's authority and purpose to question him as it did. See p. 123, *supra.* In addition the other sources of this information which we recognized in *Watkins, supra,* at 209–215, leave no room for a "pertinency" objection on this record. The subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education.[22] Just prior to petitioner's appearance before the Subcommittee, the scope of the day's hearings had been announced as "in the main communism in education and the experiences and background in the party by Francis X. T. Crowley.

[22] Excerpts from the Chairman's statement at the opening of the investigation on February 25, 1953, as to the nature of this inquiry are set forth in Note 31, *infra.*

It will deal with activities in Michigan, Boston, and in some small degree, New York." Petitioner had heard the Subcommittee interrogate the witness Crowley along the same lines as he, petitioner, was evidently to be questioned, and had listened to Crowley's testimony identifying him as a former member of an alleged Communist student organization at the University of Michigan while they both were in attendance there.[23] Further, petitioner had stood mute in the face of the Chairman's statement as to why he had been called as a witness by the Subcommittee.[24] And, lastly, unlike Watkins, *id.*, at 182–185, petitioner refused to answer questions as to his own Communist Party affiliations, whose pertinency of course was clear beyond doubt.

Petitioner's contentions on this aspect of the case cannot be sustained.

Constitutional Contentions.

Our function, at this point, is purely one of constitutional adjudication in the particular case and upon the particular record before us, not to pass judgment upon the general wisdom or efficacy of the activities of this Committee in a vexing and complicated field.

---

[23] Crowley immediately preceded petitioner on the witness stand. It appears to be undisputed that petitioner was in the hearing room at the time this statement was made and during Crowley's testimony. In his own examination petitioner acknowledged knowing Crowley.

[24] The Chairman stated at the hearing, just before petitioner was excused,

"that the evidence or information contained in the files of this committee, some of them in the nature of evidence, shows clearly that the witness has information about Communist activities in the United States of America, particularly while he attended the University of Michigan.

"That information which the witness has would be very valuable to this committee and its work."

The precise constitutional issue confronting us is whether the Subcommittee's inquiry into petitioner's past or present membership in the Communist Party [25] transgressed the provisions of the First Amendment,[26] which of course reach and limit congressional investigations. *Watkins, supra,* at 197.

The Court's past cases establish sure guides to decision. Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown. These principles were recognized in the *Watkins* case, where, in speaking of the First Amendment in relation to congressional inquiries, we said (at p. 198): "It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred. . . . The critical element is the existence of,

---

[25] Because the sustaining of petitioner's conviction on any one of the five Counts of the indictment suffices for affirmance of the judgment under review, we state the constitutional issue only in terms of petitioner's refusals to answer the questions involved in Counts One and Two in order to sharpen discussion. However, we consider his refusal to answer the question embraced in Count Four would require the same constitutional result. As to Counts Three and Five, see p. 115, *supra.*

[26] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness." See also *American Communications Assn.* v. *Douds,* 339 U. S. 382, 399–400; *United States* v. *Rumely, supra,* at 43–44. More recently in *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449, 463–466, we applied the same principles in judging state action claimed to infringe rights of association assured by the Due Process Clause of the Fourteenth Amendment, and stated that the " 'subordinating interest of the State must be compelling' " in order to overcome the individual constitutional rights at stake. See *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255, 265 (concurring opinion). In light of these principles we now consider petitioner's First Amendment claims.

The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose. See *Watkins* v. *United States, supra,* at 198.

That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here.[27] In the last analysis this power rests on

[27] See, Legislative Recommendations by House Committee on Un-American Activities, Subsequent Action Taken by Congress or Executive Agencies (A Research Study by Legislative Reference Service of the Library of Congress), Committee on Un-American Activities, House of Representatives, 85th Cong., 2d Sess., June 1958.

the right of self-preservation, "the ultimate value of any society," *Dennis* v. *United States,* 341 U. S. 494, 509. Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.[28]

On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. See, *e. g., Carlson* v. *Landon,* 342 U. S. 524; *Galvan* v. *Press,* 347 U. S. 522. On the same premises this Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See *Gerende* v. *Board of Supervisors,* 341 U. S. 56; *Garner* v. *Board of Public Works,* 341 U. S. 716. See also *Beilan* v. *Board of Public Education,* 357 U. S. 399; *Lerner* v. *Casey,* 357 U. S. 468; *Adler* v. *Board of Education,* 342 U. S. 485. Similarly, in other areas, this Court has recognized the close nexus between the Communist Party and violent overthrow of government. See *Dennis* v. *United States, supra; American Communications Assn.* v. *Douds, supra.* To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary polit-

---

[28] See, Subversive Activities Control Act of 1950, Title I of the Internal Security Act of 1950, § 2, 64 Stat. 987–989. See also *Carlson* v. *Landon,* 342 U. S. 524, 535, n. 21.

ical party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, affairs to which Judge Learned Hand gave vivid expression in his opinion in *United States* v. *Dennis,* 183 F. 2d 201, 213, and to the vast burdens which these conditions have entailed for the entire Nation.

We think that investigatory power in this domain is not to be denied Congress solely because the field of education is involved. Nothing in the prevailing opinions in *Sweezy* v. *New Hampshire, supra,* stands for a contrary view. The vice existing there was that the questioning of Sweezy, who had not been shown ever to have been connected with the Communist Party, as to the contents of a lecture he had given at the University of New Hampshire, and as to his connections with the Progressive Party, then on the ballot as a normal political party in some 26 States, was too far removed from the premises on which the constitutionality of the State's investigation had to depend to withstand attack under the Fourteenth Amendment. See the concurring opinion in *Sweezy, supra,* at 261, 265, 266, n. 3. This is a very different thing from inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow. See Note 20, *supra.* Indeed we do not understand petitioner here to suggest that Congress in no circumstances may inquire into Communist activity in the field of education.[29]

---

[29] The *amicus* brief of the American Association of University Professors states at page 24: "The claims of academic freedom cannot be asserted unqualifiedly. The social interest it embodies is but one of a larger set, within which the interest in national self-preservation and in enlightened and well-informed law-making also prominently appear. When two major interests collide, as they do in the present

Rather, his position is in effect that this particular investigation was aimed not at the revolutionary aspects but at the theoretical classroom discussion of communism.

In our opinion this position rests on a too constricted view of the nature of the investigatory process, and is not supported by a fair assessment of the record before us. An investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist Party, see *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 167 F. 2d 241, and to inquire into the various manifestations of the Party's tenets. The strict requirements of a prosecution under the Smith Act,[30] see *Dennis* v. *United States, supra,* and *Yates* v. *United States,* 354 U. S. 298, are not the measure of the permissible scope of a congressional investigation into "overthrow," for of necessity the investigatory process must proceed step by step. Nor can it fairly be concluded that this investigation was directed at controlling what is being taught at our universities rather than at overthrow. The statement of the Subcommittee Chairman at the opening of the investigation evinces no such intention,[31] and so far as this record re-

---

case, neither the one nor the other can claim *a priori* supremacy. But it is in the nature of our system of laws that there must be demonstrable justification for an action by the Government which endangers or denies a freedom guaranteed by the Constitution."

[30] 54 Stat. 670, 18 U. S. C. § 2385.

[31] The following are excerpts from that statement:

". . . In opening this hearing, it is well to make clear to you and others just what the nature of this investigation is.

"From time to time, the committee has investigated Communists and Communist activities within the entertainment, newspaper, and labor fields, and also within the professions and the Government. In no instance has the work of the committee taken on the character of an investigation of entertainment organizations, newspapers, labor unions, the professions, or the Government, as such, and it is not

veals nothing thereafter transpired which would justify our holding that the thrust of the investigation later changed. The record discloses considerable testimony concerning the foreign domination and revolutionary

---

now the purpose of this committee to investigate education or educational institutions, as such. . . .

. . . . . .

"The purpose of the committee in investigating Communists and Communist activities within the field of education is no greater and no less than its purpose in investigating Communists and Communist activities within the field of labor or any other field.

"The committee is charged by the Congress with the responsibility of investigating the extent, character, and objects of un-American propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"It has been fully established in testimony before congressional committees and before the courts of our land that the Communist Party of the United States is part of an international conspiracy which is being used as a tool or weapon by a foreign power to promote its own foreign policy and which has for its object the overthrow of the governments of all non-Communist countries, resorting to the use of force and violence, if necessary. . . . Communism and Communist activities cannot be investigated in a vacuum. The investigation must, of necessity, relate to individuals and, therefore, this morning the committee is calling you [one, Davis] as a person known by this committee to have been at one time a member of the Communist Party.

. . . . . .

"The committee is equally concerned with the opportunities that the Communist Party has to wield its influence upon members of the teaching profession and students through Communists who are members of the teaching profession. Therefore, the objective of this investigation is to ascertain the character, extent and objects of Communist Party activities when such activities are carried on by members of the teaching profession who are subject to the directives and discipline of the Communist Party." The full statement is printed as the Appendix to the original Court of Appeals opinion, 100 U. S. App. D. C. 22–24, 240 F. 2d 884–886.

purposes and efforts of the Communist Party.[32] That there was also testimony on the abstract philosophical level does not detract from the dominant theme of this investigation—Communist infiltration furthering the alleged ultimate purpose of overthrow. And certainly the conclusion would not be justified that the questioning of petitioner would have exceeded permissible bounds had he not shut off the Subcommittee at the threshold.

Nor can we accept the further contention that this investigation should not be deemed to have been in furtherance of a legislative purpose because the true objective of the Committee and of the Congress was purely "exposure." So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power. *Arizona* v. *California,* 283 U. S. 423, 455, and cases there cited. "It is, of course, true," as was said in *McCray* v. *United States,* 195 U. S. 27, 55, "that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The

---

[32] Thus, early in the investigation one of the witnesses, Hicks, testified in response to a question as to "the general purpose of the Communist Party in endeavoring to organize a cell or unit among the teaching profession" at the various universities that contrary to his original view:

". . . it is very obvious to me that the popular front [Communist protection of democracy against Fascism] was simply a dodge that happened in those particular years to serve the foreign policy of the Soviet Union; so it seems to me that the party, in organizing branches in the colleges, had two purposes. One was to carry out the existing line which they wanted to make a show of advancing, and then, of course, the other was to try to have a corps of disciplined revolutionaries whom they could use for other purposes when the time came."

remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power." These principles of course apply as well to committee investigations into the need for legislation as to the enactments which such investigations may produce. Cf. *Tenney* v. *Brandhove,* 341 U. S. 367, 377–378. Thus, in stating in the *Watkins* case, p. 200, that "there is no congressional power to expose for the sake of exposure," we at the same time declined to inquire into the "motives of committee members," and recognized that their "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." Having scrutinized this record we cannot say that the unanimous panel of the Court of Appeals which first considered this case was wrong in concluding that "the primary purposes of the inquiry were in aid of legislative processes." 240 F. 2d, at 881.[33] Certainly this is not a case like *Kilbourn* v. *Thompson,* 103 U. S. 168, 192, where "the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial." See *McGrain* v. *Daugherty,* 273 U. S. 135, 171. The constitutional legislative power of Congress in this instance is beyond question.

---

[33] We agree with the Court of Appeals that the one sentence appearing in the Committee's report for 1954, upon which petitioner largely predicates his exposure argument, bears little significance when read in the context of the full report and in light of the entire record. This sentence reads: "The 1954 hearings were set up by the committee in order to demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success."

Finally, the record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state. There is no indication in this record that the Subcommittee was attempting to pillory witnesses. Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee.[34] And the relevancy of the questions put to him by the Subcommittee is not open to doubt.

We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended.

We hold that petitioner's conviction for contempt of Congress discloses no infirmity, and that the judgment of the Court of Appeals must be

Affirmed.

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

On May 28, 1954, petitioner Lloyd Barenblatt, then 31 years old, and a teacher of psychology at Vassar College, was summoned to appear before a Subcommittee of the House Committee on Un-American Activities. After service of the summons, but before Barenblatt appeared on June 28, his four-year contract with Vassar expired and was not renewed. He, therefore, came to the Committee as a private citizen without a job. Earlier that day, the Committee's interest in Barenblatt had been aroused by the testimony of an ex-Communist named Crowley. When Crowley had first appeared before the Un-American Activities Committee he had steadfastly

[34] See p. 124 and Note 24, *supra*.

refused to admit or deny Communist affiliations or to identify others as Communists. After the House reported this refusal to the United States Attorney for prosecution, Crowley "voluntarily" returned and asked to testify. He was sworn in and interrogated, but not before he was made aware by various Committee members of Committee policy to "make an appropriate recommendation" to protect any witness who "fully cooperates with the committee." He then talked at length, identifying by name, address and occupation, whenever possible, people he claimed had been Communists. One of these was Barenblatt, who, according to Crowley, had been a Communist during 1947–1950 while a graduate student and teaching fellow at the University of Michigan. Though Crowley testified in great detail about the small group of Communists who had been at Michigan at that time and though the Committee was very satisfied with his testimony, it sought repetition of much of the information from Barenblatt. Barenblatt, however, refused to answer their questions and filed a long statement outlining his constitutional objections. He asserted that the Committee was violating the Constitution by abridging freedom of speech, thought, press, and association, and by conducting legislative trials of known or suspected Communists which trespassed on the exclusive power of the judiciary. He argued that however he answered questions relating to membership in the Communist Party his position in society and his ability to earn a living would be seriously jeopardized; that he would, in effect, be subjected to a bill of attainder despite the twice-expressed constitutional mandate against such legislative punishments.[1] This would occur, he pointed out, even

[1] Bills of attainder are among the few measures explicitly forbidden to both State and Federal Governments by the body of the Constitution itself. U. S. Const., Art. I, § 9, cl. 3, states "No Bill of

if he did no more than invoke the protection of clearly applicable provisions of the Bill of Rights as a reason for refusing to answer.

He repeated these, and other objections, in the District Court as a reason for dismissing an indictment for contempt of Congress. His position, however, was rejected at the trial and in the Court of Appeals for the District of Columbia Circuit over the strong dissents of Chief Judge Edgerton and Judges Bazelon, Fahy and Washington. The Court today affirms, and thereby sanctions the use of the contempt power to enforce questioning by congressional committees in the realm of speech and association. I cannot agree with this disposition of the case for I believe that the resolution establishing the House Un-American Activities Committee and the questions that Committee asked Barenblatt violate the Constitution in several respects. (1) Rule XI creating the Committee authorizes such a sweeping, unlimited, all-inclusive and undiscriminating compulsory examination of witnesses in the field of speech, press, petition and assembly that it violates the procedural requirements of the Due Process Clause of the Fifth Amendment. (2) Compelling an answer to the questions asked Barenblatt abridges freedom of speech and association in contravention of the First Amendment. (3) The Committee proceedings were part of a legislative program to stigmatize and punish by public identification and exposure all witnesses considered by the Committee to be guilty of Communist affiliations, as well as all witnesses who refused to answer Committee questions on constitutional grounds; the Committee was thus improperly seeking to try, convict, and punish suspects, a task which the Constitution expressly denies to Congress and grants exclu-

---

Attainder or ex post facto Law shall be passed." U. S. Const., Art. I, § 10, cl. 1, reads in part "No State shall . . . pass any Bill of Attainder [or] ex post facto Law . . . ."

sively to the courts, to be exercised by them only after indictment and in full compliance with all the safeguards provided by the Bill of Rights.

I.

It goes without saying that a law to be valid must be clear enough to make its commands understandable. For obvious reasons, the standard of certainty required in criminal statutes is more exacting than in noncriminal statutes.[2] This is simply because it would be unthinkable to convict a man for violating a law he could not understand. This Court has recognized that the stricter standard is as much required in criminal contempt cases as in all other criminal cases,[3] and has emphasized that the "vice of vagueness" is especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved.[4] In this area the statement that a statute is void if it "attempts to cover so much that it effectively covers nothing," see *Musser* v. *Utah*, 333 U. S. 95, 97, takes on double significance. For a statute broad enough to support infringement of speech, writings, thoughts and public assemblies, against the unequivocal command of the First Amendment necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others.[5] Vagueness becomes

---

[2] *E. g., Lanzetta* v. *New Jersey*, 306 U. S. 451; *Winters* v. *New York*, 333 U. S. 507, 515; *Jordan* v. *De George*, 341 U. S. 223, 230–231.

[3] *E. g., Watkins* v. *United States*, 354 U. S. 178, 207–208; *Flaxer* v. *United States*, 358 U. S. 147; *Scull* v. *Virginia*, 359 U. S. 344.

[4] See, *e. g., Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, 333 U. S. 507; *Watkins* v. *United States*, 354 U. S. 178; *Scull* v. *Virginia*, 359 U. S. 344.

[5] *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98. Cf. *Herndon* v. *Lowry*, 301 U. S. 242.

even more intolerable in this area if one accepts, as the Court today does, a balancing test to decide if First Amendment rights shall be protected. It is difficult at best to make a man guess—at the penalty of imprisonment—whether a court will consider the State's need for certain information superior to society's interest in unfettered freedom. It is unconscionable to make him choose between the right to keep silent and the need to speak when the statute supposedly establishing the "state's interest" is too vague to give him guidance. Cf. *Scull* v. *Virginia,* 359 U. S. 344.

Measured by the foregoing standards, Rule XI cannot support any conviction for refusal to testify. In substance it authorizes the Committee to compel witnesses to give evidence about all "un-American propaganda," whether instigated in this country or abroad.[6] The word "propaganda" seems to mean anything that people say, write, think or associate together about. The term "un-American" is equally vague. As was said in *Watkins* v. *United States,* 354 U. S. 178, 202, "Who can define [its] meaning . . . ? What is that single, solitary 'principle of the form of government as guaranteed by our Constitution'?" I think it clear that the boundaries of the Committee are, to say the least, "nebulous." Indeed, "It would be difficult to imagine a less explicit authorizing resolution." *Ibid.*

---

[6] Rule XI in relevant part reads, "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 15, 18, 24. See also H. Res. 7, 86th Cong., 1st Sess., Cong. Rec., Jan. 7, 1959, p. 13.

The Court—while not denying the vagueness of Rule XI—nevertheless defends its application here because the questions asked concerned communism, a subject of investigation which had been reported to the House by the Committee on numerous occasions. If the issue were merely whether Congress intended to allow an investigation of communism, or even of communism in education, it may well be that we could hold the data cited by the Court sufficient to support a finding of intent. But that is expressly not the issue. On the Court's own test, the issue is whether Barenblatt can know with sufficient certainty, at the time of his interrogation, that there is so compelling a need for his replies that infringement of his rights of free association is justified. The record does not disclose where Barenblatt can find what that need is. There is certainly no clear congressional statement of it in Rule XI. Perhaps if Barenblatt had had time to read all the reports of the Committee to the House, and in addition had examined the appropriations made to the Committee he, like the Court, could have discerned an intent by Congress to allow an investigation of communism in education. Even so he would be hard put to decide what the need for this investigation is since Congress expressed it neither when it enacted Rule XI nor when it acquiesced in the Committee's assertions of power. Yet it is knowledge of this need—what is wanted from him and why it is wanted—that a witness must have if he is to be in a position to comply with the Court's rule that he balance individual rights against the requirements of the State. I cannot see how that knowledge can exist under Rule XI.

But even if Barenblatt could evaluate the importance to the Government of the information sought, Rule XI would still be too broad to support his conviction. For we are dealing here with governmental procedures which the Court itself admits reach to the very fringes of con-

gressional power. In such cases more is required of legislatures than a vague delegation to be filled in later by mute acquiescence.[7] If Congress wants ideas investigated, if it even wants them investigated in the field of education, it must be prepared to say so expressly and unequivocally. And it is not enough that a court through exhaustive research can establish, even conclusively, that Congress wished to allow the investigation. I can find no such unequivocal statement here.

For all these reasons, I would hold that Rule XI is too broad to be meaningful and cannot support petitioner's conviction.[8]

II.

The First Amendment says in no equivocal language that Congress shall pass no law abridging freedom of speech, press, assembly or petition.[9] The activities of

---

[7] See, *e. g., Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *id.,* at 551 (concurring opinion); *Berra* v. *United States,* 351 U. S. 131, 135 (dissenting opinion); *Watkins* v. *United States,* 354 U. S. 178, 203–205; *Sweezy* v. *New Hampshire,* 354 U. S. 234. Cf. *United States* v. *Rumely,* 345 U. S. 41; *Kent* v. *Dulles,* 357 U. S. 116. These cases show that when this Court considered that the legislative measures involved were of doubtful constitutionality substantively, it required explicit delegations of power.

[8] It is of course no answer to Barenblatt's claim that Rule XI is too vague, to say that if it had been too vague it would have been so held in *Watkins* v. *United States,* 354 U. S. 178. It would be a strange rule, indeed, which would imply the invalidity of a broad ground of decision from the fact that this Court decided an earlier case on a narrower basis.

[9] The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." There can be no doubt that the same Amendment protects the right to keep silent. See *West*

this Committee, authorized by Congress, do precisely that, through exposure, obloquy and public scorn. See *Watkins* v. *United States,* 354 U. S. 178, 197–198. The Court does not really deny this fact but relies on a combination of three reasons for permitting the infringement: (A) The notion that despite the First Amendment's command Congress can abridge speech and association if this Court decides that the governmental interest in abridging speech is greater than an individual's interest in exercising that freedom, (B) the Government's right to "preserve itself," (C) the fact that the Committee is only after Communists or suspected Communists in this investigation.

(A) I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process. There are, of course, cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct. With these cases I agree. Typical of them are *Cantwell* v. *Connecticut,* 310 U. S. 296, and *Schneider* v. *Irvington,* 308 U. S. 147. Both of these involved the right of a city to control its streets. In *Cantwell,* a man had been convicted of breach of the peace for playing a phonograph on the street. He defended on the ground that he was disseminating religious views and could not, therefore, be stopped. We upheld his defense, but in so doing we pointed out that the city did have substantial power over conduct on the streets even where this power might to some extent affect speech. A State, we said, might "by general and non-discriminatory legislation

---

Virginia Board of Education v. *Barnette,* 319 U. S. 624; *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460–466; *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255 (concurring opinion); *Watkins* v. *United States,* 354 U. S. 178; *Scull* v. *Virginia,* 359 U. S. 344. Cf. *United States* v. *Rumely,* 345 U. S. 41.

regulate the times, the places, and the manner of soliciting upon its streets and holding meetings thereon." 310 U. S., at 304. But even such laws governing conduct, we emphasized, must be tested, though only by a balancing process, if they indirectly affect ideas. On one side of the balance, we pointed out, is the interest of the United States in seeing that its fundamental law protecting freedom of communication is not abridged; on the other the obvious interest of the State to regulate conduct within its boundaries. In *Cantwell* we held that the need to control the streets could not justify the restriction made on speech. We stressed the fact that where a man had a right to be on a street, "he had a right peacefully to impart his views to others." 310 U. S., at 308. Similar views were expressed in *Schneider,* which concerned ordinances prohibiting the distribution of handbills to prevent littering. We forbade application of such ordinances when they affected literature designed to spread ideas. There were other ways, we said, to protect the city from littering which would not sacrifice the right of the people to be informed. In so holding, we, of course, found it necessary to "weigh the circumstances." 308 U. S., at 161. But we did not in *Schneider,* any more than in *Cantwell,* even remotely suggest that a law directly aimed at curtailing speech and political persuasion could be saved through a balancing process. Neither these cases, nor any others, can be read as allowing legislative bodies to pass laws abridging freedom of speech, press and association merely because of hostility to views peacefully expressed in a place where the speaker had a right to be. Rule XI, on its face and as here applied, since it attempts inquiry into beliefs, not action—ideas and associations, not conduct—does just that.[10]

---

[10] I do not understand the Court's opinion in *Watkins* v. *United States,* 354 U. S. 178, 198, to approve the type of balancing process adopted in the Court's opinion here. We did discuss in that case

To apply the Court's balancing test under such circumstances is to read the First Amendment to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised." This is closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is *reasonable* to do so. Not only does this violate the genius of our *written* Constitution, but it runs expressly counter to the injunction to Court and Congress made by Madison when he introduced the Bill of Rights. "If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against *every* assumption of power in the Legislative or Executive; they will be naturally led to resist *every* encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." [11] Unless we return to this view of our judicial function, unless we once again accept the notion that the Bill of Rights means what it

---

"the weight to be ascribed to . . . the interest of the Congress in demanding disclosures from an unwilling witness." As I read, and still read, the Court's discussion of this problem in *Watkins* it was referring to the problems raised by *Kilbourn* v. *Thompson,* 103 U. S. 168, which held that legislative committees could not make roving inquiries into the private business affairs of witnesses. The Court, in *Kilbourn,* held that the courts must be careful to insure that, on balance, Congress did not unjustifiably encroach on an individual's private business affairs. Needless to say, an individual's right to silence in such matters is quite a different thing from the public's interest in freedom of speech and the test applicable to one has little, if anything, to do with the test applicable to the other.

[11] 1 Annals of Cong. 439 (1789). (Italics supplied.)

says and that this Court must enforce that meaning, I am of the opinion that our great charter of liberty will be more honored in the breach than in the observance.

But even assuming what I cannot assume, that some balancing is proper in this case, I feel that the Court after stating the test ignores it completely. At most it balances the right of the Government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations. Such a balance, however, mistakes the factors to be weighed. In the first place, it completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves. It is this right, the right to err politically, which keeps us strong as a Nation. For no number of laws against communism can have as much effect as the personal conviction which comes from having heard its arguments and rejected them, or from having once accepted its tenets and later recognized their worthlessness. Instead, the obloquy which results from investigations such as this not only stifles "mistakes" but prevents all but the most courageous from hazarding any views which might at some later time become disfavored. This result, whose importance cannot be overestimated, is doubly crucial when it affects the universities, on which we must largely rely for the experimentation and development of new ideas essential to our country's welfare. It is these interests of society, rather than Barenblatt's own right to silence, which I think the Court should put on the balance against the demands of the Government, if any balancing process is to be tolerated. Instead they are not mentioned, while on the other side the demands of the Government are vastly overstated and called "self preservation." It is admitted that this Committee can only seek

information for the purpose of suggesting laws, and that Congress' power to make laws in the realm of speech and association is quite limited, even on the Court's test. Its interest in making such laws in the field of education, primarily a state function, is clearly narrower still. Yet the Court styles this attenuated interest self-preservation and allows it to overcome the need our country has to let us all think, speak, and associate politically as we like and without fear of reprisal. Such a result reduces "balancing" to a mere play on words and is completely inconsistent with the rules this Court has previously given for applying a "balancing test," where it is proper: "[T]he courts should be *astute* to examine the *effect* of the challenged legislation. Mere *legislative preferences or beliefs* . . . may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *Irvington,* 308 U. S. 147, 161. (Italics supplied.)

(B) Moreover, I cannot agree with the Court's notion that First Amendment freedoms must be abridged in order to "preserve" our country. That notion rests on the unarticulated premise that this Nation's security hangs upon its power to punish people because of what they think, speak or write about, or because of those with whom they associate for political purposes. The Government, in its brief, virtually admits this position when it speaks of the "communication of unlawful ideas." I challenge this premise, and deny that ideas can be proscribed under our Constitution. I agree that despotic governments cannot exist without stifling the voice of opposition to their oppressive practices. The First Amendment means to me, however, that the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire,

that even its most fundamental postulates are bad and should be changed; "Therein lies the security of the Republic, the very foundation of constitutional government." [12] On that premise this land was created, and on that premise it has grown to greatness. Our Constitution assumes that the common sense of the people and their attachment to our country will enable them, after free discussion, to withstand ideas that are wrong. To say that our patriotism must be protected against false ideas by means other than these is, I think, to make a baseless charge. Unless we can rely on these qualities—if, in short, we begin to punish speech—we cannot honestly proclaim ourselves to be a free Nation and we have lost what the Founders of this land risked their lives and their sacred honor to defend.

(C) The Court implies, however, that the ordinary rules and requirements of the Constitution do not apply because the Committee is merely after Communists and they do not constitute a political party but only a criminal gang. "[T]he long and widely accepted view," the Court says, is "that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence." [13] This justifies the

[12] "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *De Jonge* v. *Oregon*, 299 U. S. 353, 365.

[13] Cf. statement of Sir Richard Nagle presenting a bill of attainder against between two and three thousand persons for political offenses, " 'Many of the persons here attainted,' said he, 'have been proved traitors by such evidence as satisfies us. As to the rest we have followed common fame.' " Cited in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 142, 148 (concurring opinion).

investigation undertaken. By accepting this charge and allowing it to support treatment of the Communist Party and its members which would violate the Constitution if applied to other groups, the Court, in effect, declares that Party outlawed. It has been only a few years since there was a practically unanimous feeling throughout the country and in our courts that this could not be done in our free land. Of course it has always been recognized that members of the Party who, either individually or in combination, commit acts in violation of valid laws can be prosecuted. But the Party as a whole and innocent members of it could not be attainted merely because it had some illegal aims and because some of its members were lawbreakers. Thus in *De Jonge* v. *Oregon,* 299 U. S. 353, 357 (1937), on stipulated facts that the Communist Party advocated criminal syndicalism—"crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution"—a unanimous Court, speaking through Chief Justice Hughes, held that a Communist addressing a Communist rally could be found guilty of no offense so long as no violence or crime was urged at the meeting. The Court absolutely refused to concede that either De Jonge or the Communist Party forfeited the protections of the First and Fourteenth Amendments because one of the Party's purposes was to effect a violent change of government. See also *Herndon* v. *Lowry,* 301 U. S. 242.

Later, in 1948, when various bills were proposed in the House and Senate to handicap or outlaw the Communist Party, leaders of the Bar who had been asked to give their views rose up to contest the constitutionality of the measures. The late Charles Evans Hughes, Jr., questioned the validity under both the First and Fifth Amendments of one of these bills, which in effect outlawed the Party. The late John W. Davis attacked it

as lacking an ascertainable standard of guilt under many of this Court's cases.[14] And the Attorney General of the United States not only indicated that such a measure would be unconstitutional but declared it to be unwise even if valid. He buttressed his position by citing a statement by J. Edgar Hoover, Director of the Federal Bureau of Investigation, and the declaration of this Court in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642, that:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [15]

Even the proponent of the bill disclaimed any aim to outlaw the Communist Party and pointed out the "disadvantages" of such a move by stating that "the Communist Party was illegal and outlawed in Russia when it took over control of the Soviet Union." [16] Again, when the

---

[14] See Hearings, Senate Committee on the Judiciary on H. R. 5852, 80th Cong., 2d Sess. 415–420, 420–422.

[15] *Id.*, at 422–425. See also Hearings, Subcommittee on Legislation of the House Committee on Un-American Activities on H. R. 4422, H. R. 4581, 80th Cong., 2d Sess. 16–37.

[16] Hearings, Subcommittee on Legislation of the Committee on Un-American Activities on H. R. 4422, H. R. 4581, 80th Cong., 2d Sess. 13. This statement was relied on by the Honorable Thomas E. Dewey, then a candidate for the presidency of the United States, in a speech given in Portland, Oregon, in May, 1948. Mr. Dewey went on to say, in opposing outlawry of the Communist Party:

"I am against it because it is a violation of the Constitution of the United States and of the Bill of Rights, and clearly so. I am against it because it is immoral and nothing but totalitarianism itself. I am against it because I know from a great many years' experience in the enforcement of the law that the proposal wouldn't

Attorney General testified on a proposal to bar the Communist Party from the ballot he said, "an organized group, whether you call it political or not, could hardly be barred from the ballot without jeopardizing the constitutional guarantees of all other political groups and parties." [17]

All these statements indicate quite clearly that no matter how often or how quickly we repeat the claim that the Communist Party is not a political party, we cannot outlaw it, as a group, without endangering the liberty of all of us. The reason is not hard to find, for mixed among those aims of communism which are illegal are perfectly normal political and social goals. And muddled with its revolutionary tenets is a drive to achieve power through the ballot, if it can be done. These things necessarily make it a political party whatever other, illegal, aims it may have. Cf. *Gerende* v. *Board of Supervisors,* 341 U. S. 56. Significantly until recently the Communist Party was on the ballot in many States. When that was so, many Communists undoubtedly hoped to accomplish

---

work, and instead it would rapidly advance the cause of communism in the United States and all over the world.

. . . . . .

"There is an American way to do this job, a perfectly simple American way . . . outlawing every conceivable *act* of subversion against the United States. . . .

. . . . . .

"Now, times are too grave to try any expedients and fail. This expedient has failed, this expedient of outlawing has failed in Russia. It failed in Europe, it failed in Italy, it failed in Canada. . . .

"Let us not make such a terrific blunder in the United States . . . . Let us go forward as Free Americans. Let us have the courage to be free." XIV Vital Speeches of the Day, 486–487. (Italics supplied.)

[17] Hearings, Subcommittee on Legislation of the Committee on Un-American Activities on H. R. 4422, H. R. 4581, 80th Cong., 2d Sess. 20. Compare statement of John Lilburne, "what is done unto any one, may be done unto every one." Note 39, *infra.*

its lawful goals through support of Communist candidates. Even now some such may still remain.[18] To attribute to them, and to those who have left the Party, the taint of the group is to ignore both our traditions that guilt like belief is "personal and not a matter of mere association" and the obvious fact that "men adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Schneiderman* v. *United States,* 320 U. S. 118, 136. See also *Dennis* v. *United States,* 341 U. S. 494, 579, 581 (dissenting opinions).

The fact is that once we allow any group which has some political aims or ideas to be driven from the ballot and from the battle for men's minds because some of its members are bad and some of its tenets are illegal, no group is safe. Today we deal with Communists or suspected Communists. In 1920, instead, the New York Assembly suspended duly elected legislators on the ground that, being Socialists, they were disloyal to the country's principles.[19] In the 1830's the Masons were hunted as outlaws and subversives, and abolitionists were considered revolutionaries of the most dangerous kind in both North and South.[20] Earlier still, at the time of the uni-

---

[18] S. Doc. No. 97, 85th Cong., 2d Sess. 149, lists the States with laws relating to the Communist Party and the ballot. See also, Fund For The Republic, Digest of the Public Record of Communism in the United States, 324–343. For a discussion of state laws requiring a minimum percentage of the votes cast to remain on the ballot, see Note, 57 Yale L. J. 1276.

[19] See O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 593. Significantly the action of the New York Assembly was strongly condemned by Charles Evans Hughes, then a former Associate Justice of this Court, and later its Chief Justice.

[20] See generally, McCarthy, The Antimasonic Party: A Study of Political Antimasonry in the United States, 1827–1840. H. R. Doc. No. 461, 57th Cong., 2d Sess. 365. Nye, William Lloyd Garrison, 88–105; Korngold, Two Friends of Man, 82–104. Cf. St. George

versally unlamented alien and sedition laws, Thomas Jefferson's party was attacked and its members were derisively called "Jacobins." Fisher Ames described the party as a "French faction" guilty of "subversion" and "officered, regimented and formed to subordination." Its members, he claimed, intended to "take arms against the laws as soon as they dare." [21] History should teach us then, that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out.[22] It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time. Whatever the States were left free to do, the First Amendment sought to leave Congress devoid of any kind or quality of power to direct any type of national laws against the freedom of individuals to think what they please, advocate whatever policy they choose, and join with others to bring about the social, religious, political and governmental changes which seem best to them.[23] Today's holding, in my judgment, marks

---

Tucker, Appendix, 1 Blackstone (Tucker ed. 1803) 315, discussing English laws "for suppressing assemblies of free-masons" and pointing out that similar laws cannot be enacted under our Constitution.

[21] Ames, Laocoon, printed in Works of Fisher Ames (1809 ed.), 94, 97, 101, 106. See also *American Communications Assn.* v. *Douds*, 339 U. S. 382, 445 (dissenting opinion).

[22] Cf. Mill, On Liberty (1885 ed.), 30 (criticizing laws restricting the right to advocate tyrannicide).

[23] Cf. St. George Tucker, Appendix, 1 Blackstone Commentaries (Tucker ed. 1803) 299. "[T]he judicial courts of the respective states are open to all persons alike, for the redress of injuries of this nature

another major step in the progressively increasing retreat from the safeguards of the First Amendment.

It is, sadly, no answer to say that this Court will not allow the trend to overwhelm us; that today's holding will be strictly confined to "Communists," as the Court's language implies. This decision can no more be contained than could the holding in *American Communications Assn.* v. *Douds,* 339 U. S. 382. In that case the Court sustained as an exercise of the commerce power an Act which required labor union officials to take an oath that they were not members of the Communist Party. The Court rejected the idea that the *Douds* holding meant that the Party and all its members could be attainted because of their Communist beliefs. It went to great lengths to explain that the Act held valid "touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint." "[W]hile this Court sits," the Court proclaimed, no wholesale proscription of Communists or their Party can occur. 339 U. S., at 404, 410. I dissented and said:

> "Under such circumstances, restrictions imposed on proscribed groups are seldom static, even though the rate of expansion may not move in geometric progression from discrimination to arm-band to ghetto and worse. Thus I cannot regard the Court's holding as one which merely bars Communists from holding union office and nothing more. For its reasoning would apply just as forcibly to statutes barring Communists and their respective sympathizers from election to political office, mere mem-

---

[libel]; . . . . But the genius of our government will not permit the federal legislature to interfere with the subject; and the federal courts are, I presume, equally restrained by the principles of the constitution, and the amendments which have since been adopted."

bership in unions, and in fact from getting or holding any job whereby they could earn a living." 339 U. S., at 449.

My prediction was all too accurate. Today, Communists or suspected Communists have been denied an opportunity to work as government employees, lawyers, doctors, teachers, pharmacists, veterinarians, subway conductors, industrial workers and in just about any other job. See *Speiser* v. *Randall,* 357 U. S. 513, 531 (concurring opinion). Cf. *Barsky* v. *Board of Regents,* 347 U. S. 442, 456, 467, 472 (dissenting opinions). In today's holding they are singled out and, as a class, are subjected to inquisitions which the Court suggests would be unconstitutional but for the fact of "Communism." Nevertheless, this Court still sits! [24]

III.

Finally, I think Barenblatt's conviction violates the Constitution because the chief aim, purpose and practice of the House Un-American Activities Committee, as disclosed by its many reports, is to try witnesses and punish them because they are or have been Communists or because they refuse to admit or deny Communist affiliations. The punishment imposed is generally punishment by humiliation and public shame. There is nothing strange or novel about this kind of punishment. It is in

---

[24] The record in this very case indicates how easily such restrictions spread. During the testimony of one witness an organization known as the Americans for Democratic Action was mentioned. Despite testimony that this organization did not admit Communists, one member of the Committee insisted that it was a Communist front because "it followed a party line, almost identical in many particulars with the Communist Party line." Presumably if this accusation were repeated frequently and loudly enough that organization, or any other, would also be called a "criminal gang." Cf. *Feiner* v. *New York,* 340 U. S. 315, 321, 329 (dissenting opinions).

fact one of the oldest forms of governmental punishment known to mankind; branding, the pillory, ostracism and subjection to public hatred being but a few examples of it.[25] Nor is there anything strange about a court's reviewing the power of a congressional committee to inflict punishment. In 1880 this Court nullified the action of the House of Representatives in sentencing a witness to jail for failing to answer questions of a congressional committee. *Kilbourn* v. *Thompson,* 103 U. S. 168. The Court held that the Committee in its investigation of the Jay Cooke bankruptcy was seeking to exercise judicial power, and this, it emphatically said, no committee could do. It seems to me that the proof that the Un-American Activities Committee is here undertaking a purely judicial function is overwhelming, far stronger, in fact, than it was in the Jay Cooke investigation which, moreover, concerned only business transactions, not freedom of association.

The Un-American Activities Committee was created in 1938. It immediately conceived of its function on a grand scale as one of ferreting out "subversives" and especially of having them removed from government jobs.[26] It made many reports to the House urging re-

[25] See generally, XII Encyclopedia of the Social Sciences 714; Barnes, The Story of Punishment, 62–64; Lowie, Primitive Society, 398; Andrews, Old-Time Punishments (1890 ed.), 1–145, 164–187; IV Plutarch's Lives (Clough, New Nat. ed. 1914) 43–44.

[26] In its very first report it stated, "The committee has felt that it is its sworn duty and solemn obligation to the people of this country to focus the spotlight of publicity upon every individual and organization engaged in subversive activities regardless of politics or partisanship." It further claimed that, "While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate, communism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities. . . ." H. R. Rep. No. 2, 76th Cong., 1st Sess. 9–10, 13. See also the statement of the Committee's first Chairman, "I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know

moval of such employees.[27] Finally, at the instigation of the Committee, the House put a rider on an appropriation bill to bar three government workers from collecting their salaries.[28] The House action was based on Committee findings that each of the three employees was a member of, or associated with, organizations deemed undesirable and that the "views and philosophies" of these workers "as expressed in various statements and writings constitute subversive activity within the definition adopted by your committee, and that [they are], therefore, unfit for the present to continue in Government employment." [29] The Senate and the President agreed

---

that exposure in a democracy of subversive activities is the most effective weapon that we have in our possession." 83 Cong. Rec. 7570 (1938).

[27] See, *e. g.*, H. R. Rep. No. 2748, 77th Cong., 2d Sess. 5. "On September 6, 1941, the chairman of this committee wrote the President a letter, accompanied by 43 exhibits, detailing the Communist affiliation and background of the following officials . . . and suggested that they be dismissed from their positions." "On November 28, 1941 . . . the chairman called the attention of the members to the case of [the] principal economist in the Department of Agriculture"; "On January 15, 1942, the chairman of the committee . . . called attention to . . . one Malcolm Cowley. . . . Several weeks later Mr. Cowley resigned his position with the Federal Government"; "On March 28, 1942, the chairman wrote a letter to the . . . Chairman of the Board of Economic Welfare, and called attention to . . . eight of its employees and made particular reference to one Maurice Parmelee . . . . The following week, Mr. Parmelee was dismissed . . . ." *Id.*, at 6. "In the Chairman's speech of September 24 [1942] he also presented to the House the names of 19 officials of the Government . . . . Yet, to the committee's knowledge, no action has been taken in the cases of the 19 officials." *Id.*, at 8.

[28] Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450. The history of this rider is detailed in *United States* v. *Lovett*, 328 U. S. 303.

[29] See, *e. g.*, H. R. Rep. No. 448, 78th Cong., 1st Sess. 6, 8. The Un-American Activities Committee did not actually undertake the

to the rider, though not without protest. We held that statute void as a bill of attainder in *United States* v. *Lovett,* 328 U. S. 303 (1946), stating that its "effect was to inflict punishment without the safeguards of a judicial trial" and that this "cannot be done either by a State or by the United States." 328 U. S., at 316–317.

Even after our *Lovett* holding, however, the Committee continued to view itself as the "only agency of government that has the power of exposure," and to work unceasingly and sincerely to identify and expose all suspected Communists and "subversives" in order to eliminate them from virtually all fields of employment.[30] How well it has succeeded in its declared program of "pitiless publicity and exposure" is a matter of public record. It is enough to cite the experience of a man who masqueraded as a Communist for the F. B. I. and who reported to this same Committee that since 1952 when his "membership" became known he has been unable to hold any job.[31] To

---

trials of these government employees. That task fell to a special Subcommittee of the Committee on Appropriations which was created in response to a speech by the Chairman of the Un-American Activities Committee. *Id.,* at 3.

[30] Virtually every report of the Committee emphasizes that its principal function is exposure and that once exposed subversives must be driven out. Space, however, prevents listing more than a random sampling of statements by the Committee. These are given in an Appendix to this opinion, *post,* p. 163. For other similar statements by the Committee and its members see, *e. g.,* notes 26, 27, *supra;* 31–37, *infra; Watkins* v. *United States,* 354 U. S. 178; *United States* v. *Josephson,* 165 F. 2d 82, 93 (dissenting opinion); *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 138, 167 F. 2d 241, 252 (dissenting opinion).

[31] This evidence was given before the Committee on May 7, 1959, in Chicago, Ill. It has not yet been published.

Even those the Committee does not wish to injure are often hurt by its tactics, so all-pervasive is the effect of its investigations.

"It has been brought to the attention of the committee that many persons so subpenaed . . . have been subjected to ridicule and dis-

accomplish this kind of result, the Committee has called witnesses who are suspected of Communist affiliation, has subjected them to severe questioning and has insisted that each tell the name of every person he has ever known at any time to have been a Communist, and, if possible, to give the addresses and occupations of the people named. These names are then indexed, published, and reported to Congress, and often to the press.[32] The same technique is employed to cripple the job opportunities of those who strongly criticize the Committee or take other actions it deems undesirable.[33] Thus, in 1949, the Com-

---

crimination as a result of having received such subpenas"; "The committee . . . has met with many obstacles and difficulties. Not the least of these has been the reluctance of former Communists to give testimony before the committee which might bring upon them public censure and economic retaliation"; "To deny to these *cooperative* witnesses a full opportunity for social, economic, and political rehabilitation . . . will . . . render more difficult the obtaining of authentic . . . information." H. R. Rep. No. 2431, 82d Cong., 2d Sess. 5. (Italics added.)

"While the American people . . . were fortunate to have this testimony, some of the witnesses themselves were not. Instances have come to the committee's attention where several of these witnesses have been forced from gainful employment after testifying. Some have been released from the employment which they competently held for years prior to their testimony." H. R. Rep. No. 2516, 82d Cong., 2d Sess. 3.

[32] Descriptions of the size and availability of Committee's files as well as the efficiency of its cross-indexing system can be found in most of its reports. See, *e. g.*, H. R. Rep. No. 2742, 79th Cong., 2d Sess. 16–17; H. R. Rep. No. 1950, 81st Cong., 2d Sess. 18–23; H. R. Rep. No. 2431, 82d Cong., 2d Sess. 24–28.

[33] It is impossible even to begin to catalogue people who have been stigmatized by the Committee for criticizing it. In 1942 the Committee reported "Henry Luce's Time magazine has been drawn sucker-fashion into this movement to alter our form of government. . . ." H. R. Rep. No. 2277, 77th Cong., 2d Sess. 2. In 1946 Harold Laski and socialists generally were attacked for their "impertinence in suggesting that the United States should trade its system of free economy

mittee reported that it had indexed and printed some 335,000 names of people who had signed "Communist" petitions of one kind or another.[34] All this the Committee did and does to punish by exposure the many phases of "un-American" activities that it reports cannot be reached by legislation, by administrative action, or by any other agency of Government, which, of course, includes the courts.

The same intent to expose and punish is manifest in the Committee's investigation which led to Barenblatt's conviction. The declared purpose of the investigation was to identify to the people of Michigan the individuals responsible for the, alleged, Communist success there.[35] The Committee claimed that its investigation "uncovered" members of the Communist Party holding positions in the school systems in Michigan; that most of the teachers subpoenaed before the Committee refused to answer questions on the ground that to do so might result in

---

for some brand of Socialism." The Committee deemed it "imperative" that it ascertain the "methods used to enable Mr. Laski to broadcast to [a] rally." H. R. Rep. No. 2233, 79th Cong., 2d Sess. 46–47. In 1951 a full report was issued on a "communist lobby"—a committee formed to urge defeat of a communist control bill before Congress. Among the distinguished sponsors of the group listed by the committee was the late Prof. Zechariah Chafee. The Committee, nevertheless, advised "the American public that individuals who knowingly and actively support such a propaganda outlet . . . are actually aiding and abetting the Communist program in the United States." H. R. Rep. No. 3248, 81st Cong., 2d Sess. 1, 11–12, 15. See also, Gellhorn, Report on a Report of the House Committee on Un-American Activities, 60 Harv. L. Rev. 1193.

[34] H. R. Rep. No. 1950, 81st Cong., 2d Sess. 19.

[35] "The 1954 hearings were set up by the committee in order to demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success." H. R. Rep. No. 57, 84th Cong., 1st Sess. 15.

self-incrimination, and that most of these teachers had lost their jobs. It then stated that "the Committee on Un-American Activities approves of this action. . . ." [36] Similarly, as a result of its Michigan investigation, the Committee called upon American labor unions to amend their constitutions, if necessary, in order to deny membership to any Communist Party member.[37] This would, of course, prevent many workers from getting or holding the only kind of jobs their particular skills qualified them for. The Court, today, barely mentions these statements, which, especially when read in the context of past reports by the Committee, show unmistakably what the Committee was doing. I cannot understand why these reports are deemed relevant to a determination of a congressional intent to investigate communism in education, but irrelevant to any finding of congressional intent to bring about exposure for its own sake or for the purposes of punishment.

I do not question the Committee's patriotism and sincerity in doing all this.[38] I merely feel that it cannot be done by Congress under our Constitution. For, even assuming that the Federal Government can compel witnesses to testify as to Communist affiliations in order to subject them to ridicule and social and economic retaliation, I cannot agree that this is a legislative function. Such publicity is clearly punishment, and the Constitution

---

[36] *Id.*, at 17.

[37] "[T]he Committee on Un-American Activities calls upon the American labor movement . . . to amend its constitutions where necessary in order to deny membership to a member of the Communist Party or any other group which dedicates itself to the destruction of America's way of life." *Ibid.*

[38] Sincerity and patriotism do not, unfortunately, insure against unconstitutional acts. Indeed, some of the most lamentable and tragic deaths of history were instigated by able, patriotic and sincere men. See generally Mill, On Liberty (1885 ed.), 43–48.

allows only one way in which people can be convicted and punished. As we said in *Lovett,* "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. *They intended to safeguard the people of this country from punishment without trial by duly constituted courts.*" 328 U. S., at 317. (Italics added.) Thus if communism is to be made a crime, and Communists are to be subjected to "pains and penalties," I would still hold this conviction bad, for the crime of communism, like all others, can be punished only by court and jury after a trial with all judicial safeguards.

It is no answer to all this to suggest that legislative committees should be allowed to punish if they grant the accused some rules of courtesy or allow him counsel. For the Constitution proscribes *all* bills of attainder by State or Nation, not merely those which lack counsel or courtesy. It does this because the Founders believed that punishment was too serious a matter to be entrusted to any group other than an independent judiciary and a jury of twelve men acting on previously passed, unambiguous laws, with all the procedural safeguards they put in the Constitution as essential to a fair trial—safeguards which included the right to counsel, compulsory process for witnesses, specific indictments, confrontation of accusers, as well as protection against self-incrimination, double jeopardy and cruel and unusual punishment—in short, due process of law. Cf. *Chambers* v. *Florida,* 309 U. S. 227. They believed this because not long before worthy men had been deprived of their liberties, and indeed their lives, through parliamentary trials without these safeguards. The memory of one of these, John Lilburne—banished and disgraced by a parliamentary

committee on penalty of death if he returned to his country—was particularly vivid when our Constitution was written. His attack on trials by such committees and his warning that "what is done unto any one, may be done unto every one" [39] were part of the history of the times

---

[39] "For certainly it cannot be denied, but if he be really an offender, he is such by the breach of some law, made and published before the fact, and ought by due process of law, and verdict of 12 men, to be thereof convict, and found guilty of such crime; unto which the law also hath prescribed such a punishment agreeable to that our fundamental liberty; which enjoineth that no freeman of England should be adjudged of life, limb, liberty, or estate, but by Juries; a freedom which parliaments in all ages contended to preserve from violation; as the birthright and chief inheritance of the people, as may appear most remarkably in the Petition of Right, which you have stiled that most excellent law.

"And therefore we trust upon second thoughts, being the parliament of England, you will be so far from bereaving us, who have never forfeited our right, of this our native right, and way of Trials by Juries, (for what is done unto any one, may be done unto every one), that you will preserve them entire to us, and to posterity, from the encroachments of any that would innovate upon them. . . .

"And it is believed, that . . . had [the cause] at any time either at first or last been admitted to a trial at law, and had passed any way by verdict of twelve sworn men: all the trouble and inconveniences arising thereupon had been prevented: the way of determination by major votes of committees, being neither so certain nor so satisfactory in any case as by way of Juries, the benefit of challenges and exceptions, and unanimous consent, being all essential privileges in the latter; whereas committees are tied to no such rules, but are at liberty to be present or absent at pleasure. Besides, Juries being birthright, and the other but new and temporary, men do not, nor, as we humbly conceive, ever will acquiesce in the one as in the other; from whence it is not altogether so much to be wondered at, if upon dissatisfactions, there have been such frequent printing of men's cases, and dealings of Committees, as there have been; and such harsh and inordinate heats and expressions between parties interested, such sudden and importunate appeals to your authority, being indeed all alike out of the true English road, and leading into

which moved those who wrote our Constitution to determine that no such arbitrary punishments should ever occur here. It is the protection from arbitrary punishments through the right to a judicial trial with all these safeguards which over the years has distinguished America from lands where drumhead courts and other similar "tribunals" deprive the weak and the unorthodox of life, liberty and property without due process of law. It is this same right which is denied to Barenblatt, because the Court today fails to see what is here for all to see—that exposure and punishment is the aim of this Committee and the reason for its existence. To deny this is to ignore the Committee's own claims and the reports it has issued ever since it was established. I cannot believe that the nature of our judicial office requires us to be so blind, and must conclude that the Un-American Activities Committee's "identification" and "exposure" of Communists and suspected Communists, like the activities of the Committee in *Kilbourn* v. *Thompson,* amount to an encroachment on the judiciary which bodes ill for the liberties of the people of this land.

Ultimately all the questions in this case really boil down to one—whether we as a people will try fearfully and futilely to preserve democracy by adopting totalitarian methods, or whether in accordance with our traditions and our Constitution we will have the confidence and courage to be free.

I would reverse this conviction.

---

nothing but trouble and perplexity, breeding hatred and enmities between worthy families, affronts and disgust between persons of the same public affection and interest, and to the rejoicing of none but public adversaries. All which, and many more inconveniences, can only be avoided, by referring all such cases to the usual Trials and final determinations of law." 5 Howell's State Trials 411–412, Statement of John Lilburne (1653).

APPENDIX TO OPINION OF MR. JUSTICE BLACK, DISSENTING.

RANDOM SELECTION OF STATEMENTS BY THE HOUSE UN-AMERICAN ACTIVITIES COMMITTEE ON EXPOSURE AND PUNISHMENT OF "SUBVERSIVES."

"[T]o inform the American people of the activities of any such organizations . . . is the real purpose of the House Committee." "The purpose of this committee is the task of protecting our constitutional democracy by turning the light of pitiless publicity on [these] organizations." H. R. Rep. No. 1476, 76th Cong., 3d Sess. 1–2, 24.

"The very first exposure which our committee undertook in the summer of 1938 was that of the German-American Bund." "Other organizations . . . have been greatly crippled . . . as a result of our exposures. The American Youth Congress once enjoyed a very considerable prestige . . . . Today many of its distinguished former sponsors refuse to be found in its company. . . . We kept the spotlight of publicity focused upon the American Youth Congress, and today it is clear to all that, in spite of a degree of participation in its activities by many fine young people, it was never at its core anything less than a tool of Moscow." "This committee is the only agency of Government that has the power of exposure. . . . There are many phases of un-American activities that cannot be reached by legislation or administrative action. We believe that the committee has shown that fearless exposure . . . is the . . . answer." H. R. Rep. No. 1, 77th Cong., 1st Sess. 21–22, 24.

"Our investigation has shown that a steady barrage against Congress comes . . . from the New Republic, one of whose editors . . . was recently forced out of an $8,000

Government job by the exposure of his Communist activities." H. R. Rep. No. 2277, 77th Cong., 2d Sess. 3.

"[T]he House Committee on Un-American Activities is empowered to explore and expose activities by un-American individuals and organizations which, while sometimes being legal, are nonetheless inimical to our American concepts." The Committee recommends that Congress "discharge . . . any employee or official of the Federal Government whose loyalty to the United States is found to be in doubt." H. R. Rep. No. 2742, 79th Cong., 2d Sess. 16, 17.

"Index of Persons and Organizations." (Six pages of names follow.) H. R. Rep. No. 2233, 79th Cong., 2d Sess. III–VIII.

"Early in 1947 the committee adopted the following eight point program . . . .

"1. To expose and ferret out the Communists and Communist sympathizers in the Federal Government.

"2. To spotlight the spectacle of . . . Communists . . . in American labor."

"In a sense the storm of opposition to the activities of the committee is a tribute to its achievements in the field of exposure . . . ." Report of the Committee on Un-American Activities to the United States House of Representatives, 80th Cong., 2d Sess., Dec. 31, 1948, 2, 3 (Committee print).

"The committee would like to remind the Congress that its work is part of an 11-year continuity of effort that began . . . in August 1938. The committee would also like to recall that at no time in those 11 years has it ever wavered from a relentless pursuit and exposure." "In the course of its investigations . . . the committee has made available a large, completely indexed, and readily accessible reference collection of lists of signers of Communist Party election petitions." H. R. Rep. No. 1950, 81st Cong., 2d Sess. 15, 19.

"To conduct the exposé . . . it was necessary for the investigative staff to interview over 100 persons . . . .

"The same tedious investigation of details was necessary prior to the successful exposure . . . in the Territory of Hawaii." "As a result of the investigation and hearings held by the committee, Dolivet's contract with the United Nations has not been renewed, and it is the committee's understanding that he was removed from editorship of the United Nations World." H. R. Rep. No. 3249, 81st Cong., 2d Sess. 4, 5.

"During 1951 the committee's hearings disclosed the positive identification of more individuals . . . than during any preceding year." "If communism in Hollywood is now mythical, it is only because this committee conducted three investigations to bring it about. The industry itself certainly did not accomplish this." "The committee's investigation . . . was concerned almost entirely with the problem of exposure of the actual members of the Communist Party and did not deal, except in a few instances, with . . . fellow travelers." "On the question of fellow travelers, suffice it to say . . . 'The time has come now when even the fellow traveler must get out.'" "Dr. Struik was identified as a Communist teacher . . . . Nevertheless, he was permitted to teach . . . until this year." "With individuals like . . . Struik . . . teaching in our leading universities, your committee wonders who the Professor Struiks were . . . who led Alger Hiss along the road of communism." H. R. Rep. No. 2431, 82d Cong., 2d Sess. 6, 8–9, 16–17.

"In this annual report, the committee feels that the Congress and the American people will have a much clearer and fuller picture . . . by having set forth the names and, where possible, the positions occupied by individuals who have been identified as Communists, or former Communists, during the past year." "The committee considers the failure of certain trade-unionists to

rid themselves of Communists to be a national disgrace." "The following persons were identified." (Approximately fifty pages of names follow.) H. R. Rep. No. 2516, 82d Cong., 2d Sess. 6–7, 12–27, 28–34, 36–40, 41–56, 58–67 (similar lists can be found in various other reports).

"The focal point of the investigation into the general area of education was to the individual who had been identified." "The question has been asked as to what purpose is served by the disclosure of the names of individuals who may long ago have left the conspiracy." "The committee has no way of knowing the status of his membership at present until he is placed under oath and the information is sought to be elicited." H. R. Rep. No. 1192, 83d Cong., 2d Sess. 1, 7.

MR. JUSTICE BRENNAN, dissenting.

I would reverse this conviction. It is sufficient that I state my complete agreement with my Brother BLACK that no purpose for the investigation of Barenblatt is revealed by the record except exposure purely for the sake of exposure. This is not a purpose to which Barenblatt's rights under the First Amendment can validly be subordinated. An investigation in which the processes of lawmaking and law-evaluating are submerged entirely in exposure of individual behavior—in adjudication, of a sort, through the exposure process—is outside the constitutional pale of congressional inquiry. *Watkins* v. *United States,* 354 U. S. 178, 187, 200; see also *Sweezy* v. *New Hampshire,* 354 U. S. 234; *NAACP* v. *Alabama,* 357 U. S. 449; *Uphaus* v. *Wyman, ante,* p. 82 (dissenting opinion).

Syllabus.

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.

No. 127. Argued March 23–24, 1959.—Decided June 8, 1959.

Appellees sued in a three-judge Federal District Court for a declaratory judgment that five Virginia statutes enacted in 1956 and never construed by the Virginia courts were unconstitutional and to enjoin their enforcement. Appellants moved to dismiss the action on the ground that the District Court should not exercise its jurisdiction to enjoin the enforcement of state statutes that have not been authoritatively construed by the state courts. The District Court found two of the statutes vague and ambiguous and withheld judgment on them, retaining jurisdiction, pending construction by the state courts; but it declared the other three unconstitutional and enjoined their enforcement against appellees. *Held:* As to the three statutes which it held unconstitutional, the District Court should have abstained from deciding the merits of the issues tendered to it and should have retained jurisdiction until the Virginia courts had been afforded a reasonable opportunity to construe them. Pp. 168–179.

(a) The federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. Pp. 176–177.

(b) The three statutes here involved leave reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem. Pp. 177–178.

(c) These enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, each enactment as phrased by its legislature and as construed by its highest court. P. 178.

509615 O–59–14

(d) Appellants having represented to this Court that they would never prosecute appellees for conduct engaged in during the pendency of these proceedings, the judgment of the District Court is vacated and the case remanded to that Court with instructions to afford appellees a reasonable opportunity to bring appropriate proceedings in the Virginia courts, meanwhile retaining its own jurisdiction of the case, and for further proceedings consistent with the opinion of this Court. P. 179.

159 F. Supp. 503, judgment vacated and cause remanded.

David J. Mays and *J. Segar Gravatt* argued the cause for appellants. With them on the brief were *Henry T. Wickham* and *Clarence F. Hicks.*

Thurgood Marshall argued the cause for appellees. With him on the brief were *Robert L. Carter, Oliver W. Hill, Spottswood W. Robinson III, William T. Coleman, Jr., Jack Greenberg, Constance Baker Motley* and *Louis H. Pollak.*

Mr. Justice Harlan delivered the opinion of the Court.

In this case a three-judge District Court was convened pursuant to 28 U. S. C. § 2281 to hear federal constitutional challenges against five Virginia statutes. It declared three invalid under the Fourteenth Amendment, and permanently enjoined the appellants from enforcing them against the appellees; the other two statutes it found vague and ambiguous and accordingly retained jurisdiction pending a construction by the state courts. 159 F. Supp. 503. Only the former disposition was appealed. The appeal raises two questions: First, whether in the circumstances of this case the District Court should have abstained from a constitutional adjudication, retaining the cause while the parties, through appropriate proceedings, afforded the Virginia courts an opportunity to construe the three statutes in light of state and federal constitutional requirements. Second, if such an absten-

tion was not called for, whether the District Court's constitutional holdings were correct. Because of our views upon the first question we do not reach the second.

National Association for the Advancement of Colored People (NAACP) and NAACP Legal Defense and Educational Fund, Incorporated (Fund), appellees herein, are organizations engaged in furthering the rights of colored citizens. Both are membership corporations organized under the laws of New York, and have registered under the laws of Virginia as foreign corporations doing business within the State. NAACP's principal relevant activities in Virginia are appearing before legislative bodies and commissions in support of, or opposition to, measures affecting the status of the Negro race within the State, and furnishing assistance to Negroes concerned in litigation involving their constitutional rights. Fund performs functions similar to those of NAACP in the field of litigation, but is precluded by its charter from attempting to influence legislation. The revenues of NAACP are derived both from membership dues and general contributions, those of Fund entirely from contributions.

NAACP and Fund brought this action against the Attorney General of Virginia and a number of other Commonwealth officials, appellants herein, for declaratory and injunctive relief with respect to Chapters 31, 32, 33, 35 and 36 of the Acts of the Virginia Assembly, passed in 1956. 4 Va. Code, 1958 Supp., §§ 18–349.9 to 18–349.37; 7 Va. Code, 1958, §§ 54–74, 54–78, 54–79. The complaint, alleging irreparable injury on account of these enactments, sought a declaration that each infringed rights assured under the Fourteenth Amendment and an injunction against its enforcement. Jurisdiction was predicated upon the civil rights statutes, 42 U. S. C. §§ 1981, 1983, 28 U. S. C. § 1343, diversity of citizenship, 28 U. S. C. § 1332, and the presence of a federal question, 28 U. S. C. § 1331.

The Attorney General and his codefendants moved to dismiss the action on the ground, among others, that the District Court should not "exercise its jurisdiction to enjoin the enforcement of state statutes which have not been authoritatively construed by the state courts." The District Court, recognizing "the necessity of maintaining the delicate balance between state and federal courts under the concept of separate sovereigns," stated that "the constitutionality of state statutes requiring special competence in the interpretation of local law should not be determined by federal courts in advance of a reasonable opportunity afforded the parties to seek an adjudication by the state court," but considered that relief should be granted where "the statute is free from ambiguity and there remains no reasonable interpretation which will render it constitutional . . . ." 159 F. Supp., at 522, 523. On this basis, the court, one judge dissenting, held Chapters 31, 32, and 35 unconstitutional, and permanently enjoined their enforcement against NAACP and Fund. Chapters 33 and 36, on the other hand, the court unanimously found vague and ambiguous. It accordingly retained jurisdiction as to those Chapters, without reaching their constitutionality, allowing the complaining parties a reasonable time within which to obtain a state interpretation.

The Commonwealth defendants, proceeding under 28 U. S. C. § 1253, appealed to this Court the lower court's disposition of Chapters 31, 32, and 35. We noted probable jurisdiction. 358 U. S. 807. NAACP and Fund did not appeal the disposition of Chapters 33 and 36.

The three Virginia statutes before us are lengthy, detailed, and sweeping. Chapters 31 and 32 are registration statutes. Chapter 31 deals with the rendering of financial assistance in litigation. It proscribes the public solicitation of funds, and the expenditure of funds from whatever source derived, for the commencement or fur-

ther prosecution of an "original proceeding," by any person, broadly defined to include corporations and other entities, which is neither a party nor possessed of a "pecuniary right or liability" in such proceeding, unless a detailed annual filing is made with the State Corporation Commission. If such person is a corporation, the filing must include among other things, (1) certified copies of its charter and by-laws; (2)"a certified list of the names and addresses of the officers, directors, stockholders, members, agents and employees or other persons acting for or in [its] behalf;" (3) a certified statement of the sources of its income, however derived, including the names and addresses of contributors or donors if required by the Commission; (4) a detailed certified statement of the corporation's expenditures for the preceding year, the objects thereof, and whatever other information relative thereto may be required by the Commission; and (5) a certified statement of the "counties and cities in which it proposes to or does finance or maintain litigation to which it is not a party." Correspondingly broad disclosures are required of individuals who fall within the statutory proscription.

Violation of this Chapter is punishable as a misdemeanor for individuals, and by a fine of not more than $10,000 for corporations, plus a mandatory denial or revocation of authority to do business within the State in the case of a foreign corporation. An individual "acting as an agent or employee" of a corporation or other entity with respect to activity violative of the Chapter is deemed guilty of a misdemeanor. And directors, officers, and "those persons responsible for the management or control of the affairs" of a corporation or other entity are made jointly and severally liable for whatever fines might be imposed on it.

Chapter 32 deals with activities relating to the passage of racial legislation, with advocacy of "racial integration or segregation," and also with the raising and expenditure

of funds in connection with racial litigation. Declaring that the "continued harmonious relations between the races are . . . essential to the welfare, health and safety of the people of Virginia," the Chapter finds it "vital to the public interest" that registration be made with the State Corporation Commission by "persons, firms, partnerships, corporations and associations whose activities are causing or may cause interracial tension and unrest." Specifically, under § 2 of this Chapter, annual filings are required of

> "[e]very person, firm, partnership, corporation or association, whether by or through its agents, servants, employees, officers, or voluntary workers or associates, who or which engages as one of its principal functions or activities in the promoting or opposing in any manner the passage of legislation by the General Assembly in behalf of any race or color, or who or which has as one of its principal functions or activities the advocating of racial integration or segregation or whose activities cause or tend to cause racial conflicts or violence, or who or which is engaged or engages in raising or expending funds for the employment of counsel or payment of costs in connection with litigation in behalf of any race or color, in this State . . . ."

The extent of such filing is comparable to that required by Chapter 31. The information so furnished is a matter of public record, to "be open to the inspection of any citizen at any time during the regular business hours of" the State Corporation Commission.

Failure to register subjects individuals to punishment as for a misdemeanor, and corporations to a fine not exceeding $10,000. Like Chapter 31, Chapter 32 also makes "responsible" persons liable jointly and severally for corporate fines. Further, "[e]ach day's failure to

register and file the information required . . . shall constitute a separate offense and be punished as such." The Chapter is not applicable to persons or organizations which carry on the proscribed activities through matter which may qualify as second-class mail in the United States mails, or by radio or television, nor to persons or organizations acting in connection with any political campaign.

Chapter 35 is a "barratry" statute. Barratry is defined as "the offense of stirring up litigation." A "barrator" is thus a person or organization which "stirs up litigation." Stirring up litigation means "instigating," which in turn "means bringing it about that all or part of the expenses of the litigation are paid by the barrator," or by those, other than the plaintiffs, acting in concert with him, "unless the instigation is justified." An instigation is "justified" when "the instigator is related by blood or marriage to the plaintiff whom he instigates, or . . . is entitled by law to share with the plaintiff in money or property that is the subject of the litigation or . . . has a direct interest ["personal right or a pecuniary right or liability"] in the subject matter of the litigation or occupies a position of trust in relation to the plaintiff; or . . . is acting on behalf of a duly constituted legal aid society approved by the Virginia State Bar which offers advice or assistance in all kinds of legal matters to all members of the public who come to it for advice or assistance and are unable because of poverty to pay legal fees."

Individuals guilty of barratry as defined in the Chapter are punishable as for a misdemeanor and "shall" have their licenses "to practice law or any other profession . . . revoked for such period as provided by law." Corporations are subject to a fine of not more than $10,000 and, if they are foreign, mandatory revocation of their authority to do business within the State. Moreover, a "person who aids and abets a barrator by giving money or render-

ing services to or for the use or benefit of the barrator for committing barratry shall be guilty of barratry and punished . . . ." A host of exceptions to which the Chapter is not applicable is provided;[1] none of these has thus far been asserted to include, or to be capable of including, appellees.

The majority below held Chapters 31 and 32[2] unconstitutional on similar grounds, centering its treatment of both around § 2 of Chapter 32, the material provisions of which have already been set forth, p. 172, *supra*. In essence § 2 was found to infringe rights assured under the Fourteenth Amendment, in that, taken in conjunction with the registration requirements of the statute, (1) the clause relating to the promoting or opposing of racial legislation invaded rights of free speech because it was not restricted to lobbying activities;[3] (2) the clause directed

---

[1] "This article shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not protect the client from payment of the costs and expense of litigation, nor shall this article apply to any matter involving annexation, zoning, bond issues, or the holding or results of any election or referendum, nor shall this article apply to suits pertaining to or affecting possession of or title to real or personal property, regardless of ownership, nor shall this article apply to suits involving the legality of assessment or collection of taxes or the rates thereof, nor shall this article apply to suits involving rates or charges or services by common carriers or public utilities, nor shall this article apply to criminal prosecutions, nor to the payment of attorneys by legal aid societies approved by the Virginia State Bar, nor to proceedings to abate nuisances. Nothing herein shall be construed to be in derogation of the constitutional rights of real parties in interest to employ counsel or to prosecute any available legal remedy under the laws of this State."

[2] Chief Judge Hutcheson, the dissenting judge, did not reach the constitutionality of any of these statutes, because of his views on the "abstention" issue.

[3] In this, the District Court relied on *United States* v. *Harriss*, 347 U. S. 612.

at advocacy of racial "integration or segregation" had the same infirmity because it was not supported by a compelling state interest or some clear and present danger; [4] (3) the clause referring to activities causing or tending to cause racial conflicts or violence was too vague and indefinite to satisfy constitutional requirements; [5] and (4) the clause aimed at the raising and expending of funds in connection with racial litigation unduly burdened the right of access to the courts, and did not serve an interest which could support a disclosure as broad as the one demanded.[6]

Chapter 35, the "barratry" statute, was held to offend due process, in that it was found to be aimed not at the legitimate regulation of the practice of law but at preventing NAACP and Fund from continuing "their legal operations." In addition, the court held the Chapter to violate equal protection by unjustifiably discriminating between the racial litigation activities of the appellees and the general litigation efforts of "approved" legal aid societies.

These constitutional holdings were made in the context of findings that Chapters 31, 32, and 35, as well as Chapters 33 and 36 not presently before us, were passed by the Virginia Legislature "to nullify as far as possible the effect of the decision of the Supreme Court in *Brown* v. *Board of Education,* 347 U. S. 483 . . . as parts of the general plan of massive resistance to the integration of

[4] The lower court cited, among other cases, *American Communications Assn.* v. *Douds,* 339 U. S. 382; *Schenck* v. *United States,* 249 U. S. 47; *Dennis* v. *United States,* 341 U. S. 494; *Buchanan* v. *Warley,* 245 U. S. 60; *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Thomas* v. *Collins,* 323 U. S. 516; and distinguished *Bryant* v. *Zimmerman,* 278 U. S. 63.

[5] Citing *United States* v. *Harriss, supra.*

[6] On the latter ground, the court distinguished such cases as *Cantwell* v. *Connecticut,* 310 U. S. 296, and *Burroughs* v. *United States,* 290 U. S. 534; and cited *Thomas* v. *Collins, supra.*

schools of the state under the Supreme Court's decrees." 159 F. Supp., at 511, 515. In the view we take of this case we do not reach appellants' objections to these findings.

According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question. In other words, we think that the District Court in dealing with Chapters 31, 32, and 35 should have followed the same course that it did with respect to Chapters 33 and 36.

This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a "scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts," *Matthews* v. *Rodgers,* 284 U. S. 521, 525, as their "contribution . . . in furthering the harmonious relation between state and federal authority . . . ." *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, *e. g., Railroad Comm'n* v. *Pullman Co., supra; Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 168; *Spector Motor Service, Inc.,* v. *McLaughlin,* 323 U. S. 101; *American Federation of Labor* v. *Watson,* 327 U. S. 582; *Shipman* v. *DuPre,* 339 U. S. 321; *Albertson* v. *Millard,* 345 U. S.

242; *Government & Civic Employees* v. *Windsor,* 353 U. S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See *Chicago* v. *Fieldcrest Dairies, Inc., supra,* at 172–173.

The present case, in our view, is one which calls for the application of this principle, since we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.

It certainly cannot be said that Chapter 35 does not require a construction by the state courts. As appellants asserted here and in the court below, the Chapter might well be read as requiring a "stirring up" of litigation in the conventional common-law sense, in addition to the "unjustified" payment of litigation expenses. Were it to be so read, the statute might then not even apply to these appellees since the lower court found the evidence "uncontradicted that the initial steps which have led to the institution and prosecution of racial suits in Virginia with the assistance of the Association and the Fund have not been taken until the prospective plaintiffs made application to one or the other of the corporations for help." 159 F. Supp., at 533. Further the "personal right" component of "direct interest" in the statutory definition of "justified" instigation (see p. 173, *supra*) might lend itself to a construction which would embrace nonparty Negro contributors to litigation expense, including NAACP because of the relationship of that organization to its members. Cf. *NAACP* v. *Alabama,* 357 U. S. 449.

The possibility of limiting interpretation, characteristic of constitutional adjudication, also cannot be ignored.

Government & Civic Employees v. *Windsor, supra.* The "advocacy" clause of Chapter 32, for example, might be construed as reaching only that directed at the incitement of violence. Cf. *Yates* v. *United States,* 354 U. S. 298. Similar construction might be employed with respect to the clause in that Chapter relating to the influencing of legislation "in any manner," cf. *United States* v. *Harriss, supra; United States* v. *Rumely,* 345 U. S. 41. And, in connection with these and the membership and contributor list requirements of Chapters 31 and 32, cf. *NAACP* v. *Alabama, supra,* we note that Chapter 32 contains a separability clause, and that the Supreme Court of Appeals of Virginia treats legislative acts as separable, where possible, even in the absence of such an express provision. See *Woolfolk* v. *Driver,* 186 Va. 174, 41 S. E. 2d 463.

We do not intimate the slightest view as to what effect any such determinations might have upon the validity of these statutes. All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court. The Virginia declaratory judgment procedure, 2 Va. Code, 1950, §§ 8–578 to 8–585, which the appellees are now pursuing with reference to Chapters 33 and 36, also provides an expeditious avenue here. And of course we shall not assume that the Virginia courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements.

Because of its findings, amply supported by the evidence, that the existence and threatened enforcement of these statutes worked great and immediate irreparable injury on appellees, the District Court's abstention with respect to Chapters 33 and 36 proceeded on the assump-

tion "that the defendants will continue to cooperate, as they have in the past, in withholding action under the authority of the statutes until a final decision is reached . . . ." 159 F. Supp., at 534. In this Court counsel for the appellants has given similar assurances with respect to the three statutes presently before us, assurances which we understand embrace also the intention of these appellants never to proceed against appellees under any of these enactments with respect to activities engaged in during the full pendency of this litigation. While there is no reason to suppose that such assurances will not be honored by these or other Virginia officials not parties to this litigation, the District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the appellees while this case goes forward.

Accordingly, the judgment below will be vacated and the case remanded to the District Court, with instructions to afford the appellees a reasonable opportunity to bring appropriate proceedings in the Virginia courts, meanwhile retaining its own jurisdiction of the case, and for further proceedings consistent with this opinion.

It is so ordered.

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

The rule invoked by the Court to require the Federal District Court to keep hands off this litigation until the state court has construed these laws is a judge-made rule. It was fashioned in 1941 in the decision of *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, as a device to avoid needless decisions under the Federal Constitution where a resolution of state law questions might make those adjudications unnecessary. Since that time, the rule of the *Pullman* case has been greatly expanded. It

has indeed been extended so far as to make the presence in federal court litigation of a state law question a convenient excuse for requiring the federal court to hold its hand while a second litigation is undertaken in the state court. This is a delaying tactic that may involve years of time and that inevitably doubles the cost of litigation. When used widespread, it dilutes the stature of the Federal District Courts, making them secondary tribunals in the administration of justice under the Federal Constitution.

With all due deference, this case seems to me to be the most inappropriate one of all in which to withhold the hand of the Federal District Court. Congress has ordained in the Civil Rights Act that "All persons within the jurisdiction of the United States shall have the same right in every State . . . to sue, be parties, give evidence . . . as is enjoyed by white citizens . . . ." 42 U. S. C. § 1981. It has subjected to suit "Every person who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights . . . secured by the Constitution and laws . . ." 42 U. S. C. § 1983; and has given the District Courts "original jurisdiction" of actions "to redress the deprivation, under color of any State law, . . . of any right . . . secured by the Constitution of the United States or any Act of Congress providing for equal rights of citizens . . . ." 28 U. S. C. § 1343. The latter section was invoked here. From the time when Congress first implemented the Fourteenth Amendment by the comprehensive Civil Rights Act of 1871 the thought has prevailed that the federal courts are the unique tribunals which are to be utilized to preserve the civil rights of the people. Representative Dawes, in the debate on the 1871 bill, asked "what is the proper method of thus securing the free and undisturbed enjoyment of these rights?" Looking to the Act which eventually

became law he answered, "The first remedy proposed by this bill is a resort to the courts of the United States.* Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges and immunities; and hold him to account there, . . . I submit . . . that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and fact, as that great tribunal of the Constitution." Cong. Globe, 42d Cong., 1st Sess. 476 (1871).

It seems plain to me that it was the District Court's duty to provide this remedy, if the appellees, who invoked that court's jurisdiction under the Civil Rights Act, proved their charge that the appellants, under the color of the Virginia statutes, had deprived them of civil rights secured by the Federal Constitution. See *Hague* v. *C. I. O.*, 307 U. S. 496, 530–532.

Judge Soper, speaking for the three-judge District Court, said that the five statutes against which the suits were directed "were enacted for the express purpose of impeding the integration of the races in the public schools" of Virginia. 159 F. Supp. 503, 511. He reviewed at length the legislative history of the five Virginia statutes (*id.*, 511–515) concluding that "they were

*It was not until 1875 that Congress gave the federal courts general jurisdiction over federal-question cases. 18 Stat. 470. The choice made in the Civil Rights Acts of 1870 and 1871 to utilize the federal courts to insure the equal rights of the people was a deliberate one, reflecting a belief that some state courts, which were charged with original jurisdiction in the normal federal-question case, might not be hospitable to claims of deprivation of civil rights. Whether or not that premise is true today, the fact remains that there has been no alteration of the congressional intent to make the federal courts the primary protector of the legal rights secured by the Fourteenth and Fifteenth Amendments and the Civil Rights Acts.

passed to nullify as far as possible the effect of the decisions" of this Court in *Brown* v. *Board of Education,* 347 U. S. 483, 349 U. S. 294. *Id.,* 511. They were indeed "parts of the general plan of massive resistance" which Virginia inaugurated against those decisions. *Id.,* 515.

Of course Virginia courts were not parties to the formulation of that legislative program. But they are interpreters of Virginia laws and bound to construe them, if possible, so that the legislative purpose is not frustrated. Where state laws make such an assault as these do on our decisions and a State has spoken defiantly against the constitutional rights of the citizens, reasons for showing deference to local institutions vanish. The conflict is plain and apparent; and the federal courts stand as the one authoritative body for enforcing the constitutional right of the citizens.

This Court has had before it other state schemes intended to emasculate constitutional provisions or circumvent our constitutional decisions. In *Guinn* v. *United States,* 238 U. S. 347, a "Grandfather Clause" in an Oklahoma suffrage statute, exempting citizens who were qualified to vote on January 1, 1866, and their lineal descendants, from the requirements of a literacy test was said to have "no discernible reason other than the purpose to disregard the prohibitions of the [Fifteenth] Amendment," and was struck down because in "direct and positive disregard" of that Amendment. *Id.,* pp. 363, 365. Oklahoma sought to avoid the effects of that decision (rendered in 1915) by requiring all qualified voters in 1916 to register within a named 12-day period, else the right to vote would be lost to them permanently. Persons who voted in the 1914 election were, however, exempt from the requirement. The new statute was invalidated, this Court noting that the Fifteenth Amendment barred "sophisticated as well as simple-minded" "contrivances by a state to thwart equality in

the enjoyment of the right to vote." *Lane* v. *Wilson,* 307 U. S. 268, 275. The Boswell Amendment to the Alabama Constitution required prospective voters to understand and explain a section of the Alabama Constitution to the satisfaction of a registrar. A three-judge court found it to be a device in purpose and in practice to perpetuate racial distinctions in regulation of suffrage. We affirmed the judgment without requiring any submission of the amendment to the state courts to see how they might narrow it. *Schnell* v. *Davis,* 336 U. S. 933, affirming 81 F. Supp. 872. All these cases originated in federal courts and implicated state laws evasive of our decisions; and we decided them without rerouting them through the state courts.

A similar history is evidenced by the "White Primary" cases. It starts with *Nixon* v. *Herndon,* 273 U. S. 536, where a Texas statute prohibiting Negroes from participating in Democratic Party primary elections was characterized as a "direct and obvious infringement" of the Fourteenth Amendment's Equal Protection Clause. As a result of that decision, the Texas Legislature enacted a new statute authorizing the State Executive Committee of a political party to prescribe the qualifications for voters in its primary elections. Pursuant thereto the Democratic Party Committee adopted a resolution limiting the voting privilege to white Democrats. Finding that the Committee was an arm of the State, and that it discharged its power in such a way as to "discriminate invidiously between white citizens and black" this Court overturned the restriction. *Nixon* v. *Condon,* 286 U. S. 73, 89. In *Smith* v. *Allwright,* 321 U. S. 649, we held that approval by the state party convention of the discriminating prohibition did not save it. And see *Terry* v. *Adams,* 345 U. S. 461. These cases too originated in federal courts and were aimed at state laws at war with our decisions. Here, again, we decided them without

509615 O–59–15

making the parties first repair to the state courts for a construction of the state statutes.

We need not—we should not— give deference to a state policy that seeks to undermine paramount federal law. We fail to perform the duty expressly enjoined by Congress on the federal judiciary in the Civil Rights Acts when we do so.

To return to the present case: the error, if any, of the District Court was not in passing on the constitutionality of three of the five Virginia statutes now before us but in remitting the parties to the Virginia courts for a construction of the other two.

Syllabus.

COUNTY OF ALLEGHENY *v.* FRANK MASHUDA CO. ET AL.

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

No. 347. Argued April 2, 1959.—Decided June 8, 1959.

1. A federal district court may not abstain from exercising its properly invoked diversity jurisdiction in a state eminent domain case in which the exercise of that jurisdiction would not entail the possibility of a premature and perhaps unnecessary decision of a serious federal constitutional question, would not create the hazard of unsettling some delicate balance in the area of federal-state relationships, and would not even require the District Court to guess at the resolution of uncertain and difficult issues of state law. Pp. 186–198.

2. While a proceeding to assess damages for the condemnation of land for an airport was pending in a Pennsylvania state court, the landowners, properly invoking jurisdiction on the ground of diversity of citizenship, sued in a Federal District Court for a judgment of ouster, on the ground that the taking was for private use and therefore contrary to state law. There was no federal constitutional question involved; the state law on the point was clear and well settled; the case turned on the purely factual question whether the taking was for private rather than public use; and under state procedure the issue of the validity of the taking could be litigated in a separate suit. However, the District Court dismissed the suit on the ground that it should not interfere with the administration of the affairs of a political subdivision acting under color of state law in a condemnation proceeding. *Held:* No exceptional circumstances justifying abstention appear in this case, and the District Court should have adjudicated the claim. Pp. 186–198.

   (a) The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. P. 188.

   (b) Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. Pp. 188–189.

(c) An order to the parties to repair to the state court in this case would not entail the possibility of mooting a federal constitutional issue or changing its posture. P. 189.

(d) Adjudication of the issues in this case by the District Court would present no hazard of disrupting federal-state relations, since the District Court would be acting toward the pending state condemnation proceeding in the same manner as would a state court. Pp. 189–191.

(e) The fact that this case concerns the exercise of a State's power of eminent domain did not justify the District Court in abstaining from exercising its jurisdiction. Pp. 191–196.

(f) This case illustrates the unnecessary delay and expense that results from refusal of the District Court to exercise its properly invoked jurisdiction. Pp. 196–197.

(g) Refusal to exercise jurisdiction could not be justified on the ground that the state court had assumed jurisdiction over the *res*, since the pending state proceeding was simply an *in personam* suit to determine the amount the State should pay for the property. P. 197.

(h) A decision by the District Court holding that the taking was invalid would not be barred by 28 U. S. C. § 2283, which provides that a federal court may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments, since respondents do not seek an injunction in this case. Pp. 197–198.

256 F. 2d 241, affirmed.

Philip Baskin argued the cause for petitioner. With him on the brief were *Maurice Louik* and *Francis A. Barry.*

Harold R. Schmidt argued the cause for respondents. With him on the brief were *Don Rose* and *John L. Laubach, Jr.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question whether a District Court may abstain from exercising its properly invoked diver-

sity jurisdiction in a state eminent domain case in which the exercise of that jurisdiction would not entail the possibility of a premature and perhaps unnecessary decision of a serious federal constitutional question, would not create the hazard of unsettling some delicate balance in the area of federal-state relationships, and would not even require the District Court to guess at the resolution of uncertain and difficult issues of state law. We hold that in such circumstances a District Court cannot refuse to discharge the responsibility, imposed by Congress under 28 U. S. C. §§ 1332 and 1441, to render prompt justice in cases where its diversity jurisdiction has been properly invoked.

The Board of County Commissioners of Allegheny County, Pennsylvania, invoked the applicable eminent domain statutes of the State to appropriate certain property of respondents, citizens of Wisconsin, for the alleged purpose of improving and enlarging the Greater Pittsburgh Airport. The Board adopted the required resolution of taking, and thereafter petitioned the Court of Common Pleas of Allegheny County for appointment of a Board of Viewers to assess damages for the taking. A Board of Viewers was convened and awarded the respondents $52,644 in compensation for their property. Both parties appealed this award to the Common Pleas Court pursuant to the state procedure, and that proceeding is now pending. Subsequent to the time when the County obtained possession respondents learned that their property had been leased to Martin W. Wise, Inc., allegedly for its private business use. The applicable Pennsylvania substantive law is clear: "It is settled law in Pennsylvania that private property cannot be taken for a private use under the power of eminent domain." *Philadelphia Clay Co.* v. *York Clay Co.*, 241 Pa. 305, 308, 88 A. 487; see also *Winger* v. *Aires*, 371 Pa. 242, 89 A. 2d 521; *Lance's Appeal*, 55 Pa. 16.

On the basis of this settled law respondents brought suit in the United States District Court for the Western District of Pennsylvania, alleging that "at the time of the taking the only definite plan and purpose of the County with regard to said land was that the same would be leased to defendant Martin W. Wise, Inc. for the benefit of the said lessee and for no public use," and seeking a judgment of ouster against the County and Martin W. Wise, Inc., damages, and, in the alternative, an injunction restraining the County from proceeding further in the pending state court damage proceeding.[1] The District Court, although recognizing that its diversity jurisdiction had been properly invoked, dismissed the suit on the ground that it "should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding." 154 F. Supp. 628, 629. The Court of Appeals reversed, holding that a challenge to the validity of a taking such as respondents make in this case may, and perhaps must, be brought in an independent suit different from the Board of Viewers proceeding to assess damages, and that such an independent suit based on diversity of citizenship could therefore be maintained in the District Court. 256 F. 2d 241. We granted certiorari because of the important question presented as to whether the District Court had discretion to abstain from the exercise of jurisdiction in the circumstances of this case. 358 U. S. 872.

The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only

[1] The prayer for injunctive relief was expressly abandoned in oral argument before this Court.

in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. Since no exceptional circumstances justifying abstention appear in this case we think that the Court of Appeals was correct in holding that the District Court should have adjudicated the respondents' claim.

This Court has sanctioned a federal court's postponement of the exercise of its jurisdiction in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. See, *e. g., City of Meridian* v. *Southern Bell Tel. & Tel. Co.,* 358 U. S. 639; *Government Employees Organizing Comm.* v. *Windsor,* 353 U. S. 364; *Leiter Minerals, Inc.,* v. *United States,* 352 U. S. 220; *Albertson* v. *Millard,* 345 U. S. 242; *Shipman* v. *DuPre,* 339 U. S. 321; *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368; *American Federation of Labor* v. *Watson,* 327 U. S. 582; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450; *Spector Motor Service, Inc.,* v. *McLaughlin,* 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U. S. 168; *Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U. S. 496. But there are no federal constitutional questions raised in this case.

This Court has also upheld an abstention on grounds of comity with the States when the exercise of jurisdiction by the federal court would disrupt a state administrative process, *Burford* v. *Sun Oil Co.,* 319 U. S. 315; *Pennsylvania* v. *Williams,* 294 U. S. 176, interfere with the collection of state taxes, *Toomer* v. *Witsell,* 334 U. S. 385, 392; *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies, *Alabama Public Service Comm'n* v. *Southern R. Co.,* 341 U. S. 341; *Hawks* v. *Hamill,* 288 U. S. 52. But adjudication of the issues in this case by the District Court would

present no hazard of disrupting federal-state relations. The respondents did not ask the District Court to apply paramount federal law to prohibit state officials from carrying out state domestic policies, nor do they seek the obvious irritant to state-federal relations of an injunction against state officials. The only question for decision is the purely factual question whether the County expropriated the respondents' land for private rather than for public use. The District Court would simply be acting as would a court of the State in applying to the facts of this case the settled state policy that a County may not take a private citizen's land under the State's power of eminent domain except for public use.

It is true that a decision by the District Court returning the land to respondents on the ground that the taking was invalid would interfere with the proceeding to assess damages now pending in the state court in the sense that the damage proceeding would be mooted since the County would no longer have the land. But this interference, if properly called interference at all, cannot justify abstention since exactly the same suit to contest the validity of the taking could be brought in a state court different from the one in which the damage proceeding is now pending. It is perfectly clear under Pennsylvania law that the respondents could have challenged the validity of the taking, on the ground that it was not for public purposes, in a suit brought in a Court of Common Pleas independent of the damage proceedings pending on appeal from the Board of Viewers. The Court of Appeals' opinion instructs us as to the state procedure which would have applied if respondents had chosen the state forum: "These [Pennsylvania] authorities establish the propriety, if not the necessity, of testing the validity of a condemnation in a proceeding in the Pennsylvania courts independent of that in which compensation is awarded." 256 F. 2d, at 243. Again the Court of Appeals stated:

"the question involved before the federal court need not, and perhaps cannot, be raised in the pending state action . . . ." *Ibid.* We, of course, usually accept state law as found by the Court of Appeals, see *Propper* v. *Clark,* 337 U. S. 472; *The Tungus* v. *Skovgaard,* 358 U. S. 588, 596, and we have no hesitancy in doing so here where there is no indication that its conclusion as to the state law is not correct.[2] The issues of validity and damage are triable separately not because federal jurisdiction has been invoked, but because they are triable separately under the Pennsylvania law. Respondents, it bears repetition, could have brought this very suit in a state court different from the one in which the damage proceeding is pending and an adjudication of that validity suit by the state court would have the same effect on the pending damage proceeding as will the federal court adjudication. Instead of bringing such a suit in the state court, respondents exercised their right under 28 U. S. C. § 1332 to institute the equivalent suit in the District Court based on diversity of citizenship. Certainly considerations of comity are satisfied if the District Court acts toward the pending state damage proceeding in the same manner as would a state court.

It is suggested, however, that abstention is justified on grounds of avoiding the hazard of friction in federal-state relations any time a District Court is called on to adjudicate a case involving the State's power of eminent domain, even though, as in this case, the District Court would simply be applying state law in the same manner as would a state court. But the fact that a case concerns

---

[2] The Court of Appeals' conclusion as to the Pennsylvania law is amply supported by Pennsylvania authorities. *E. g., Spann* v. *Joint Boards of School Directors,* 381 Pa. 338, 113 A. 2d 281; *Pioneer Coal Co.* v. *Cherrytree & D. R. Co.,* 272 Pa. 43, 116 A. 45; *Philadelphia Clay Co.* v. *York Clay Co.,* 241 Pa. 305, 88 A. 487. See also 14 Standard Pa. Practice, c. 71, §§ 230, 231, 233, 235.

a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with "sovereign prerogative" than a State's power to regulate fishing in its waters, *Toomer* v. *Witsell,* 334 U. S. 385, its power to regulate intrastate trucking rates, *Public Utilities Comm'n of California* v. *United States,* 355 U. S. 534, a city's power to issue certain bonds without a referendum, *Meredith* v. *Winter Haven,* 320 U. S. 228, its power to license motor vehicles, *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77, and a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law.

Furthermore, the federal courts have been adjudicating cases involving issues of state eminent domain law for many years, without any suggestion that there was entailed a hazard of friction in federal-state relations. A host of cases, many in this Court, have approved the decision by a federal court of precisely the same kind of state eminent domain question which the District Court was asked to decide in this case. This Court approved such a decision as early as 1878,[3] in *Boom Co.* v. *Patterson,* 98

[3] The basis for federal court adjudication of state eminent domain proceedings was established even before this. In *Suydam* v. *Broadnax,* 14 Pet. 67; *Union Bank* v. *Jolly's Adm'rs,* 18 How. 503; and *Hyde* v. *Stone,* 20 How. 170, this Court held that the federal courts would decide diversity cases even though they involved issues, such as the validity of a will, which were peculiarly within the State's competence to regulate. The principles were clearly settled in *Gaines* v. *Fuentes,* 92 U. S. 10. That case concerned a suit "to annul [a will] . . . as a muniment of title, and to limit the operation of the decree admitting it to probate." 92 U. S., at 20. The case, originally brought in a state court, was removed to a federal court on the basis of diversity

U. S. 403. There the petitioner, a private corporation authorized to utilize the State's power of eminent domain, moved in a state court to condemn respondent's land. Both parties appealed from an award by Commissioners, as provided by the relevant state statute, to a state court for a trial *de novo*. At this point, respondent removed the case to a federal court on the basis of diversity of citizenship. This Court, while recognizing that eminent domain is "an exercise by the State of its sovereign right . . . and with its exercise the United States . . . has no right to interfere . . . ," held that the removal was proper and that the federal court correctly adjudicated the issues involved. The Court concluded: "But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties, . . . there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State." 98 U. S., at 406. This rationale was subsequently applied by this Court to uphold adjudication of state eminent domain proceedings involving suits between diverse parties in the federal courts even though the procedures available would not be the same as those provided

---

of citizenship. This Court upheld the removal on the ground that, although the State had authority to establish the substantive law relevant to the validity of wills and the procedure by which wills were to be contested, if, under the scheme developed by the State, a controversy arose between citizens of different States, the federal courts would adjudicate that controversy. These principles were further articulated in *Chicot County* v. *Sherwood,* 148 U. S. 529. This Court has often upheld federal court determinations of state law concerning wills, *e. g., Ellis* v. *Davis,* 109 U. S. 485; *Hess* v. *Reynolds,* 113 U. S. 73, even when the State itself claimed the decedent's property by escheat, *McClellan* v. *Carland,* 217 U. S. 268.

by the state practice, *Searl* v. *School District No. 2,* 124 U. S. 197, and even though the case involved the power of the condemning authority to take the property, *Pacific Railroad Removal Cases,* 115 U. S. 1, 17–23.

It is now settled practice for Federal District Courts to decide state condemnation proceedings in proper cases despite challenges to the power of the condemning authority to take the property. This Court has approved of the practice many times. *East Tennessee, Va. & Ga. R. Co.* v. *Southern Telegraph Co.,* 112 U. S. 306; *Clinton* v. *Missouri P. R. Co.,* 122 U. S. 469; *Upshur County* v. *Rich,* 135 U. S. 467, 475–477 (dictum); *Martin's Adm'r* v. *Baltimore & Ohio R. Co.,* 151 U. S. 673, 683 (dictum); *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239; *Mason City and Fort Dodge R. Co.* v. *Boynton,* 204 U. S. 570; *Commissioners of Lafayette County* v. *St. Louis Southwestern R. Co.,* 257 U. S. 547 (dictum); *Cincinnati* v. *Vester,* 281 U. S. 439. Cf. *Risty* v. *Chicago, R. I. & P. R. Co.,* 270 U. S. 378. Trial of state eminent domain cases has become a common practice in the federal courts.[4] Indeed, Rule 71A of the Federal Rules of Civil Procedure,

[4] *E. g., Wabash R. Co.* v. *Duncan,* 170 F. 2d 38; *Franzen* v. *Chicago, M. & St. P. R. Co.,* 278 F. 370; *In re Bensel,* 206 F. 369; *Broadmoor Land Co.* v. *Curr,* 142 F. 421; *South Dakota Cent. R. Co.* v. *Chicago, M. & St. P. R. Co.,* 141 F. 578; *Chicago, R. I. & P. R. Co.* v. *10 Parcels of Real Estate Located in Madison County, Iowa,* 159 F. Supp. 140; *Williams Live Stock Co.* v. *Delaware, L. & W. R. Co.,* 285 F. 795; *Deepwater R. Co.* v. *Western Pocahontas Coal & Lumber Co.,* 152 F. 824; *Union Terminal R. Co.* v. *Chicago, B. & Q. R. Co.,* 119 F. 209; *Kirby* v. *Chicago & N. W. R. Co.,* 106 F. 551; *Sugar Creek, P. B. & P. C. R. Co.* v. *McKell,* 75 F. 34; *Kansas City & T. R. Co.* v. *Interstate Lumber Co.,* 37 F. 3; *Mineral Range R. Co.* v. *Detroit & Lake Superior Copper Co.,* 25 F. 515; *City of Chicago* v. *Hutchinson,* 15 F. 129. Cf. *Kaw Valley Drainage District* v. *Metropolitan Water Co.,* 186 F. 315; *Fishblatt* v. *Atlantic City,* 174 F. 196; *Adams* v. *City of Woburn,* 174 F. 192; *Kansas City* v. *Hennegan,* 152 F. 249. See also 7 Moore's Federal Practice (2d ed.) § 71A.11; 6 Nichols on Eminent Domain (3d ed.) § 27.8 [2].

adopted by the Court in 1951, provides a detailed procedure for use in eminent domain cases in the Federal District Courts and specifically provides, in subsection (k), "The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed." This Rule makes perfectly clear, as do the Notes of the Advisory Committee on Rules pertaining to it,[5] that this Court, when it adopted the Rule, intended that state eminent domain cases, including those which raised questions of authority to take land, would be tried in the Federal District Courts if jurisdiction was properly invoked. This was confirmed by this Court's opinion in *Chicago, R. I. & P. R. Co.* v. *Stude,* 346 U. S. 574. Although holding that the respondent could not remove a state condemnation case to the Federal District Court on diversity grounds because he was the plaintiff in the state proceeding, the Court clearly recognized that the defendant in such a proceeding could remove in accordance with § 1441 and obtain a federal adjudication of the issues involved.

There is no suggestion that the state eminent domain proceedings tried in the federal courts, both before and after promulgation of the Rule 71A procedures, have resulted in misapplication of state law, inconvenience, or friction with the States. Rule 71A was adopted only after a thorough investigation of eminent domain practice in the federal courts,[6] and its provision for trying state

---

[5] Note to Subdivision (k), Notes to Rule 71A of Advisory Committee on Rules, printed at 28 U. S. C. A. Rule 71A (1958 Pocket Part).

[6] See Notes to Rule 71A of Advisory Committee on Rules, note 8, *supra;* see also 7 Moore's Federal Practice (2d ed.) § 71A.120; 64 Yale L. J. 600.

eminent domain cases in the District Courts necessarily reflects a conclusion that this practice is unobjectionable.

Aside from the complete absence of any possibility that a District Court adjudication in this case would necessitate decision of a federal constitutional issue or conflict with state policy, the state law that the District Court was asked to apply is clear and certain. All that was necessary for the District Court to dispose of this case was to determine whether, as a matter of fact, the respondents' property was taken for the private use of Martin W. Wise, Inc. The propriety of a federal adjudication in this case follows *a fortiori* from the established principle that Federal District Courts should apply settled state law without abstaining from the exercise of jurisdiction even though this course would require decision of difficult federal constitutional questions. *Chicago* v. *Atchison, T. & S. F. R. Co.,* 357 U. S. 77; *Public Utilities Comm'n of California* v. *United States,* 355 U. S. 534; *Toomer* v. *Witsell,* 334 U. S. 385.

The undesirability of a refusal to exercise jurisdiction in the absence of exceptional circumstances which clearly justify an abstention is demonstrated by the facts of this case. Respondents have consumed considerable time and expense in pursuing their claim that their property has been unlawfully taken. To order them out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties. This would be a particular hardship for the respondents, who, besides incurring the added expense, would also suffer a further prolonged unlawful denial of the possession of their property if ultimately they prevail against the County and its lessee. It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them "that promptness of decision

which in all judicial actions is one of the elements of justice." *Forsyth* v. *Hammond,* 166 U. S. 506, 513.

Two other contentions raised by the County can be disposed of quickly. The County argues that the Board of Viewers has established jurisdiction over the land in question and thus the rule applies that when one court has assumed jurisdiction over a *res,* no other court will undertake to enter a judgment which might be incompatible with the disposition ultimately to be made by the first court. The short answer to this contention is that the Board of Viewers under Pennsylvania law does not have *in rem* jurisdiction over property. This is apparent from the fact that an independent proceeding lies to question the validity of the taking of property which is the subject of a Board of Viewers' proceeding. The "damage" proceeding is simply an *in personam* suit to determine what the State must pay for property it appropriates; it does not require or contemplate control of the *res* by the Board of Viewers.

The County also urges that a decision by the District Court holding the taking to be invalid would be barred by 28 U. S. C. § 2283. That section provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The County's theory is that a holding that the taking was invalid and an order reconveying the land to respondents would be *res judicata* on the parties in the Board of Viewers' proceedings. Since the County would no longer have the land, that proceeding to determine the compensation due for the taking of the land would be mooted. But it has been firmly established under the language of

§ 2283, which has, in substance, been in force since first enacted in § 5 of the Act of March 2, 1793,[7] that a federal suit is not barred merely because a holding in the case might be *res judicata* on the same parties litigating the same issue in a state court and thereby moot the state proceeding. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, settled the governing principle. In that case diversity jurisdiction had been invoked to adjudicate an alleged breach of contract. The defendant in the federal court proceeding had initiated a suit in a state court to adjudicate the same issue. The Court of Appeals ruled that the Federal District Court should have issued a requested injunction to stay the state court proceedings. This Court held that a statute similar to present § 2283 barred the injunction, but that the District Court could adjudicate the breach of contract issue even though its holding would be decisive of the state case. The Court stated that "the rule . . . has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." 260 U. S., at 230. Congress in enacting § 2283 expressed no intention to modify this firmly established principle. Thus there is no reason to expand the plain wording of § 2283 which bars only *injunctions* designed to stay state court proceedings. The respondents' suit in the District Court was for a judgment of ouster. They abandoned the claim for an injunction against the state court and against the County. It follows that § 2283 would not bar the relief requested in the District Court.

Affirmed.

---

[7] The language of 28 U. S. C. § 2283 has been retained substantially unchanged from its original form in § 5 of the Act of March 2, 1793, 1 Stat. 334–335. For a discussion of its origin and history, see *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118.

MR. JUSTICE CLARK, with whom MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE HARLAN join, dissenting.

The Court says that under the peculiar facts of this case the trial judge has abused his discretion in abstaining from trying the issue involved here, which is presently pending in a previously filed state case between the same parties. I see nothing in the facts that reveals any clear abuse of discretion. In fact, the disruption of the State's processes by the refusal of the Court in the circumstances of this case to permit the application of modern businesslike procedures in the administration of the federal diversity jurisdiction requires my dissent.

Allegheny County, a subdivision of the State of Pennsylvania, took action under its state law to acquire property owned by respondents which was allegedly necessary for the enlargement of its Greater Pittsburgh Airport. The respondents made no effort to remove that action to the federal court. If that had been done, the entire case would have been subject to trial in the federal court. Instead, however, the respondents appeared in the state case and contested the issue of damages for the taking, but raised no objection whatever to its validity. Both parties appealed from an award of $52,644 in damages and demanded a trial *de novo* in the State's Court of Common Pleas. The County thereupon entered upon the property and began its improvement. A year later respondents filed this suit in the federal court attacking the validity of the County's taking in the state suit.[1]

[1] The grounds are obviously frivolous. Respondents urge that the County's leasing to its contractor of a strip 75′ x 150′ out of the 8 acres condemned amounts to an abandonment of its taking for "public use." The record shows that the lease was made in order to permit the contractor to use this small strip for storage and con-

509615 O–59–16

The Court requires the County to litigate that sole issue in the federal court while the state court holds in abeyance the original case involving the taking as well as the damages therefor.

Thus the state suit is split; the validity of the taking being involved in the federal court as well as the state proceeding, while the amount of damages remains for the state court alone. Admittedly the federal court cannot obtain jurisdiction over the latter. As a result, the County now has two lawsuits on its hands, one, involving half of its state case, will be tried in the federal court, while the remainder pends in the state court. If it finally prevails in the federal court, after two or three more years of delay incident to trial and appeal, still it must go back to its state case and try the issue of damages. If the County loses in the federal court, it must nevertheless go back to the state court and start all over again with a new action or an amendment of the old one. This is true because the plans, as shown in the record, indicate clearly that the County will be obliged to take respondents' property because it is situated adjacent to the old entrance to the airport and would be necessary for the proposed enlargement. The latter course would inevitably lead to greater damages, as well as additional years of delay, all of which would be occasioned by the action today.

The Court describes this needless merry-go-round of technical procedures as preventing "added expense [and] . . . further prolonged unlawful denial of the possession of their [respondents'] property. . . ." Obviously just the opposite is true. The respondents, by not removing the case to the federal court, but rather by waiting a year before filing the present suit, have now delayed the

---

centration of supplies of the contractor in the performance of his duties under the contract with the County for the improvement and enlargement of the Greater Pittsburgh Airport.

County for over three years,[2] and bid fair to extend that period for at least two more under the ruling of this Court. On the other hand, if the Court required respondents to proceed in the state suit, all of the issues between the parties would be settled in the one suit, even if respondents persisted—as the Court holds is their right—in filing a separate suit in the state court over the validity of the taking. That suit could easily be consolidated with the original case, and the validity of the taking as well as the damages therefor could be settled at one trial. This, of course, cannot be done when one of the cases is in the federal court and the other in the state. This points up the fallacy of the Court's conclusion that "considerations of comity are satisfied if the [Federal] District Court acts toward the pending state damage proceeding in the same manner as would a state court." It is, indeed, a poor way to administer justice, especially where a subdivision of the State is involved.

In short, I say that under the peculiar facts of this case the "exceptional circumstances" of which the majority speaks are present. An "order to the parties to repair to the state court would clearly serve an important countervailing interest," namely, the orderly and businesslike administration of justice, as well as the comity due Pennsylvania's courts.

As to the latter consideration, the Court bottoms its decision to make the County split its case between the two jurisdictions on the proposition that respondents "abandoned the claim for an injunction against the state

---

[2] The record does not reveal whether the County has proceeded with its improvements or not. If it has not, the respondents' action in filing this suit, and which the Court approves, has delayed a much-needed improvement for over three years. If it has proceeded to complete the improvement, the County has still been delayed in obtaining final title to the property for all these years, all because of this frivolous action of the respondents.

court and against the County." But the reality of the situation is that the state court, which has already abstained for three years at the urging of respondents may now decide that it should proceed to hear and determine both the issues of validity and damages which are and have been pending in the state case. If it did so, there would result an unseemly race between the forums and a head-on collision between the state and federal courts. The latter would be moving by way of ejectment and the former by way of condemnation over the same property and involving the same parties. Still, since, as the majority says, "the plain wording of § 2283 . . . bars . . . injunctions," this unseemly spectacle could not be stopped and would result in "needless friction with state policies." *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 500 (1941). In view of these circumstances, peculiar to this case, there is nothing here to show that the trial court clearly abused its discretion and I would therefore reverse the Court of Appeals and reinstate the judgment of the trial judge.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* CABOT CARBON CO. ET AL.

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

No. 329. Argued March 24, 1959.—Decided June 8, 1959.

Respondents organized an "employee committee" at each of their numerous plants for the stated purposes of meeting regularly with management to consider and discuss problems of mutual interest, including grievances, and of handling grievances at nonunion plants and departments. In practice, such committees also made proposals and requests respecting such matters as seniority, job classification, job bidding, working schedules, holidays, vacations, sick leave, a merit system, wage corrections, and improvement of working conditions and facilities. A "central committee" consisting of the chairmen of the several plant committees also met annually at the head office with respondents' Director of Industrial Relations and made proposals and requests with respect to matters covering nearly the whole scope of the employment relationship which are commonly considered and dealt with in collective bargaining. After appropriate administrative proceedings, the National Labor Relations Board found that both the "employee committees" and the "central committee" were "labor organizations" within the meaning of § 2 (5) of the National Labor Relations Act and that respondents had dominated, interfered with, and supported them in violation of § 8 (a) (2); and it issued an appropriate cease and desist order. *Held:* The order is sustained. Pp. 204–218.

1. Such committees are "labor organizations" within the meaning of § 2 (5) of the Act. Pp. 210–218.

(a) Since such committees exist, in part at least, for the purpose of "dealing with employers concerning grievances . . . or conditions of work," they are not excluded from the definition of "labor organizations" in § 2 (5) simply because they do not "bargain with" employers in the usual concept of collective bargaining. Pp. 210–213.

(b) Consideration of the declared purposes and actual functions of these committees shows that they existed for the purpose, in part at least, of "dealing with employers concerning grievances,

labor disputes, wages, rates of pay, hours of work, or conditions of work," and that, therefore, they are "labor organizations" within the meaning of § 2 (5). Pp. 213–215.

(c) There is nothing in the 1947 amendment of § 9 (a) or its legislative history to indicate that Congress thereby eliminated, or intended to eliminate, such employee committees from the term "labor organization" as defined in § 2 (5) and used in § 8 (a) (2), or that authorizes an employer to engage in "dealing with" an employer-dominated "labor organization" as the representative of his employees concerning their grievances. Pp. 215–218.

2. Since the Board's order does not forbid employers and employees from discussing matters of mutual interest concerning the employment relationship but merely precludes the employers from dominating, interfering with or supporting the employee committees, it does not abridge freedom of speech in violation of the First Amendment. P. 218.

256 F. 2d 281, reversed.

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

Haywood H. Hillyer, Jr. argued the cause for respondents. With him on the brief were *M. Truman Woodward, Jr., Richard C. Keenan* and *Milton C. Denbo.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

The question for decision in this case is whether "Employee Committees" established and supported by respondents at each of their several plants for the stated purposes of meeting regularly with management to consider and discuss problems of mutual interest, including grievances, and of handling "grievances at nonunion plants and departments," are, in the light of their declared purposes and actual practices, "labor organizations"

within the meaning of § 2 (5) of the National Labor Relations Act.[1]

Respondents are affiliated corporations under the same general management and maintain their principal office at Pampa, Texas. They are, and for many years have been, engaged in operating a number of plants, principally in Texas and Louisiana, primarily for the purposes of manufacturing and selling carbon black and oil field equipment. Pursuant to a suggestion of the War Production Board in 1943, respondents decided to establish an Employee Committee at each of their plants. To that end, respondents prepared, in collaboration with employee representatives from their several plants, a set of bylaws, stating the purposes, duties and functions of the proposed Employee Committees, for transmittal to and adoption by the employees in establishing such Committees. The bylaws were adopted by a majority of employees at each plant and by respondents, and, thus, the Employee Committees were established. Those bylaws, and certain related company rules, were later published by respondents in a company manual called "The Guide," and are still in effect.

In essence, the bylaws state: that the purpose of the Committees is to provide a procedure for considering employees' ideas and problems of mutual interest to employees and management; [2] that each plant Committee

[1] Section 2 (5) of the National Labor Relations Act, 61 Stat. 138, 29 U. S. C. § 152 (5) provides:

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

[2] Examples of the problems of mutual interest to employees and management to be considered at the Committee-Management meet-

shall consist of a stated number of employees (ranging from 2 to 3) whose terms shall be one year, and that retiring members, with the help of plant clerks, will conduct the nomination and election of their successors; that each plant Committee shall meet with the plant management at regular monthly meetings and at all special meetings called by management, shall assist the plant management in solving problems of mutual interest, and that time so spent will be considered time worked; and that "It shall be the Committee's responsibility to: . . . Handle grievances at nonunion plants and departments according to procedure set up for these plants and departments." [3]

In November 1954, International Chemical Workers Union, AFL–CIO, filed with the National Labor Relations Board, and later several times amended, an unfair labor practice charge against respondents, alleging, in part, that respondents were unlawfully dominating, inter-

---

ings were stated in the bylaws to be, but were not limited to, safety; increased efficiency and production; conservation of supplies, materials, and equipment; encouragement of ingenuity and initiative; and grievances at nonunion plants or departments.

[3] As published in The Guide the established grievance procedure applicable to nonunion plants and departments provides, in summary, that in handling an employee's grievance it shall be the Committee's duty to consult with the Foreman, the Assistant Plant Superintendent and the Plant Superintendent, and consider all the facts. If, after having done so, the Committee believes that the employee has a just grievance it shall prepare in writing a formal statement of its supporting reasons and present it to the Plant Superintendent, who shall send copies of it, attaching his own report and recommendations, to the District Superintendent, the department head and Industrial Relations Department of the company. Within five days after receipt of such grievance the District Superintendent or the department head, or both, shall meet with the Committee and plant management and discuss the problem and announce their decision. If the Committee still feels that the grievance has not been fairly settled it may appeal to the General Manager who, within five days, shall meet with the Committee and plant management and announce his decision.

fering with and supporting labor organizations, called Employee Committees, at their several plants. Thereafter the Board, in April 1956, issued a complaint against respondents under § 10 (b) of the Act (29 U. S. C. § 160 (b)) alleging, *inter alia,* that the Employee Committees were labor organizations within the meaning of § 2 (5) (see note 1), and that respondents, since May 1954, had dominated, interfered with, and supported the Committees in violation of § 8 (a)(2) of the Act.[4]

After a hearing, the trial examiner issued his intermediate report containing detailed findings of fact. The relevant findings, mainly based on undisputed evidence, may be summarized as follows: The Committees' bylaws were prepared and adopted in the manner, and contain the provisions, above stated. During the period here involved (from May 1954 to the date of the hearing before the Board in June 1956), the Employee Committees, in addition to considering and discussing with respondents' plant officials problems of the nature covered by the bylaws, made and discussed proposals and requests respecting many other aspects of the employee relationship, including seniority, job classifications, job bidding, makeup time, overtime records, time cards, a merit system, wage corrections, working schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions. Respondents' plant officials participated in those discussions and in some instances granted the Committees'

---

[4] Section 8 (a) (2) of the Act, 61 Stat. 140, 29 U. S. C. § 158 (a) (2), provides:

"(a) It shall be an unfair labor practice for an employer—

. . . . . .

"(2) to dominate or interfere with the formation or administration of any *labor organization* or contribute financial or other support to it; *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. . . ." (Emphasis added.)

requests.[5] Although not provided for in the bylaws, a "Central Committee," consisting of the chairmen of the several plant Committees, met annually with respondents' Director of Industrial Relations in Pampa, Texas, where, during the 1955 and 1956 meetings, the Central Committee made proposals and requests with respect to many matters covering nearly the whole scope of the employment relationship.[6] The Director of Industrial Relations discussed those proposals and requests, their feasibility and economic consequences from respondents' point of view, and sought to reach some solution. In some instances he expressed approval of requests or promised to see what could be done toward meeting them, in other instances he suggested that the matter be taken up with local management, and in still other instances he rejected the proposals and requests and explained his reasons for doing so.

---

[5] Among other things, respondents' plant officials agreed to Employee Committee requests to change from a company to a plant seniority system in several plants where employees desired the change; to provide longer notice periods concerning jobs up for bid; to permit employees to report early and leave early on week ends; to establish an annual basis for allocating overtime; and to install vents in the roofs of warehouses.

[6] The subjects discussed by the Central Committee with respondents' Director of Industrial Relations at those meetings included Committee proposals and requests for: a vacation of 3 weeks for employees with 10 years' service; annual sick leave; a disability benefit plan; amendments in the practice of working on holidays; the establishment and financing by respondents of an employee educational program; the granting of leaves of absence to employees wishing to attend college; the furnishing to certain employees of work clothing; a change in policy to permit shiftmen to make up work days lost; the creation of more job classifications, with resulting higher wages; more opportunities for employees to transfer from one plant or department to another; payment of wages to employees while attending National Guard camps; making the working day of shiftworkers the same as that of the gangs with which they work; and a general wage increase.

The trial examiner also found that the Employee Committees have no membership requirements, collect no dues and have no funds; that plant clerks assist the Committees in conducting their elections and do all of their clerical work; and that respondents pay all of the necessary expenses of the Committees. None of the Committees has ever attempted to negotiate a collective bargaining contract with respondents. From time to time the Board has certified independent labor organizations as the exclusive bargaining agents for certain bargaining units of employees in approximately one-third of respondents' plants, and, as such agents for those bargaining units, the respective certified labor organizations have entered into collective bargaining contracts with respondents which, as they may have been amended, are still in effect. Since the respective dates of those collective bargaining contracts the certified labor organizations and the Employee Committees have coexisted in those plants, but the functions of those Employee Committees have generally been reduced to plant efficiency, production promotion and the handling of grievances for employees who are not included in the bargaining units.

Upon these findings the trial examiner concluded in his intermediate report that the Employee Committees and the Central Committee are labor organizations within the meaning of § 2 (5), and that during the period here involved respondents dominated, interfered with, and supported those labor organizations in violation of § 8 (a)(2) (see note 4). He therefore recommended that respondents be ordered to cease such conduct, and to withdraw all recognition from, and completely disestablish, the Committees "as the representative of any of [their] employees for the purpose of dealing with Respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." The Board adopted the findings, conclusions and recommendations

of the trial examiner and entered its order accordingly. 117 N. L. R. B. 1633.

Respondents then petitioned the Court of Appeals to review and vacate the Board's findings and order, and the Board's answer sought enforcement of its order. The Court of Appeals denied enforcement of the Board's order and set it aside. 256 F. 2d 281. It found that respondents dominated and supported the Committees but held that they were not "labor organizations" within the meaning of § 2 (5) (see note 1) because it thought (a) that the term "dealing with," as used in that section, means "bargaining with," and that these Committees "avoid[ed] the usual concept of collective bargaining," and (b) that the provisions and legislative history of the 1947 amendment of § 9 (a) of the Act show that Congress, in effect, excluded such employee committees from the definition of "labor organization" contained in § 2 (5). 256 F. 2d, at 285–289. Because of an asserted conflict of that decision with the decisions of other Courts of Appeals, and of the importance of the matter to the proper administration of the National Labor Relations Act, we granted certiorari. 358 U. S. 863.

We turn first to the Court of Appeals' holding that an employee committee which does not "bargain with" employers in "the usual concept of collective bargaining" does not engage in "dealing with" employers, and is therefore not a "labor organization" within the meaning of § 2 (5). Our study of the matter has convinced us that there is nothing in the plain words of § 2 (5), in its legislative history, or in the decisions construing it, that supports that conclusion.

Section 2 (5) includes in its definition of "labor organization" any "employee representation committee or plan . . . which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances,

labor disputes, wages, rates of pay, hours of employment, or conditions of work." [7] (Emphasis added.) Certainly nothing in that section indicates that the broad term "dealing with" is to be read as synonymous with the more limited term "bargaining with." See, *e. g., Labor Board* v. *Jas. H. Matthews & Co.,* 156 F. 2d 706, 708, and *Indiana Metal Products Corp.* v. *Labor Board,* 202 F. 2d 613, 620–621. The legislative history of § 2 (5) strongly confirms that Congress did not understand or intend those terms to be synonymous. When the original print of the 1935 Wagner bill (S. 1958) was being considered in the Senate, the then Secretary of Labor proposed an amendment to § 2 (5) which, if adopted, would have given that section the meaning now ascribed to it by the Court of Appeals. The proposal was that the term "bargaining collectively" be substituted for the term "dealing." [8] But the proposal was not adopted.[9] It is therefore quite clear that Congress, by adopting the broad term "dealing" and rejecting the more limited term "bargaining collectively," did not intend that the broad term "dealing with" should be limited to and mean only "bargaining with" as held by

---

[7] "The term 'labor organization' is phrased very broadly in order that the independence of action guaranteed by section 7 . . . and protected by section 8 shall extend to all organizations of employees that deal with employers in regard to 'grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.' This definition includes employee-representation committees and plans in order that the employers' activities in connection therewith shall be equally subject to the application of section 8." S. Rep. No. 573, 74th Cong., 1st Sess. 7, reprinted in 2 Legislative History of the National Labor Relations Act, 1935, p. 2306. (The latter publication will hereafter be cited, for example, as 2 Leg. Hist. (1935) 2306.)

[8] Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess. 66–67, reprinted in 1 Leg. Hist. (1935) 1442–1443.

[9] S. 1958 (2d print), 74th Cong., 1st Sess. 4, reprinted in 2 Leg. Hist. (1935) 2287.

the Court of Appeals.[10] Construing § 2 (5) of the original Wagner Act, the Courts of Appeals uniformly held that employee committees or plans, under whatever name called, that functioned similarly to those here, were "labor organizations" as defined in that statute.[11] With full knowledge of the terms of § 2 (5) of the original Wagner Act,[12] and of its legislative history and judicial interpretation, Congress in the Taft-Hartley Act re-enacted the section without change.[13] Since that time, as before, the several Courts of Appeals have uniformly held that employee committees or plans, functioning similarly to those here, were "labor organizations" within the definition of § 2 (5).[14]

The Court of Appeals was therefore in error in holding that company-dominated Employee Committees, which exist for the purpose, in part at least, "*of dealing with* employers concerning grievances . . . or conditions of

---

[10] See comparison of S. 2926 (73d Cong.) and S. 1958 (74th Cong.), pp. 1, 22–23, reprinted in 1 Leg. Hist. (1935) 1320, 1347.

[11] *Labor Board* v. *American Furnace Co.*, 158 F. 2d 376, 378 (C. A. 7th Cir.); *Labor Board* v. *Jas. H. Matthews & Co.*, 156 F. 2d 706, 707–708 (C. A. 3d Cir.); *Labor Board* v. *C. Nelson Mfg. Co.*, 120 F. 2d 444, 445 (C. A. 8th Cir.). Compare *Labor Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 268–269; *Labor Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 246–248.

[12] 49 Stat. 450.

[13] 61 Stat. 138, 29 U. S. C. § 152 (5).

[14] *Pacemaker Corp.* v. *Labor Board*, 260 F. 2d 880, 883 (C. A. 7th Cir.) (where the Seventh Circuit expressly disagreed with the ruling below); *Labor Board* v. *Standard Coil Products Co.*, 224 F. 2d 465, 467–468 (C. A. 1st Cir.); *Labor Board* v. *Stow Mfg. Co.*, 217 F. 2d 900, 903–904 (C. A. 2d Cir.); *Labor Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651–652 (C. A. 6th Cir.); *Indiana Metal Products Corp.* v. *Labor Board*, 202 F. 2d 613, 621 (C. A. 7th Cir.); *Harrison Sheet Steel Co.* v. *Labor Board*, 194 F. 2d 407, 410 (C. A. 7th Cir.); *Labor Board* v. *General Shoe Corp.*, 192 F. 2d 504, 507 (C. A. 6th Cir.). But see *Labor Board* v. *Associated Machines*, 219 F. 2d 433 (C. A. 6th Cir.).

work," are not "labor organizations," within the meaning of § 2 (5), simply because they do not "bargain with" employers in "the usual concept of collective bargaining." (Emphasis added.)

Consideration of the declared purposes and actual functions of these Committees shows that they existed for the purpose, in part at least, "of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." It cannot be, and is not, disputed that, by the terms of the bylaws, which were accepted both by the employees and by respondents, the Employee Committees undertook the "responsibility to," and did, "[h]andle grievances [with respondents on behalf of employees] at nonunion plants and departments according to grievance procedure set up [by respondents] for these plants and departments" (see note 3). It is therefore as plain as words can express that these Committees existed, at least in part, for the purpose "of dealing with employers concerning grievances . . . ." This alone brings these Committees squarely within the statutory definition of "labor organizations."

Moreover, although none of the Employee Committees attempted to negotiate any formal bargaining contract with respondents, the Employee Committees, at the regular Employee Committee-Management meetings held during the period here involved, made proposals and requests respecting such matters as seniority, job classification, job bidding, working schedules, holidays, vacations, sick leave, a merit system, wage corrections, and improvement of working facilities and conditions. Respondents' plant officials participated in the discussion of these matters and frequently granted the Committees' requests (see note 5). Also, during the 1955 and 1956 meetings of the Central Committee with respondents' Director of Industrial Relations in Pampa, Texas, the

Central Committee made proposals and requests with respect to matters covering nearly the whole scope of the employment relationship and which are commonly considered and dealt with in collective bargaining (see note 6). The Director of Industrial Relations discussed those proposals and requests with the Central Committee, and sought to reach some solution. He granted some of them and rejected others, explaining his reasons for doing so. Respondents say that these activities by the Committees and respondents' officials do not mean that the Committees were "dealing with" respondents in respect to those matters, because, they argue, the proposals and requests amounted only to recommendations and that final decision remained with respondents. But this is true of all such "dealing," whether with an independent or a company-dominated "labor organization." The principal distinction lies in the unfettered power of the former to insist upon its requests. *Labor Board* v. *Jas. H. Matthews & Co.*, 156 F. 2d 706, 708.[15] Whether those proposals and requests by the Committees, and respondents' consideration of and action upon them, do or do not constitute "the usual concept of collective bargaining" (256 F. 2d, at 285), we think that those activities establish that the Committees were "dealing with" respondents, with respect to those subjects, within the meaning of § 2 (5).

We therefore conclude that under the declared purposes and actual practices of these Committees they are labor organizations unless, as the Court of Appeals held and as respondents contend, Congress by the 1947 amend-

[15] In *Labor Board* v. *Jas. H. Matthews & Co.*, the court said: "Respondents say that this Junior Board did not deal, it only recommended and that final decision was with management. Final decision is always with management, although when a claim is made by a well organized, good sized union, management is doubtless more strongly influenced in its decision than it would be by a recommendation of a board which it, itself, has selected and which has been provided with no fighting arms." 156 F. 2d, at 708.

ment of § 9 (a), in legal effect, eliminated such committees from the term "labor organization" as defined in § 2 (5) and used in § 8 (a)(2) (see note 4). We now turn to that contention.

In 1947 the House passed H. R. 3020, known as the "Hartley Bill," which, among other things, proposed a new section, to be designated 8 (d)(3), providing:

> "(d) Notwithstanding any other provision of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act:
>
> . . . . .
>
> "(3) Forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative as their representative under section 9." [16]

The Senate amended H. R. 3020 by substituting its own bill, S. 1126, known as the "Taft Bill." [17] The Senate bill contained no provision corresponding to the new § 8 (d)(3) proposed by the House, but it did propose an amendment to § 9 (a) of the original Wagner Act (49 Stat. 453) by adding to the proviso of that section which read:

> "*Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer"

the words

> "and to have such grievances adjusted, without the intervention of the bargaining representative, as long

[16] H. R. 3020, 80th Cong., 1st Sess. 26, reprinted in 1 Leg. Hist. (1947) 183.

[17] S. 1126, 80th Cong., 1st Sess., reprinted in 1 Leg. Hist. (1947) 99.

as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment." [18]

Thereupon the Senate requested a conference.[19] The conferees later reported a new measure, taken partly from the House bill and partly from the Senate bill and containing some entirely new provisions.[20] That bill as finally agreed upon by the conferees did not contain the House's proposed new § 8 (d)(3) or any similar language, but it did contain the Senate's proposed amendment to § 9 (a).

In reporting to the House, the House conferees stated with respect to the elimination of its proposed new § 8 (d)(3) that:

"Section 8 (d)(3) . . . in the House bill provided that nothing in the act was to be construed as prohibiting an employer from forming or maintaining a committee of employees and discussing with it matters of mutual interest, if the employees did not have a bargaining representative. This provision is omitted from the conference agreement since the act by its terms permits individual employees and groups of employees to meet with the employer and section 9 (a) of the conference agreement permits employers to answer their grievances." [21]

---

[18] H. R. 3020, as amended by the Senate, 80th Cong., 1st Sess. 86, reprinted in 1 Leg. Hist. (1947) 244; now 61 Stat. 143, 29 U. S. C. § 159 (a).

[19] 93 Cong. Rec. 5298, reprinted in 2 Leg. Hist. (1947) 1522.

[20] H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., reprinted in 1 Leg. Hist. (1947) 505.

[21] H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 45, reprinted in 1 Leg. Hist. (1947) 549.

The bill so agreed upon by the conferees was passed by both Houses and eventually became the law.[22]

Notwithstanding the fact that Congress rejected the House proposal of a new section, to be designated § 8 (d)(3), which, if adopted, would have permitted an employer to form or maintain a committee of employees and to discuss with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if there was no employee representative, respondents contend that Congress intended to accomplish the same purposes by its amendment to § 9 (a), and that, in consequence, an employer, whose employees have no bargaining representative, may now legally form or maintain a committee of employees and discuss with it the matters referred to in the proposed § 8 (d)(3) advocated by the House.

This argument treats the amendment to § 9 (a) as though Congress had adopted, rather than rejected as it did, the proposed § 8 (d)(3) advocated by the House. And it overlooks the facts that the House Conference Report itself declared that "The conference agreement does not make any change" in the definition of "labor organization,"[23] and that, as pointed out by Senator Taft, the conferees specifically rejected all attempts to "amend . . . the provisions in subsection 8 (2) [of the original Wagner Act] relating to company-dominated unions" and had left its prohibitions "unchanged."[24] The amendment to § 9 (a) does not say that an employer may form or maintain an employee committee for the purpose of "dealing with" the employer, on behalf of employees, concerning grievances. On the contrary the amendment to § 9 (a) simply provides, in substance, that

---

[22] 61 Stat. 136 *et seq.*, 29 U. S. C. § 151 *et seq.*

[23] H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 33, 1 Leg. Hist. (1947) 537.

[24] 93 Cong. Rec. 6600, reprinted in 2 Leg. Hist. (1947) 1539.

any individual employee or group of employees shall have the right personally to present their own grievances to their employer, and to have such grievances adjusted, without the intervention of any bargaining representative, as long as the adjustment is not inconsistent with the terms of any collective bargaining contract then in effect, provided that the bargaining representative, if there is one, has been given an opportunity to be present. It is thus evident that there is nothing in the amendment of § 9 (a) that authorizes an employer to engage in "dealing with" an employer-dominated "labor organization" as the representative of his employees concerning their grievances.

We therefore conclude that there is nothing in the amendment of § 9 (a), or in its legislative history, to indicate that Congress thereby eliminated or intended to eliminate such employee committees from the term "labor organization" as defined in § 2 (5) and used in § 8 (a)(2).

Respondents argue that to hold these employee committees to be labor organizations would prevent employers and employees from discussing matters of mutual interest concerning the employment relationship, and would thus abridge freedom of speech in violation of the First Amendment of the Constitution. But the Board's order does not impose any such bar; it merely precludes the employers from dominating, interfering with or supporting such employee committees which Congress has defined to be labor organizations.

The judgment of the Court of Appeals is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Syllabus.

MARTIN, 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.

No. 157. Argued April 2, 1959.—Decided June 8, 1959.

Respondents owned property abutting a section of highway in Pennsylvania which was about to be designated as a "limited access highway" under authority of a Pennsylvania statute which provides that the owners of property affected by the designation of a "limited access highway" shall be entitled "only to damages arising from an actual taking of property" and not for "consequential damages where no property is taken." They sued in a Federal District Court for injunctive relief and a judgment declaring the statute unconstitutional. The District Court stayed its proceedings to permit the parties to seek a determination of their rights under the Act in the state courts. They brought an equity suit in a state court, which held that the Act provides a method by which every property owner may have it decided whether he is entitled to compensation, and, if so, for what and in what amounts, and that their constitutional rights, whatever they may be, will be protected. The State Supreme Court affirmed. Thereafter, the District Court concluded that the State Legislature did not intend to compensate abutting landowners whose rights of access to an existing highway are destroyed by its designation as a limited access highway, and that the Act violated the Due Process Clause of the Fourteenth Amendment; and it permanently enjoined the Governor and the Secretary of Highways from proceeding further. *Held:* The circumstances were such that the District Court should have declined to adjudicate this controversy. Pp. 220–225.

(a) The desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions should have led the District Court to stay its hand. Pp. 223–224.

(b) Another reason why the District Court should have stayed its hand is to be found in the complex and varying effects which the contemplated state action may have upon different landowners. Pp. 224–225.

(c) There is no reason to suppose that the State will not accord full constitutional scope to the statutory phrase "actual taking of property"; but, should it fail to do so, recourse may be had to this Court. P. 225.

160 F. Supp. 404, reversed.

Anne X. Alpern, Attorney General of Pennsylvania, argued the cause for appellants. On the brief were *Harry J. Rubin,* Deputy Attorney General, *Harrington Adams* and *Leonard M. Mendelson.*

Edward P. Good argued the cause for appellees. With him on the brief were *A. E. Kountz* and *Thomas D. Caldwell.*

Opinion of the Court by MR. JUSTICE STEWART, announced by MR. JUSTICE WHITTAKER.

This action was instituted in the District Court for the Western District of Pennsylvania by owners of property abutting a section of highway which runs between downtown Pittsburgh and the Greater Pittsburgh Airport. The complaint stated that the Secretary of Highways and the Governor of Pennsylvania were about to designate that section of the road a "limited access highway" under authority of a Pennsylvania statute. Claiming that such action would deprive them of their property without due process of law, since the Pennsylvania statute allegedly did not provide compensation for loss of access to the highway, the plaintiffs asked for injunctive relief and for a judgment declaring the statute unconstitutional.

The legislation under which it was asserted the state officials were planning to act is the Pennsylvania Limited Access Highways Act of 1945.[1] The Act defines a limited

[1] Pa. Laws 1945, No. 402, § 1 *et seq.*, as amended, Pa. Laws 1947, No. 213 and Pa. Laws 1957, No. 112. 36 Purdon's Pa. Stat. Ann. § 2391.1 *et seq.*

access highway as "a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor." [2] It authorizes the Secretary of Highways, with the approval of the Governor, to declare any highway, or part thereof, to be a limited access highway.[3] Section 8 of the statute, as amended in 1947, provides:

> "The owner or owners of private property affected by the construction or designation of a limited access highway . . . shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken . . . ."

The latter section was specifically attacked by the plaintiffs, who claimed that in the light of the Pennsylvania courts' interpretation of other statutes, this provision would be construed to mean that compensation was to be paid only if land were taken. The Limited Access Highways Act itself had never been construed by the courts of Pennsylvania.

The district judge issued a temporary restraining order. Thereafter a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. After stipulations of fact were filed, the District Court entered an order staying proceedings to permit the parties to seek a determination of their rights under the statute in the courts of Pennsylvania.

Thereupon the plaintiffs filed an equitable proceeding in the Common Pleas Court of Dauphin County, Pennsylvania. That court pointed out that the plaintiffs were asking for a determination of "whether or not a tak-

---

[2] 36 Purdon's Pa. Stat. Ann. § 2391.1.

[3] 36 Purdon's Pa. Stat. Ann. § 2391.2.

ing of property has occurred and what damages shall be awarded therefor, and that, if the depriving them of access is found to be a taking of a compensable property right, that plaintiffs' legitimate interests will be constitutionally safeguarded by a resort to viewers proceedings and, if necessary, by later appeals to the courts." *Creasy* v. *Lawler,* 8 Pa. D. & C. 2d 535, 537.

As a court of equity, the county court found it proper to determine only the last of these questions, and its answer was unequivocal:

> "All of plaintiffs' rights can be protected and secured in a proceeding before viewers, as is provided in section 8 of The Limited Access Highway Act of May 29, 1945. . . . Here the legislature, in The Limited Access Highways Act, . . . has provided a way in which every property owner may have it decided whether he is entitled to compensation and, if so, when, for what, and in what amounts. . . . Should the Commonwealth proceed, then *at that time* plaintiffs will have the right to proceed before viewers on the question of their right to damages. In the orderly course of the procedure provided by The Limited Access Highways Act, they will have a right of appeal to the common pleas court and a jury trial, and still later to have their rights adjudicated in the appellate courts. At all times their constitutional rights, whatever they may be, will be guarded and protected." 8 Pa. D. & C. 2d, at 538–539.

This decision was affirmed *per curiam* by the Supreme Court of Pennsylvania, which explicitly adopted the lower court's opinion. 389 Pa. 635, 133 A. 2d 178.

Further proceedings were then had in the District Court. Although stating its awareness "that the federal courts should be reluctant to exercise jurisdiction in cases where the plaintiffs' constitutional rights will be properly

protected in the state tribunal and where the statute under attack has not yet been construed by the State courts," nevertheless the District Court proceeded to adjudicate the merits of the controversy, believing that the plaintiffs might be irreparably harmed during the period required to determine their rights in the state courts. "Without venturing to predict the ultimate decision of the Pennsylvania Courts on the issue of compensation," the District Court was of the view that the Pennsylvania Legislature did not intend to compensate abutting landowners "whose right of access to an existing highway is destroyed by the designation of that highway as a limited-access highway." For that reason the court found the statute repugnant to the Due Process Clause of the Fourteenth Amendment. A final decree was issued, permanently enjoining, in the most sweeping terms, the Secretary of Highways and the Governor from proceeding. *Creasy* v. *Stevens,* 160 F. Supp. 404.[4] The case is here by way of a direct appeal, 28 U. S. C. § 1253, of which this Court noted probable jurisdiction. 358 U. S. 807.

It was the clear pronouncement of the Pennsylvania courts that the state statute provides a complete procedure to guard and protect the plaintiffs' constitutional rights "at all times." In the light of this pronouncement it is difficult to perceive the basis for the District Court's conclusion that the plaintiffs would be irreparably harmed

[4] The language of the court's order was as follows: "Now, Therefore, It Is Finally Determined, Ordered, Adjudged and Decreed that the defendants, Lewis M. Stevens, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania, be and they hereby are permanently enjoined from enforcing or otherwise complying with the Pennsylvania 'Limited-Access Highways Act', 1945, May 29, P. L. 1108, § 1, et seq., as amended, 36 Purdon's Pa. Stat. Ann. § 2391.1 et seq., so as to interfere with or deprive the plaintiffs of their right of ingress or egress to, from or across the 'Airport Parkway' in Allegheny County, Pennsylvania."

unless the state officers were enjoined from proceeding under the statute. There is no question here of the State's right to create or designate a limited access highway. The only question is the plaintiffs' right to compensation. It must be assumed that the courts of Pennsylvania meant what they said in stating that the plaintiffs will be afforded a procedure through which the full measure of their rights under the United States Constitution will be preserved. Assuming, however, that there was a basis to support intervention by a court of equity, the District Court, we think, should nevertheless have declined to adjudicate this controversy.

The circumstances which should impel a federal court to abstain from blocking the exercise by state officials of their appropriate functions are present here in a marked degree. The considerations which support the wisdom of such abstention have been so thoroughly and repeatedly discussed by this Court as to require little elaboration. *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168; *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101; *American Federation of Labor* v. *Watson,* 327 U. S. 582; *Government Employees* v. *Windsor,* 353 U. S. 364. See also *Alabama Comm'n* v. *Southern R. Co.,* 341 U. S. 341. Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions. All those factors are present here.

At least one additional reason for abstention in the present case is to be found in the complex and varying effects which the contemplated state action may have upon the different landowners. Some of them may be completely deprived of access; others may have access to existing roads or service roads to be constructed; still

others may have access to the highway itself through points of ingress and egress established under the statute. In the state court proceedings the case of each landowner will be considered separately, with whatever particular problems each case may present.

There is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase "actual taking of property." [5] If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here.

Reversed.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE joins, concurring.

A District Court's abstention from the exercise of its properly invoked jurisdiction is justified, in my view, "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve one of two important countervailing interests: either the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question, or the avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships." *Louisiana Power & Light Co.* v. *City of Thibodaux, ante,* p.

---

[5] See Bowie, Limiting Highway Access, 4 Md. L. Rev. 219 (1940); Clarke, The Limited-Access Highway, 27 Wash. L. Rev. 111 (1952); Cunnyngham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 Mo. L. Rev. 19 (1948); Duhaime, Limiting Access to Highways, 33 Ore. L. Rev. 16 (1953); Enfield and McLean, Controlling the Use of Access, National Academy of Sciences, National Research Council, Highway Research Board Bulletin No. 101 (1955), p. 70; and Reese, Legal Aspects of Limiting Highway Access, National Academy of Sciences, National Research Council, Highway Research Board Bulletin No. 77 (1953), p. 36.

32 (dissenting opinion). Both of these circumstances in which abstention is justified are present in this case. If the District Court directs the parties to the Pennsylvania courts, those courts may interpret the cutting off of access rights as a taking of property requiring the payment of compensation under Pennsylvania law. Such an interpretation would obviate any need for determination of the serious constitutional issue raised in the District Court.

Furthermore, the District Court's action has halted at the threshold the carrying out of a large-scale highway program before the state courts have had an opportunity to interpret the statute creating that program. This constitutes an unnecessary interference with state domestic policy creating undesirable friction in federal-state relationships.

Therefore, I concur in the judgment of the Court.

MR. JUSTICE DOUGLAS, dissenting in part.

We are all agreed that the District Court improperly enjoined the enforcement of the Pennsylvania statute. But I believe that these property owners are entitled to a declaratory judgment by the federal court, determining whether access to a highway is a property right, compensable under the Fifth Amendment (and made applicable to the States through the Fourteenth, *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226).

Congress has granted the District Courts jurisdiction over cases arising "under the Constitution," 28 U. S. C. § 1331, as this one does. That jurisdiction need not be exercised where it would be obstructive of state action and lead to needless interference with state agencies. *Alabama Comm'n* v. *Southern R. Co.,* 341 U. S. 341. It likewise need not be exercised where the resolution of state law questions—which are complex or unsettled—may make it unnecessary to reach a federal constitutional

question. *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168; *American Federation of Labor* v. *Watson,* 327 U. S. 582. And these principles are applicable in the main to declaratory judgment actions as well as to those where injunctions are sought. *Great Lakes Co.* v. *Huffman,* 319 U. S. 293.

In my view these cases are irrelevant here. We have at bottom in this case a question whether access to a highway is a property right which is compensable under the Fifth and Fourteenth Amendments. If it is compensable, as the District Court ruled, see 160 F. Supp. 404, 410–412, this is the most appropriate time to make the announcement. Particularly is this so when appellees in this case sought a declaration by the state court of their rights under the statute and were told that "their constitutional rights, *whatever they may be,* will be guarded and protected." Such a ruling by the District Court would not halt the highway program. But it might have an effect on engineering designs for new local service roads to provide substitute means of access to the highways; and it would make clear to the local authorities what the scope of their financial commitments in the undertaking is.

A determination of appellees' property rights would not be a premature decision because of the inability to forecast how the State will effect its goal of limiting access to its highway. Whether or not the landowners will be left landlocked or given access to substitute service roads goes only to the question of the amount of property "taken," if any. It has nothing to do with the question of the landowner's property right in access to a highway abutting his land.

We have witnessed in recent times a hostility to the exercise by federal courts of their power to declare what a citizen's rights are under local law in diversity cases (*Louisiana Power & Light Co.* v. *Thibodaux, ante,* p.

25) and in cases where federal rights are invoked. *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237; *Harrison* v. *NAACP, ante,* p. 167. I think the federal courts, created by the First Congress, are today a haven where rights can sometimes be adjudicated even more dispassionately than in state tribunals. At least Congress in its wisdom has provided since 1875 (18 Stat. 470) that the lower federal courts should be the guardian of federal rights. The judicial intolerance of diversity jurisdiction, noted by my Brother BRENNAN in his dissent in *Louisiana Power & Light Co.* v. *Thibodaux, supra,* seems to be spreading to other heads of federal jurisdiction as the decisions in this case and in *Harrison* v. *NAACP,*[1] *supra,* suggest. True it is, that the exercise of that power in some cases would be so utterly disruptive of state-federal relations as to make it undesirable. As a general rule, however, the federal courts should be responsible for the exposition of federal law. It should be their responsibility in cases properly before them under heads of jurisdiction prescribed by Congress to construe federal statutes and the Federal Constitution. There is no more appropriate occasion for the exercise of that jurisdiction than the present case which involves the question whether or not access rights constitute "property" in the constitutional sense.[2] That question concerns not state law but

[1] The *Harrison* case invoked federal jurisdiction not only under 28 U. S. C. § 1331 and § 1332 (diversity) but also under § 1343 (civil rights).

[2] Title 28 U. S. C. § 2201 permits a federal court to declare a party's rights in the case of an actual controversy. There is such a controversy here. Appellants have expressed their intention to declare the highway on which appellees' properties abut to be a limited access highway, and have consistently argued that appellees have no right to compensation, although they may be denied access to the highway which they previously had. This is enough to create an actual controversy which a federal court may settle if its processes are, as here, properly invoked.

a concept imbedded in the Bill of Rights. It is in no way entangled with local law. The Supremacy Clause of the Constitution makes all local projects bow to that concept of "property." And in my view there is no more appropriate tribunal for an adjudication of that issue than the Federal District Court, which in this case acted at the very threshold of this engineering project and made a ruling that informs the local authorities of the full reach of their responsibilities. This is not intermeddling in state affairs nor creating needless friction. It is an authoritative pronouncement at the beginning of a controversy which saves countless days in the slow, painful, and costly litigation of separate individual lawsuits in state viewers proceedings.

MILLS ET AL. *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 74. Argued April 22, 1959.—Decided June 8, 1959.*

Refusing an offer of full immunity from state prosecution and claiming the federal privilege against self-incrimination, petitioners were convicted of contempt in a state court for refusing to answer before a state grand jury questions the answers to which they claimed would expose them to federal prosecution for violation of the income tax laws. There was evidence of close cooperation between state and federal authorities. *Held:* The judgments are affirmed on the authority of *Knapp* v. *Schweitzer*, 357 U. S. 371.

Affirmed.

Eugene Stanley argued the cause for petitioners in No. 74. With him on the brief was *Albert B. Koorie.*

Milo B. Williams argued the cause and filed a brief for petitioner in No. 75.

Michael E. Culligan, Assistant Attorney General of Louisiana, and *J. David McNeill* argued the causes for respondent. With *Mr. Culligan* on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Richard A. Dowling.*

PER CURIAM.

The judgments are affirmed. *Knapp* v. *Schweitzer,* 357 U. S. 371.

MR. JUSTICE BRENNAN joins the Court's opinion, reiterating his belief, expressed in *Knapp* v. *Schweitzer,* 357 U. S. 371, 381, that reconsideration of the holding in *Feldman* v. *United States,* 322 U. S. 487, is inappropriate in this case. He also reiterates his belief that nothing

*Together with No. 75, *Mills* v. *Louisiana,* also on certiorari to the same Court.

in this decision forecloses reconsideration of the *Feldman* holding in a case presenting the issue presented by *Feldman.*

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

In *Knapp* v. *Schweitzer,* 357 U. S. 371, the Court left open the question whether in the case of collaboration between state and federal officers a witness could successfully assert the federal privilege against self-incrimination in a state proceeding. In my view, that question should be answered here, for the records in these cases show such collaboration. Yet the majority of the Court ignores the question in affirming without opinion. Therefore, although I agree with and join the dissenting opinion of MR. JUSTICE DOUGLAS, I add these additional views.

The petitioners in these cases were held in contempt for failure to answer questions before a state grand jury investigating the bribery of police officials of New Orleans by persons conducting lottery operations within that city. From the nature of the questions asked petitioners, it is evident that they were suspected of engaging in lotteries and giving bribes. The District Attorney of the Parish of Orleans, under authority granted by state statute, offered petitioners full immunity from state prosecution for crimes, other than perjury, uncovered by the questioning. Nevertheless, petitioners refused to answer questions relating to bribery and their connections with lottery operations, pleading in justification of this refusal the federal privilege against self-incrimination.

The contempt proceedings and the state court reviews were had upon an agreed statement of facts. These stipulations recited that during the pendency of the state grand jury investigation "the Intelligence Division, Internal Revenue Service of the United States, the United States Attorney for the Eastern District of Louisiana and the

509615 O–59–18

United States Grand Jury [had] been for several months and [were then] engaged in investigating some of the members of the New Orleans Police Department for income tax evasion, a felony under the laws of the United States." In addition, the parties agreed that these investigations were well publicized and that, at the time of the instant proceedings, a number of federal income tax indictments had been returned against police officers. Further, it was established that each of the petitioners had been requested to execute, and had executed, waivers of the statute of limitations on his federal tax liabilities for most of the years in question. Lastly, the parties stipulated:

> "That there has existed, and now exists [at the time of the state proceeding], cooperation and collaboration between the District Attorney for the Parish of Orleans and the United States Attorney for the Eastern District of Louisiana and the Internal Revenue Service of the United States of America and its investigators, as well as with the Police Bureau of Investigation of the City of New Orleans in reference to members of the New Orleans Police Department regarding public bribery and income tax evasion and that the Honorable Leon D. Hubert, Jr., District Attorney for the Parish of Orleans, has held conferences with the United States Attorney for the Eastern District of Louisiana regarding public bribery on the part of certain members of the New Orleans Police Department and income tax evasion, felonies under the law of the United States of America and the State of Louisiana."

In *Knapp* v. *Schweitzer, supra,* which decided that the federal privilege against self-incrimination may not ordinarily be raised in a state proceeding, the Court said:

> "Of course the Federal Government may not take advantage of this recognition of the States' autonomy

> in order to evade the Bill of Rights. If a federal officer should be a party to the compulsion of testimony by state agencies, the protection of the Fifth Amendment would come into play. Such testimony is barred in a federal prosecution, see *Byars* v. *United States,* 273 U. S. 28. Whether, in a case of such collaboration between state and federal officers, the defendant could successfully assert his privilege in the state proceeding, we need not now decide, for the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation. Petitioner's assertion that a federal prosecuting attorney announced his intention of cooperating with state officials in the prosecution of cases in a general field of criminal law presents a situation devoid of legal significance as a joint state and federal endeavor." 357 U. S., at 380.

I dissented from that decision on the ground that the state court had decided that the federal privilege did not obtain on the seemingly false premise that information adduced in the state proceeding could not be used against the petitioner in a subsequent federal prosecution. But even accepting, for the purpose of argument, the validity of the *Knapp* result, I am of the view that the question which was not answered there should be considered here and resolved in favor of the petitioners.

The *Knapp* decision when taken in conjunction with *Feldman* v. *United States,* 322 U. S. 487, means that a person can be convicted of a federal crime on the basis of testimony which he is compelled to give in a state investigation. This opens vast opportunities for calculated efforts by state and federal officials working together to force a disclosure in a state proceeding and to convict on the basis of that disclosure in a federal proceeding. Such opportunities will not go unused unless the courts are vigilant to protect the rights of persons who find them-

selves faced with such coaction of federal and state prosecuting agencies. Such vigilance becomes increasingly required as the Federal Government, through prosecutions for tax evasion, moves into the criminal areas regulated by the States.*

In the instant case the record shows clearly that state and federal authorities had launched a coordinated investigation into the suspected bribery by gamblers of New Orleans' police officers. The State was interested primarily in the enforcement of its public bribery statutes. The Federal Government sought to apprehend tax evaders. The state and federal agencies involved in this twofold investigation collaborated to obtain desired ends. Policemen suspected of taking bribes and gamblers suspected of giving them were called for questioning. Both were in jeopardy of prosecution: the police under state statute for taking bribes and under federal statute for income tax evasion; the gamblers under state statute for giving bribes and under federal statutes for income tax evasion and for failure to pay the special stamp and excise taxes levied on gambling operations. Doubt which might have existed concerning federal interest in petitioners' possible tax evasions was removed when petitioners were induced to waive the statute of limitations for relevant tax years.

The opinion in the *Knapp* case states that the protection of the Fifth Amendment comes into play if a federal officer is a party to the compulsion of testimony by a state agency. 357 U. S. 371, 380. The threshold question then is whether the requisite relationship existed between the State District Attorney and the United States At-

*Cf. *Commissioner* v. *Wilcox*, 327 U. S. 404; *Rutkin* v. *United States*, 343 U. S. 130; *United States* v. *Calamaro*, 354 U. S. 351; *Rollinger* v. *United States*, 208 F. 2d 109; *Berra* v. *United States*, 221 F. 2d 590; *Schira* v. *Commissioner*, 240 F. 2d 672; *United States* v. *Wampler*, 5 F. Supp. 796; *United States* v. *Iozia*, 104 F. Supp. 846.

torney and Internal Revenue agents. The stipulation, when read in the light of the known facts, adequately shows that federal officers participated in the state action which sought to compel the testimony of petitioners. That stipulation, signed by the state prosecutor, admits of "cooperation," "collaboration," and "conferences." These terms viewed against the background of contemporaneous investigations by a federal grand jury, a state grand jury, the Police Bureau of Investigation of the City of New Orleans, and the Intelligence Division of the Internal Revenue Service, all pointed at a group of persons which included petitioners, require the conclusion that the State was used as an instrument of federal investigation.

I come then to the question left open in the *Knapp* case: whether, where, as here, a State is used as an instrument of federal investigation, witnesses can successfully assert their federal privilege against self-incrimination in state proceedings. *Knapp* v. *Schweitzer, supra,* suggests that where testimony is compelled in such circumstances, the testimony would be inadmissible in a subsequent federal prosecution. See *Byars* v. *United States,* 273 U. S. 28. See also *Feldman* v. *United States,* 322 U. S. 487, 494. But this is only partial protection. To compel testimony in a federal investigation, a witness must be assured at the outset complete immunity from any prosecution which might result from his compelled disclosures. *Counselman* v. *Hitchcock,* 142 U. S. 547; *Brown* v. *Walker,* 161 U. S. 591; *Blau* v. *United States,* 340 U. S. 159; *Ullmann* v. *United States,* 350 U. S. 422, 430. There is no indication that such protection obtains here—that petitioners are protected from federal prosecutions which might result from their testimony even though that testimony is not admissible in the subsequent proceeding. *Byars* v. *United States, supra,* merely prohibits the introduction of illegally seized evidence and *Knapp* v.

Schweitzer, supra, and *Feldman* v. *United States, supra,* speak merely of the non-use of the compelled testimony in a subsequent federal prosecution. None of these cases deals with the fruits of the compelled testimony, and defendants, like petitioners, who are forced to testify under circumstances similar to those here present, are left without the protection against self-incrimination intended by the Constitution. These cases, in my opinion, should be extended to prohibit any prosecution resulting from disclosures compelled under circumstances similar to those which exist here. But this is not an established principle and a witness is entitled to more than hopes of immunity when federal agencies seek to compel incriminatory testimony. Therefore, in my view, petitioners properly invoked their federal privilege against self-incrimination in the present proceeding and the contempts should be discharged. Cf. *Rea* v. *United States,* 350 U. S. 214; *Bartkus* v. *Illinois,* 359 U. S. 121, 164 (dissenting opinion).

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

Petitioners in these cases were summoned before a state grand jury in New Orleans and interrogated concerning bribery of public officials and income tax evasion. They were at the time being investigated by the Federal Internal Revenue Service. Accordingly, they objected to the questions, invoking the Fifth Amendment and stating that the answers to the questions would tend to incriminate them. Their objections were overruled and they were held in contempt for refusal to answer. The Supreme Court of Louisiana refused writs of certiorari, mandamus, and prohibition, finding "no error of law in the ruling complained of." The cases are here on certiorari. 358 U. S. 810.

It has been the prevailing view since *Twining* v. *New Jersey,* 211 U. S. 78, that the guaranty of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is not made applicable to the States through the Fourteenth Amendment. *Adamson* v. *California,* 332 U. S. 46. Under the *Twining* rule, the Louisiana courts, therefore, need not bow to the Fifth Amendment as a requirement read into state law by the Bill of Rights.

That is not, however, the end of our problem. For the question remains whether a state court can override a claim of *federal* right seasonably raised in the state proceeding, when the failure to recognize the *federal* right will result in its destruction or nullification.

The classical case involves a *federal* right in the conduct of a business, as in the case of the contractor in *Leslie Miller, Inc.* v. *Arkansas,* 352 U. S. 187, who, having been the successful bidder for federal construction work, could not be subjected to conflicting state licensing requirements. Related cases are in the class of *Service Storage & Transfer Co.* v. *Virginia,* 359 U. S. 171, and *Castle* v. *Hayes Freight Lines,* 348 U. S. 61, which hold that an interstate motor carrier certificate issued by the Interstate Commerce Commission could not be overridden in state proceedings. Litigants asserting federal rights as the basis of a claim (*Testa* v. *Katt,* 330 U. S. 386) or as a defense to a claim under state law (*Miles* v. *Illinois Central R. Co.,* 315 U. S. 698) may do so in state courts which must recognize and protect the federal rights. Chief Justice White stated it as the "duty resting upon" state and federal courts "to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose." *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211, 223. Litigants, resting on a *federal* right,

need not resort to federal courts to protect those rights where those rights are put in jeopardy in state proceedings.

There is no more apt illustration of that principle than the present case. The Fifth Amendment to the Constitution reserves a twofold *federal* guarantee for every citizen. It protects him from being forced to give testimony in any federal proceeding, criminal or civil (*Counselman* v. *Hitchcock,* 142 U. S. 547, 562; *McCarthy* v. *Arndstein,* 262 U. S. 355, 266 U. S. 34), judicial, investigative or administrative (*Quinn* v. *United States,* 349 U. S. 155, 161; *Smith* v. *United States,* 337 U. S. 137), which might tend to incriminate him. And it also assures that no incriminating information adduced from a defendant involuntarily by anyone, anywhere, may be admitted into evidence against him in any federal prosecution. *Bram* v. *United States,* 168 U. S. 532; *Wan* v. *United States,* 266 U. S. 1. It was to this second principle that the ruling of this Court in *Feldman* v. *United States,* 322 U. S. 487, was unfaithful. As long as that decision is adhered to, the evidence obtained in a state proceeding such as the one in this case can be used in a federal prosecution. It is, therefore, too late to protect the *federal* right if one waits for action by the federal court. The *federal* right is lost irretrievably, if it is not saved by the state court. As stated by the Supreme Court of Michigan in *People* v. *DenUyl,* 318 Mich. 645, 651, 29 N. W. 2d 284, 287:

> "It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution."

If the dissent in *Feldman* v. *United States, supra,* had prevailed and testimony compelled from a witness in a state proceeding had been barred from use against him when he became a defendant in a federal proceeding, pro-

tection of the *federal* right against self-incrimination could be left to the federal courts. But *Feldman,* until it is overruled, controls the regimes under which state investigations are made and federal prosecutions conducted. As long as it is on the books the only place a witness, who is being examined in state proceedings about matters that may incriminate him under federal laws, can protect his rights against self-incrimination under the Fifth Amendment is in the state courts.

Knapp v. *Schweitzer,* 357 U. S. 371, is contrary to the disposition I would make of the present cases. But it is not a principled decision that addressed itself to the proposition that unless the *federal* right is protected in the state proceeding it is lost forever. The opinion in that case was concerned with maintaining the vitality of state investigations. Not once did it mention *Feldman* v. *United States, supra,* nor address itself to the dilemma created by that decision. Nowhere does it explain how in light of *Feldman* v. *United States* the *federal* right can be protected and the vitality of state investigations also maintained. I have said enough to indicate that both cannot be done by affirming these judgments. As long as *Feldman* v. *United States* stands on the books, the state courts should be required to recognize the *federal* right against self-incrimination—lest it be lost forever.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* ALABAMA EX REL. PATTERSON.

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

No. 753. Decided June 8, 1959.*

Having been led by both parties and the state of the record to treat as the sole issue before it on the merits the question whether Alabama could constitutionally compel petitioner to produce its membership lists in court, this Court reversed a decision of the Supreme Court of Alabama sustaining a conviction of contempt for failing to do so. 357 U. S. 449. On remand of the case to the Supreme Court of Alabama for proceedings not inconsistent with the opinion of this Court, the State Supreme Court "again affirmed" the contempt conviction and fine which this Court had set aside—on the ground that this Court was "mistaken" in considering that petitioner had complied with the production order except as to its membership lists. *Held:*

1. Certiorari granted. P. 241.

2. The judgment of the State Supreme Court is reversed, since it is now too late for the State to claim that petitioner had failed to comply with the production order in other respects, that issue being foreclosed by this Court's prior disposition of the case. Pp. 244–245.

3. Upon further proceedings, the trial court may require petitioner to produce any such additional items, not inconsistent with this and the earlier opinion of this Court, that may be appropriate, reasonable and constitutional under the circumstances then appearing. P. 245.

4. Assuming that the State Supreme Court will not fail to proceed promptly with the disposition of the matters left open under this Court's mandate for further proceedings, petitioner's application for a writ of mandamus is denied. P. 245.

268 Ala. 53, 109 So. 2d 138, reversed.

---

*Together with No. 674, Misc., *National Association for the Advancement of Colored People* v. *Livingston, Chief Justice of the Supreme Court of Alabama, et al.*, on motion for leave to file and petition for writ of mandamus.

Robert L. Carter, Thurgood Marshall, Arthur D. Shores, William T. Coleman, Jr., George E. C. Hayes, William R. Ming, Jr., James M. Nabrit, Jr., Louis H. Pollak, Frank D. Reeves and *William Taylor* for petitioner.

MacDonald Gallion, Attorney General of Alabama, and *James W. Webb,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted.

In our original opinion in this case, 357 U. S. 449, we held the Alabama judgment of civil contempt against this petitioner, together with the $100,000 fine which it carried, constitutionally impermissible in the circumstances disclosed by the record. We declined, however, to review the trial court's restraining order prohibiting petitioner from engaging in further activities in the State, that order then not being properly before us. 357 U. S., at 466–467. Our mandate, issued on August 1, 1958, accordingly remanded the case to the Supreme Court of Alabama "for proceedings not inconsistent with" our opinion.

In due course the petitioner moved in the Supreme Court of Alabama that our mandate be forwarded to the Circuit Court of Montgomery County for the further proceedings which were left open by our decision. After the motion had been twice renewed [1] the Supreme Court of Alabama on February 12, 1959, "again affirmed" the contempt adjudication and $100,000 fine which this Court

[1] Petitioner's motion was first made on November 5, 1958, and was renewed, on November 19, 1958, and on December 1, 1958, by mailing to the Attorney General and filing with the Alabama Supreme Court copies of the original.

had set aside.[2] Finding that the Circuit Court had determined that petitioner had failed to "produce the documents described" in its production order, the State Supreme Court concluded that this Court was "mistaken" in considering that, except for the refusal to provide its membership lists, petitioner had complied, or tendered satisfactory compliance, with such order. This conclusion was considered as "necessitating another affirmance of the [contempt] judgment," involving, so the State Court thought, matters not covered by the opinion and mandate of this Court.

We have reviewed the petition, the response of the State and all of the briefs and the record filed here in the former proceedings. Petitioner there claimed that it had satisfactorily complied with the production order, except as to its membership lists, and this the State did not deny. In fact, aside from the procedural point, both the State and petitioner in the certiorari papers posed one identical question, namely, had the petitioner "the constitutional right to refuse to produce records of its membership in Alabama, relevant to issues in a judicial proceeding to which it is a party, on the mere speculation that these

---

[2] In its previous order, on which the former proceeding here was based, the Alabama Supreme Court held that certiorari did not lie to review the merits of the contempt adjudication, and dismissed the original petition for certiorari on that ground, 265 Ala. 349, 91 So. 2d 214. Its opinion on which the present proceedings are based includes this statement: "Lest there be no misapprehension on the part of the bench and bar of Alabama, we here reaffirm the well recognized and uniform pronouncements of this Court with respect to the functions and limitations of common-law certiorari, and the distinctions between that and other methods of review. 265 Ala. 349, 91 So. 2d 214, *supra*. As we stated in *American Federation of State, County and Municipal Employees* v. *Dawkins*, 268 Ala. 13, 104 So. 2d 827, 834: 'We cannot hurdle or make shipwreck of well-known rules of procedure in order to accommodate a single case.'" 268 Ala. 531, 532, 109 So. 2d 138–139.

members may be exposed to economic and social sanctions by private citizens of Alabama because of their membership?" (State's Brief in Opposition to Petition for Certiorari, p. 2.) [3] The State made not even an indication that other portions of the production order had not been complied with and, therefore, required its affirmance. On the contrary, the State on this phase of the case relied entirely on petitioner's refusal to furnish the "records of its membership." That was also the basis on which the issue was briefed and argued before us by both sides after certiorari had been granted. That was the view of the record which underlay this Court's conclusion that petitioner had "apparently complied satisfactorily with the production order, except for the membership lists," 357 U. S., at 465.[4] And that was the premise on which the Court disposed of the case. The State plainly accepted this view of the issue presented by the record and by its argument on it, for it did not seek a rehearing or suggest a clarification or correction of our opinion in that regard.

It now for the first time here says that it "has never agreed, and does not now agree, that the petitioner has complied with the trial court's order to produce with the exception of membership. The respondent, in fact, specifically denies that the petitioner has produced or offered to produce in all aspects except for lists of membership." This denial comes too late. The State is bound by its previously taken position, namely, that decision of the sole question regarding the membership lists, is dispositive of the whole case.

We take it from the record now before us that the Supreme Court of Alabama evidently was not acquainted

[3] Question I in the petition for certiorari was as follows: "Whether the refusal of petitioner to produce names and addresses of its Alabama members was protected by the Fourteenth Amendment's interdiction against state interference with First Amendment rights?"

[4] See Note 5, *infra*.

with the detailed basis of the proceedings here and the consequent ground for our defined disposition. Petitioner was, as the Supreme Court of Alabama held, obliged to produce the items included in the Circuit Court's order. It having claimed here its satisfactory compliance with the order, except as to its membership lists, and the State having not denied this claim, it was taken as true.[5]

In these circumstances the Alabama Supreme Court is foreclosed from re-examining the grounds of our disposition. "Whatever was before the Court, and is disposed

---

[5] Indeed had the State denied this claim it would have raised additional serious constitutional issues. As we noted in our original opinion the contempt adjudication not only carried a fine of serious proportions, but under Alabama law it had the effect of foreclosing "petitioner from obtaining a hearing on the merits of the underlying ouster action, or from taking any steps to dissolve the temporary restraining order which had been issued *ex parte*, until it purged itself of contempt." 357 U. S., at 454. Yet upon the facts disclosed by the record, the validity of a contempt decree carrying these consequences would, apart from the refusal to produce the membership lists, have depended upon nothing more substantial than the reasonableness of the degree of petitioner's tendered compliance. For example, Item "5" of the production order called for: "All files, letters, copies of letters, telegrams and other correspondence, dated or occurring within the last twelve months next preceding the date of filing the petition for injunction, pertaining to or between the National Association for the Advancement of Colored People, Inc., and persons, corporations, associations, groups, chapters and partnerships within the State of Alabama." Petitioner's tender was this: "the files in the offices of respondent [petitioner] are filed under subject matter headings. Therefore, to comply with this paragraph would require respondent to search all of its files in order to secure all information requested. Respondent receives correspondence in its offices at the rate of 50,000 letters alone per year and files are maintained for a period of ten years. Respondent produces, however, all memoranda to branches during the twelve months period next preceding June 1, 1956, which would include its branches in the State of Alabama."

of, is considered as finally settled." *Sibbald* v. *United States,* 12 Pet. 488, 492. See also *Martin* v. *Hunter's Lessee,* 1 Wheat. 304; *Tyler* v. *Magwire,* 17 Wall. 253.

This requires that the judgment of the Supreme Court of Alabama be reversed. Upon further proceedings in the Circuit Court, if it appears that further production is necessary, that court may, of course, require the petitioner to produce such further items, not inconsistent with this and our earlier opinion, that may be appropriate, reasonable and constitutional under the circumstances then appearing.

We assume that the State Supreme Court, thus advised, will not fail to proceed promptly with the disposition of the matters left open under our mandate for further proceedings, 357 U. S., at 466–467, and, therefore, deny petitioner's application in No. 674, Misc., for a writ of mandamus.

It is so ordered.

Mr. Justice Stewart took no part in the consideration or decision of this case.

OHIO EX REL. EATON *v.* PRICE, CHIEF OF POLICE.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 699. Decided June 8, 1959.

By a vote of four to four, the Court noted probable jurisdiction of the appeal in this case, which was believed by the four Members voting against such action to turn on the same question as that decided by a five-to-four vote on May 4, 1959, in *Frank* v. *Maryland*, 359 U. S. 360.

Reported below: 168 Ohio St. 123, 151 N. E. 2d 523.

J. Harvey Crow for appellant.

Charles S. Rhyne and *Joseph P. Duffy* for appellee.

PER CURIAM.

Probable jurisdiction is noted.

MR. JUSTICE BRENNAN, who voted to note probable jurisdiction, filed a separate memorandum.

MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER, who voted against noting probable jurisdiction, filed a separate memorandum.

MR. JUSTICE CLARK, who voted against noting probable jurisdiction, filed a separate memorandum.

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

MR. JUSTICE BRENNAN.

The Court's practice, when considering a jurisdictional statement whereby a litigant attempts to invoke the Court's jurisdiction on appeal, is quite similar to its well-known one on applications for writs of certiorari. That

is, if four Justices or more are of opinion that the questions presented by the appeal should be fully briefed and argued orally, an order noting probable jurisdiction or postponing further consideration of the jurisdictional questions to a hearing on the merits is entered. Even though this action is taken on the votes of only a minority of four of the Justices, the Court then approaches plenary consideration of the case anew as a Court; votes previously cast in Conference that the judgment of the court appealed from be summarily affirmed, or that the appeal be dismissed for want of a substantial federal question, do not conclude the Justices casting them, and every member of the Court brings to the ultimate disposition of the case his judgment based on the full briefs and the oral arguments. Because of this, disagreeing Justices do not ordinarily make a public notation, when an order setting an appeal for argument is entered, that they would have summarily affirmed the judgment below, or have dismissed the appeal from it for want of a substantial federal question. Research has not disclosed any instance of such notations until today.[1]

The reasons for such forbearance are obvious. Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case, and public expression of views on the merits of a case by a Justice before argument and deci-

[1] Likewise, dissents from orders granting certiorari are ordinarily not publicly noted, even though the grant or denial of certiorari, as we have often said, expresses no intimation as to the merits of a case. The sole exception found appears to be *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 937, where the extraordinary power to grant certiorari before judgment in the Court of Appeals was exercised, and two Justices expressed their view that judgment in that court should have been obtained before this Court reviewed the case. Of course, in these circumstances, the notation could not possibly have implied or have been taken to imply any view of the case on the merits.

509615 O–59–19

sion may well be misunderstood; the usual practice in judicial adjudication in this country, where hearings are held, is that judgment follow, and not precede them. Public respect for the judiciary might well suffer if any basis were given for an assumption, however wrong in fact, that this were not so. Thus, the practice of not noting dissents from such orders has been followed, regardless of how strongly Justices may have felt as to the merits of a case or how clearly they have thought decision in it controlled by past precedent.[2] A precedent which appears to some Justices, upon the preliminary consideration given a jurisdictional statement, to be completely controlling may not appear to be so to other Justices. Plenary consideration can change views strongly held, and on close, reflective analysis precedents may appear inapplicable to varying fact situations. I believe that this approach will obtain in this case despite the unusual notation made today by four of my colleagues.

MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER are of the view that this case is controlled by, and should be affirmed on the authority of, *Frank* v. *Maryland,* 359 U. S. 360.

The *Frank* case was decided on May 4. Application to review this case came before us within two weeks of the *Frank* decision. Since we deem the decision in the Maryland case to be completely controlling upon the Ohio decision, we are of the opinion that it would manifest

---

[2] Notation of dissent from a denial of certiorari, or from a summary disposition of an appeal, is a completely different matter. Such notations occur with some frequency and I have made them myself. They are expressions of a Justice's view that a case should be heard when the Court decides not to have a hearing. Obviously such notations do not tend to foreclose or embarrass consideration of the case when it is later heard, since by definition it is not to be heard.

disrespect by the Court for its own process to indicate its willingness to create an opportunity to overrule a case decided only a fortnight ago after thorough discussion at the bar and in the briefs and after the weightiest deliberation within the Court.

MR. JUSTICE CLARK.

This case cannot be considered in isolation. In his jurisdictional statement filed February 12, 1959, appellant stated that No. 278, *Frank* v. *Maryland,* "is similar to the facts in this case at bar and involves the same constitutional questions," thus raising "substantially the same problems presented by this appeal." We, therefore, held this case awaiting the decision in No. 278, *Frank* v. *Maryland.* It was decided May 4, 1959, by a 5–4 vote. 359 U. S. 360. Thereafter this case was again considered and Brother STEWART, who was with the majority in *Frank* recused himself because the case came from Ohio's Supreme Court, where his father then served. After a study of the two cases I agreed with appellant that this case was "similar to the facts," involved the same constitutional questions and raised "substantially the same problems" as the *Frank* case. In fact, as presented here, the cases appeared to be on all fours, except that the penalty provision in Maryland's Act is $20, while that of Ohio's law is a maximum of $200, or a jail sentence not exceeding 30 days. I therefore voted to affirm. My brothers in the majority in *Frank* voted likewise. However, the four dissenters in *Frank* voted to note probable jurisdiction and bring the case on for argument. The result, for all practical purposes, is a reconsideration of the constitutional question decided in *Frank* by a full Court. This flies in the face of the real purpose, as well as the intended effect, of our Rule 58 which permits rehearings only "at the instance of a justice who concurred in the judgment or decision . . . ." It likewise is, in my

view, very poor judicial administration, especially since *Frank* was decided less than four weeks ago and only an eight-man Court can sit to review the question decided there.

Believing that the Bar will be confused by this action today, which beyond doubt will be characterized as a reconsideration of the *Frank* holding, I have noted my adherence to *Frank*. Otherwise my silence would be construed as acquiescence in a reconsideration of that case. While I have followed a policy of not noting my vote in Conference, except on the merits, our reports are full of such notations.

FORD MOTOR CO. *v.* PARK ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 831. Decided June 8, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 355 Mich. 103, 94 N. W. 2d 407.

William T. Gossett and *L. Homer Surbeck* for appellant.

Abraham L. Zwerdling and *Harold A. Cranefield* for Park et al., appellees.

Paul L. Adams, Attorney General of Michigan, *Stanton S. Faville,* Chief Assistant Attorney General, and *Samuel J. Torina,* Solicitor General, for the Attorney General of Michigan, appellee.

PER CURIAM.

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

BURNS *v.* OHIO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 581. Argued May 18, 1959.—
Decided June 15, 1959.

Ohio accords to each person whose conviction of a felony has been affirmed by its Court of Appeals the right to apply to its Supreme Court for leave to appeal, and that Court has jurisdiction to grant such leave and hear such appeals in its discretion. After petitioner's conviction of a felony had been affirmed by the Ohio Court of Appeals, he gave notice of appeal and attempted to file in the Ohio Supreme Court motions for leave to appeal and to proceed *in forma pauperis*, supported by an affidavit of poverty. These papers were returned to him by the Clerk of the Ohio Supreme Court with a letter advising him, in effect, that the Court had determined on numerous occasions that such papers could not be filed without payment of a docket fee. In this Court, counsel for the State conceded that the Clerk's letter is "in reality and in effect" the judgment of the Supreme Court of Ohio. *Held:*

1. Since the Ohio Supreme Court had sanctioned its Clerk's well-publicized and uniform practice of returning pauper's applications with form letters such as that used in this case, this amounted to a delegation to the Clerk of a matter involving no discretion, and it sufficed to make the Clerk's letter a "final judgment" of Ohio's highest court within the meaning of 28 U. S. C. § 1257. Pp. 256–257.

2. Since a person who is not indigent may have the Ohio Supreme Court consider his application for leave to appeal from a felony conviction, denial of the same right to this indigent petitioner solely because he was unable to pay the filing fee violated the Fourteenth Amendment. *Griffin* v. *Illinois*, 351 U. S. 12. Pp. 257–258.

(a) That petitioner had already received one appellate review of his conviction in Ohio does not require a different result, since others similarly situated who could pay the filing fee could have the State's Supreme Court consider their applications for leave to appeal. P. 257.

(b) That the granting of leave to appeal is discretionary with the Ohio Supreme Court in a case such as this does not require a different result, since that Court did not permit petitioner to invoke its discretion. Pp. 257–258.

Judgment vacated and cause remanded.

Helen G. Washington (appointed by this Court as counsel for petitioner in this case, 358 U. S. 939) argued the cause and filed a brief for petitioner.

William M. Vance, Assistant Attorney General of Ohio, and *Harry C. Schoettmer* argued the cause for respondent. With them on the brief were *Mark McElroy,* Attorney General of Ohio, and *C. Watson Hover.*

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

The question presented in this case is whether a State may constitutionally require that an indigent defendant in a criminal case pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts.

After a trial in Ohio in 1953, the petitioner was convicted of burglary and sentenced to life imprisonment.[1] That same year his conviction was affirmed without opinion by the Ohio Court of Appeals. Petitioner immediately filed a notice of appeal in the Court of Appeals but did nothing further until 1957, when he sought to file a copy of the earlier notice of appeal and a motion for leave to appeal in the Supreme Court of Ohio.[2] To these papers petitioner attached an affidavit of poverty which declared that he was "without sufficient funds with which to pay the costs for Docket and Filing Fees in this

[1] Petitioner was also convicted of larceny and sentenced to a term of seven years to be served concurrently with the burglary sentence.

[2] Despite the passage of years the appeal was timely. *State* v. *Grisafulli,* 135 Ohio St. 87, 19 N. E. 2d 645.

cause of action." He also attached a motion for leave to proceed *in forma pauperis*.

The Clerk of the Supreme Court of Ohio refused to file the papers. He returned them with the following letter:

> "This will serve to acknowledge receipt of your motion for leave to proceed in forma pauperis, motion for leave to appeal and notice of appeal.
>
> "We must advise that the Supreme Court has determined on numerous occasions that the docket fee, required by Section 1512 of the General Code of Ohio, and the Rules of Practice of the Supreme Court, takes precedence over any other statute which may allow a pauper's affidavit to be filed in lieu of a docket fee. For that reason we cannot honor your request.
>
> "We are returning the above mentioned papers to you herewith." [3]

---

[3] The Rules of Practice of the Supreme Court of Ohio obviously referred to in the clerk's letter are Rules VII and XVII.
§ 1512 (Rev. Code § 2503.17):

"The clerk of the supreme court shall charge and collect the following fees:

"(A) For each case entered upon the minute book, including original actions in said court, appeal proceedings filed as of right, . . . for each motion . . . for leave to file a notice of appeal in criminal cases . . . twenty dollars . . . .

"(B) For filing assignments of error . . . upon allowance of a motion for leave to appeal . . . five dollars . . . .

. . . . . .

"Such fees must be paid to the clerk by the party invoking the action of the court, before the case or motion is docketed and shall be taxed as costs and recovered from the other party, if the party invoking the action succeeds, unless the court otherwise directs."
Rule VII:

"Section 1. *Felony Cases.* In felony cases, where leave to appeal is sought, a motion for leave to appeal shall be filed with the Clerk of this Court along with a copy of the notice of appeal which was

Under Art. IV, § 2, of the State Constitution, the Supreme Court of Ohio has appellate jurisdiction in many types of cases including those "involving questions arising under the constitution of the United States or of this state" and "cases of felony on leave first obtained." [4] Since burglary is a felony in Ohio,[5] the Supreme Court had jurisdiction to review petitioner's conviction and petitioner sought to file his motion asking leave to appeal.[6] The filing fee required by the Supreme Court on a motion for leave to appeal is $20 [7] and if that fee is paid, and the

---

filed in the Court of Appeals, upon payment of the docket fee required by Section 2503.17, Revised Code.

. . . . . .

"Section 4. *Appeal as of Right.* In any criminal case, whether felony or misdemeanor, if the notice of appeal shows that the appeal involves a debatable question arising under the Constitution of the United States or of this state, the appeal may be docketed upon filing the transcript of the record and any original papers in the case, upon payment of the fee required by Section 2503.17, Revised Code."

Rule XVII:

"The Docket Fees fixed by Section 2503.17, Revised Code, must be paid in advance. . . ."

[4] See also Ohio Rev. Code §§ 2953.02, 2953.08, which implement this constitutional provision.

[5] See Ohio Rev. Code §§ 2907.09, 1.06, 1.05.

[6] In his notice of appeal filed in the Court of Appeals, petitioner stated "This appeal is on questions of law and is taken on condition that a motion for leave to appeal be allowed." But in the motion for leave to appeal to the Supreme Court, petitioner stated, among other contentions, that his conviction conflicted with his "Constitutional Guarantees of the Fourteenth Amendment (14) to the Constitution of the United States; and, Article I, Section 10 of the Constitution of the State of Ohio." This might indicate that petitioner was claiming an appeal as of right to the Supreme Court. However, since petitioner has consistently characterized his appeal as one which requires leave, we so consider it here.

[7] See n. 3, *supra.*

papers are otherwise proper, the motion will be considered with the possibility that leave to appeal will be granted.

We granted certiorari and leave to proceed *in forma pauperis*. 358 U. S. 919. Subsequently, an order was entered, 358 U. S. 943, expressly limiting the grant of certiorari to the question posed by petitioner in his *pro se* petition which is restated at the outset of this opinion.[8]

The State's commendable frankness in this case has simplified the issues. It has acknowledged that the clerk's letter to petitioner is "in reality and in effect" the judgment of the Supreme Court. Only recently, that court had occasion to comment on the function of its clerk in these words:

> "It is the duty of the clerk of this court, in the absence of instructions from the court to the contrary, to accept for filing any paper presented to him, provided such paper is not scurrilous or obscene, is properly prepared and is accompanied by the requisite filing fee." [9]

In a companion case, the court observed that its clerk "acts as the court in carrying out its instructions." [10] The State represented that the clerk had been instructed not to docket any papers without fees and also that the Supreme Court had not deviated from its practice in this respect. Moreover, the State asserted that it was impossible for petitioner to file any action at all in the Supreme

---

[8] As posed by petitioner, the question was

"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."

[9] *State ex rel. Wanamaker* v. *Miller*, 164 Ohio St. 176, 177, 128 N. E. 2d 110.

[10] *State ex rel. Wanamaker* v. *Miller*, 164 Ohio St. 174, 175, 128 N. E. 2d 108, 109.

Court without paying the fee in advance. There is no showing that these instructions have been modified or rescinded in any way and the Supreme Court has sanctioned the clerk's well-publicized procedure of returning pauper's applications, without exception, with the above-quoted form letter. This delegation to the clerk of a matter involving no discretion clearly suffices to make the clerk's letter a final judgment of Ohio's highest court, as required by 28 U. S. C. § 1257.

Although the State admits that petitioner "in truth and in fact" is a pauper, it presses several arguments which it claims distinguish *Griffin* v. *Illinois,* 351 U. S. 12, and justify the Ohio practice. First, the State argues that petitioner received one appellate review of his conviction in Ohio, while in *Griffin,* Illinois had left the defendant without any judicial review of his conviction. This is a distinction without a difference for, as *Griffin* holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. 351 U. S., at 18, 22. This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.

Since *Griffin* proceeded upon the assumption that review in the Illinois Supreme Court was a matter of right, 351 U. S., at 13, Ohio seeks to distinguish *Griffin* on the further ground that leave to appeal to the Supreme Court of Ohio is a matter of discretion. But this argument misses the crucial significance of *Griffin.* In Ohio, a defendant who is not indigent may have the Supreme Court consider on the merits his application for leave to appeal from a felony conviction. But as that court has interpreted § 1512 and its rules of practice, an indigent defendant is denied that opportunity. There is no

rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio.

The State's action in this case in some ways is more final and disastrous from the defendant's point of view than was the *Griffin* situation. At least in *Griffin,* the defendant might have raised in the Supreme Court any claims that he had that were apparent on the bare record, though trial errors could not be raised. Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.

What was said in *Griffin,* might well be said here: "We are confident that the State will provide corrective rules to meet the problem which this case lays bare." 351 U. S., at 20.[11]

The judgment below is vacated and the cause is remanded to the Supreme Court of Ohio for further action not inconsistent with this opinion.

It is so ordered.

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

---

[11] Shortly after this Court's decision in *Griffin* v. *Illinois, supra,* the Illinois Supreme Court promulgated Rule 65–1, which provides in part that any person sentenced to imprisonment who is "without financial means with which to obtain the transcript of the proceedings at his trial" will receive a transcript if it is "necessary to present fully the errors recited in the petition. . . ."

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

It is the special obligation of this Court strictly to observe the limits of its jurisdiction. No matter how tempting the appeal of a particular situation, we should not indulge in disregard of the bounds by which Congress has defined our power of appellate review. There will be time enough to enforce the constitutional right, if right it be, which the Court now finds the petitioner to possess when it is duly presented for judicial determination here, and there are ample modes open to the petitioner for assertion of such a claim in a way to require our adjudication.

The appellate power of this Court to review litigation originating in a state court can come into operation only if the judgment to be reviewed is the final judgment of the highest court of the State. That a judgment is the prerequisite for the appellate review of this Court is an ingredient of the constitutional requirement of the "Cases" or "Controversies" to which alone "The judicial Power shall extend." U. S. Const., Art. III, § 2. That it be a "final judgment" was made a prerequisite by the very Act which established this Court in 1789. Act of September 24, 1789, § 25, 1 Stat. 85, now 28 U. S. C. § 1257. "Close observance of this limitation upon the Court is not regard for a strangling technicality." *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 67. Such has been the undeviating constitutional, legislative and judicial command binding on this Court and respected by it without exception or qualification to this very day.

The requisites of such a final judgment are not met by what a state court may deem to be a case or judgment in the exercise of the state court's jurisdiction. See *Tyler* v. *Judges,* 179 U. S. 405; *Doremus* v. *Board of Education,*

342 U. S. 429. Nor can consent of the parties to the determination of a cause by this Court overleap the jurisdictional limitations which are part of this Court's being. Litigants cannot give this Court power which the Constitution and Congress have withheld. *Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379, 382. The President of the United States himself cannot secure from this Court determination of a legal question except when such a question duly arises in the course of adjudication of a case or controversy, even though he asks for needed help in a great national emergency. See President Washington's questions in 33 Writings of Washington (Fitzpatrick ed. 1940) 15–19, 28, and the correspondence between Secretary of State Thomas Jefferson and Chief Justice Jay, in 3 Correspondence and Public Papers of John Jay (Johnston ed. 1891) 486–489.

As the importance of the interrogator and the significance of the question confer no power upon this Court to render advisory opinions, a compassionate appeal cannot endow it with jurisdiction to review a judgment which is not final. One's sympathy, however deep, with petitioner's claim cannot dispense with the precondition of a final judgment for exercising our judicial power. If the history of this Court teaches one lesson as important as any, it is the regretful consequences of straying off the clear path of its jurisdiction to reach a desired result. This Court cannot justify a yielding to the temptation to cut corners in disregard of what the Constitution and Congress command. Burns has other paths to this Court to assert what, forsooth, all of us may deem a failure by Ohio to accord him—a constitutional right—other paths besides our indifference to the rules by which we are bound. Specifically, he has four obvious remedies for securing an ascertainment and enforcement of his constitutional claim by this Court without having

this Court treat the letter of a clerk of a court as a court's judgment. For although the caption of the case would indicate that our review was of the Supreme Court of Ohio, in fact the review can only be of the refusal of the clerk of that court to docket petitioner's papers until a twenty-dollar docket fee was paid. The Supreme Court of Ohio was not asked to consider the appeal, nor did it itself refuse to do so. The decisions in *State ex rel. Dawson* v. *Roberts,* 165 Ohio St. 341, 135 N. E. 2d 409, and *State ex rel. Wanamaker* v. *Miller,* 164 Ohio St. 174 and 176, 128 N. E. 2d 108 and 110, mandamus denied *sub nom. Wanamaker* v. *Supreme Court of Ohio,* 350 U. S. 881, demonstrate conclusively that the Ohio court has retained the ultimate power to determine what papers will be permitted to be filed. There is not the remotest indication in the record that this petitioner's claim to file his appeal without paying the customary filing fee, because of indigence, was brought to the attention of the Ohio Supreme Court, nor is there any showing in the record that in writing his letter the clerk was acting at the specific behest of that court in this case.

(1) Petitioner may make a direct application addressed in terms to the judges of the Supreme Court of Ohio. Such applications informally expressed by way of letters are frequently addressed to this Court, and are accepted here as the basis for judgments by this Court. We are not to assume that an application so addressed to the judges of the Ohio Supreme Court will not be transmitted to that court and acted upon by it. This is not merely an appropriate assumption about the functioning of courts. It is an assumption one can confidently make based upon the records in this Court. See *Wanamaker* v. *Supreme Court of Ohio, supra.* (Papers filed here in connection with the *Wanamaker* case make it clear that the Supreme Court of Ohio does consider letters

asking that that court instruct its clerk to accept petitions for filing.) The Supreme Court of Ohio might well yield to this claim of Burns as other courts in like situations have yielded since *Griffin* v. *Illinois,* 351 U. S. 12. But in any event, a denial of Burns' application or refusal to entertain it would constitute a judgment of that court as an appropriate prerequisite for review here.

(2) Ever since § 13 of the Act of September 24, 1789, 1 Stat. 81, as amended, 28 U. S. C. § 1651, this Court has had power to issue mandamus in protection of its appellate jurisdiction in order to avoid frustration of it. This is an exercise of anticipatory review by bringing here directly a case which could be brought to this Court in due course.

(3) Under the Civil Rights Act, R. S. § 1979, 42 U. S. C. § 1983, Burns, like others before him who have allegedly been denied constitutional rights under color of any statute of a State, may have his constitutional rights determined and, incidentally, secure heavy damages for any denial of constitutional rights. See *Lane* v. *Wilson,* 307 U. S. 268.

(4) Burns' claim, in essence, is unlawful detention because of a denial of a constitutional right under the Fourteenth Amendment. That lays the foundation for a habeas corpus proceeding in the United States District Court. See *Johnson* v. *Zerbst,* 304 U. S. 458. To be sure, if the right he claims be recognized in habeas corpus proceedings, he would not be released as a matter of course but merely conditionally on the State Supreme Court's entertaining his petition for review as an indigent incapable of meeting court costs. The contingent nature of the release would not impair the availability of habeas corpus. See *Chin Yow* v. *United States,* 208 U. S. 8.

Thus, it cannot be urged that necessity compels what the Constitution and statutes forbid—adjudication here of a claim which has not been rejected in a final judgment

of a state court. Adherence to the dictates of the laws which govern our jurisdiction, though it may result in postponement of our determination of petitioner's rights, is the best assurance of the vindication of justice under law through the power of the courts. We should dismiss the writ of certiorari inasmuch as there has been no final judgment over which we have appellate power.

509615 O–59–20

NAPUE *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 583. Argued April 30, 1959.—Decided June 15, 1959.

At petitioner's trial in a state court in which he was convicted of murder, the principal state witness, an accomplice then serving a 199-year sentence for the same murder, testified in response to a question by the Assistant State's Attorney that he had received no promise of consideration in return for his testimony. The Assistant State's Attorney had in fact promised him consideration, but he did nothing to correct the witness' false testimony. The jury was apprised, however, that a public defender had promised "to do what he could" for the witness. *Held:* The failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment. Pp. 265–272.

(a) The established principle that a State may not knowingly use false testimony to obtain a tainted conviction does not cease to apply merely because the false testimony goes only to the credibility of the witness. Pp. 269–270.

(b) The fact that the jury was apprised of other grounds for believing that the witness may have had an interest in testifying against petitioner was not sufficient to turn what was otherwise a tainted trial into a fair one. Pp. 270–271.

(c) Since petitioner claims denial of his rights under the Federal Constitution, this Court was not bound by the factual conclusion reached by the Illinois Supreme Court, but reexamined for itself the evidentiary basis on which that conclusion was founded. Pp. 271–272.

13 Ill. 2d 566, 150 N. E. 2d 613, reversed.

George N. Leighton argued the cause and filed a brief for petitioner.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *Latham Castle,* Attorney General of Illinois, *Raymond S. Sarnow* and *A. Zola Graves,* Assistant Attorneys General.

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

At the murder trial of petitioner the principal state witness, then serving a 199–year sentence for the same murder, testified in response to a question by the Assistant State's Attorney that he had received no promise of consideration in return for his testimony. The Assistant State's Attorney had in fact promised him consideration, but did nothing to correct the witness' false testimony. The jury was apprised, however, that a public defender had promised "to do what he could" for the witness. The question presented is whether on these facts the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The record in this Court contains testimony from which the following facts could have been found. The murder in question occurred early in the morning of August 21, 1938, in a Chicago, Illinois, cocktail lounge. Petitioner Henry Napue, the witness George Hamer, one Poe and one Townsend entered the dimly lighted lounge and announced their intention to rob those present. An off-duty policeman, present in the lounge, drew his service revolver and began firing at the four men. In the melee that followed Townsend was killed, the officer was fatally wounded, and the witness Hamer was seriously wounded. Napue and Poe carried Hamer to the car where a fifth man, one Webb, was waiting. In due course Hamer was apprehended, tried for the murder of the policeman, convicted on his plea of guilty and sentenced to 199 years. Subsequently, Poe was apprehended, tried, convicted, sentenced to death and executed. Hamer was not used as a witness.

Thereafter, petitioner Napue was apprehended. He was put on trial with Hamer being the principal witness

for the State. Hamer's testimony was extremely important because the passage of time and the dim light in the cocktail lounge made eyewitness identification very difficult and uncertain, and because some pertinent witnesses had left the state. On the basis of the evidence presented, which consisted largely of Hamer's testimony, the jury returned a guilty verdict and petitioner was sentenced to 199 years.

Finally, the driver of the car, Webb, was apprehended. Hamer also testified against him. He was convicted of murder and sentenced to 199 years.

Following the conviction of Webb, the lawyer who, as former Assistant State's Attorney, had prosecuted the Hamer, Poe and Napue cases filed a petition in the nature of a writ of error *coram nobis* on behalf of Hamer. In the petition he alleged that as prosecuting attorney he had promised Hamer that if he would testify against Napue, "a recommendation for a reduction of his [Hamer's] sentence would be made and, if possible, effectuated." [1] The

[1] In relevant part, his petition read as follows:

"After Hamer was sentenced your petitioner [the Assistant State's Attorney] well knowing that identification of Poe, Napue and Webb if and when apprehended would be of an unsatisfactory character and not the kind of evidence upon which a jury could be asked to inflict a proper, severe penalty, and being unable to determine in advance whether Poe, Napue and Webb would make confessions of their participation in the crime, represented to Hamer that if he would be willing to cooperate with law enforcing officials upon the trial of [*sic*] trials of Poe, Napue and Webb when they were apprehended, that a recommendation for a reduction of his sentence would be made and, if possible, effectuated.

. . . . . .

"Before testifying on behalf of the State and against Napue, Hamer expressed to your petitioner a reluctance to cooperate any further unless he were given definite assurance that a recommendation for reduction of his sentence would be made. Your petitioner, feeling that the interests of justice required Hamer's testimony, again assured Hamer that every possible effort would be made to conform to the promise previously made to him."

attorney prayed that the court would effect "consummation of the compact entered into between the duly authorized representatives of the State of Illinois and George Hamer."

This *coram nobis* proceeding came to the attention of Napue, who thereafter filed a post-conviction petition, in which he alleged that Hamer had falsely testified that he had been promised no consideration for his testimony,[2] and that the Assistant State's Attorney handling the case had known this to be false. A hearing was ultimately held at which the former Assistant State's Attorney testified that he had only promised to help Hamer if Hamer's story "about being a reluctant participant" in the robbery was borne out, and not merely if Hamer would testify at petitioner's trial. He testified that in his *coram nobis* petition on Hamer's behalf he "probably used some language that [he] should not have used" in his "zeal to do something for Hamer" to whom he "felt a moral obligation." The lower court denied petitioner relief on the basis of the attorney's testimony.

On appeal, the Illinois Supreme Court affirmed on different grounds over two dissents. 13 Ill. 2d 566, 150 N. E. 2d 613. It found, contrary to the trial court, that the attorney had promised Hamer consideration if he would testify at petitioner's trial, a finding which the State does not contest here. It further found that the Assistant State's Attorney knew that Hamer had lied in denying that

---

[2] The alleged false testimony of Hamer first occurred on his cross-examination:

"Q. Did anybody give you a reward or promise you a reward for testifying?

"A. There ain't nobody promised me anything."

On redirect examination the Assistant State's Attorney again elicited the same false answer.

"Q. [by the Assistant State's Attorney] Have I promised you that I would recommend any reduction of sentence to anybody?

"A. You did not."

he had been promised consideration. It held, however, that petitioner was entitled to no relief since the jury had already been apprised that someone whom Hamer had tentatively identified as being a public defender "was going to do what he could" in aid of Hamer, and "was trying to get something did" for him.[3] We granted cer-

---

[3] The following is Hamer's testimony on the subject:

"Q. [on cross-examination] And didn't you tell him [one of Napue's attorneys] that you wouldn't testify in this case unless you got some consideration for it?

"A. . . . Yes, I did; I told him that.

. . . . . .

"Q. What are you sentenced for?

"A. One Hundred and Ninety-Nine Years.

"Q. You hope to have that reduced, don't you?

"A. Well, if anybody would help me or do anything for me, why certainly I would.

"Q. Weren't you expecting that when you came here today?

"A. There haven't no one told me anything, no more than the lawyer. The lawyer come in and talked to me a while ago and said he was going to do what he could.

"Q. Which lawyer was that?

"A. I don't know; it was a Public Defender. I don't see him in here.

"Q. You mean he was from the Public Defender's office?

"A. I imagine that is where he was from, I don't know.

"Q. And he was the one who told you that?

"A. Yes, he told me he was trying to get something did for me.

"Q. . . . And he told you he was going to do something for you?

"A. He said he was going to try to.

. . . . . .

"Q. And you told them [police officers] you would [testify at the trial of Napue] but you expected some consideration for it?

"A. I asked them was there any chance of me getting any. The man told me he didn't know, that he couldn't promise me anything.

"Q. Then you spoke to a lawyer today who said he would try to get your time cut?

"A. That was this Public Defender. I don't even know his name. . . ."

tiorari to consider the question posed in the first paragraph of this opinion. 358 U. S. 919.

First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, *Mooney* v. *Holohan,* 294 U. S. 103; *Pyle* v. *Kansas,* 317 U. S. 213; *Curran* v. *Delaware,* 259 F. 2d 707. See *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688, and *White* v. *Ragen,* 324 U. S. 760. Compare *Jones* v. *Commonwealth,* 97 F. 2d 335, 338, with *In re Sawyer's Petition,* 229 F. 2d 805, 809. Cf. *Mesarosh* v. *United States,* 352 U. S. 1. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Alcorta* v. *Texas,* 355 U. S. 28; *United States ex rel. Thompson* v. *Dye,* 221 F. 2d 763; *United States ex rel. Almeida* v. *Baldi,* 195 F. 2d 815; *United States ex rel. Montgomery* v. *Ragen,* 86 F. Supp. 382. See generally annotation, 2 L. Ed. 2d 1575.

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People* v. *Savvides,* 1 N. Y. 2d 554, 557; 136 N. E. 2d 853, 854–855; 154 N. Y. S. 2d 885, 887:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter

> what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Second, we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one. As Mr. Justice Schaefer, joined by Chief Justice Davis, rightly put it in his dissenting opinion below, 13 Ill. 2d 566, 571, 150 N. E. 2d 613, 616:

> "What is overlooked here is that Hamer clearly testified that no one had offered to help him except an unidentified lawyer from the public defender's office."

Had the jury been apprised of the true facts, however, it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration. That the Assistant State's Attorney himself thought it important to establish before the jury that no official source had promised Hamer consideration is made clear by his redirect examination, which was the last testimony of Hamer's heard by the jury:

> "Q. Mr. Hamer, has Judge Prystalski [the trial judge] promised you any reduction of sentence?

"A. No, sir.

"Q. Have I promised you that I would recommend any reduction of sentence to anybody?

"A. You did not. [That answer was false and known to be so by the prosecutor.]

"Q. Has any Judge of the criminal court promised that they [*sic*] would reduce your sentence?

"A. No, sir.

"Q. Has any representative of the Parole Board been to see you and promised you a reduction of sentence?

"A. No, sir.

"Q. Has any representative of the Governor of the State of Illinois promised you a reduction of sentence?

"A. No, sir."

We are therefore unable to agree with the Illinois Supreme Court that "there was no constitutional infirmity by virtue of the false statement."

Third, the State argues that we are not free to reach a factual conclusion different from that reached by the Illinois Supreme Court, and that we are bound by its determination that the false testimony could not in any reasonable likelihood have affected the judgment of the jury. The State relies on *Hysler* v. *Florida,* 315 U. S. 411. But in that case the Court held only that a state standard of specificity and substantiality in making allegations of federal constitutional deprivations would be respected, and this Court made its own "independent examination" of the allegations there to determine if they had in fact met the Florida standard. The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304; *Cooper* v. *Aaron,* 358 U. S. 1.

This principle was well stated in *Niemotko* v. *Maryland,* 340 U. S. 268, 271:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

It is now so well settled that the Court was able to speak in *Kern-Limerick, Inc.,* v. *Scurlock,* 347 U. S. 110, 121, of the "long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." [4] As previously indicated, our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. Accordingly, the judgment below must be

Reversed.

---

[4] See, *e. g., Payne* v. *Arkansas,* 356 U. S. 560, 562; *Leyra* v. *Denno,* 347 U. S. 556, 558; *Avery* v. *Georgia,* 345 U. S. 559, 561; *Feiner* v. *New York,* 340 U. S. 315, 322, 323, note 4 (dissenting opinion); *Cassell* v. *Texas,* 339 U. S. 282, 283; *Haley* v. *Ohio,* 332 U. S. 596, 599; *Malinski* v. *New York,* 324 U. S. 401, 404; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 149; *Ward* v. *Texas,* 316 U. S. 547, 550; *Smith* v. *Texas,* 311 U. S. 128, 130; *South Carolina* v. *Bailey,* 289 U. S. 412, 420. See also, *e. g., Roth* v. *United States,* 354 U. S. 476, 497 (dissenting opinion); *Stroble* v. *California,* 343 U. S. 181, 190; *Sterling* v. *Constantin,* 287 U. S. 378, 398; *Southern Pacific Co.* v. *Schuyler,* 227 U. S. 601, 611; *Creswill* v. *Grand Lodge Knights of Pythias,* 225 U. S. 246, 261.

Mr. Justice Holmes, writing for the Court, recognized the principle over 35 years ago in *Davis* v. *Wechsler,* 263 U. S. 22, 24:

"If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of a state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

MAGENAU, ADMINISTRATOR, *v.* AETNA FREIGHT LINES, INC.

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

No. 439. Argued May 18, 1959.—
Decided June 15, 1959.

Basing jurisdiction on diversity of citizenship, petitioner sued in a Federal District Court to recover for the wrongful death of his decedent, who was killed when a tractor-trailer leased by respondent crashed off a Pennsylvania highway. The case was tried to a jury on a negligence theory and judgment went for petitioner. The Court of Appeals reversed on the ground that the decedent was an employee of respondent and the Pennsylvania Workmen's Compensation Act provided the exclusive remedy. Both courts treated the question whether the decedent was respondent's employee within the meaning of the Pennsylvania statute as a question of law for determination by the judge, instead of the jury. *Held:* The judgment is reversed and the cause is remanded for a new trial. Pp. 274–279.

(a) In a Federal District Court, all disputed issues of fact necessary to a determination as to whether the decedent was respondent's employee within the meaning of the Pennsylvania Workmen's Compensation Act were for jury determination, regardless of the practice in the state courts, unless the State's assignment of those factual issues to the judge rather than the jury has been "announced as an integral part of the special relationship created by the statute." *Byrd* v. *Blue Ridge Electrical Cooperative,* 356 U. S. 525. P. 278.

(b) No such reason for the distinction has been shown here, and, on the record in this case, not all of the disputed issues of fact necessary to a determination as to whether the decedent was respondent's employee within the meaning of the Pennsylvania statute were submitted to, or passed on by, the jury. Therefore, a new trial is necessary. Pp. 276–279.

257 F. 2d 445, reversed and cause remanded.

Harry L. Shniderman argued the cause for petitioner. With him on the brief were *M. Fletcher Gornall, Jr.* and *William W. Knox.*

William F. Illig argued the cause for respondent. With him on the brief was *John E. Britton.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a diversity case for wrongful death of petitioner's decedent, who was killed when a tractor-trailer leased by respondent crashed off a Pennsylvania highway. The action was tried to a jury on a negligence theory and judgment went for petitioner. 161 F. Supp. 875. The Court of Appeals reversed, finding that under Pennsylvania law the decedent was an employee of respondent and that the Pennsylvania Workmen's Compensation Act, Purdon's Pa. Stat. Ann., 1952, Tit. 77, provided the exclusive remedy. 257 F. 2d 445. We granted certiorari, 358 U. S. 927, on the question whether, in the light of *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525 (1958) (decided after this case was argued in the Court of Appeals), the matter of the relationship of the decedent to respondent was a jury question. We have concluded that *Byrd* does control that issue and that the judgment must therefore be reversed.

Respondent is an interstate motor carrier of freight certificated under the Interstate Commerce Act. It had leased a tractor-trailer, complete with driver, from one Fidler, an independent contractor. Its lease contract, which had been in effect for four years, required Fidler to furnish the driver as well as to keep the leased equipment in repair. In this connection the evidence indicates that Fidler had authorized his driver, where circumstances required, to hire services and purchase necessities on trips of this kind. The vehicle and driver leased by respondent were en route from Syracuse, N. Y., to Midland, Pa., with 36,000 pounds of steel when the mishap leading to

decedent's death occurred. The trip from Syracuse had been so beset with difficulties, such as tire replacements, battery trouble and brake failure, as well as bad weather, that it had already consumed 7 days' time. Under ordinary conditions 20 hours of elapsed time would have been sufficient. During a stop at a tavern near Waterford, Pa., the driver, Schroyer, was talking to the tavern keeper about his truck troubles when decedent and his cousin entered the place. Schroyer offered the cousin $25 to accompany him for the remainder of the trip and, upon refusal, made the same offer to decedent. The latter accepted. While the evidence is weak on the point, the indications are that decedent's job was to aid the driver in the event further trouble with the truck was encountered. Decedent was experienced with cars and had worked for a short time as a mechanic. Schroyer and decedent proceeded in the truck-trailer toward their destination, with the former driving. Some hours later the vehicle was found off the road on the downside of an embankment. Both men were dead.

This action ensued, in which petitioner alleged negligence on the part of Fidler and respondent for continuing to operate the vehicle with knowledge of its defective brakes. Liability of respondent was rested upon the rule that its status as a certificated carrier made it liable for the negligence of Fidler, its independent contractor, whose motor equipment was operated under the former's I. C. C. certificate. This is the law of Pennsylvania, *Kissell* v. *Motor Age Transit Lines,* 357 Pa. 204, 209, 53 A. 2d 593, 597.[1] Petitioner's theory was that his decedent was an invitee on the tractor-trailer, and that Fidler and his driver, Schroyer, therefore, owed decedent

[1] Also see 49 Stat. 557, as amended, 49 U. S. C. § 315, which provides that a certificate holder must carry insurance to satisfy any final judgment for injuries due to the "negligent . . . use of motor vehicles under such certificate."

a duty of due care for breach of which respondent was liable under its I. C. C. certificate. Respondent claimed that decedent was a trespasser and, under Pennsylvania law, that it was therefore liable only for wanton misconduct. After discovery had been exhausted, respondent moved for summary judgment on the ground that the circumstances of decedent's engagement by Schroyer created an employer-employee relationship between it and decedent under the State workmen's compensation statute. The motion was denied and the case went to trial. It was submitted to the jury on special interrogatories covering the issues as to liability and a general charge as to the damages. The trial judge entered judgment on the special issues and the damage verdict for $76,500.

Interrogatory No. 1,[2] the meaning of which is now in controversy, inquired as to whether it was "reasonably necessary for the protection of defendant's [respondent's] interests" to engage decedent. The Court of Appeals held that the affirmative answer of the jury classified decedent as respondent's employee bringing him within the general definition of § 104 of the Pennsylvania Workmen's Compensation Act.[3] It noted that respondent had

---

[2] "Interrogatory Number 1. Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompanying him for the remainder of the trip?"

[3] Section 104 of the Pennsylvania Workmen's Compensation Act, Purdon's Pa. Stat. Ann., 1952, Tit. 77, § 22, Cum. Supp., provides:

"The term 'employe,' as used in this act is declared to be synonymous with servant, and includes—

"All natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the

conceded that decedent was its "casual" employee but that this was not enough to take him out of the Act's coverage for, in addition, such casual employment must "not be in the regular course of business" of respondent. This, the Court of Appeals said, was a question of law under Pennsylvania practice and open to review. It held that the finding under Interrogatory No. 1 put decedent "into the regular business" of respondent. This holding would call for the dismissal of this suit, as petitioner's exclusive remedy would be under the Pennsylvania Workmen's Compensation Act.

Since the keystone of the Court of Appeals' holding depends on its interpretation of Special Interrogatory No. 1, we note the views of the trial judge on that issue. In his opinion on the motion of respondent for judgment *non obstante verdicto,* he observed that "the interrogatory . . . was not so phrased as to require the jury to determine whether decedent was an employee of Aetna." Rather, it "was simply to secure a finding from the jury as to the reasonable necessity of Schroyer engaging decedent." 161 F. Supp., at 878. Likewise during the trial, in a colloquy with counsel as to this interrogatory, he advised: "[Y]ou notice there I refrain from saying just what his [decedent's] status is. I don't think it necessary to have the jury find whether he was employed or not; I think that is a question for the law." On balance we believe that an examination of the record supports this interpretation of Interrogatory No. 1, although it must be admitted that the apparently inadvertent use of the words in "protection of the defendant's interest" in the interrogatory may have been taken in a different light by the jury.

---

employer. Every executive officer of a corporation elected or appointed in accordance with the charter and by-laws of the corporation, except elected officers of the Commonwealth or any of its political subdivisions, shall be an employe of the corporation."

Be this as it may, however, not only the question of the relationship of the decedent to respondent should have been submitted to the jury but, in order to meet § 104's definition, it should likewise have passed upon whether the employment, if any, was "casual" and not "in the regular course" of respondent's business. Our opinion in *Byrd* came down subsequent to argument in the Court of Appeals. As we said in that case "An essential characteristic of [the federal system] is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury . . . [assigning] the decisions of disputed questions of fact to the jury." *Byrd* v. *Blue Ridge Rural Electric Coop., supra,* at 537. We found there that the South Carolina rule in compensation cases, permitting courts to decide such factual issues without the aid of juries, was not "announced as an integral part of the special relationship created by the statute." *Id.,* at 536. We held that under such circumstances "the federal court should not follow the state rule." *Id.,* at 538. The same reasoning applies here. We have been given no reason for the distinction in the Pennsylvania practice of trying such disputed factual issues to the court. Respondent does not claim that the rule is an "integral part of the special relationship" created by its statute but rather that the disputed issue of employment was in fact submitted to the jury. It cannot be gainsaid that all of the disputed issues were not so submitted. In order to determine whether the Pennsylvania Act bars recovery here the court must have a full answer as to the status of the decedent as an employee under § 104 of the Act. If the jury, under proper instructions, finds facts which show that, under § 104, the decedent was respondent's employee and that such employment was "casual" and not "in the regular course" of respondent's business, then it can find for petitioner.

We are therefore of the opinion that a new trial on the whole case is necessary, since these disputed issues are so interrelated with the ultimate issues of liability and damages that a limited hearing would not be in the interest of fairness and efficiency in judicial administration. If the evidence on that trial is such as to justify with reason different conclusions on the factual issues as to the relationship of decedent as an employee, under § 104 of Pennsylvania's Act, of either respondent or its contractor, Fidler, resolution of those issues, along with others that arise from the evidence, will be for the jury. The jury's verdict at that trial will determine if as well as in what amount petitioner may recover in this action.

Reversed and remanded.

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

The issues in this case have had a shifting history. Today the problem of the case appears to be cast into these questions: was the issue of decedent Ormsbee's employment submitted to the jury and, if not, should it have been? But at trial the evidence massed on both sides was to prove or disprove that decedent was a trespasser. In the course of showing he was something other than a trespasser, petitioner introduced evidence which tended to prove that decedent was in fact a temporary employee of respondent, hired by the truck driver to aid in an emergency. Respondent countered by urging that the evidence introduced by petitioner, if believed, proved decedent was an employee of Aetna and therefore, under applicable Pennsylvania law, deprived petitioner of a common-law remedy against Aetna. The trial judge, believing employment to be a question of law, reserved until after the verdict a ruling on the effect of the Penn-

509615 O-59-21

sylvania Workmen's Compensation Act, Purdon's Pa. Stat. Ann., 1952, Tit. 77, §§ 22, 52, 462. And so, putting aside this question, and keeping the original issue regarding the status of decedent as a trespasser in mind, the judge framed one of the four interrogatories submitted to the jury to elicit its opinion whether decedent was or was not a trespasser. The jury found that he was not by answering the following interrogatory in the affirmative:

> "Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompany him for the remainder of the trip?"

The jury also returned a general verdict for petitioner.

In his opinion refusing Aetna's motions for a new trial or judgment notwithstanding the verdict, the trial judge reasoned that the Pennsylvania Act did not bar petitioner's recovery at common law because the nature of decedent's employment did not, under the Pennsylvania decisions, bring him under the Workmen's Compensation Act. 161 F. Supp. 875. The Court of Appeals disagreed with the trial judge's interpretation of the interrogatory, of the Pennsylvania statute and of the decisions thereunder. Reviewing the jury's verdict for decedent's administrator, that court held that the affirmative answer to the interrogatory necessitated a finding that decedent was an employee of Aetna within the definition of that status in the Pennsylvania Act and that therefore the only remedy was under that Act. 257 F. 2d 445. In so doing, the court was applying to facts as found by a jury the law made applicable to the parties to this action by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and the Rules of Decision Act, 28 U. S. C. § 1652.

Petitioner now asserts that our opinion in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, required the jury in the federal courts to decide the issue of employment and that the jury did not make that determination here. To agree with this second proposition we must either find that the Court of Appeals totally misinterpreted the answer of the jury to the interrogatory or that the rule stated in *Byrd* requires not only that disputed questions of fact be submitted to the jury but also that the application of law to facts likewise rests with the jury. The former ruling would deviate from the settled practice of this Court to accept the interpretation of proceedings below adopted by the Court of Appeals unless that interpretation is baseless.[1] Moreover, the ruling of the Court of Appeals was based primarily on an interpretation of Pennsylvania law and not on an extrapolation from the jury's finding. Judge Goodrich held that "[w]e cannot escape the conclusion that the [jury] finding that authorized the hiring of Ormsbee put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all." 257 F. 2d, at 448. Thus the Court of Appeals applied the jury-found facts to the court-interpreted statute and said that the Pennsylvania law barred a common-law remedy. We should not review here the finding of the Court of Appeals on the meaning of the Pennsylvania statute. This Court has repeatedly deferred to decisions on local law reached by the lower federal courts.[2] What reason is there to

---

[1] See, *e. g.*, *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502–503; *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U. S. 543.

[2] *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 499; *Reitz* v. *Mealey*, 314 U. S. 33, 39; *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280, 281; *Helvering* v. *Stuart*, 317 U. S. 154, 162–163, modified on other grounds, 317 U. S. 602; *Palmer* v. *Hoffman*,

deviate from that practice in this case? The meaning given to the Pennsylvania statutory language and to the cases interpreting it was the determination of three uncommonly experienced Pennsylvania circuit judges. Finally, no prior federal case would justify a ruling that in the federal courts application of law to fact is a jury function.[3] Nor does historical analysis support the assumption that such was the case at the time of the adoption of the Seventh Amendment.[4] Whether a given set of facts constitutes an employment relationship is a pure question of law and as such not within a jury's province. The charge, interrogatory, and answer thereto, as reasonably interpreted by the Court of Appeals, do not permit the conclusion that issues were withheld from the jury which were within its sphere of power, duty, and capability.

But suppose it be correct to conclude that the Court of Appeals erred in its opinion that the jury resolved all relevant factual inquiries. Still the petitioner has no case

---

318 U. S. 109, 118; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237; *Hillsborough* v. *Cromwell*, 326 U. S. 620, 630; *Steele* v. *General Mills, Inc.*, 329 U. S. 433, 438–439; *Gardner* v. *New Jersey*, 329 U. S. 565, 575; *Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 447–448; *Estate of Spiegel* v. *Commissioner of Internal Revenue*, 335 U. S. 701, 707–708; *Propper* v. *Clark*, 337 U. S. 472, 486–487; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 534; *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 674; *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 755; *Williams* v. *United States*, 341 U. S. 97, 100; *Sutton* v. *Leib*, 342 U. S. 402, 411; *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204–205; *id.*, at 209, 212 (concurring opinions); *General Box Co.* v. *United States*, 351 U. S. 159, 165; *id.*, at 169–170 (dissenting opinion).

[3] Cf. *Ex parte Peterson*, 253 U. S. 300, 310: "The limitation imposed by the [Seventh] Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."

[4] See Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 684–686 (1918).

that should prevail here. For not only did the petitioner fail at trial to request the question of employment to be submitted to a jury, he himself stated during the course of the trial that employment was a question of law.[5] And when the trial judge said that he believed that as a question of law it ought not to be submitted to a jury, the petitioner did not claim otherwise.[6] Indeed it was the respondent who requested that the question be submitted to the jury and who objected when this request was refused. I shall continue to believe it to be law in civil cases in the federal courts that, barring some extraordinary circumstances not here present, failure to request a given issue to be submitted to a jury constitutes a waiver of any right to such submission.[7] The least requisite for raising such failure on appeal is notice to the trial court by way of an objection.[8]

Certiorari was granted upon a petition which urged that the Court of Appeals had so ruled as to deprive petitioner of the right to a jury determination of employment status and thus that the case raised the same basic question as that dealt with by this Court in *Byrd*. More particular consideration than could be expected to be given to the petition for certiorari[9] has made it apparent

---

[5] "The Court: In other words, the finding of trespasser is a conclusion of law.

"Mr. Knox (attorney for petitioner): The same as employees." Transcript of Record, p. 173a.

[6] "The Court: I don't think it is necessary to have the jury find whether he was employed or not; I think that is a question for the law." Transcript of Record, p. 169a.

[7] See, *e. g., Pennsylvania R. Co.* v. *Minds,* 250 U. S. 368, 375; *Shutte* v. *Thompson,* 15 Wall. 151, 164.

[8] Fed. Rules Civ. Proc., 49, 51.

[9] "We are not aided by oral arguments and necessarily rely in an especial way upon petitions, replies and supporting briefs. Unless these are carefully prepared, contain *appropriate* references to the record and present with *studied accuracy, brevity and clearness*

that neither statement is correct. The briefs on the merits and oral argument made it inescapably clear that petitioner failed to present a case which qualifies for our consideration in the light of the historical development of our certiorari jurisdiction [10] and the rule which we have promulgated to guide its exercise.[11] This is an ordinary diversity case turning solely on the application of Pennsylvania law to a unique set of facts and involving no question which justifies review under our discretionary jurisdiction. When the Court has discovered, even after argument, that there existed no question suitable for this Court's determination, certiorari has been dismissed as improvidently granted.[12] The reasons for such a disposition of a case even after argument—action so often taken as fairly to be part of the settled practice of the Court—were thus expounded by Mr. Chief Justice Taft:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing con-

---

whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket." *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430, 434.

[10] See *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 447 (dissenting opinion).

[11] Rules of the Supreme Court of the United States, Rule 19.

[12] *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387.

> flict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head." [13]

And so, since upon full consideration of this case it becomes clear that the complained-of error was probably not committed and that in any event petitioner is not in a position to assert it, due regard for the controlling importance of observing the conditions for the proper exercise of our discretionary jurisdiction requires that the writ of certiorari should be dismissed as improvidently granted.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Plenary consideration of this case, and indeed the opinion of the majority of this Court, have made it clear that the Court of Appeals dealt with the factual issues involved on the basis of a concession by the respondent and the jury's answer to Interrogatory No. 1. It is therefore now apparent that this case presents no question concerning the classification of these issues as for the court or for the jury under the decision in *Byrd* v. *Blue Ridge Rural Cooperative, Inc.,* 356 U. S. 525, and that the premise on which we granted certiorari was accordingly a mistaken one. And whether or not the Court of Appeals in acting as it did was correct in its assessment of the trial record is certainly not a matter justifying the exercise of our certiorari power within the criteria of Rule 19. I therefore agree with my Brother FRANKFURTER that the writ of certiorari should be dismissed as improvidently granted, and join in his dissenting opinion.

Even if a *Byrd* issue could be considered as properly presented, the most that should be done is to remand the

---

[13] *Id.,* at 393.

case to the Court of Appeals for further consideration in light of that decision. A retrial of this case would be justified under *Byrd* only if the Pennsylvania practice treating factual issues under § 104 of the Workmen's Compensation Act as for the court, instead of for the jury, see *Persing* v. *Citizens Traction Co.*, 294 Pa. 230, 144 A. 97; *Vescio* v. *Pennsylvania Electric Co.*, 336 Pa. 502, 9 A. 2d 546, is merely a "form and mode" of procedure rather than "an integral part" of the rights created by the Act. Before deciding such a difficult and subtle question of local law, this Court should have the aid of the Court of Appeals whose members are more competent than we to speak on Pennsylvania law.

Syllabus.

ANONYMOUS NOS. 6 AND 7 *v.* BAKER, JUSTICE OF THE SUPREME COURT OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 378. Argued March 25, 1959.—Decided June 15, 1959.

Appellants, who are licensed private detectives and private investigators, but not attorneys, were convicted of contempt for refusal to answer pertinent questions put to them as witnesses summoned before a New York judge who, pursuant to court order, was conducting a non-adversary, non-prosecutorial, preliminary fact-finding inquiry, analogous to a grand jury proceeding, into alleged unethical practices of attorneys and others acting in concert with them. Appellants did not plead the state privilege against self-incrimination but based their refusal to testify solely on the fact that their counsel was required to remain outside the hearing room while they were being interrogated, though the judge had expressed his readiness to suspend the questioning whenever appellants wished to consult with counsel. It was customary for such proceedings to be kept secret, like grand jury proceedings, and this practice was sanctioned by New York statute and by the court order authorizing the inquiry. *Held:*

1. Since the validity under the Federal Constitution of the state statute pertaining to such proceedings was not "drawn into question" or passed upon by the state courts in this case, this Court lacks jurisdiction of this appeal under 28 U. S. C. § 1257 (2); but certiorari is granted. P. 290.

2. Petitioner's conviction of contempt for refusal to testify in these circumstances did not offend the Due Process Clause of the Fourteenth Amendment. *In re Groban*, 352 U. S. 330. Pp. 290–298.

(a) The requirement of the authorizing court order that the inquiry be private and the exclusion of counsel for the witnesses from the hearing room were not procedural innovations, but were in accordance with established state policy. Pp. 290–294.

(b) To declare such a policy unconstitutional would necessitate ignoring weighty considerations supporting it and would require going far beyond anything indicated by this Court's past "right to counsel" decisions under the Fourteenth Amendment. Pp. 294–296.

(c) Notwithstanding an informal statement made by a staff assistant, the record in this case does not warrant a conclusion that appellants were being questioned not merely as witnesses but with an eye to their future prosecution. Pp. 296–298.

4 N. Y. 2d 1034, 1035, 152 N. E. 2d 651, affirmed.

Raphael H. Weissman argued the cause and filed a brief for appellants.

Denis M. Hurley argued the cause for appellee. With him on the brief were *Michael A. Castaldi* and *Michael Caputo*.

Mr. Justice Harlan delivered the opinion of the Court.

Appellants have been convicted of contempt for refusal to answer pertinent questions put to them as witnesses summoned in a state judicial Inquiry into alleged improper practices at the local bar. The sole issue before us is whether this conviction offended the Due Process Clause of the Fourteenth Amendment to the Federal Constitution by reason of the fact that the justice in charge of the Inquiry had required counsel retained by appellants to remain outside the hearing room while they were being interrogated, even though he expressed his readiness to suspend the course of questioning whenever appellants wished to consult with counsel. No claim is made that appellants were not fully represented by counsel in the contempt proceedings themselves or that such proceedings were otherwise lacking in due process.

On January 21, 1957, the Appellate Division of the Supreme Court of the State of New York, Second Department, acting pursuant to § 90 of the State Judiciary Law, 29 N. Y. Laws Ann. § 90 (McKinney 1948), and in response to a petition of the Brooklyn Bar Association charging "ambulance chasing" and related unethical

practices among segments of the Kings County Bar,[1] ordered an investigation into these alleged conditions by an Additional Special Term of the Supreme Court, Mr. Justice Arkwright presiding.[2]

Appellants, licensed private detectives and investigators, but not attorneys, appeared before the Special Term pursuant to witness subpoenas, accompanied by counsel. The presiding justice, acting upon the authority of an appellate decision made during the course of this same Inquiry, *Matter of M. Anonymous* v. *Arkwright,* 5 App. Div. 2d 790, 170 N. Y. S. 2d 535, leave to appeal denied, 4 N. Y. 2d 676, 173 N. Y. S. 2d 1025, 149 N. E. 2d 538, informed appellants that their counsel would not be allowed in the hearing room while they were being questioned, but that they would be free to consult with him at any time during their interrogation. Solely because of that limitation upon the participation of counsel, appellants thereafter refused to answer all manner of questions put to them. Their conviction for contempt, carrying a sentence of 30 days' imprisonment, followed.[3] The Appellate Division affirmed, 6 App. Div. 2d 719, 176 N. Y. S. 2d 227, and the New York Court of Appeals, finding that

[1] The petition of the Bar Association alleged, among other things: "That such practices result in the following: unfair agreements of retainer; maintenance by lawyers of some system of obtaining prompt information of accidents; congestion of court calendars by unworthy causes which are never intended to be brought to trial; a false conception by lawyers engaged in this practice that the relationship between attorney and client is a commercial transaction in which the interest of the client plays an unimportant part; impairment of public confidence in the Courts; and delay in the administration of justice."

[2] Upon Mr. Justice Arkwright's retirement on December 31, 1958, the Appellate Division designated Mr. Justice Edward G. Baker of the New York Supreme Court as his successor.

[3] Each appellant was enlarged on bail after serving two days of his sentence.

"no substantial constitutional question is involved," dismissed ensuing appeals. 4 N. Y. 2d 1034, 1035, 152 N. E. 2d 651, 177 N. Y. S. 2d 687. Appellants, proceeding under 28 U. S. C. § 1257 (2),[4] then appealed to this Court, and we postponed further consideration of jurisdiction to a hearing on the merits. 358 U. S. 891.

Dealing first with the question of our jurisdiction, we think it clear that this appeal must be dismissed. It is predicated on the ground that the state courts held valid under the Federal Constitution § 90 (10) of New York's Judiciary Law (see Note 6, *infra*), said to be the basis of the Special Term procedure here attacked. However, it appears that the federal constitutionality of § 90 (10) was never "drawn in question" or passed upon in the state courts; the Appellate Division, from whose decision the Court of Appeals denied leave to appeal, simply relied on the earlier cases of *Matter of M. Anonymous* v. *Arkwright, supra,* and *Matter of S. Anonymous* v. *Arkwright,* 5 App. Div. 2d 792, 170 N. Y. S. 2d 538, which in turn appear not to have involved such an adjudication. In these circumstances we must hold that we lack jurisdiction under 28 U. S. C. § 1257 (2). Nevertheless, treating the appeal as a petition for writ of certiorari, we grant the writ. 28 U. S. C. § 2103.

We turn to the merits. An understanding of the nature of the proceedings before the Special Term is first necessary. In New York the traditional powers of the courts

---

[4] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

over the admission, discipline, and removal of members of the bar is placed by law in the Appellate Division of the State Supreme Court. N. Y. Judiciary Law § 90. When the Appellate Division is apprised of conditions calling for general inquiry it usually appoints, as here, a Justice of the Supreme Court, sitting at Special Term, to make a preliminary investigation. The duties of such a justice are purely investigatory and advisory, culminating in one or more reports to the Appellate Division upon which future action may then be based. In the words of Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, the proceedings at Special Term thus simply constitute a "preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right . . . a quasi-administrative remedy whereby the court is given information that may move it to other acts thereafter . . . ." *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465, 479, 162 N. E. 487, 492.

Customarily the proceedings at Special Term are conducted in private, for reasons which Mr. Justice Cardozo explained in the *Karlin* case as follows (248 N. Y., at 478–479, 162 N. E., at 492):

> "The argument is pressed that in conceding to the court a power of inquisition we put into its hands a weapon whereby the fair fame of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored. The mere summons to appear at such a hearing and make report as to one's conduct, may become a slur and a reproach. Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages. This has been done in the first judicial

> department, at least in many instances, by the order of the justice presiding at the hearing. It has been done in the second judicial department . . . by order of the Appellate Division directing the inquiry. A preliminary inquisition . . . is not a sitting of a court within the fair intendment of section 4 of the Judiciary Law whereby sittings of a court are required to be public. . . . The closest analogue is an inquisition by the grand jury for the discovery of crime."

By analogy to grand jury proceedings counsel are not permitted to attend the examination of witnesses called in such an investigation, cf. *People ex rel. McDonald* v. *Keeler,* 99 N. Y. 463, 485, 2 N. E. 615, 626–627,[5] although the New York courts have held that the Special Term may in its discretion permit such attendance where it appears that the witness himself is a target of the inquiry. See *Matter of M. Anonymous* v. *Arkwright, supra,* 5 App. Div. 2d, at 791, 170 N. Y. S. 2d, at 538.

These practices have received legislative approval, evidenced by § 90 (10) of the State Judiciary Law, quoted in the margin,[6] and by the Legislature's refusal in 1958

---

[5] In investigations of this kind New York has deemed "the presence of lawyers . . . not conducive to the economical and thorough ascertainment of the facts." *In re Groban,* 352 U. S. 330, 335, 336 (concurring opinion). In an interim report, release of which was authorized by the Appellate Division, Mr. Justice Arkwright stated that from March of 1957 to June of 1958 the Inquiry issued 4,875 "request" subpoenas, 2,150 witness and *duces tecum* subpoenas, and examined the records of approximately 5,000 insurance companies. During the same period the Inquiry's staff examined informally about 2,500 persons, and from May of 1957 to June of 1958 some 726 witnesses were interrogated before the Special Term itself.

[6] "Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the

to amend the State Civil Rights Law, 8 N. Y. Laws Ann. § 1–242 (McKinney 1948), so as to require that counsel be allowed to attend the interrogation of witnesses in proceedings of this character.[7]

---

conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

[7] A proposed bill would have added to the Civil Rights Law a new § 12–a, providing as follows: "Right of representation by counsel of persons called as witnesses in certain inquiries and investigations. Any person called as a witness by or before any . . . judicial investigating committee, . . . or before any judge, . . . authorized or directed to conduct any inquiry or investigation, whose testimony may tend to involve himself or any other person in any subsequent criminal or quasi-criminal prosecution or in any subsequent disciplinary proceeding for professional misconduct, . . . or the revocation or suspension of any license to engage in a profession, trade or business, shall have the right to be accompanied by his counsel who shall be entitled on behalf of his client to (a) object to the jurisdiction of the . . . inquiry . . . and to argue briefly thereon; (b) to confer privately with his client to advise him of his legal rights whenever his client requests such a conference; (c) to object to procedures deemed by him to violate his client's legal rights; and (d) question the witness on his behalf, at the conclusion of his direct testimony, on any matter relevant to the subject of the inquiry or investigation, subject to such reasonable limitations as may be imposed by the officer presiding at such inquiry or investigation."

Thus, what we have here in the Appellate Division's order that the Inquiry be private [8] and in the Special Term's exclusion of counsel from the hearing room is not a procedural innovation by a particular court or judge in a particular case, but an expression of established state policy. We are now asked to declare that policy unconstitutional.

To do so would not only necessitate our ignoring the weighty considerations which support New York's policy, but would require us to limit state power in this area of investigation far beyond anything indicated by this Court's past "right to counsel" decisions under the Fourteenth Amendment. Although we have held that in state criminal proceedings, which these are not, *Matter of M. Anonymous* v. *Arkwright, supra,* a defendant has an unqualified right to be represented at trial by retained counsel, *Chandler* v. *Fretag,* 348 U. S. 3, we have not extended that right to the investigation stages of such proceedings. See *Cicenia* v. *LaGay,* 357 U. S. 504; see also *Crooker* v. *California,* 357 U. S. 433. Again, while it has been decided that there is a constitutional right to counsel in a criminal contempt proceeding, growing out of a state investigation, conducted before a judge sitting as

---

[8] The Appellate Division's order establishing the Special Term provided "that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, Subdivision 10); that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this court; and . . . that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations."

a "One Man Grand Jury," *In re Oliver,* 333 U. S. 257,[9] we have held that a witness examined in a state investigation conducted in private is not constitutionally entitled to the assistance of counsel while being interrogated. *In re Groban,* 352 U. S. 330.

In the *Groban* case we upheld the constitutionality of an Ohio statute [10] which, as construed by the Ohio courts, authorized the Fire Marshal to exclude from the hearing room counsel representing those summoned to testify before him in an investigation into the causes of a fire. We there said (at 332–333):

> "The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination." (Footnotes omitted.)

The *Groban* case is controlling here and requires rejection of appellants' constitutional claims. As did Ohio in *Groban,* New York has a privilege against self-incrim-

---

[9] See p. 288, *supra;* Note 13, *infra.*

[10] Page's Ohio Rev. Code, 1954, § 3737.13.

ination, N. Y. Const., Art. I, § 6, which was freely exercised by other witnesses in this investigation,[11] and was fully available to these appellants. Moreover, the circumstance that this investigation was conducted by an experienced judge, rather than an administrative official, and the fact that appellants throughout their interrogation were freely given the right to consult counsel, notwithstanding his exclusion from the hearing room, make the constitutional claim here far less tenable than that found wanting in *Groban*.

Appellants seek to escape from *Groban* by arguing that they were summoned before the Special Term not as mere witnesses but with an eye to their future prosecution. This contention rests upon an informal "off the record" conversation which appellants and their counsel had with an assistant on the Inquiry's staff some four months before appellants were actually examined. In response to counsel's inquiry as to "what was wanted of his clients in this matter," the assistant made the replies set forth in the margin.[12]

---

[11] In the interim report already mentioned, Note 5, *supra*, Mr. Justice Arkwright stated:

"We have been scrupulous in apprising all attorneys of the stated purposes of the Inquiry as laid down by the Appellate Division, and witnesses, whenever required, have been advised of their constitutional rights.

"As many as 30 persons sworn as witnesses before the Additional Special Term have, as is their unquestioned right, invoked their constitutional privilege against self-incrimination, including 11 attorneys and 10 doctors. Faced with this roadblock, Counsel for the Inquiry has been forced to develop and to present independent evidence of the facts."

[12] ". . . I indicated that we did not intend to pussyfoot with them, we were not trying to trap them in any manner, but that testimony and evidence had come before us in the course of our investigation that someone in the employ of the Gotham Claims Service [appellants' partnership] had, with some frequency, obtained statements from defendants [in pending or prospective negligence

We think that the role in which these appellants were summoned to the Inquiry is to be judged by the actions of the Special Term, not by the statements of a subordinate staff member, evidently motivated by nothing more than a desire to avoid a plea of self-incrimination which would have blocked the Inquiry from obtaining possibly helpful information. The record shows that the Special Term, aware of the claims as to this occurrence, which it caused to be fully explored in the presence of appellants and their counsel, repeatedly assured appellants that they were

---

actions], holding themselves out to be from defendant's [insurance] carrier and also holding themselves out to be from other agencies, and in one instance the district attorney's office. That our investigation had disclosed that these statements had been tampered with, and that it was relative to this that we wished to speak to them to find out if these statements were actually taken by the Gotham Claims Service, for what attorneys these statements were taken, and whether the tampering was done by them or their employees or at the direction of some attorney.

"I told Mr. Zangara [appellants' counsel] that the interests of the Judicial Inquiry was primarily directed at the attorneys that they had done business with, that if they cooperated fully I felt that the Court would take that into consideration if something unethical had been done.

"I further stated that in my opinion there was prima facie evidence in the event that the clients decided to plead the Fifth Amendment, to refer this matter to the district attorney.

"I stated it was my opinion, I did not indicate that that would be done, I did not indicate that it was even being considered at the time. I was merely giving my opinion for which they had asked. I made it quite clear that this was all off the record, that they were asking what amounted to a favor, and I was being very frank and honest with them. And I was thanked for indicating to them what the picture was.

. . . . . .

"In fact, I remember indicating that any final action on the matter would have to be on the part of your Honor [the Justice in charge of the Inquiry] and that the Appellate Division would finally rule as to what would actually be done."

before the Inquiry solely as witnesses.[13] That they might later be faced with criminal charges, adds nothing to their present constitutional claim. *In re Groban, supra,* at 332–333.

The final order of the Court of Appeals of the State of New York must be

Affirmed.

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

In re Groban, 352 U. S. 330, decided two years ago, upheld as constitutional the action of a state fire marshal in compelling persons suspected of burning a building to testify about the fire in secret and without benefit of the presence of their counsel. Four of us dissented on the ground that such secret inquisitions violated the Due

---

[13] The record shows that when appellants persisted in their recalcitrance despite the court's directions to answer, it called in counsel, informed him that it considered appellants' refusals contemptuous and directed him and appellants to reappear two days thereafter. At that time, the court heard argument by counsel why appellants should not be held in contempt. It then again told counsel that each appellant was "here merely as a witness, not as a defendant, not as a respondent. You understand what I am talking about. You can explain that to him." The court next explained the procedure it would follow as to each appellant:

"We are going to ask him some of the questions that were asked before and if he wishes to consult you, we will give him every opportunity to do so at any time during the questioning or any time that I direct.

". . . if you will retire from the courtroom we will call . . . [him] to the stand."

Appellants continued in refusing to answer. The court held them in contempt and recalled counsel for a hearing on the contention that their corridor conversation with the staff assistant established their status as defendants. It then heard argument by counsel on punishment, and imposed the challenged sentence.

Process Clause of the Fourteenth Amendment. In this case the Court upholds the action of a state judge in compelling testimony from persons suspected of getting statements of defendants in negligence cases under false pretenses and later "tampering" with these statements.* I think it violates due process for a judge no less than for a fire marshal to compel testimony to be given incommunicado. In fact it was Star Chamber judges who helped to make closed-door court proceedings so obnoxious in this country that the Bill of Rights guarantees public trials and the assistance of counsel. And secretly compelled testimony does not lose its highly dangerous potentialities merely because it represents only a "preliminary inquisition . . . whereby the court is given information that may move it to other acts thereafter." Nor does this record justify a holding that this inquisition adopted the mantle of secrecy and barred counsel from the room out of tender solicitude for the reputation of the defendants in this contempt case. Doubtless the defendants' lawyer and the defendants themselves are at least as capable and perhaps as much interested in saving their reputations as the judge who is sending them to jail.

The naked, stark issue here is whether a judge, who must actually try cases in public—or any other government official for that matter—can consistently with due process compel persons to testify and perhaps to lay the groundwork for their later conviction of crime, in secret chambers, where counsel for the State can be present but where counsel for the suspect cannot. In upholding such secret inquisitions the Court once again retreats from what I conceive to be its highest duty, that of maintaining

*Despite the judge's repeated statements that these persons were "witnesses" not defendants, the statement of a member of the judge's inquiry staff, set out in note 12 of the Court's opinion, makes it clear that they were suspected and under investigation for criminal conduct.

unimpaired the rights and liberties guaranteed by the Fourteenth Amendment and the Bill of Rights. Cf. *Bartkus* v. *Illinois,* 359 U. S. 121; *Frank* v. *Maryland,* 359 U. S. 360; *Barenblatt* v. *United States, ante,* p. 109; *Uphaus* v. *Wyman, ante,* p. 72. Here as in *Groban* my answer would be that no public official can constitutionally exercise such a dangerous power over any individual. I would therefore reverse this conviction.

NATIONAL LABOR RELATIONS BOARD *v.* FANT MILLING CO.

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

No. 482. Argued May 20, 1959.—Decided June 15, 1959.

A union which had been certified by the National Labor Relations Board as the exclusive collective bargaining representative for a unit of respondent's employees filed a charge with the Board alleging that respondent had violated § 8 (a) (5) of the Act by refusing to bargain collectively with the union; but the Regional Director declined to issue a complaint on the ground that the evidence was insufficient. Later respondent unilaterally granted a general wage increase and notified the union that it was withdrawing its recognition and would not bargain further with it. In the light of these additional facts and although no amended charge was filed, the Board issued a complaint, held hearings, found that respondent had refused to bargain collectively, and issued an appropriate order. *Held:* In finding a refusal to bargain collectively, the Board was not precluded from considering conduct on the part of the employer which was related to that alleged in the charge and grew out of it while the proceeding was pending before the Board. *National Licorice Co.* v. *Labor Board,* 309 U. S. 350. Pp. 301–309.

258 F. 2d 851, reversed.

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

O. B. Fisher argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

The National Labor Relations Act makes it an unfair labor practice for an employer to refuse to bargain in good

faith with the representative of his employees.[1] The question presented by this case is the extent to which the Labor Board may, in formulating a complaint and in finding a violation of this section of the Act, take cognizance of events occurring subsequent to the filing of the charge upon which the complaint is based.

Pursuant to an election a union was certified in June 1953 as the exclusive bargaining representative for an appropriate unit of the respondent's employees at its plant in Sherman, Texas. During the ensuing months agents of the union and of the respondent met on several occasions for the supposed purpose of working out a collective bargaining contract. By May 20, 1954, several such meetings had taken place, but no agreement had been reached.

On that date the union filed a charge with the Regional Director of the Board, alleging that the respondent had violated § 8 (a)(5) of the Act by refusing to bargain collectively with the union. Two months later the Regional Director advised the union that he was refusing to issue a complaint on the ground that "it does not appear that there is sufficient evidence of violations to warrant further

---

[1] "Sec. 8 (a) It shall be an unfair labor practice for an employer— . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a). . . . (d) 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, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." 29 U. S. C. § 158 (a).

proceedings at this time." The union requested the General Counsel of the Board to review this refusal.[2]

In the meantime and until October 1954 more than a dozen further meetings were held between representatives of the union and of the respondent. No real progress towards reaching an agreement was made. In October, while negotiations were still going on, the respondent unilaterally put into effect a general wage increase without prior notice to the union. A few weeks later the respondent advised the union that it was withdrawing recognition and that it would refuse any further bargaining conferences.

Thereafter, in January 1955, the Regional Director informed the union that "upon reconsideration of the facts and circumstances, and additional evidence furnished us in connection with our investigation in the above matter, we have decided to and are hereby withdrawing our refusal to issue Complaint with respect to the 8 (a)(5) allegation of refusal to bargain . . . . We shall proceed with our investigation in due course." Later the Board's General Counsel advised the union as follows: "With respect to the 8 (a)(5) allegation of refusal to bargain; the Regional Director advised the parties by letter dated January 24, 1955, that he was withdrawing his dismissal of the 8 (a)(5) portion of the charge and was continuing with the investigation thereof. All further inquiries with respect to the 8 (a)(5) allegation should be addressed to the Regional Director." Five days afterwards the Regional Director issued a complaint, alleging that "on or about November 21, 1953, and at all times thereafter,

---

[2] The respondent continues here to press the claim that this request was not timely under § 102.19 of the Board's Rules and Regulations, although the uncontroverted evidence shows that the request was filed within an extension of time that had been granted.

Respondent did refuse and continues to refuse to bargain collectively . . . ."; that "On or about October 7, 1954, Respondent, without notice to the Union, put into effect a general wage increase . . . ."; and that by those acts "Respondent did engage in and is hereby engaging in an unfair labor practice within the meaning of Section 8 (a), subsection (5) of the Act." [3]

The Board, agreeing with its Trial Examiner, held that the respondent had refused to bargain collectively with the union within the meaning of the Act, finding that "after November 21, 1953, . . . the Respondent was merely going through the motions of collective bargaining without a genuine intention of trying to negotiate an agreement with the Union as required by the provisions of the Act." An appropriate order was accordingly issued. 117 N. L. R. B. 1277.[4] The Board expressly held that the respondent's unilateral grant of a general wage increase in October of 1954, although occurring subsequent to the original charge and not the subject of an amended charge, was properly included as a subject of the complaint. Moreover, its finding of a refusal to bargain was largely influenced by this specific conduct on the part of the respondent.[5] One member of the Board dissented

---

[3] The chronology of these events refutes the respondent's claim that the Regional Director acted while the matter was under review by the General Counsel. The General Counsel had exercised his reviewing authority prior to the time the complaint issued.

[4] The Board ordered the respondent to cease and desist from refusing to bargain; to refrain from interfering with the union's efforts to bargain; upon request, to bargain collectively with the union; and to post appropriate notices.

[5] The language of the Board's decision makes clear how strongly it relied upon the October 1954 wage increase in reaching its conclusion, *e. g.*: "We have no difficulty in determining the Respondent's bad faith throughout these protracted negotiations, particularly in view of the Respondent's unilateral effectuation of a general wage

upon the ground that the October wage increase could not lawfully be made the basis of a finding that the respondent had violated the Act.

The Court of Appeals denied the Board's petition for enforcement. 258 F. 2d 851. Substantially agreeing with the reasoning of the dissenting Board member, the court held that § 10 (b) of the Act requires "that a charge must set up *facts* showing an unfair labor practice . . . , and the *facts must be predicated on actions which have already been taken.*" (Emphasis in original.)[6] It further held that "the complaint must faithfully reflect the

---

increase early in October 1954, while the negotiations were still in progress but without consultation with or even notice to the Union. . . .

. . . . . .

"We find, rather, that the giving of this general increase while negotiations were still continuing, and in complete disregard of the Union's representative status, provides the final insight into the Respondent's conduct of negotiations with the Union."

[6] Section 10 (b) of the Act provides: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon." 29 U. S. C. § 160 (b).

facts constituting the unfair labor practices as presented in the charge." [7]

To attribute so tightly restricted a function to a Board complaint is, as this Court pointed out in *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, not consonant with the basic scheme of the Act. One of the issues in that case was substantially identical to the issue presented here—"whether the jurisdiction of the Board is limited to such unfair labor practices as are set up in the charge presented to the Board so as to preclude its determination that [certain actions on the part of the employer] involved unfair labor practices, since both occurred after the charge was lodged with the Board. . . ." 309 U. S., at 357. The Court's resolution of the issue was unambiguous:

> "It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes

---

[7] Judge Cameron wrote the prevailing opinion for the court. Chief Judge Hutcheson wrote a separate concurring opinion in which he agreed with Judge Cameron's view: "In short, what has happened here is that by the device of injecting into the case entirely new matter completely unrelated to the charge, the regional director, in violation of the provisions of the Act, that no complaint can be filed except one based upon a charge, has filed a complaint, and the Board has heard and condemned the respondent in respect of matters which, because of the lack of a charge, were not before it." Judge Rives dissented, expressing the view that "the . . . construction . . . by the majority seems to me excessively technical and restrictive, and, if sustained, I believe that it will seriously cripple the Board in any effective enforcement of the Act."

> of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the court below correctly held that 'the Board was within its power in treating the whole sequence as one.' " 309 U. S. 350, at 369.

In the present case, as in *National Licorice,* the unilateral wage increase was "of the same class of violations as those set up in the charge . . . ." The wage increase was "related to" the conduct alleged in the charge and developed as one aspect of that conduct "while the proceeding [was] pending before the Board."

A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *Labor Board* v. *I. & M. Electric Co.,* 318 U. S. 9, 18. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was

created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce, as this Court has recognized from the beginning. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1.

Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power [8] in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge. For

---

[8] Section 11 of the Act provides: "Investigatory powers of Board. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—(1) Documentary evidence; summoning witnesses and taking testimony.

"The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing." 29 U. S. C. § 161.

these reasons we adhere to the views expressed in *National Licorice Co.* v. *Labor Board.*[9]

What has been said is not to imply that the Board is, in the words of the Court of Appeals, to be left "*carte blanche* to expand the charge as they might please, or to ignore it altogether." 258 F. 2d., at 856. Here we hold only that the Board is not precluded from "dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, at 369. It follows in the present case that the October wage increase was a proper subject of the Board's complaint and was properly considered by the Board in reaching its decision.[10]

Reversed.

---

[9] The 1947 amendments to the National Labor Relations Act made no change with respect to the respective functions of a charge and a complaint. The only change in § 10 (b) was the addition of the provisions that "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge, etc." See note 6, *supra.* This limitation extinguishes liability for unfair labor practices committed more than six months prior to the filing of the charge. It does not relate to conduct subsequent to the filing of the charge.

[10] The Board urges that we instruct the Court of Appeals to enforce the Board's order. We decline to do so. Cf. *Labor Board* v. *Pittsburgh S. S. Co.,* 340 U. S. 498. However, we think it appropriate to state that if the factual summary contained in Judge Rives' dissenting opinion finds support in the record as a whole, the Board's order should be enforced "even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 488.

MARSHALL *v.* UNITED STATES.

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

No. 383. Argued March 25–26, 1959.—Decided June 15, 1959.

At a jury trial in a Federal District Court in which petitioner was convicted of unlawfully dispensing certain drugs without a prescription from a licensed physician, in violation of 21 U. S. C. § 331 (k), the judge refused to permit the Government to introduce evidence that petitioner had previously practiced medicine without a license; but some of the jurors saw and read newspaper articles alleging that he had a record of two previous felony convictions and reciting other defamatory matters about him. Upon being questioned, each of these jurors assured the judge that he would not be influenced by the news articles and that he could decide the case only on the evidence of record. *Held:* The harm to petitioner that resulted when prejudicial information denied admission into evidence was brought before jurors through newspapers requires that a new trial be granted. Pp. 310–313.

258 F. 2d 94, reversed.

George J. Francis argued the cause for petitioner. With him on the brief were *Omer Griffin* and *Frances De Lost.*

James W. Knapp argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Anderson* and *Beatrice Rosenberg.*

PER CURIAM.

Petitioner was convicted of unlawfully dispensing a number of dextro amphetamine sulfate tablets, a drug within the scope of 21 U. S. C. § 353 (b)(1)(B), without a prescription from a licensed physician, which resulted in misbranding and violation of 21 U. S. C. § 331 (k). The Court of Appeals affirmed, one judge dissenting, 258 F. 2d 94. The case is here on a petition for certiorari, 28 U. S. C. § 1254 (1), which we granted because of doubts

whether exposure of some of the jurors to newspaper articles about petitioner was so prejudicial in the setting of the case as to warrant the exercise of our supervisory power to order a new trial. 358 U. S. 892.

Petitioner never took the stand; nor did he offer any evidence. A government agent testified that he was introduced to petitioner as a salesman who had difficulty staying awake on long automobile trips and that on two occasions he obtained these tablets from petitioner. Petitioner asked the trial judge to rule there was entrapment as a matter of law. The judge refused so to hold and submitted the issue of entrapment with appropriate instructions to the jury. Cf. *Masciale* v. *United States,* 356 U. S. 386. The Government asked to be allowed to prove that petitioner had previously practiced medicine without a license, as tending to refute the defense of entrapment. The trial judge refused this offer saying, "It would be just like offering evidence that he picked pockets or was a petty thief or something of that sort which would have no bearing on the issue and would tend to raise a collateral issue and I think would be prejudicial to the defendant."

Yet during the trial two newspapers containing such information got before a substantial number of jurors. One news account said:

> "Marshall has a record of two previous felony convictions.
>
> "In 1953, while serving a forgery sentence in the State Penitentiary at McAlester, Okla., Marshall testified before a state legislative committee studying new drug laws for Oklahoma.
>
> "At that time, he told the committee that although he had only a high school education, he practiced medicine with a $25 diploma he received through the mails. He told in detail of the ease in which he wrote and passed prescriptions for dangerous drugs."

509615 O–59–23

The other news account said:

> "The defendant was Howard R. (Tobey) Marshall, once identified before a committee of the Oklahoma Legislature as a man who acted as a physician and prescribed restricted drugs for Hank Williams before the country singer's death in December, 1953.
>
> . . . . . .
>
> "Marshall was arrested with his wife, Edith Every Marshall, 56, in June, 1956. She was convicted on the drug charges in Federal District Court here in November and was sentenced to 60 days in jail.
>
> "Records show that Marshall once served a term in the Oklahoma penitentiary for forgery. There is no evidence he is a doctor, court attaches said."

The trial judge on learning that these news accounts had reached the jurors summoned them into his chamber one by one and inquired if they had seen the articles. Three had read the first of the two we have listed above and one had read both. Three others had scanned the first article and one of those had also seen the second. Each of the seven told the trial judge that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles. The trial judge, stating he felt there was no prejudice to petitioner, denied the motion for mistrial.

The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt* v. *United States,* 218 U. S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost cer-

tain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson* v. *United States,* 335 U. S. 469, 475. It may indeed be greater for it is then not tempered by protective procedures.

In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts (*Bruno* v. *United States,* 308 U. S. 287; *McNabb* v. *United States,* 318 U. S. 332) we think a new trial should be granted.

Reversed.

MR. JUSTICE BLACK dissents.

PETERSEN *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 830. Decided June 15, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 51 Cal. 2d 177, 331 P. 2d 24.

Marvin E. Lewis for appellant.

Stanley Mosk, Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, *Arlo E. Smith,* Deputy Attorney General, *Dion Holm* and *George Baglin* for appellee.

PER CURIAM.

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

ORTEGA *v.* BIBB, DIRECTOR OF THE DEPARTMENT OF PUBLIC SAFETY, ET AL.

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

No. 790, Misc. Decided June 15, 1959.

PER CURIAM.

The appeal is dismissed.

SPANO *v.* NEW YORK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 582. Argued April 27, 1959.—Decided June 22, 1959.

After petitioner, a foreign-born young man of 25 with a junior-high-school education and no previous criminal record, had been indicted for first-degree murder, he retained counsel and surrendered to police at 7:10 p. m. He was then subjected to persistent and continuous questioning by an assistant prosecutor and numerous police officers for virtually eight hours until he confessed, after he had repeatedly requested, and had been denied, an opportunity to consult his counsel. At his trial in a state court, his confession was admitted in evidence over his objection, and he was convicted and sentenced to death. *Held:* On the record in this case, petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused; his confession was not voluntary; and its admission in evidence violated the Due Process Clause of the Fourteenth Amendment. Pp. 315–324.

4 N. Y. 2d 256, 173 N. Y. S. 2d 793, 150 N. E. 2d 226, reversed.

Herbert S. Siegal argued the cause for petitioner. With him on the brief was *Rita D. Schechter.*

Irving Anolik argued the cause for respondent. With him on the brief were *Daniel V. Sullivan* and *Walter E. Dillon.*

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

This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment. As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement.

Because of the delicate nature of the constitutional determination which we must make, we cannot escape the responsibility of making our own examination of the record. *Norris* v. *Alabama,* 294 U. S. 587.

The State's evidence reveals the following: Petitioner Vincent Joseph Spano is a derivative citizen of this country, having been born in Messina, Italy. He was 25 years old at the time of the shooting in question and had graduated from junior high school. He had a record of regular employment. The shooting took place on January 22, 1957.

On that day, petitioner was drinking in a bar. The decedent, a former professional boxer weighing almost 200 pounds who had fought in Madison Square Garden, took some of petitioner's money from the bar. Petitioner followed him out of the bar to recover it. A fight ensued, with the decedent knocking petitioner down and then kicking him in the head three or four times. Shock from the force of these blows caused petitioner to vomit. After the bartender applied some ice to his head, petitioner left the bar, walked to his apartment, secured a gun, and walked eight or nine blocks to a candy store where the decedent was frequently to be found. He entered the store in which decedent, three friends of decedent, at least two of whom were ex-convicts, and a boy who was supervising the store were present. He fired five shots, two of which entered the decedent's body, causing his death. The boy was the only eyewitness; the three friends of decedent did not see the person who fired the shot. Petitioner then disappeared for the next week or so.

On February 1, 1957, the Bronx County Grand Jury returned an indictment for first-degree murder against petitioner. Accordingly, a bench warrant was issued for his arrest, commanding that he be forthwith brought before the court to answer the indictment, or, if the court had adjourned for the term, that he be delivered into the

custody of the Sheriff of Bronx County. See N. Y. Code Crim. Proc. § 301.

On February 3, 1957, petitioner called one Gaspar Bruno, a close friend of 8 or 10 years' standing who had attended school with him. Bruno was a fledgling police officer, having at that time not yet finished attending police academy. According to Bruno's testimony, petitioner told him "that he took a terrific beating, that the deceased hurt him real bad and he dropped him a couple of times and he was dazed; he didn't know what he was doing and that he went and shot at him." Petitioner told Bruno that he intended to get a lawyer and give himself up. Bruno relayed this information to his superiors.

The following day, February 4, at 7:10 p. m., petitioner, accompanied by counsel, surrendered himself to the authorities in front of the Bronx County Building, where both the office of the Assistant District Attorney who ultimately prosecuted his case and the courtroom in which he was ultimately tried were located. His attorney had cautioned him to answer no questions, and left him in the custody of the officers. He was promptly taken to the office of the Assistant District Attorney and at 7:15 p. m. the questioning began, being conducted by Assistant District Attorney Goldsmith, Lt. Gannon, Detectives Farrell, Lehrer and Motta, and Sgt. Clarke. The record reveals that the questioning was both persistent and continuous. Petitioner, in accordance with his attorney's instructions, steadfastly refused to answer. Detective Motta testified: "He refused to talk to me." "He just looked up to the ceiling and refused to talk to me." Detective Farrell testified:

"Q. And you started to interrogate him?
"A. That is right.

. . . . .

"Q. What did he say?

"A. He said 'you would have to see my attorney. I tell you nothing but my name.'

. . . . . .

"Q. Did you continue to examine him?

"A. Verbally, yes, sir."

He asked one officer, Detective Ciccone, if he could speak to his attorney, but that request was denied. Detective Ciccone testified that he could not find the attorney's name in the telephone book.[1] He was given two sandwiches, coffee and cake at 11 p. m.

At 12:15 a. m. on the morning of February 5, after five hours of questioning in which it became evident that petitioner was following his attorney's instructions, on the Assistant District Attorney's orders petitioner was transferred to the 46th Squad, Ryer Avenue Police Station. The Assistant District Attorney also went to the police station and to some extent continued to participate in the interrogation. Petitioner arrived at 12:30 and questioning was resumed at 12:40. The character of the questioning is revealed by the testimony of Detective Farrell:

"Q. Who did you leave him in the room with?

"A. With Detective Lehrer and Sergeant Clarke came in and Mr. Goldsmith came in or Inspector Halk came in. It was back and forth. People just came in, spoke a few words to the defendant or they listened a few minutes and they left."

But petitioner persisted in his refusal to answer, and again requested permission to see his attorney, this time from Detective Lehrer. His request was again denied.

It was then that those in charge of the investigation decided that petitioner's close friend, Bruno, could be of

[1] How this could be so when the attorney's name, Tobias Russo, was concededly in the telephone book does not appear. The trial judge sustained objections by the Assistant District Attorney to questions designed to delve into this mystery.

use. He had been called out on the case around 10 or 11 p. m., although he was not connected with the 46th Squad or Precinct in any way. Although, in fact, his job was in no way threatened, Bruno was told to tell petitioner that petitioner's telephone call had gotten him "in a lot of trouble," and that he should seek to extract sympathy from petitioner for Bruno's pregnant wife and three children. Bruno developed this theme with petitioner without success, and petitioner, also without success, again sought to see his attorney, a request which Bruno relayed unavailingly to his superiors. After this first session with petitioner, Bruno was again directed by Lt. Gannon to play on petitioner's sympathies, but again no confession was forthcoming. But the Lieutenant a third time ordered Bruno falsely to importune his friend to confess, but again petitioner clung to his attorney's advice. Inevitably, in the fourth such session directed by the Lieutenant, lasting a full hour, petitioner succumbed to his friend's prevarications and agreed to make a statement. Accordingly, at 3:25 a. m. the Assistant District Attorney, a stenographer, and several other law enforcement officials entered the room where petitioner was being questioned, and took his statement in question and answer form with the Assistant District Attorney asking the questions. The statement was completed at 4:05 a. m.

But this was not the end. At 4:30 a. m. three detectives took petitioner to Police Headquarters in Manhattan. On the way they attempted to find the bridge from which petitioner said he had thrown the murder weapon. They crossed the Triborough Bridge into Manhattan, arriving at Police Headquarters at 5 a. m., and left Manhattan for the Bronx at 5:40 a. m. via the Willis Avenue Bridge. When petitioner recognized neither bridge as the one from which he had thrown the weapon, they reentered Manhattan via the Third Avenue Bridge, which petitioner stated was the right one, and then returned to

the Bronx well after 6 a. m. During that trip the officers also elicited a statement from petitioner that the deceased was always "on [his] back," "always pushing" him and that he was "not sorry" he had shot the deceased. All three detectives testified to that statement at the trial.

Court opened at 10 a. m. that morning, and petitioner was arraigned at 10:15.

At the trial, the confession was introduced in evidence over appropriate objections. The jury was instructed that it could rely on it only if it was found to be voluntary. The jury returned a guilty verdict and petitioner was sentenced to death. The New York Court of Appeals affirmed the conviction over three dissents, 4 N. Y. 2d 256, 173 N. Y. S. 2d 793, 150 N. E. 2d 226, and we granted certiorari to resolve the serious problem presented under the Fourteenth Amendment. 358 U. S. 919.

Petitioner's first contention is that his absolute right to counsel in a capital case, *Powell* v. *Alabama,* 287 U. S. 45, became operative on the return of an indictment against him, for at that time he was in every sense a defendant in a criminal case, the grand jury having found sufficient cause to believe that he had committed the crime. He argues accordingly that following indictment no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment. He seeks to distinguish *Crooker* v. *California,* 357 U. S. 433, and *Cicenia* v. *Lagay,* 357 U. S. 504, on the ground that in those cases no indictment had been returned. We find it unnecessary to reach that contention, for we find use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles.

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered

from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases.[2] Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. The facts of no case recently in this Court have quite approached the brutal beatings in *Brown* v. *Mississippi,* 297 U. S. 278 (1936), or the 36 consecutive hours of questioning present in *Ashcraft* v. *Tennessee,* 322 U. S. 143 (1944). But as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made. Our judgment here is that, on all the facts, this conviction cannot stand.

Petitioner was a foreign-born young man of 25 with no past history of law violation or of subjection to official interrogation, at least insofar as the record shows. He

---

[2] *E. g., Cicenia* v. *Lagay,* 357 U. S. 504; *Crooker* v. *California,* 357 U. S. 433; *Ashdown* v. *Utah,* 357 U. S. 426; *Payne* v. *Arkansas,* 356 U. S. 560; *Thomas* v. *Arizona,* 356 U. S. 390; *Fikes* v. *Alabama,* 352 U. S. 191; *Leyra* v. *Denno,* 347 U. S. 556; *Stein* v. *New York,* 346 U. S. 156; *Brown* v. *Allen,* 344 U. S. 443; *Stroble* v. *California,* 343 U. S. 181; *Gallegos* v. *Nebraska,* 342 U. S. 55; *Johnson* v. *Pennsylvania,* 340 U. S. 881; *Harris* v. *South Carolina,* 338 U. S. 68; *Turner* v. *Pennsylvania,* 338 U. S. 62; *Watts* v. *Indiana,* 338 U. S. 49; *Lee* v. *Mississippi,* 332 U. S. 742; *Haley* v. *Ohio,* 332 U. S. 596; *Malinski* v. *New York,* 324 U. S. 401; *Lyons* v. *Oklahoma,* 322 U. S. 596; *Ashcraft* v. *Tennessee,* 322 U. S. 143; *Ward* v. *Texas,* 316 U. S. 547; *Lisenba* v. *California,* 314 U. S. 219; *Vernon* v. *Alabama,* 313 U. S. 547; *Lomax* v. *Texas,* 313 U. S. 544; *White* v. *Texas,* 310 U. S. 530; *Canty* v. *Alabama,* 309 U. S. 629; *Chambers* v. *Florida,* 309 U. S. 227; *Brown* v. *Mississippi,* 297 U. S. 278.

had progressed only one-half year into high school and the record indicates that he had a history of emotional instability.[3] He did not make a narrative statement, but was subject to the leading questions of a skillful prosecutor in a question and answer confession. He was subjected to questioning not by a few men, but by many. They included Assistant District Attorney Goldsmith, one Hyland of the District Attorney's Office, Deputy Inspector Halks,[4] Lieutenant Gannon, Detective Ciccone, Detective Motta, Detective Lehrer, Detective Marshal, Detective Farrell, Detective Leira,[5] Detective Murphy, Detective Murtha, Sergeant Clarke, Patrolman Bruno and Stenographer Baldwin. All played some part, and the effect of such massive official interrogation must have been felt. Petitioner was questioned for virtually eight straight hours before he confessed, with his only respite being a transfer to an arena presumably considered more appropriate by the police for the task at hand. Nor was the questioning conducted during normal business hours, but began in early evening, continued into the night, and did not bear fruition until the not-too-early morning. The drama was not played out, with the final admissions obtained, until almost sunrise. In such circumstances slowly mounting fatigue does, and is calculated to, play its part. The questioners persisted in the face of his repeated refusals to answer on the advice of his

---

[3] Medical reports from New York City's Fordham Hospital introduced by defendant showed that he had suffered a cerebral concussion in 1955. He was described by a private physician in 1951 as "an extremely nervous tense individual who is emotionally unstable and maladjusted," and was found unacceptable for military service in 1951, primarily because of "Psychiatric disorder." He failed the Army's AFQT–1 intelligence test. His mother had been in mental hospitals on three separate occasions.

[4] His name is sometimes spelled "Hawks."

[5] Although each is referred to separately in the record, it may be that Detectives Lehrer and Leira are the same person.

attorney, and they ignored his reasonable requests to contact the local attorney whom he had already retained and who had personally delivered him into the custody of these officers in obedience to the bench warrant.

The use of Bruno, characterized in this Court by counsel for the State as a "childhood friend" of petitioner's, is another factor which deserves mention in the totality of the situation. Bruno's was the one face visible to petitioner in which he could put some trust. There was a bond of friendship between them going back a decade into adolescence. It was with this material that the officers felt that they could overcome petitioner's will. They instructed Bruno falsely to state that petitioner's telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child. And Bruno played this part of a worried father, harried by his superiors, in not one, but four different acts, the final one lasting an hour. Cf. *Leyra* v. *Denno*, 347 U. S. 556. Petitioner was apparently unaware of John Gay's famous couplet:

> "An open foe may prove a curse,
> But a pretended friend is worse,"

and he yielded to his false friend's entreaties.

We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused, after considering all the facts in their post-indictment setting.[6] Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. Com-

---

[6] *Lisenba* v. *California*, 314 U. S. 219, is not to the contrary. There, while petitioner had already been arraigned on an incest charge, his later questioning and confession concerned a murder.

pare *Crooker* v. *California, supra,* and *Cicenia* v. *Lagay, supra.* They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these. *Malinski* v. *New York,* 324 U. S. 401. Accordingly, we hold that petitioner's conviction cannot stand under the Fourteenth Amendment.

The State suggests, however, that we are not free to reverse this conviction, since there is sufficient other evidence in the record from which the jury might have found guilt, relying on *Stein* v. *New York,* 346 U. S. 156. But *Payne* v. *Arkansas,* 356 U. S. 560, 568, authoritatively establishes that *Stein* did not hold that a conviction may be sustained on the basis of other evidence if a confession found to be involuntary by this Court was used, even though limiting instructions were given. *Stein* held only that when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it. The judgment must be

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE BRENNAN join, concurring.

While I join the opinion of the Court, I add what for me is an even more important ground of decision.

We have often divided on whether state authorities may question a suspect for hours on end when he has no lawyer present and when he has demanded that he have the benefit of legal advice. See *Crooker* v. *California,* 357 U. S. 433, and cases cited. But here we deal not with a suspect but with a man who has been formally charged

with a crime. The question is whether after the indictment and before the trial the Government can interrogate the accused *in secret* when he asked for his lawyer and when his request was denied. This is a capital case; and under the rule of *Powell* v. *Alabama,* 287 U. S. 45, the defendant was entitled to be represented by counsel. This representation by counsel is not restricted to the trial. As stated in *Powell* v. *Alabama, supra,* p. 57:

> "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.

We do not have here mere suspects who are being secretly interrogated by the police as in *Crooker* v. *California, supra,* nor witnesses who are being questioned in secret administrative or judicial proceedings as in *In re Groban,* 352 U. S. 330, and *Anonymous Nos. 6 & 7* v. *Baker, ante,* p. 287. This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel. This seems to me to be a flagrant violation of the principle announced in *Powell* v. *Alabama, supra,* that the right of counsel extends to the preparation for trial, as well as to the trial itself. As Professor Chafee once said, "A person accused of crime

needs a lawyer right after his arrest probably more than at any other time." Chafee, Documents on Fundamental Human Rights, Pamphlet 2 (1951–1952), p. 541. When he is deprived of that right after indictment and before trial, he may indeed be denied effective representation by counsel at the only stage when legal aid and advice would help him. This *secret inquisition* by the police when defendant asked for and was denied counsel was as serious an invasion of his constitutional rights as the denial of a continuance in order to employ counsel was held to be in *Chandler* v. *Fretag,* 348 U. S. 3, 10. What we said in *Avery* v. *Alabama,* 308 U. S. 444, 446, has relevance here:

> ". . . the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."

I join with Judges Desmond, Fuld, and Van Voorhis of the New York Court of Appeals (4 N. Y. 2d 256, 266, 173 N. Y. S. 2d 793, 801, 150 N. E. 2d 226, 231–232), in asking, what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses? In that event the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights.

MR. JUSTICE STEWART, whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring.

While I concur in the opinion of the Court, it is my view that the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment.

Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime. See *Crooker* v. *California,* 357 U. S. 433; *Cicenia* v. *Lagay,* 357 U. S. 504. When the petitioner surrendered to the New York authorities he was under indictment for first degree murder.

Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. At every stage in those proceedings the accused has an absolute right to a lawyer's help if the case is one in which a death sentence may be imposed. *Powell* v. *Alabama,* 287 U. S. 45. Indeed the right to the assistance of counsel whom the accused has himself retained is absolute, whatever the offense for which he is on trial. *Chandler* v. *Fretag,* 348 U. S. 3.

What followed the petitioner's surrender in this case was not arraignment in a court of law, but an all-night inquisition in a prosecutor's office, a police station, and an automobile. Throughout the night the petitioner repeatedly asked to be allowed to send for his lawyer, and his requests were repeatedly denied. He finally was induced to make a confession. That confession was used to secure a verdict sending him to the electric chair.

Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.

509615 O-59—24

UNITED STATES *v.* 93.970 ACRES OF LAND ET AL.

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

No. 573. Argued May 21, 1959.—
Decided June 22, 1959.

Under a statute authorizing the Secretary of the Navy to lease naval lands under revocable leases, he leased a naval airfield in Illinois to a private operator. The lease contained a preamble stating that it was considered essential to retain the field in a stand-by status for use "in connection with Naval Aviation activities" and a substantive provision that "this lease will at all times be revocable at will by the Government" upon giving certain notice. Subsequently, the Army desired to use the land for an aerial defense missile site, and the Secretaries of the Army and Navy jointly served notice of revocation on the lessee. The lessee declined to leave the land, claiming that the lease could be revoked only when the land was needed for "Naval Aviation activities." In order to obtain possession as soon as possible, the Government sued to condemn whatever possessory interest the lessee might be adjudicated to have; but the Government maintained that it had validly revoked the lease. *Held:*

1. The Government's right to revoke the lease was not restricted to occasions when it desired to use the land for aviation purposes, and the revocation was valid and effective. Pp. 331–332.

2. The doctrine of "election of remedies" did not require the Government to abandon its right to revoke the lease in order to exercise its right to obtain immediate possession under the condemnation law. P. 332.

3. Since essential interests of the Federal Government are here involved and Congress has not made state law applicable, federal law governs, even if the doctrine of election of remedies is a part of the law of Illinois. Pp. 332–333.

258 F. 2d 17, reversed.

Ralph S. Spritzer argued the cause for the United States. On the brief were *Solicitor General Rankin,*

Assistant Attorney General Morton, Roger P. Marquis and *S. Billingsley Hill.*

Leonard R. Hartenfeld argued the cause for respondent. With him on the brief was *J. Herzl Segal.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The basic question presented in this case is whether the United States can have adjudicated under one complaint (1) the claim by a third person of a valuable possessory interest in government property and (2) condemnation and value of that interest, if any. In 1947 the United States leased an airfield to respondent Illinois Aircraft Services & Sales Co. The preamble to the lease stated that because of the strategic value of the field the Government considered it essential to retain it "in a stand-by status for post-war use in connection with Naval Aviation activities . . . ." [1] One paragraph of the lease provided:

> "It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, . . . in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential."

---

[1] The preamble reads:

"Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use in connection with Naval Aviation activities; and

. . . . . .

"Whereas, the use of the airfield and facilities by the Lessee . . . will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government."

In 1954 the Army wanted to use the property for an aerial defense missile (NIKE) site. Timely notice of revocation was delivered to respondent under the signatures of the Secretaries of the Army and Navy, stating that a national emergency declared by the President in 1950 was still in effect and that both Secretaries deemed revocation of the lease essential. Respondent declined to leave the land, claiming that the Government had gone beyond the authority granted by the lease in attempting to revoke it for use by the Army rather than in connection with Naval Aviation activities mentioned in the preamble to the lease.

In order to obtain possession and use of the land as soon as possible—and without waiting to try out the validity of the prior revocation in a separate action or actions—the Government filed a complaint to condemn whatever possessory interest respondent might be adjudicated to have. Although the Government's complaint alleged that it had revoked the lease and, in effect, that respondent had no compensable interest in the property taken, the District Court ruled that by suing for condemnation the United States had "elected" to abandon its prior revocation. On this basis the court found that respondent had a compensable interest and let a jury determine its value. Under instructions that the lease was revocable only if needed for "aviation purposes" and that a NIKE site was not such a purpose, the jury returned a $25,000 verdict for respondents. On appeal the United States Court of Appeals for the Seventh Circuit affirmed this verdict by a divided court. 258 F. 2d 17. It held (1) that the doctrine of "election of remedies" applied and barred consideration of the revocation whether state or federal law governed and (2) that the lease could only be validly revoked under its terms if the Government planned to use the land for "aviation purposes." To review the

severe restrictions the court's holding places on the ability of the United States to get, quickly, land it may need for government purposes, we granted certiorari. 358 U. S. 945.[2]

We cannot agree that the lease permitted revocation only if the Government wanted the land for "aviation purposes." It is true that the preamble to the agreement states that the airfield was leased, rather than sold, because it was needed in stand-by status for naval aviation activities. It is also true that immediately following the preamble there is a statement, common in many contracts, that "Now Therefore, in consideration of the foregoing, and of the covenants hereinafter mentioned, the Government" leases the airport. There is no indication, however, either in the lease itself or as far as we have been shown in the history of the agreement, that this preamble and the formal legal statement immediately following it meant to limit the express and unequivocal clause of the lease allowing revocation at the will of the Secretary of the Navy in the event of a national emergency. Instead the preamble can be easily understood, in view of the Surplus Property Act of 1944, which required all *surplus* property to be disposed of, as a mere statement of why the property was not considered surplus.[3] In addition the statute which authorized the airport lease provided that such leases shall be revocable "at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In

---

[2] The decision of the court below is also in apparent conflict with *United States* v. *San Geronimo Dev. Co.*, 154 F. 2d 78 (C. A. 1st Cir.), and *United States* v. *Turner*, 175 F. 2d 644 (C. A. 5th Cir.).

[3] 58 Stat. 767–770, 777, as amended, 50 U. S. C. App. (1946 ed.) §§ 1612 (e), 1613, 1620, 1632.

any event each such lease shall be revocable by the Secretary . . . during a national emergency declared by the President." [4] Under the circumstances, we cannot and will not assume that an explicit revocation clause in the lease means any less than it seems to mean. We therefore hold that the revocation was valid and effective.

It follows necessarily from this that application of the doctrine of "election of remedies" would put the Government in an impossible situation. For under the doctrine, the Government must choose either to abandon its power to revoke the lease or to give up its right to immediate possession under condemnation law, a right which is not here questioned. We see no reason either in justice or authority why such a Hobson's choice should be imposed and why the Government should be forced to pay for property which it rightfully owns merely because it attempted to avoid delays which the applicable laws seek to prevent. Such a strict rule against combining different causes of action would certainly be out of harmony with modern legislation and rules designed to make trials as efficient, expeditious and inexpensive as fairness will permit.[5]

Respondents argue, however, that election of remedies is part of the law of Illinois and that Illinois law applies here. We cannot agree with this view. Condemnation involves essential governmental functions. See *Kohl* v. *United States,* 91 U. S. 367. We have often held that where essential interests of the Federal Government

---

[4] 61 Stat. 774, 34 U. S. C. § 522a. The current version of this statute is found in 10 U. S. C. (Supp. V) § 2667. We assume without deciding that this statute is applicable although an argument can be made for the applicability of a prior statute. That law provided that leases must be "revocable at any time." 39 Stat. 559, 34 U. S. C. (1946 ed.) § 522.

[5] Cf. *Conley* v. *Gibson,* 355 U. S. 41, 48. See also Fed. Rules Civ. Proc., 1, 2, 18.

are concerned, federal law rules unless Congress chooses to make state laws applicable.[6] It is apparent that no such choice has been made here.[7]

The judgment of the Court of Appeals is

Reversed.

---

[6] See, *e. g., Kohl* v. *United States,* 91 U. S. 367, 374; *United States* v. *Miller,* 317 U. S. 369, 380; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *Bank of America Nat. T. & S. Assn.* v. *Parnell,* 352 U. S. 29.

[7] Respondents rely on 26 Stat. 316, as amended, 50 U. S. C. § 171, which provided that condemnation proceedings like the one here involved were "to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted." But it is settled that this language required conformity in procedural matters only. See *United States* v. *Miller,* 317 U. S. 369, 379–380 (citing 25 Stat. 94); *Kanakanui* v. *United States,* 244 F. 923; *Nebraska* v. *United States,* 164 F. 2d 866, affirming *United States* v. *19,573.59 Acres of Land,* 70 F. Supp. 610. And insofar as it required such procedural conformity it was clearly repealed by Rule 71A, Federal Rules of Civil Procedure, at the time this suit was brought. It follows that federal law was wholly applicable to this case. In reaching this conclusion we express no opinion on the possible effect on other cases of the re-enactment of this conformity clause in 70A Stat. 148, 10 U. S. C. (Supp. V) § 2663 (a) (1956), or its subsequent repeal, retroactive to the time of re-enactment, by the Act of September 2, 1958. 72 Stat. 1565, 1568.

SAFEWAY STORES, INC., *v.* OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 252. Argued May 19, 1959.—Decided June 22, 1959.

Under the Oklahoma Unfair Sales Act, a State Court enjoined appellant from selling at retail any items of merchandise at prices less than statutory cost, even though some of appellant's competitors were selling below cost at prices appellant either knew or had reason to know were illegal. The Oklahoma Court also refused to enjoin certain of appellant's competitors from giving away trading stamps with goods sold at or near statutory cost, and enjoined appellant from reducing its prices below cost to meet that competition. *Held:* The Oklahoma Unfair Sales Act, as construed and applied in this case, does not transgress the Equal Protection or Due Process Clause of the Fourteenth Amendment. Pp. 334–342.

322 P. 2d 178, affirmed.

Ramsey Clark argued the cause for appellant. With him on the brief were *V. P. Crowe, Robert L. Clark* and *William L. Keller.*

Samuel M. Lane argued the cause for appellees. With him on the brief were *W. J. Holloway, Sr., M. A. Ned Looney* and *Robert P. Beshar.*

Mac Q. Williamson, Attorney General of Oklahoma, filed a brief, as *amicus curiae,* urging affirmance.

Chester Inwald filed a brief for the National Association of Tobacco Distributors, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit for an injunction, brought in a state court in Oklahoma by appellee, Oklahoma Retail Grocers Association, against appellant, Safeway Stores, for selling sev-

eral specified items of retail grocery merchandise below "cost" in violation of the Oklahoma Unfair Sales Act. Okla. Stat. tit. 15, §§ 598.1–598.11 (1951). Section 598.3 of the Act provides:

> "It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this Act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this Act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce."

The elements of "cost" are enumerated in other sections of the statute. Safeway defended on the ground, *inter alia,* that its reductions were permitted by § 598.7 of the Unfair Sales Act which allows "any retailer or wholesaler" to

> ". . . advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality at cost to him as a wholesaler or retailer."

Safeway by cross-petition sought to enjoin several named members of appellee Association, including Speed, alleging that they were selling below cost in violation of the Act. The trial court, with some qualification, granted the injunction against Safeway and denied relief against appellees. On appeal, the Supreme Court of Oklahoma affirmed, 322 P. 2d 179, and since the constitutionality of

the state statute was challenged under the Fourteenth Amendment, we noted probable jurisdiction, 358 U. S. 807, and brought the case here under 28 U. S. C. § 1257 (2).

Safeway makes two main claims.

1. Safeway justified cutting prices below cost in some cities by claiming it was to meet the prices of some of its competitors who were also selling below cost. The statute allows a reduction below cost only when it is a good faith meeting of the competition of a seller who is selling at his own cost. The trial court found that Safeway's reductions violated the Act, and that Safeway could not avail itself of the statutory defense of meeting competition since its reductions were not in good faith but were made to meet prices Safeway "either knew or had reason to know were illegal . . . ." The court enjoined Safeway from

> ". . . selling, at retail, any items of merchandise . . . at prices which are less than cost to the retailer as defined in the Oklahoma 'Unfair Sales Act' and in violation of the provisions of said 'Unfair Sales Act', except to meet in good faith the prices of competitors who are selling the same articles or products of comparable quality at cost to them as retailers as defined in the Oklahoma 'Unfair Sales Act', and except in instances of other exempted sales as provided in Section 598.6 of said Oklahoma 'Unfair Sales Act.' "

The injunction, phrased substantially in the terms of the statute, allows Safeway to meet the prices of competitors who are selling "at cost to them" if the other requisites of the good faith defense are met. Appellant claims that this injunction deprives it of a constitutional right to compete since it forbids meeting the prices of competitors who are selling below cost. There is no constitutional

right to employ retaliation against action outlawed by a State. Safeway, the Oklahoma court held, had ample means, under the state statute, to enjoin the illegal methods of its competitors. It had no constitutional right to embark on the very kind of destructive price war the Act was designed to prevent.

Appellant also claims that there are situations in which a competitor might reduce his prices below cost without violating the Act, and hence, under the injunction, Safeway would have no remedy whatsoever since it could not retaliate in kind and judicial relief would not be available. The conclusive answer to this claim is that it is not before us for adjudication. The court below found that Safeway was meeting prices it "knew or had reason to know" were illegal. It then phrased its injunction in the terms of a statute which has yet to be construed in the abstract circumstances presented by appellant. The Oklahoma Supreme Court carefully noted that it was interpreting the Unfair Sales Act as applied to the particular facts of this case, pointing out that "until a proper factual case is presented which requires a clear determination and offers a practical situation in which all the conflicting problems and considerations of the area involved are apparent, this court will refrain from theorizing." 322 P. 2d, at 181. If this is a rule of wise restraint for the courts of Oklahoma in this situation, it clearly bars constitutional adjudication here.[1]

---

[1] The Oklahoma Supreme Court said:

"In this connection our attention has been called to the recent case (10–4–57) of State by Clark v. Wolkoff, Minn., 85 N. W. 2d 401, 403, wherein it was held that '(I)f a merchant in good faith sets the price of an article on the basis of a competitor's price, which price he in good faith believes to be a *legal price*, there is no violation,' which clearly is not the case herein. In the instant case, Safeway obviously and admittedly did not, in good faith, set the price of its articles which were subject to the Unfair Sales Act on the basis of its competitors' prices, which it in good faith believed to be legal prices

2. Appellant's second contention involves its competitors' use of trading stamps. Trading stamps, it hardly needs to be stated, are, generally speaking, coupons given by dealers to retail purchasers on the basis of the dollar value of the items purchased, *e. g.*, one stamp for each ten cents' worth of goods, and are collected by the purchaser until he has enough to redeem for various items of merchandise. Trading stamps have had a checkered career in the United States, but since World War II their popularity has grown until now it is a reasonable estimate that these multi-colored scraps of paper may be found in almost half of America's homes.[2]

When this suit was brought Safeway did not use trading stamps. In the Oklahoma City-Midwest City area several of its competitors did. These stamps were deemed to be worth approximately 2.5 percent of the price of the goods with which they were given. Safeway contended in the Oklahoma courts that giving a trading stamp with goods sold at or near the statutory minimum resulted in an unlawful reduction below "cost" to the extent of the value of the trading stamp. To be specific, if an item sold for $1, and that price was statutory cost, the trading stamps given with it would be worth approximately 2.5

---

under the Unfair Sales Act, but on the contrary it set illegal prices for the sole purpose of meeting prices of its competitors, which it thought to be illegal." 322 P. 2d, at 181.

[2] The latest chapter in trading stamp history was recounted in The [London] Economist for May 30, 1959, at p. 850:

"In Colorado a proposal to tax the stamps brought battalions of housewives to the state capital. One of its original sponsors changed his mind when his own mother threatened to campaign against his re-election if he did not alter his stand. The newest twist to the trading stamp story is that they can now be exchanged, in the East, for a theatre seat, even, after July 12th, for one for 'My Fair Lady.' This will take, however, the stamps accumulated on nearly $700 worth of purchases—about what it costs to feed a family for five months."

cents and the net price was therefore $.975, or 2.5 cents below cost. Safeway sought to restrain its competitors from selling below cost in this manner and also claimed that it was justified, in order to meet competition, in reducing its prices to the net of its competitors' prices, taking into account the value of trading stamps. The Oklahoma court found that the giving of trading stamps with items sold at or near statutory cost was not a violation of the statute and denied Safeway's request for an injunction. The court also decided that Safeway could not reduce its prices to meet the trading stamp competition. It did, however, provide that Safeway could do what appellees did, it might issue "trading stamps, cash register receipts, or other evidence of credit issued as a discount for prompt payment of cash . . . ," as long as the value of the discount did not exceed three percent.[3]

Safeway contends that such a construction of the Unfair Sales Act violates the Fourteenth Amendment. Appellant claims that even though the State may prohibit sales below "cost," it is barred from allowing a merchant to give trading stamps with goods sold at or near "cost," unless it allows competing merchants to make an equivalent price reduction. For the State to differentiate between the use of trading stamps and price-cutting is, so the argument runs, a constitutionally inadmissible discrimination.[4]

> "It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of the equal protection of the

[3] Safeway, in fact, did offer its own cash discount coupons during the course of this litigation.

[4] This Court in other contexts has upheld, against a challenge based on the Fourteenth Amendment, state tax laws which discriminated against the use of trading stamps. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369; *Pitney* v. *Washington*, 240 U. S. 387.

> laws has been applied. The generalities on this subject are not in dispute; their application turns peculiarly on the particular circumstances of a case." *Goesaert* v. *Cleary*, 335 U. S. 464, 467.

The Oklahoma court decided that, although price cuts below cost were prohibited by the statute, the use of trading stamps was not a price reduction but constituted a cash discount, *i. e.*, a reduction given to customers for prompt payment of cash. Opposing expert accountants sustained and rejected the validity of such a difference. In matters of this sort we might content ourselves in resting on the clash of expert opinion to show that the Oklahoma decision was not wanting in a foundation that may not unjustifiably have commended itself as a state policy. However, we may note some readily apparent differences between the practices which support the State's differentiation and thereby the power asserted by the State.

Trading stamps are given to cash customers "across the board," namely, the number of stamps varies directly with the total cost of goods purchased. Safeway's price-cutting, however, was selective. This difference is vital in the context of this Act. One of the chief aims of state laws prohibiting sales below cost was to put an end to "loss-leader" selling. The selling of selected goods at a loss in order to lure customers into the store is deemed not only a destructive means of competition; it also plays on the gullibility of customers by leading them to expect what generally is not true, namely, that a store which offers such an amazing bargain is full of other such bargains.[5] Clearly there is a reasonable basis for a conclusion that selective price cuts tend to perpetuate this abuse whereas the use of trading stamps does not.

---

[5] See the article by Mr. Brandeis, as he then was, in the November 15, 1913, issue of Harper's Weekly, at p. 10.

This difference alone would be enough to require affirmance. It is reinforced by other tenable grounds for distinction. There was a basis in evidence for the view that the use of trading stamps has an entirely different impact on the consuming market than do price cuts. When prices are the same customers tend to go to the store offering trading stamps. But when prices are cut to the extent of the value of the trading stamp the stamps lose their lure and lower prices prove a more potent attraction. On the basis of this not unreasonable belief as to the economics of the highly competitive, low-profit-margin retail-grocery business, Oklahoma could well have concluded that its choice was to provide that all use a cash discount system or none could do so.[6] Such a view of the economic aspects of the problem affords an ample basis for the legislative judgment enforced by the court below.

Certainly this Court will not interpose its own economic views or guesses when the State has made its choice.

> "The Fourteenth Amendment enjoins the 'equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas,* 310 U. S. 141, 147.

---

[6] This would come about if the dealer using trading stamps were allowed to meet the lowered price, or if, by being required to drop trading stamps, the other dealer were forced to raise prices. It is conceivable that a mathematical formula might be developed to equalize the use of trading stamps and price cuts. But certainly the Constitution does not place such a complex and, at best, uncertain and speculative burden on the States.

We are not concerned with the soundness of the distinctions drawn. It is enough that it is open to Oklahoma to believe them to be valid as the basis of a policy for its people.[7]

Affirmed.

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

---

[7] Appellant also claims that the Oklahoma law is pre-empted by federal antitrust laws. However, this claim was not made below.

PALERMO *v.* UNITED STATES.

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

No. 471. Argued April 28, 1959.—Decided June 22, 1959.

During the trial in a Federal District Court at which petitioner was convicted of knowingly and willfully evading the payment of income taxes for the years 1950, 1951 and 1952, an important issue was whether his handwritten record of dividends received in 1951 and 1952 had been given to an accounting firm while it was preparing his returns for those years rather than in 1953, after revenue agents had begun investigating his returns. To impeach the testimony of a partner in the accounting firm that they had not received this record until 1953, petitioner called for and obtained the production of certain documents in the possession of the Government; but he was denied production of a 600-word memorandum summarizing parts of a 3½-hour interrogation of the witness by a government agent. *Held:* Such memorandum was not a "statement" of the kind required to be produced under the so-called Jencks Act, 18 U. S. C. § 3500; its production was properly denied; and the conviction is sustained. Pp. 343–356.

258 F. 2d 397, affirmed.

Wyllys S. Newcomb argued the cause for petitioner. With him on the brief was *John A. Wells.*

Ralph S. Spritzer argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Lawrence K. Bailey.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner was convicted of knowingly and willfully evading the payment of income taxes for the years 1950, 1951 and 1952. A substantial part of the alleged evasion was failure to report income from dividends. Among the Government's exhibits at trial was a record, presum-

509615 O–59–25

ably contemporaneous and in the petitioner's handwriting, of dividends received during 1951 and 1952. This record reflected an amount of dividend income for 1951 substantially larger than that reported on the 1951 return. Petitioner contended that this record had been turned over to the accounting firm which regularly prepared his return, Arthur R. Sanfilippo & Co., in early 1952 for use in preparing his 1951 return, but that the figures had not been accurately entered on the return by the accountants. The Government's contention was that the record had not been given to the accounting firm until early 1953, subsequent to the initiation of the investigation of petitioner's tax affairs and long after the filing of the 1951 return. The time at which the record had been given to the accountants thus became directly relevant to the issue of criminal intent in the charge against the petitioner. Arthur R. Sanfilippo, an important government witness and the principal partner in the accounting firm, testified that his firm had not received the handwritten record of dividend income until early 1953.

Prior to the trial, on July 16, 1956, during the course of an interrogation by agents of the Internal Revenue Service, Sanfilippo had been unable to recall when the dividend record had been received. More than a month later, August 23, 1956, Sanfilippo had met with revenue agents to verify and sign the transcript of his earlier testimony. At this meeting he executed a supplementary affidavit reciting that he wished to clarify his original answers and that he remembered that his firm had not received the dividend record until after revenue agents had begun their investigation of petitioner's tax returns. A memorandum of the conference at which this affidavit was executed was made by one of the agents present. On cross-examination of Sanfilippo the defense demanded and received various documents including the transcript of the July 16 interrogation and the August 23

affidavit. The defense also requested production of any memoranda, or of any part thereof summarizing what Sanfilippo had said, which had been made of the August 23 conference. The trial judge denied this request on the ground that the Act of September 2, 1957, 71 Stat. 595, 18 U. S. C. § 3500—the so-called "Jencks" Act—governing the production of statements made to government agents by government witnesses, precluded production of the requested memorandum since it was not within the definition of "statement" in (e) of the Act.[1] The Court of Appeals for the Second Circuit affirmed. 258 F. 2d 397. Together with several other cases raising Jencks Act problems, we granted certiorari, 358 U. S. 905, to determine the scope and meaning of this new statute.

Accurate analysis of these problems as a basis of their appropriate solution requires due appreciation of the background against which the statutory terms must be projected.

Exercising our power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts, this Court, on June 3, 1957, in *Jencks* v. *United States,* 353 U. S. 657, decided that the defense in a federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses. These statements were therefore to be turned over to the defense at the time of cross-examination if their contents related to the subject matter of the witness' direct testimony, and if a demand had been made for specific statements which had been written by the witness or, if orally made, as recorded by

[1] We reject the Government's contention that, at trial, petitioner asserted only that the statute did not cover his request for production, and failed to assert that, if the statute was applicable, the memorandum could be produced under its terms. We find that objection to the interpretation of the statute was adequately made.

agents of the Government. We also held that the trial judge was not to examine the statements to determine if they contained material inconsistent with the testimony of the witness before deciding whether he would turn them over to the defense. Once the statements had been shown to contain related material only the defense was adequately equipped to decide whether they had value for impeachment. This decision only concerned production and therefore did not purport to modify the laws of evidence governing the admissibility of prior statements of a witness.

The decision promptly gave rise to sharp controversy and concern. The day following our opinion the House of Representatives was told that the decision in *Jencks* posed a serious problem of national security and that legislation would be introduced. 103 Cong. Rec. 8290. The same day H. R. 7915, the first of eleven House bills dealing with what became the Jencks problem, was introduced in the House.[2] Defendants' counsel began to invoke the *Jencks* decision to justify demands for production far more sweeping than that involved in *Jencks*, and under circumstances far removed from those of that case, and some federal trial judges acceded to those excessive demands.[3] The Department of Justice, concerned over these rapid intrusions of *Jencks* into often totally unrelated

---

[2] 103 Cong. Rec. 8327. The other House bills were H. R. 8225, 103 Cong. Rec. 9572; H. R. 8243, 103 Cong. Rec. 9746; H. R. 8335, 103 Cong. Rec. 10181; H. R. No. 8341, 103 Cong. Rec. 10181; H. R. 8388, 103 Cong. Rec. 10403; H. R. 8393, 103 Cong. Rec. 10403; H. R. 8414, 103 Cong. Rec. 10547; H. R. 8416, 103 Cong. Rec. 10547; H. R. 8423, 103 Cong. Rec. 10547; H. R. 8438, 103 Cong. Rec. 10589.

[3] Many of the cases in the lower federal courts after *Jencks* and prior to the enactment of the statute are collected in the statement of the Attorney General contained in H. R. Rep. No. 700, 85th Cong., 1st Sess., and in S. Rep. No. 569, 85th Cong., 1st Sess. See also S. Rep. No. 981, 85th Cong., 1st Sess.; 103 Cong. Rec. 15939–15941.

areas, drafted legislation to clarify and delimit the reach of *Jencks*. See 103 Cong. Rec. 15781. On June 24, 1957, this legislation was introduced into the Senate by Senator O'Mahoney acting for himself and several other Senators. 103 Cong. Rec. 10057. After study by a subcommittee of the Judiciary Committee the bill was reported out, 103 Cong. Rec. 10601, then withdrawn and a completely new measure substituted. 103 Cong. Rec. 14913. When the bill reached the floor for debate Senator O'Mahoney proposed an amendment in the nature of a substitute which was adopted, 103 Cong. Rec. 15938, and the bill passed the Senate on August 26. *Ibid.* In the House the original H. R. 7915, after being amended in Committee, see 103 Cong. Rec. 10925, was passed on August 27, 103 Cong. Rec. 16130, and then substituted for the text of the Senate bill. 103 Cong. Rec. 16131. The two versions went to Conference. The Conference Report was agreed to by the Senate on August 29, 103 Cong. Rec. 16490, and by the House the next day. 103 Cong. Rec. 16742. The Act was approved on September 2, and became law as § 3500 of the Criminal Code, 18 U. S. C.[4] Congress

[4] The statute provides:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate

had determined to exercise its power to define the rules that should govern in this particular area in the trial of criminal cases instead of leaving the matter to the law-making of the courts.

---

to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

In almost every enactment there are gaps to be filled and ambiguities to be resolved by judicial construction. This statute is not free from them. Here, however, the detailed particularity with which Congress has spoken has narrowed the scope for needful judicial interpretation to an unusual degree. The statute clearly defines procedures and plainly indicates the circumstances for their application. Since this case is the first calling for authoritative exposition of an Act that frequently comes into use in federal criminal prosecutions we deem it appropriate to explicate the construction of the statute required by the circumstances of this case.

1. Subsection (a) requires that no statement of a government witness made to an agent of the Government and in the Government's possession shall be turned over to the defense until the witness has testified on direct examination. This section manifests the general statutory aim to restrict the use of such statements to impeachment. Subsections (b), (c) and (d) provide procedures for the production of "statements," and for the consequences to the Government of failure to produce. Subsection (e) restrictively defines with particularity the term "statement" as used in the three preceding sections. The suggestion that the detailed statutory procedures restrict only the production of the type of statement described in subsection (e), leaving all other statements, *e. g.*, non-verbatim, non-contemporaneous records of oral statements, to be produced under pre-existing rules of procedure as if the statute had not been passed at all, flouts the whole history and purpose of the enactment. It would mock Congress to attribute to it an intention to surround the production of the carefully restricted and most trustworthy class of statements with detailed procedural safeguards, while allowing more dubious and less

reliable documents a more favored legal status, free from safeguards in the tournament of trials. To state such a construction demonstrates its irrationality; the authoritative legislative history precludes its acceptance.

To be sure, the statute does not, in so many words, state that it is the exclusive, limiting means of compelling for cross-examination purposes the production of statements of a government witness to an agent of the Government. But some things too clearly evince a legislative enactment to call for a redundancy of utterance. One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of *Jencks* would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness. Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations. The committee reports of both Houses and the floor debates clearly manifest the intention to avoid these dangers by restricting production to those statements specifically defined in the bill.[5] Indeed both the House

[5] See, *e. g.*, H. R. Rep. No. 700, 85th Cong., 1st Sess.; S. Rep. No. 569, 85th Cong., 1st Sess.; S. Rep. No. 981, 85th Cong., 1st Sess. The statements in the reports are frequent and clear. There are many like expressions on the floor of both chambers. For example, there was a lengthy debate in the Senate over an amendment which would have restricted the type of statement which could be produced beyond the limitations already incorporated in the Senate bill. The entire debate proceeded on the explicit assumption that only those

and Senate bills as they went to Conference explicitly so stated. See 103 Cong. Rec. 16130; 103 Cong. Rec. 16125. Nothing in the Conference Reports or the limited debate following Conference intimated the slightest intention to change the exclusive nature of the measure. Indeed the reports and debate proceeded on the explicit assumption that the bill retained as a major purpose the barring of all statements not specifically defined.[6] The purpose of the Act, its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U. S. C. § 3500 cannot be produced at all.

2. Since the statutory procedures are exclusive they constitute the rule of law governing the production of the statement at issue in this case and it becomes necessary to determine the scope and meaning of the statutory definition of "statement" contained in (e). Clause (1) of (e) permits the production of "a written statement made by said witness and signed or otherwise adopted or approved by him . . . ." Although some situations may arise, creating peripheral problems of construction, its import is clear. Clause (2) widens the definition of "statement" to include "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." Clearly this provision allows the production of mechanical or stenographic recordings of oral state-

---

statements which were enumerated in the bill could be produced at all. 103 Cong. Rec. 15930–15935. See also 103 Cong. Rec. 16116. There are many similar expressions during the debates.

[6] See legislative history summarized in Appendix A, *post*, p. 356.

ments, even though later transcribed. A preliminary problem for determining that the statement now before us may be produced is whether the statutory phrase "other recording" allows an even wider scope for production. We find the legislative history persuasive that the statute was meant to encompass more than mere automatic reproductions of oral statements.[7]

However, such a finding is only the beginning of the task of construction. It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment.[8] It was important that the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. It is clear from the continuous congressional emphasis on "substantially verbatim recital," and "continuous, narrative statements made by the witness recorded verbatim, or nearly so . . . ," see Appendix B, *post*, p. 358, that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history,[9] and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substan-

---

[7] See legislative history summarized in Appendix B, *post*, p. 358.

[8] See, *e. g.*, 103 Cong. Rec. 16739. See also many statements to the same effect in the House and Senate Reports.

[9] See legislative material cited and quoted in Appendix B, *post*, p. 358.

tial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions. In expounding this standard we do not wish to create the impression of a "delusive exactness." The possible permutations of fact and circumstance are myriad. Trial courts will be guided by the indicated standard, informed by fidelity to the congressional purposes we have outlined. There is nothing impalpable about these provisions. Since we feel the statutory standard has guiding definiteness, it would be idle to attempt a minute enumeration of particular situations to which it is to be applied. Such a vain attempt at forecasting myriad diversities with minor variance is as futile and uncalled for in this as in so many other areas of the law. That is what the judicial process is for—to follow a generally clear direction in dealing with a new diversity as it may occasionally arise. Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined,[10] and subject to the appropriately limited review of appellate courts.[11]

---

[10] Of course the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration. Neither is it significant whether or not the statement is admissible as evidence.

[11] The statute as interpreted does not reach any constitutional barrier. Congress has the power to prescribe rules of procedure for the federal courts, and has from the earliest days exercised that power. See 37 Harv. L. Rev., at 1086 and 1093–1094, for a collection of such legislation. The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress. See *Funk* v. *United States*, 290 U. S. 371,

3. The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court. However, when it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. Indeed, any other procedure would be destructive of the statutory purpose. The statute governs the production of documents; it does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced. The Act's major concern is with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of (e), or do not relate to the subject matter of the witness' testimony. It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them.

It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evi-

---

382; *Gordon* v. *United States*, 344 U. S. 414, 418. Much of the law of evidence and of discovery is concerned with limitations on a party's right to have access to, and to admit in evidence, material which has probative force. It is obviously a reasonable exercise of power over the rules of procedure and evidence for Congress to determine that only statements of the sort described in (e) are sufficiently reliable or important for purposes of impeachment to justify a requirement that the Government turn them over to the defense.

dence extrinsic to the statement itself may or must be offered to prove the nature of the statement. In most cases the answer will be plain from the statement itself. In others further information might be deemed relevant to assist the court's determination. This is a problem of the sound and fair administration of a criminal prosecution and its solution must be guided by the need, reflected in so much of our law of evidence, to avoid needless trial of collateral and confusing issues while assuring the utmost fairness to a criminal defendant. See, *e. g.*, *Nardone* v. *United States,* 308 U. S. 338, 342.

In light of these principles the case before us is clear. Both the District Court and the Court of Appeals correctly held that the sole standard governing production of the agent's memorandum of his conference with Sanfilippo was 18 U. S. C. § 3500. The district judge and a unanimous Court of Appeals held that the statement was not within the definition of statement in (e) as properly understood by them. We have examined the statement and the record and find that the determination of the two courts below was justified and therefore must be sustained.[12] It would bespeak a serious reflection on the conscience and capacity of the federal judiciary if both a trial judge and a Court of Appeals were found to have disregarded the command of Congress, duly interpreted,

---

[12] The statement consists of a brief agent's summary, of approximately 600 words, of a conference lasting 3½ hours. It was made up after the conference and consists of several brief statements of information given by Sanfilippo in response to questions of the agent. The typed agent's memorandum is clearly not a virtually verbatim narrative of the conference but represents the agent's selection of those items of information deemed appropriate for inclusion in the memorandum. Thus by applying the governing standard set forth at pp. 352 and 353, *supra,* it is clear that the lower courts did not err in refusing to hand the statement over to the defense.

for making available a prior statement of a government witness in a case. Against such a contingency there is always the safeguard of this Court's reviewing power.

Affirmed.

[For opinion of MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, see *post*, p. 360.]

APPENDIX A TO OPINION OF THE COURT.

SUMMARY OF LEGISLATIVE HISTORY DEMONSTRATING THE INTENT OF THE CONFERENCE MEASURE TO RETAIN AS A PRIMARY PURPOSE OF THE ACT A PROHIBITION OF PRODUCTION OF ALL STATEMENTS NOT DESCRIBED IN SUBSECTION (E). (SEE PP. 350–351, ANTE.)

The bills as they went to Congress contained explicit provisions making them exclusive. For example, the Senate bill provided in subsection (a):

> "In any criminal prosecution brought by the United States, no statement or report of a Government witness or prospective Government witness (other than the defendant) made to an agent of the Government which is in the possession of the United States shall be the subject of subpena, or inspection, except, if provided in the Federal Rules of Criminal Procedure, *or as provided in paragraph (b) of this section.*" (Emphasis added.) 103 Cong. Rec. 16130.

The House bill contained a similar provision.

Although the last phrase of this section was dropped out when the section was rewritten to eliminate reference to the Federal Rules of Criminal Procedure, see 103 Cong. Rec. 16488; H. R. Rep. No. 1271, 85th Cong., 1st Sess., there is no indication that its omission was intended

to work a silent and radical change in the entire concept and purpose of the Act. Both the Conference Report of the House Managers and the floor remarks of the Senate Conferees enumerate the particular changes which had been made to meet earlier specific differences and objections. No mention is made, nor can an intimation be found, of any intention to change the exclusive nature of the measure. The House Conference Report enumerates the specific changes and then states that "To remove any doubt as to the kinds of statements affected by the bill as agreed to by the conferees, a new paragraph 'e' was added . . . expressly defining the term 'statement.' " H. R. Rep. No. 1271, 85th Cong., 1st Sess. 3. In the Senate, Senator O'Mahoney, in response to a question, gave the specific changes which had been made in the bill by the Conference, and he did not give the slightest indication that it had lost its exclusive nature. 103 Cong. Rec. 16487.

What small debate there was following the Conference Report supports the conclusion that no change in the exclusiveness of the bill was intended. For example, Senator O'Mahoney, introducing the conference measure, stated that, "[t]here was some fear upon the part of the Department of Justice that the Senate bill would create a greater latitude for the examination of irrelevant reports of agents. The language which was devised by the conferees has cleared up the doubts . . . ." 103 Cong. Rec. 16487. See also 103 Cong. Rec. 16488–16489. In the House, Representative Keating, one of the Conferees, explained that "The conferees provided that the only statements a defendant could see, and then only in the courtroom were those actually signed or formally approved by the witness or a stenographic verbatim recital of a statement made by a witness which is recorded contemporaneously with the making of such oral statement.

In other words, only those statements need be produced in court by the Government which could be shown in court to impeach the credibility of the witness." 103 Cong. Rec. 16739. See also 103 Cong. Rec. 16742.

APPENDIX B TO OPINION OF THE COURT.

PARTIAL SUMMARY OF LEGISLATIVE HISTORY BEARING ON THE PROPER CONSTRUCTION OF SUBSECTION (E). (SEE PP. 351 AND 352, ANTE.)

The original Senate bill, as passed by the Senate, allowed the production of "any transcriptions or records of oral statements made by the witness to an agent of the Government . . . ." See 103 Cong. Rec. 16130. During the course of the Senate debate an amendment had been offered to limit this provision to mechanical transcriptions or recordings. See 103 Cong. Rec. 15930–15931. This amendment was rejected after Senator O'Mahoney, sponsor of the legislation, had argued that it would leave the bill too "limited." "All we are asking," he stated, "is that the records which are relevant and competent, which deal with the oral statements made by Government witnesses whom the Government puts on the stand, with respect to the matters concerning which they testify, be made available." 103 Cong. Rec. 15932. Thus the bill as it left the Senate was clearly not confined to automatic reproductions of oral statements, although its further reach was not explicitly demarcated.

The House bill, as passed, allowed only the production of written statements signed by the witness or otherwise adopted or approved. 103 Cong. Rec. 16125. The present language emerged from the Conference.

Senator O'Mahoney, sponsor of the original Senate bill and one of the Senate Conferees, in submitting the conference bill, made it clear that (e) "would include a memo-

randum made by an agent of the Government of an oral statement made to him by a Government witness . . . ." 103 Cong. Rec. 16488. Senator Javits then asked:

> ". . . what has been done with the so-called records provision is to tie it down to those cases in which the agent actually purports to make a substantially verbatim recital of an oral statement that the witness has made to him—not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and as transcribed by him; is that correct?" *Ibid.*

Senator O'Mahoney replied, "Precisely." Thus although the Senate history indicates that the bill was restricted to a "substantially verbatim recital," it is apparent that the Act was not designed to be restricted to mere mechanical transcription.

The proceedings in the House are less clear. It is true that Representative Keating, one of the House Conferees, did say that only stenographic verbatim recitals need be produced. 103 Cong. Rec. 16739. But this was said in reply to Representative Celler's statement that the conference measure was as liberal as the original Senate bill. Representative Celler was also a House Conferee. The report of the House Managers, signed by all the House Conferees, after pointing out that the term "statement" had been defined in the bill, stated:

> "It is believed that the provisions of the bill as agreed to by the conferees are in line with the standard enunciated by Judge George H. Moore of the eastern district of Missouri in . . . *U. S.* v. *Anderson* . . . which is set forth at page 14552 [*sic*] of the daily Congressional Record of August 26, 1957." H. R. Rep. No. 1271, 85th Cong., 1st Sess. 3.

In the opinion referred to, Judge Moore had explicitly limited the type of oral statement which could be produced under the *Jencks* decision to

> ". . . only continuous, narrative statements made by the witness recorded verbatim, or nearly so, and does not include notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions, or conclusions of the person or persons making such notes." 103 Cong. Rec. 15940.

This standard, explicitly incorporated into the House Report, has a dual significance. It not only goes beyond mechanical or stenographic statements, in defining the statements which must be made available to the defense, but indicates that once beyond that point a very restrictive standard is to be applied.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, concurring in the result.

I concur in the result but see no justification for the Court's ranging far afield of the necessities of the case in an opinion essaying *obiter* a general interpretation of the so-called "Jencks Act," 18 U. S. C. (Supp. V) § 3500. Many more concrete cases must be adjudicated in the District Courts before we shall be familiar with all the problems created by the statute.

We of this Court, removed as we are from the tournament of trials, must be careful to guard against promulgating general pronouncements which prevent the trial judges from exercising their traditional responsibility. The Court's opinion well observes that the hope for a fair administration of the statute rests in the final analysis with its responsible application in the federal trial courts.

This responsibility of the federal trial judge, it goes without saying, is not to be delegated to the prosecutor. Questions of production of statements are not to be solved through one party's determination that interview reports fall without the statute and hence that they are not to be produced to defense counsel or to the trial judge for his determination as to their coverage. I am confident that federal trial judges will devise procedural methods whereby their responsibility is not abdicated in favor of the unilateral determination of the prosecuting arm of the Government.

Congress had no thought to invade the traditional discretion of trial judges in evidentiary matters beyond checking extravagant interpretations of our decision in *Jencks* v. *United States,* 353 U. S. 657, which were said to have been made by some lower courts. Indeed Congress took particular pains to make it clear that the legislation "reaffirms" that decision's holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a government witness has testified at the trial. S. Rep. No. 981, 85th Cong., 1st Sess., p. 3. And see H. R. Rep. No. 700, 85th Cong., 1st Sess., pp. 3, 4. I see no necessity in the circumstances of this case which calls for a decision whether § 3500 is the sole vehicle whereby production of prior statements of government witnesses to government agents may be made to the defense. Certainly nothing in the statute or its legislative history justifies our stripping the trial judge of all discretion to make nonqualifying reports available in proper cases. Take the case of a memorandum of a government agent simply stating that a person interrogated for several hours as to his knowledge of the defendant's alleged criminal transactions, denied any knowledge of

them. Then suppose that person is called as a government witness at the trial and testifies in great detail as to the defendant's alleged criminal conduct. The agent's summary would not be a detailed account of the several hours' interrogation of the witness by the Government, and would not meet the definition of statement in subsection (e) of the statute; but it is inconceivable that Congress intended, by the *Jencks* statute, to strip the trial judge of discretion to order such a summary produced to the defense. Even the Government, in oral argument, conceded that the statute did not strip the district judges of discretion to order production of such a statement under some circumstances.[1] There is an obvious constitutional problem in an interpretation that the statute restrains the trial judge from ordering such a statement produced. Less substantial restrictions than this of the common-law rights of confrontation of one's accusers have been struck down by this Court under the Sixth Amendment. See *Kirby* v. *United States,* 174 U. S. 47. And in such circumstances, there becomes pertinent the command of that Amendment that criminal defendants have compulsory process to obtain witnesses for their defense. See *United States* v. *Schneiderman,* 106 F. Supp. 731, 738. It is true that our holding in *Jencks* was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close

[1] In response to a case put similar to the one given here, government counsel suggested that the primary remedy of the defendant was to call the interviewer. Of course this would only be adequate if the defense had some reason to believe that an interview of such character had taken place and if the witness recalled the interviewer's name. Pressed further as to cases of the nonavailability of the interviewer, government counsel made it clear that "I would certainly not want to carry the burden of saying that in some extraordinary situation where there was no other possible way of getting hold of it [the summary] that there might not be exceptions read into the statute—what I am talking about now is the normal, ordinary case."

to the surface of the decision; indeed, the Congress recognized its constitutional overtones in the debates on the statute.[2]

No express language of the statute forbids the production, after a witness has testified, of any statement outside the coverage of the definition in subsection (e), and certainly the legislative history is no adequate support for reading an absolute prohibition into it. It is true that until the Conference Report the bill contained a provision making it in terms exclusive; but this language was deleted in Conference. I should think this change would support an inference negating any absolute exclusivity. To be sure, the change was not explained in the hurried floor discussions which followed the agreement in Conference, in the hectic closing days of the session,[3] but the absence of an explanation for the change can argue in favor of its being taken at face value. Certainly this Court should not decide the contrary against the backdrop of a serious question of potential invasion of Sixth Amendment rights. This is not to ignore the obvious intent of Congress that the statute provide the primary tests of what the Government should produce; it is only to recognize that it is not inconsistent with achievement of the statute's aim to require the production of statements outside the scope of the statute where the fair administration of criminal justice so demands. And certainly the statute cannot be said to be exclusive where the Constitution demands production. Of course, the trial judge may fashion procedural safeguards as to those producible statements lying outside the statute's purview, perhaps by analogy to the statutory procedures for the excision of irrelevant matter.

---

[2] See H. R. Rep. No. 700, 85th Cong., 1st Sess., p. 4; S. Rep. No. 981, 85th Cong., 1st Sess., p. 3; 103 Cong. Rec. 15928, 15933, 16489.

[3] Copies of a statement analyzing the conference version were not even available to the Senate due to the press of time. See 103 Cong. Rec. 16488–16489.

It is sufficient to say in this case that the summary in controversy does not appear to fall within the category of statements, outside the definition in subsection (e), as to which the trial judge's discretion might be exercised.[4] Decision need turn on no broader ground. Cf. *Lee* v. *Madigan,* 358 U. S. 228, 230–231. What was stated in the agent's summary was already known in every important detail to the defense from the transcript of the interview of July 16 and the affidavit of August 23.

The summary in this case does not present the question whether the statute requires the production of a statement which records part of, but not the entire interview between the witness and the government agent. This is a problem which also should be left to the development of the interpretive case law, and in fact I do not read the Court's opinion as essaying a definitive answer. It is a problem I suppose which would be raised by a stenographic, electrical or mechanical transcript of only part of an interview. There is nothing in the legislative history of the statute to indicate that a stenographic transcript of a 10-minute segment of an hour's interview would not be producible under the statute. If such a transcript would be producible, how distinguish a substantially faithful reproduction, made by the interviewer from his notes or from memory, of any part of the interview? Since, as the Court's opinion concedes, statements made up from interviewer's notes[5] are not *per se* unproducible, one would

---

[4] Of course if the memorandum had been one falling within the statute, I need hardly add that the judge would have had no discretion to refuse to order its production to the defense, in the light of the statute's affirmative command.

[5] I might say in passing that the Court's emphasis on interviewer's notes as a basis of producible interview records seems wholly devoid of any real support in the text of the statute or in the legislative materials cited by the Court.

suppose that a summary, part of which gave a substantial verbatim account of part of the interview, would, as to that part, be producible under the statute. Certainly a statement can be most useful for impeachment even though it does not exhaust all that was said upon the occasion. We must not forget that when confronted with his prior statement upon cross-examination the witness always has the opportunity to offer an explanation. The statute is to be given a reasonable construction, and the courts must not lose sight of the fact that the statute regulates *production* of material for possible use in cross-examination, and does not regulate *admissibility* into evidence—as the Court properly observes. Here too, the constitutional question close to the surface of our holding in *Jencks* must be borne in mind.

I repeat that Congress made crystal clear its purpose only to check extravagant interpretations of *Jencks* in the lower courts while reaffirming the basic holding that a defendant on trial should be entitled to statements helpful in the cross-examination of government witnesses who testify against him. Although it is plain that some restrictions on production have been introduced, it would do violence to the understanding on which Congress, working at high speed under the pressures of the end of a session, passed the statute, if we were to sanction applications of it exalting and exaggerating its restrictions, in disregard of the congressional aim of reaffirming the basic *Jencks* principle of assuring the defendant a fair opportunity to make his defense. Examination of the papers so sedulously kept from defendant in this case and companion cases does not indicate any governmental interest, outside of the prosecution's interest in conviction, that is served by nondisclosure, and one may wonder whether this is not usually so. There inheres in an overrigid interpretation and application of the statute the hazard

of encouraging a practice of government agents' taking statements in a fashion calculated to insulate them from production. I am confident that the District Courts will bear all these factors in mind in devising practical solutions to the problems of production in the many areas which cannot fairly be said to be determined by the affirmance of the judgment in this case.

ROSENBERG *v.* UNITED STATES.

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

No. 451. Argued April 28, 1959.—Decided June 22, 1959.

Petitioner was convicted in a Federal District Court of transporting in interstate commerce, in violation of 18 U. S. C. § 2314, a check obtained by the perpetration of a fraud to which he had been a party. Upon his demand at the trial for production for inspection of Federal Bureau of Investigation files, the United States Attorney delivered numerous documents from the Government's files to the trial judge, who gave them to petitioner's counsel. However, the trial judge withheld a few documents, and petitioner claimed that failure to permit him to inspect them required reversal of his conviction under *Jencks* v. *United States*, 353 U. S. 657. *Held:* The conviction is sustained. Pp. 368–371.

1. Since its enactment, 18 U. S. C. § 3500—not the *Jencks* decision—governs the production of statements of government witnesses for a defendant's inspection at trial. *Palermo* v. *United States*, *ante*, p. 343. P. 369.

2. Two reports of F. B. I. investigators were properly withheld as not being "statements" of the kind required to be produced by 18 U. S. C. § 3500, since they were neither signed nor otherwise adopted by any witness at the trial nor were they reproductions of any statement made by any witness at the trial. P. 369.

3. A third document did comply with the requirement of the statute, since it was a typewritten copy of a statement given to the F. B. I. by petitioner's confessed associate in the crime, who testified against him, it was signed by the associate and it was pertinent to the trial of the case; but its production would have served no useful purpose, since petitioner's counsel had been given the original statement of which this was merely a copy. Pp. 369–370.

4. Among the documents withheld were five letters written by the victim to the F. B. I. and signed by her; but they failed to meet the requirement of 18 U. S. C. § 3500 (b) that only statements which relate to the subject matter as to which the witness has testified need be produced. P. 370.

5. A letter written by the victim to the United States Attorney, signed by her, and stating that she feared that her memory was poor as to the matters she testified about should have been produced; but failure to produce it was harmless error, since the same information was revealed by the victim to petitioner's counsel under cross-examination and upon questioning by the trial judge. Pp. 370–371.

257 F. 2d 760, affirmed.

Edward M. Dangel argued the cause for petitioner. With him on the brief was *Leo E. Sherry.*

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

A. L. Wirin and *Fred Okrand* filed a brief for Arthur L. Harris, Sr. et al., as *amici curiae,* in support of petitioner.

Mr. Justice Frankfurter delivered the opinion of the Court.

Petitioner was convicted in the District Court for the Eastern District of Pennsylvania, 146 F. Supp. 555, for transporting in interstate commerce a check obtained by the perpetration of a fraud to which he had been a party. 18 U. S. C. § 2314. That conviction was reversed by the Court of Appeals for the Third Circuit on the ground that *Jencks* v. *United States,* 353 U. S. 657, which had been decided after conviction but before appeal, required production for petitioner's inspection of certain statements in the prosecutor's possession. 245 F. 2d 870. The second trial thus ordered also resulted in a conviction, 157 F. Supp. 654, which was sustained by the Court of Appeals for the Third Circuit, 257 F. 2d 760. We granted certiorari, 358 U. S. 904, limited to the questions of the application of the *Jencks* rule to this prosecution, the effect of the statute enacted establishing legislative

rules concerning the production of documents, 18 U. S. C. (Supp. V) § 3500, and the propriety of the ruling of the Court of Appeals that if the trial judge had erred in failing to deliver to petitioner certain documents, the error was harmless and therefore not grounds for reversal.

In the second trial, upon a demand for production for inspection of Federal Bureau of Investigation files, the United States Attorney delivered to the trial judge, and the trial judge in turn gave to petitioner's counsel, numerous documents from the Government's files. Many of these would not have been required to be provided under either the *Jencks* decision or the statute enacted subsequent to it. Petitioner complains that the few documents withheld by the trial judge were required to be submitted for his inspection by our opinion in *Jencks* and that the failure to give him that opportunity requires a reversal. We have today held in *Palermo* v. *United States, ante,* p. 343, that since its enactment 18 U. S. C. (Supp. V) § 3500 and not the *Jencks* decision governs the production of statements of government witnesses for a defendant's inspection at trial.

In accordance with 18 U. S. C. (Supp. V) § 3500 (c), the material withheld was preserved in the record to permit review of the correctness of the trial judge's rulings. As did the Court of Appeals, we have reviewed the documents withheld by the trial judge. Two are reports by FBI investigators which in no sense complied with subsection (e) of the statute. They were neither signed nor otherwise adopted by any witness at the trial, nor were they reproductions as statutorily required of any statement made by any witness at the trial. A third document did comply with such requirement. It is a typewritten copy of a statement given by Rosenberg's confessed associate in the crime, Meierdiercks, to the FBI. It is signed by Meierdiercks and its contents were pertinent to the trial of the case. However, the original handwritten

statement, of which this was, as already stated, merely a copy, was itself given to petitioner's attorney. No relevant purpose could have been served by giving petitioner's counsel a typewritten copy of a document which he had already been given in its original form, no advantage to the petitioner was denied by withholding it.

The last group of documents in controversy is a series of letters written by the victim Florence Vossler to the FBI. They were signed by her and thus met the requirement of subsection (e). However, of the six letters withheld by the trial judge, five clearly fail to meet the statutory requirement that only that statement "which relates to the subject matter as to which the witness has testified" need be produced. 18 U. S. C. (Supp. V) § 3500 (b). These five were totally irrelevant to the proceedings. In the sixth of this group of letters, Florence Vossler wrote to the Assistant United States Attorney that her memory had dimmed in the three years that had passed since the fraud had been perpetrated and that to refresh her failing memory she would have to reread the original statement she had given before the first trial to the FBI.

A statement by a witness that she fears her memory as to the events at issue was poor certainly "relates to the subject matter as to which the witness has testified" and should have been given to defendant. This was recognized as error by the Court of Appeals. 257 F. 2d 760, 763. That court, however, found that the same information which was contained in the letter was revealed to defendant's counsel by statements made by Florence Vossler under cross-examination and upon questioning by the trial judge. A review of the record, portions of which are reproduced in an Appendix, precludes us from rejecting the judgment on which the Court of Appeals based its conclusion that the failure to require

production of this letter was empty of consequence. Since the same information that would have been afforded had the document been given to defendant was already in the possession of the defense by way of the witness' admissions while testifying, it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the letter.

An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled. However, when the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of justice to order a new trial. There is such a thing as harmless error and this clearly was such. The judgment of the Court of Appeals for the Third Circuit is therefore

Affirmed.

[For dissenting opinion of MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, see *post,* p. 373.]

APPENDIX TO OPINION OF THE COURT.

Mr. Singer. "Miss Vossler, it has been quite sometime since you have testified. Have you had an opportunity within the last six months or so to go over any previous testimony or statements which you might have given with reference to this matter? Have you spoken to anyone—"

Miss Vossler. "You mean testimony that I gave?"

Mr. Singer. "That is correct."

Miss Vossler. "The testimony that I gave in this court?"

The Court. "Yes, in June, 1956."

Miss Vossler. "Yes. No, I haven't seen anything."

The Court. "You haven't seen—"

Miss Vossler. "Any testimony."

The Court. "—the transcript of that testimony—"

Miss Vossler. "No, sir."

The Court. "—which was in books like this (indicating)?"

Miss Vossler. "No, no, Your Honor, nothing."

The Court. "Well, have you seen any statement which you gave to agents of the Federal Bureau of Investigation?"

Miss Vossler. "Yes, because I had a copy of the first statement that I gave on January 24. That is the only statement I had."

The Court. "Have you got that with you?"

Miss Vossler. "No, I haven't, now."

The Court. "When did you last see it?"

Miss Vossler. "Well, Mr. Bechtle asked that I leave it with him upstairs."

The Court. "When was that?"

Miss Vossler. "Monday when I arrived here."

The Court. "In other words, you looked it over Monday?"

Miss Vossler. "Well, I glanced at it Monday. I didn't read it line for line."

The Court. "Well, when did you last read it line for line?"

Miss Vossler. "Well, last week, because I had it at my home."

The Court. "Last week you read over the statement—"

Miss Vossler. "Yes."

The Court. "—of January 24, you say, 1955?"

Miss Vossler. "Yes. That is when the FBI agents came to my home."

The Court. "I see. Last week. You have that statement, don't you?"

Mr. Singer. "I have it here."

Miss Vossler. "That is the only statement that I have seen at all, at any time."

Record, pp. 330–332.

Further evidence of Florence Vossler's loss of clear recollection came to defendant's attorney during the course of the cross-examination. He asked the witness to identify a Mr. McComb.

Miss Vossler. "Well, let me see if I can remember. Mr. McComb came to my house one time—you see, it is always possible to find the names of people who buy leases or purchase leases—"

Mr. Singer. "May I interrupt you one moment, please. In all fairness to the witness, Your Honor, I feel that I should introduce this report and permit her to refresh her recollection."

The Court. "Yes, thank you. What number is it?"

Mr. Singer. "This is Court's Exhibit No. 10, which is a summary of various statements given by Miss Vossler to the FBI. And I ask Miss Vossler to read Page 2 so that she may properly answer the questions."

Record, pp. 345–346.

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

The Government's case against petitioner rested on the testimony of Charles Meierdiercks, a confessed accomplice in the swindle that concerns us here, and Florence Vossler, the victim. Meierdiercks testified, in considerable detail, that he and the petitioner obtained Miss Vossler's check by fraud and that petitioner transported that check in interstate commerce before cashing it. Miss Vossler's testimony corroborated that of Meierdiercks to a considerable extent, but did not implicate petitioner. Since a conviction would have been impossible unless the jury

believed Meierdiercks, it seems apparent that the Government put Miss Vossler on the stand in the hope that her detailed corroboration of Meierdiercks' story would lend credence in the eyes of the jury to the testimony of the confessed swindler. If the defense could have effectively impeached Miss Vossler, the Government would have had to rely on the essentially uncorroborated testimony of Meierdiercks for a conviction.

Defense counsel moved at the end of Miss Vossler's direct testimony for production of "pertinent material in the possession of the government concerning this particular witness." The trial judge, pursuant to this motion, ordered the delivery of some material to the defense but did not include a letter to the Assistant United States Attorney—handwritten and signed by Miss Vossler shortly before the trial—which stated in part: "As a matter of fact, as time goes on, I am more hazy about the whole transaction and might not fare too well under a cross-examination, though I have here my statement with which to refresh my memory. It will be 3 years in January 1958 since the above swindle took place; therefore, I could not be accurate as to day to day occurrences after such a period, though, as stated, possibly a review of my statement would help." The Court of Appeals and this Court both agree that this letter was a statement relevant to the subject matter as to which the witness testified on direct examination, and thus should have been given to the defense under the command of the *Jencks* statute, 18 U. S. C. (Supp. V) § 3500. The Court holds, however, that: "There is such a thing as harmless error and this clearly was such." I dissent because it plainly appears that the harmless error doctrine should not be invoked in the circumstances of this case.

The principle underlying our decision in *Jencks* v. *United States,* 353 U. S. 657, was that it is impossible

for a judge to be fully aware of all the possibilities for impeachment inhering in a prior statement of a government witness, "Because only the defense is adequately equipped to determine [its] . . . effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense . . . ." 353 U. S., at 668–669.

The *Jencks* statute was clearly designed to effectuate this principle. The statute, while delimiting the statements which are to be turned over to the defense, obviously comprehends that statements which are producible under it must be given to the defense regardless of a judge's opinion as to how useful they might be on cross-examination, for only the defense can fully appreciate their possible utility for impeachment. This is the rationale of the *Jencks* case, and this is the rationale of the statute. As the Senate reported: "the proposed legislation, as here presented, reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at the trial . . . ." S. Rep. No. 981, 85th Cong., 1st Sess., p. 3; and see H. R. Rep. No. 700, 85th Cong., 1st Sess., pp. 3, 4. Although we need not go so far as those courts which have suggested that the harmless error doctrine can never apply as to statements producible under the statute, see *Bergman* v. *United States,* 253 F. 2d 933; *United States* v. *Prince,* 264 F. 2d 850, fidelity to the principle underlying *Jencks* and the *Jencks* statute requires, I think, that when the defense has been denied a statement producible under the statute, an appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial was harmful error would

509615 O–59–27

be clearly erroneous. In that determination, appellate courts should be hesitant to take it upon themselves to decide that the defense could not have effectively utilized a producible statement. This must necessarily be the case if the appellate court is to give effect to the underlying principle of *Jencks,* affirmed by the statute, which, I repeat, is that "only the defense is adequately equipped to determine [its] . . . effective use for purpose of discrediting the Government's witness . . . ." Indeed, another consideration which should move the appellate court to be especially hesitant to substitute its judgment as to trial strategy for that of defense counsel is that, under the procedure established by the statute, the defense does not see the statement and has no opportunity to present arguments showing prejudice from its withholding.

In short, only a very strict standard is appropriate for applying the harmless error doctrine in these cases. Under such a standard, I cannot conclude that defense counsel could not have put Miss Vossler's letter to effective use in impeaching her. Although she stated on cross-examination that she had refreshed her memory before testifying by reference to a statement she had made previously, this oral testimony was obviously not as useful for impeachment purposes as her written admission shortly before trial that her memory of the events in question was failing. Defense counsel, if armed with the letter, might well have probed more deeply than he did in testing how her memory of the events to which she testified was refreshed. The trial strategy of defense counsel, familiar with his case and aware of the various possible lines of defense, might have been entirely different had he been in possession of the letter. At least I cannot bring myself to assume that this would not have been the case.

This is not a case in which the statement erroneously withheld from the defense merely duplicated information

already in the defense's possession;* it is not a case in which the witness' testimony was unimportant to the proofs necessary for conviction; and it is not a case in which the witness' statement was wholly void of possible use for impeachment. In this case, the defense was denied a letter written by a key government witness shortly before trial making statements which raised serious questions as to her memory of the events about which she testified in considerable detail at the trial. In such a circumstance, I think it was error for the Court of Appeals to second-guess defense counsel as to the possible use of the letter on cross-examination. If we are to be faithful to the standards we have set for ourselves in the administration of criminal justice in the federal courts we must order a new trial in a case such as this where the possible utility to the defense of the erroneously withheld statement cannot be denied. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, *or if one is left in grave doubt,* the conviction cannot stand." *Kotteakos* v. *United States,* 328 U. S. 750, 765. (Emphasis supplied.)

I would reverse the judgment of the Court of Appeals.

---

*The defense was not given a typed statement signed by Meierdiercks which was discoverable under the statute, but this was harmless error since the defense was given a handwritten statement from which the typed statement had been copied.

ATLANTIC REFINING CO. ET AL. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL.

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

No. 518. Argued May 20–21, 1959.—Decided June 22, 1959.*

Four independent producers applied to the Federal Power Commission under § 7 (e) of the Natural Gas Act for a certificate of convenience and necessity authorizing the sale to an interstate pipeline company of an enormous quantity of natural gas from wells in the Gulf of Mexico off the shore of Louisiana at a much higher rate than the pipeline company was then paying for gas. The pipeline company intervened, as did some of its distributor customers and other interested parties, the latter urging a lower rate. After twice refusing to issue the certificate on the ground that the record was insufficient to support a finding that public convenience and necessity required the sale at the proposed rate, the Commission was told that the producers would not dedicate the gas to the interstate market unless a permanent certificate was granted unconditionally and at the rate proposed. Upon rehearing, but without additional evidence, the Commission then issued such a certificate. *Held:*

1. The facts that the producers limited their application to a firm price agreed upon between them and the pipeline company, refused to accept certification at a lower price, and threatened to cancel the contract and withhold the gas from interstate commerce did not deprive the Commission of jurisdiction. Pp. 387–388.

2. The order of the Commission granting the certificates was in error, and it must be vacated and the case remanded to the Commission for further proceedings. Pp. 382, 388–394.

(a) In view of the framework in which the Commission is authorized and directed to act and the inordinate delay presently existing in proceedings under § 5 to review rates initially certificated, the initial certificating of a proposal under § 7 (e) as being

*Together with No. 536, *Tennessee Gas Transmission Co.* v. *Public Service Commission of New York et al.*, also on certiorari to the same Court.

required by public convenience and necessity is crucial; and a permanent certificate should not be issued unless the proposed rate has been shown to be in the public interest. Pp. 388–391.

(b) When the price proposed in an application under § 7 (e) is not in keeping with the public interest because it is out of line or because its approval might trigger general price rises or an increase in the applicant's existing rates, the Commission, in the exercise of its discretion, may attach such conditions as it may deem necessary. P. 391.

(c) In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather it so conditions the certificates that the consuming public may be protected while the justness and reasonableness of the prices fixed by the parties are being determined under other sections of the Act. Pp. 391–392.

(d) If unconditional certificates are issued where the rate is not clearly shown to be required by the public convenience and necessity, relief is limited to § 5 proceedings, and full protection of the public interest is not afforded. P. 392.

(e) The record contains insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of permanent certificates. Pp. 392–394.

257 F. 2d 717, affirmed on different grounds.

David T. Searls argued the cause for petitioners in No. 518. With him on a brief for petitioners were *Roy W. Johns, Charles B. Ellard* and *Bernard A. Foster, Jr.* for Atlantic Refining Co., *Gene M. Woodfin* for Continental Oil Co., *Gentry Lee* and *Bernard A. Foster, Jr.* for Cities Service Production Co., *Robert O. Koch* and *Gene M. Woodfin* for Tidewater Oil Co.

Harry S. Littman argued the cause for petitioner in No. 536. With him on the brief were *William C. Braden, Jr.* and *Jack Werner.*

Kent H. Brown argued the causes for the Public Service Commission of the State of New York, respondent. With him on the brief was *George H. Kenny.*

Edward S. Kirby argued the cause for the Public Service Electric & Gas Co., respondent. With him on a joint brief for that Company and the Long Island Lighting Co., respondents, were *David K. Kadane* and *Bertram D. Moll.*

Willard W. Gatchell, Howard E. Wahrenbrock and *William W. Ross* filed a brief for the Federal Power Commission as *amicus curiae.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This proceeding tests the jurisdiction, as well as the discretion, of the Federal Power Commission in the certificating of the sale of natural gas under § 7 (e) of the Natural Gas Act of 1938, 52 Stat. 821, 56 Stat. 84, as amended, 15 U. S. C. § 717 *et seq.*[1] The Commission has issued a certificate of public convenience and necessity to petitioners, producers of natural gas,[2] to sell to petitioner Tennessee Gas Transmission Co. 1.67 trillion cubic feet of natural gas at an initial price of 22.4 cents per MCF,

[1] Section 7 (e), 15 U. S. C. § 717f (e), provides:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[2] These are the Atlantic Refining Company, Cities Service Production Company, Continental Oil Company, and Tidewater Oil Company, all petitioners in No. 518 and sometimes known as CATCO.

including a tax of 1 cent per MCF. *Continental Oil Co.*, 17 F. P. C. 880. In the same proceeding and on the same evidence it had twice refused to issue such an unconditional certificate because of insufficient evidence or testimony "on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed." On the second occasion it proposed to petitioners that the certificates be conditioned upon an initial price of 18 cents per MCF (including the 1-cent tax), to be increased to 22.4 cents per MCF (including the 1-cent tax) after the first 24-hour delivery period, the latter rate to be subjected to the "just and reasonable" provisions of § 4 of the Act, 15 U. S. C. § 717c. The petitioners refused this proposal, and Tennessee advised the Commission that unless the certificates were issued without such conditions, CATCO would not dedicate its gas to the interstate market. Upon rehearing, after argument but without additional evidence, the Commission issued the certificates declaring "important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas" for interstate markets. 17 F. P. C., at 881.

The respondents, other than the Public Service Commission of the State of New York, are public utilities in New York and New Jersey. They buy gas from petitioner Tennessee for distribution in those States. They and the New York Commission oppose the issuance of the certificates on the ground that their issuance will increase the price of gas to consumers in those States, of whom there are over a million, using Tennessee's gas. Upon the issuance of the certificates the respondents filed petitions for review with the Court of Appeals. It held that "Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as

here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment." *Public Service Comm'n of N. Y.* v. *Federal Power Comm'n,* 257 F. 2d 717, 723. Concluding that the Commission had no jurisdiction to conduct such "a *limited* inquiry," *ibid.,* it vacated the order granting the certificates and remanded the case to the Commission. The importance in the administration of the Act of the questions thus posed required the granting of certiorari, 358 U. S. 926 (1959). We have concluded that the Court of Appeals was in error in deciding that the Commission had no jurisdiction. However, for reasons hereafter developed we hold that the order of the Commission in granting the certificates was in error and we, therefore, affirm the judgment of the Court of Appeals.

The natural gas involved here is of a Miocene sand located below seabed out in the Gulf of Mexico some 15 to 25 miles offshore from Cameron and Vermilion Parishes, Louisiana. The petitioners in No. 518 are each independent natural gas producers. They jointly own oil and gas leases (25% to each company) which they obtained from Louisiana covering large acreages of the Continental Shelf off the Louisiana coast. Jurisdiction over the Continental Shelf is claimed by the United States and the question is now in litigation. The Congress has continued existing leases in effect pending the outcome of the controversy over the title. 67 Stat. 462, 43 U. S. C. (Supp. I, 1954) §§ 1331–1343. The four companies' joint venture has resulted in the discovery of huge fields of natural gas and they have dedicated some 1.75 trillion cubic feet of gas from 95,000 acres of their leases to the petitioner Tennessee Gas Transmission Company, a natural gas company subject to the jurisdiction of the

Commission.[3] The latter is the petitioner in No. 536 which has been consolidated with No. 518.

The four contracts dedicating the gas to Tennessee run from each of the petitioner producers. The contracts call for an initial price of 22.4 cents per MCF for the gas, including 1-cent tax, with escalator clauses calling for periodic increases in specific amounts.[4] In addition, they provide for Tennessee to receive the gas at platforms on the well sites out some 15 to 25 miles in the Gulf. This requires it to build approximately 107 miles of pipeline from its nearest existing pipeline point to the offshore platforms at wellhead. The estimated cost was $16,315,412. It further appears that the necessity for the certificates was based on an application of Tennessee, Docket G–11107, in which Tennessee requested certification to enlarge and extend its facilities. This program included the building of a pipeline from southeast Louisiana to Portland, Tennessee, which would carry a large proportion of the gas from these leases. Its cost was estimated at $85,000,000. In addition the contracts provide that Tennessee give free carriage from the wells to the shore of all condensate or distillate in the gas for the account of producers who have the option to separate it from the gas at shore stations. We need not discuss the contract provisions more minutely, though respondents do claim that

---

[3] Tennessee operates a pipeline system extending from gas fields in Texas and Louisiana through Arkansas, Mississippi, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York and into Massachusetts, New Hampshire, Rhode Island and Connecticut. It serves some 80 distributing companies which in turn serve millions of consumers in the various States which its pipeline traverses.

[4] These increases were later limited to 2 cents per MCF. The escalator clauses apparently were inserted in lieu of "favored nation" clauses, but by letter, not a part of the contracts, "favored nation" clauses were to be substituted at a later date on certain contingencies.

other requirements place a greater burden on Tennessee and in practical effect increase the stated price of the gas to it.

The Presiding Examiner on March 29, 1957, found that the sales were required by the public convenience and necessity. *Continental Oil Co.*, 17 F. P. C. 563. While he found that the proposed price was higher than any price Tennessee was then paying, he pointed to other prices currently paid for onshore sales "for smaller reserves and smaller future potentials." *Id.*, at 571. The average weighted cost of gas to Tennessee he found would be increased, if the contract price was certificated, by .97 cent per MCF.[5] However, he said that no showing had been made that this would lead to an increase in Tennessee's rates to jurisdictional customers or result in an increase in the price governing its other purchases. He refused to condition the certificates on the acceptance of a lower price by the parties on the ground that no "showing of imprudence or of abuse of discretion by management," *ibid.*, had been made that indicated the proposed price could not be accepted temporarily as consistent with the public convenience and necessity, pending review in a § 5 (a) proceeding. However, he did condi-

---

[5] The exact finding is as follows:

"Including the gas which Tennessee proposes to purchase under these contracts, some 240,000 M. c. f. per day (14.73 p. s. i. a.), it is estimated that the weighted average cost of all gas to Tennessee in 1958 will be some 13.70 cents per M. c. f., as compared with 12.73 cents if the gas here proposed to be purchased is excluded." 17 F. P. C. 563, 570.

Thus is the .97-cent figure derived. It is, however, a misleading figure, for the estimate for 1958 includes the 22.4-cent gas for only two months of 1958, November and December. There is no indication in the record as to what the cost increase would be if the weighted average were calculated by including the 22.4-cent gas for the full year.

tion his recommendation on the approval of Tennessee's application in Docket G–11107 above mentioned.

The Commission, as we have indicated, took three strikes at the recommendations of the Examiner. On April 22 it reversed his finding on public convenience and necessity because the evidence was insufficient as to price. It said:

> "The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest." *Id.*, at 575.

The Commission granted petitioners temporary certificates and remanded the proceeding to the Examiner "to determine at what rates the public convenience and necessity requires these sales" of natural gas to Tennessee under a permanent certificate. *Id.*, at 576. The producers immediately moved for modification, asserting that they could not present sufficient evidence "within any reasonable period in the future" to meet the necessities of the remand and, further, could not "afford to commence construction until at least the initial rate [question] is resolved." The Commission on May 20, however, reiterated its belief that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level." 17 F. P. C. 732, 733–734. In an

effort to ameliorate the situation represented by the producers, the Commission did grant the certificates but conditioned them upon the producers' acceptance of an initial price of 17 cents per MCF (plus the 1-cent tax), which was the highest price theretofore paid by Tennessee in the Southwest. It also agreed that one day after the commencement of deliveries of gas the 17-cent price would be escalated to 21.4 cents (plus 1 cent for taxes), the increase to be collected under bond, subject to proof and refund under the provisions of § 4 of the Act. This time Tennessee sought rehearing advising the Commission that the producers would not accept the 17-cent initial price order of May 20 and that "the contracts will be terminated" with the consequent "loss of natural gas supplies" required for Tennessee's customers. The Commission, after oral argument, did not withdraw its previous findings in the matter but predicated its third order on "the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. . . . In view of these circumstances and the fact that the record does not show that the 21.4-cent [plus 1 cent for taxes] rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding . . . should not assume the character of a rate proceeding under Section 5 (a)." 17 F. P. C. 880, 881. Asserting that it was of the opinion that it would be able "to adequately protect the public interest with respect to the matter of price," *ibid.*, it ordered the certificates issued and directed that since the price "is higher than Tennessee Gas is paying under any other contract, it should be subject to prompt investigation under Section 5 (a) as to its reasonableness." *Id.*, at 882.

We note that the Commission did not seek certiorari here but has filed a brief *amicus curiae*.[6] It does not urge

[6] The brief is not signed by the Solicitor General but by both the General Counsel and the Solicitor of the Federal Power Commission.

reversal of the judgment but attacks the ground upon which the Court of Appeals bottomed its remand, namely, lack of Commission jurisdiction to consider the limited proposal of petitioners. The Commission's brief suggests that the Court not reach the issue tendered by petitioners, *i. e.*, must the Commission, in a § 7 proceeding, decide whether the proposed initial rate is just and reasonable? Instead, the Commission says, if the judgment must be affirmed it would be better to base the affirmance on the ground that its order "was not supported by sufficient evidence, and hence constituted an abuse of discretion in the circumstances of the particular case . . . ." Brief for the Federal Power Commission, p. 31. Petitioners oppose such a disposition, contending the evidence was quite substantial.

I. Jurisdiction of the Commission.

The Court of Appeals thought that the Commission had no jurisdiction to consider petitioners' proposal because it was limited to a firm price agreed upon by the parties applicant. Their refusal to accept certification at a lower price, even to the extent of canceling their contracts and withholding the gas from interstate commerce, the court held, resulted in the Commission's losing jurisdiction. We do not believe that this follows. No sales, intrastate or interstate, of gas had ever been made from the leases involved here. The contracts under which the petitioners proposed to sell the gas in the interstate market were all conditioned on the issuance of certificates of public convenience and necessity. A failure by either party to secure such certificates rendered the contracts subject to termination. Certainly the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases. Nor is there doubt that the producers were at liberty to refuse conditional certificates proposed by

the Commission's second order. While the refusal might have been couched in more diplomatic language, it had no effect on the Commission's power to act on the rehearing requested. Even though the Commission did march up the hill only to march down again upon reaching the summit we cannot say that this about-face deprived it of jurisdiction. We find nothing illegal in the petitioners' rejection of the alternative price proposed by the Commission and their standing firm on their own.

II. The Validity of the Order.

The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944). As the original § 7 (c) provided, it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." 52 Stat. 825.[7] The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. The heart of the Act is found in those provisions requiring initially that any "proposed service, sale, operation, construction, extension, or acquisition . . . will be required by the present or future public convenience and necessity," § 7 (e), 15 U. S. C. § 717f (e), and that all rates and charges "made, demanded, or received" shall be "just and reasonable," § 4, 15 U. S. C. § 717c. The Act prohibits such movements unless and until the Commission

[7] The 1942 amendments to § 7, 56 Stat. 83, were not intended to change this declaration of purpose. See Hearings, House Interstate and Foreign Commerce Committee, on H. R. 5249, 77th Cong., 1st Sess. 18–19; H. R. Rep. No. 1290, 77th Cong., 1st Sess.; S. Rep. No. 948, 77th Cong., 2d Sess.

issues a certificate of public convenience and necessity therefor, § 7 (c), 15 U. S. C. § 717f (c). Section 7 (e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself. He may, unless otherwise bound by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956), file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the 5-month suspension provision of § 4 and the posting of a bond, where required. This not only gives the natural gas company opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases. The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in § 5 of the Act, 15 U. S. C. § 717d, which authorizes the Commission *sua sponte,* or otherwise, to institute an investigation into existing rates and charges and to fix them at a just and reasonable level. Under this section, however, the rate found by the Commission to be just and reasonable becomes effective prospectively only. Gas purchasers, therefore, have no protection from excessive charges collected during the pendency of a § 5 proceeding.

In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under § 7 (e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable. Although

Phillips Petroleum Co. v. *Wisconsin,* 347 U. S. 672, was decided in 1954, cases instituted under § 5 are still in the investigative stage. This long delay, without the protection of refund, as is possible in a § 4 proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers. This the Congress did not intend. Moreover, the fact that the Commission was not given the power to suspend initial rates under § 7 makes it the more important, as the Commission itself says, that "this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest." 17 F. P. C. 563, 575.

This is especially true where, as here, the initial price will set a pattern in an area where enormous reserves of gas appear to be present. We note that in petitioners' proof a map of the Continental Shelf area off of the coast of Louisiana shows that the leases here involved cover but 17 out of a blocked-out area covering some 900 blocks of 5,000 acres each. The potential of this vast acreage, in light of discoveries already made as shown by the record, is stupendous. The Commission has found that the transaction here covers the largest reserve ever committed to interstate commerce in a single sale. Indications are that it is but a puff in comparison to the enormous potentials present under the seabed of the Gulf. The price certificated will in effect become the floor for future contracts in the area. This has been proven by conditions in southern Louisiana where prices have now vaulted from 17 cents to over 23 cents per MCF. New price plateaus will thus be created as new contracts are made and unless controlled will result in "exploitation" at the expense of the consumer, who eventually pays for the increases in his monthly bill.

It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5. Nor do we hold that a

"just and reasonable" rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7. Their proposals must be supported by evidence showing their necessity to "the present or future public convenience and necessity" before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7 (e) requires the Commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued.

There is, of course, available in such a situation, a method by which the applicant and the Commission can arrive at a rate that is in keeping with the public convenience and necessity. The Congress, in § 7 (e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of "favored nation" clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary.

This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the

509615 O–59–28

Act, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. Thus the purpose of the Congress "to create a comprehensive and effective regulatory scheme," *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana,* 332 U. S. 507, 520 (1947), is given full recognition. And § 7 is given only that scope necessary for "a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission . . . ." *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* at 341. On the other hand, if unconditional certificates are issued where the rate is not clearly shown to be required by the public convenience and necessity, relief is limited to § 5 proceedings, and, as we have indicated, full protection of the public interest is not afforded.

Our examination of the record here indicates that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates. The witnesses tendered developed little more information than was included in the printed contracts. As the proposed contract price was higher than any paid by Tennessee, including offshore

production in the West Delta area of Louisiana, it is surprising that evidence, if available, was not introduced as to the relative costs of production in the two submerged areas. Moreover the record indicates that the proposed price was some 70% higher than the weighted average cost of gas to Tennessee; still no effort was made to give the "reason why." More damaging, was the evidence that this price was greatly in excess of that which Tennessee pays from any lease in southern Louisiana. Likewise the $16,000,000 pipeline to the producers' wells was unsupported by evidence of practice or custom. Respondents contend—and it stands undenied—that this alone would add 2 cents per MCF to the cost of the gas. Again the free movement of distillates retained by the producers was "shrugged off" as being *de minimis,* without any supporting data whatever. Nor was the evidence as to whether the certification of this price would "trigger" increases in leases with "favored nation" clauses convincing, and the claim that it would not lead to an increase in rates by Tennessee was not only unsupported but has already proven unfounded.[8]

Nor do we find any support whatever in the record for the conclusory finding on which the order was based that "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas." 17 F. P. C. 880, 881. Admittedly any such need was wrapped up in the Commission's action in Docket G–11107, where Tennessee was asking for permission to enlarge its facilities. However, the two dockets were not consolidated and the Presiding Examiner conditioned his approval here on the granting of the application in Docket G–11107, no part of which record is here. Neither is

[8] Tennessee has subsequently filed an application with the F. P. C. requesting higher rates designed to produce some $19,000,000 additional annual revenue. *Tennessee Gas Transmission Co.,* Docket G–17166.

there evidence supporting the finding that the producers "would seek to dispose of their gas elsewhere than to Tennessee Gas and the interstate market," *ibid.* While the Commission says that statements were made in argument, apparently by counsel, that this was the case, we find no such testimony. Since some 90% of all commercial gas moves into the interstate market, the sale of such vast quantities as available here would hardly be profitable except interstate.

These considerations require an affirmance of the judgment with instructions that the applications be remanded to the Commission for further proceedings.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins, concurring.

I agree with the judgment of the Court on the ground that the findings upon which the Commission based its conclusion that the public convenience and necessity required the issuance to petitioners of unconditional final certificates find no support in the record. There is no evidence supporting what appear to be the crucial findings that (1) "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas," particularly insofar as this finding implies that this need is immediate and cannot be satisfied from Tennessee's existing reserves, and that (2) there was serious danger that producer petitioners' gas would be permanently lost to the interstate market unless an unconditional certificate were granted on their terms. This makes it unnecessary to consider at this stage any of the other questions sought to be presented by the parties.

PITTSBURGH PLATE GLASS CO. *v.* UNITED STATES.

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

No. 489. Argued April 28, 1959.—Decided June 22, 1959.*

Petitioners were convicted in a Federal District Court of conspiring to fix prices of plain plate glass mirrors in violation of § 1 of the Sherman Act. After a key government witness had testified at their trial and had admitted that he had testified on the same general subject matter before the grand jury which indicted petitioners, their counsel moved for production of the grand jury minutes, not attempting to show any particularized need for them but claiming an absolute right to their production under *Jencks* v. *United States*, 353 U. S. 657. This motion was denied by the trial judge. *Held:* Under Rule 6 (e) of the Federal Rules of Criminal Procedure the question whether the grand jury minutes should be produced was committed to the sound discretion of the trial judge; no abuse of his discretion has been shown; and petitioners' conviction is sustained. Pp. 396–401.

(a) Neither *Jencks* v. *United States*, *supra*, nor 18 U. S. C. § 3500, which superseded its doctrine, has any bearing on this case, since neither of them relates to grand jury minutes. P. 398.

(b) Under Rule 6 (e) of the Federal Rules of Criminal Procedure, the question whether grand jury minutes should be disclosed is committed to the sound discretion of the trial judge. Pp. 398–399.

(c) No particularized need for production of the grand jury's minutes having been shown, the trial judge did not err in denying their production. *United States* v. *Procter & Gamble*, 356 U. S. 677. Pp. 399–401.

260 F. 2d 397, affirmed.

Leland Hazard argued the cause for petitioner in No. 489. With him on the brief were *Cyrus V. Anderson* and *James B. Henry, Jr.*

---

*Together with No. 491, *Galax Mirror Co., Inc., et al.* v. *United States*, also on certiorari to the same Court, argued April 29, 1959.

H. Graham Morison argued the cause for petitioners in No. 491. With him on the brief were *Samuel K. Abrams* and *Robert M. Lichtman.*

Philip Elman argued the causes for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Richard A. Solomon, Samuel Karp* and *Ernest L. Folk III.*

Mr. Justice Clark delivered the opinion of the Court.

Petitioners stand convicted on a single-count indictment charging a conspiracy under § 1 of the Sherman Act. They contend that the trial judge erred in refusing to permit them to inspect the grand jury minutes covering the testimony before that body of a key government witness at the trial. The Court of Appeals affirmed the convictions, 260 F. 2d 397. With reference to the present claim, it held that Rule 6 (e) of the Federal Rules of Criminal Procedure [1] committed the inspection or not of grand jury minutes to the sound discretion of the trial judge,

[1] "Rule 6. The Grand Jury.

. . . . . .

"(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

and that in this instance, no abuse of that discretion had been shown. We granted certiorari limited to the question posed by this ruling. 358 U. S. 917, 918. We conclude that in the circumstances of this case the trial court did not err in refusing to make Jonas' grand jury testimony available to petitioners for use in cross-examination.

The indictment returned in the case named as defendants seven corporations, all manufacturers of mirrors, and three of their officers. However, only three of the corporations are petitioners here, along with one individual, J. A. Messer, Sr. The indictment charged a conspiracy to fix the price of plain plate glass mirrors sold in interstate commerce. It is not necessary for our purposes to detail the facts of this long trial, the record of which covers 860 pages. It is sufficient to say that the Government proved its case through 10 witnesses, the last of whom was Jonas. He was President of a large North Carolina mirror manufacturing company and had a reputation for independence in the industry. Although neither he nor his corporation was indicted, the latter was made a co-conspirator. The evidence indicates that the conspiracy was consummated at two meetings held on successive days during the week of the annual meeting of the Mirror Manufacturers Association in 1954 at Asheville, North Carolina. Jonas, not being a member of the Association, did not attend the convention. Talk at the convention regarding prices culminated in telephone calls by several representatives of mirror manufacturers to Jonas concerning his attitude on raising prices. On the day following these calls Jonas and three of the participants in the conspiracy met at an inn away from the convention headquarters and discussed "prices." Within three days thereafter each of the manufacturers announced an identical price increase, which was approximately 10 percent. Jonas' testimony, of course, was confined to the telephone calls and the meeting at the inn

where the understanding was finalized. The Government admits that he was an "important" witness. However, proof of the conspiracy was overwhelming aside from Jonas' testimony. While he was the only witness who characterized the outcome of the meetings as an "agreement" on prices, no witness negatived this conclusion and the identical price lists that followed the meeting at the inn were little less than proof positive.

After the conclusion of Jonas' testimony, defense counsel interrogated him as to the number of times he appeared and the subject of his testimony before the grand jury. Upon ascertaining that Jonas had testified three times on "the same general subject matter," counsel moved for the delivery of the grand jury minutes. He stated that the petitioners had "a right . . . to inspect the Grand Jury record of the testimony of this witness after he has completed his direct examination" relating to "the same general subject matter" as his trial testimony.[2] As authority for "the automatic delivery of Grand Jury transcripts" under such circumstances counsel cited *Jencks* v. *United States,* 353 U. S. 657 (1957). As previously indicated, the motion was denied.

It appears to us clear that *Jencks* v. *United States, supra,* is in nowise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes. Likewise, it is equally clear that Congress intended to exclude those minutes from the operation of the so-called Jencks Act, 71 Stat. 595, 18 U. S. C. (Supp. V, 1958) § 3500.[3]

Petitioners concede, as they must, that any disclosure of grand jury minutes is covered by Fed. Rules Crim. Proc. 6 (e) promulgated by this Court in 1946 after the

[2] The fact that the trial testimony and that before the grand jury included the same "subjects" or related to "the same general subject matter" is not contested.

[3] See S. Rep. No. 981, 85th Cong., 1st Sess.; 103 Cong. Rec. 15933.

approval of Congress. In fact, the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge.[4] Our cases announce the same principle,[5] and Rule 6 (e) is but declaratory of it.[6] As recently as last Term we characterized cases where grand jury minutes are used "to impeach a witness, to refresh his recollection, to test his credibility and the like" as instances of "particularized need where the secrecy of the proceedings is lifted discretely and limitedly." *United States* v. *Procter & Gamble,* 356 U. S. 677, 683 (1958).

Petitioners argue, however, that the trial judge's discretion under Rule 6 (e) must be exercised in accordance with the rationale of *Jencks;* namely, upon a showing on cross-examination that a trial witness testified before the grand jury—and nothing more—the defense has a "right" to the delivery to it of the witness' grand jury testimony.

This conclusion, however, runs counter to "a long-established policy" of secrecy, *United States* v. *Procter & Gamble, supra,* at 681, older than our Nation itself. The reasons therefor are manifold, *id.,* at 682, and are compelling when viewed in the light of the history and *modus operandi* of the grand jury. Its establishment in the Constitution "as the sole method for preferring charges in serious criminal cases" indeed "shows the high place it [holds] as an instrument of justice." *Costello* v. *United States,* 350 U. S. 359, 362 (1956). Ever since this action

---

[4] *E. g., United States* v. *Spangelet,* 258 F. 2d 338; *United States* v. *Angelet,* 255 F. 2d 383; *United States* v. *Rose,* 215 F. 2d 617, 629; *Schmidt* v. *United States,* 115 F. 2d 394; *United States* v. *American Medical Assn.,* 26 F. Supp. 429.

[5] *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940). And see *United States* v. *Procter & Gamble Co.,* 356 U. S. 677 (1958); *United States* v. *Johnson,* 319 U. S. 503, 513 (1943).

[6] See Notes of the Advisory Committee on Rules, following Rule 6, Fed. Rules Crim. Proc.

by the Fathers, the American grand jury, like that of England, "has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." *Ibid.* Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. *Id.*, at 362, 363. To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness. And this "go slow" sign would continue as realistically at the time of trial as theretofore.

It does not follow, however, that grand jury minutes should never be made available to the defense. This Court has long held that there are occasions, see *United States* v. *Procter & Gamble, supra,* at 683, when the trial judge may in the exercise of his discretion order the minutes of a grand jury witness produced for use on his cross-examination at trial. Certainly "disclosure is wholly proper where the ends of justice require it." *United States* v. *Socony-Vacuum Oil Co., supra,* at 234.

The burden, however, is on the defense to show that "a particularized need" exists for the minutes which outweighs the policy of secrecy. We have no such showing here. As we read the record the petitioners failed to show any need whatever for the testimony of the witness Jonas. They contended only that they had a "right" to the transcript because it dealt with subject matter generally covered at the trial. Petitioners indicate that the trial judge required a showing of contradic-

tion between Jonas' trial and grand jury testimony. Such a preliminary showing would not, of course, be necessary. While in a colloquy with counsel the judge did refer to such a requirement, we read his denial as being based on the breadth of petitioners' claim. Petitioners also claim error because the trial judge failed to examine the transcript himself for any inconsistencies. But we need not consider that problem because petitioners made no such request of the trial judge. The Court of Appeals apparently was of the view that even if the trial judge had been requested to examine the transcript he would not have been absolutely required to do so. It is contended here that the Court of Appeals for the Second Circuit has reached a contrary conclusion. *United States* v. *Spangelet,* 258 F. 2d 338. Be that as it may, resolution of that question must await a case where the issue is presented by the record. The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted a supposed absolute right, a right which we hold they did not have. The judgment is therefore

Affirmed.

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

In the words of the Court of Appeals, Jonas was the Government's "principal prosecuting witness." [1] He was President of Lenoir Mirror Company, which company was

[1] Jonas was the only witness to testify that the defendants had actually agreed to a uniform price increase. Furthermore, his testimony was necessary to refute other testimony that the President of petitioner Galax Mirror Co., Inc., had stated that he would follow his pricing policy regardless of what the other manufacturers did. Jonas' testimony was also instrumental in connecting petitioner Pittsburgh Plate Glass Co. to the price-fixing agreement.

a participant in the alleged price-fixing conspiracy, but was not indicted. After Jonas testified on direct examination defense counsel asked for the production of his relevant grand jury testimony. The trial judge immediately made clear his intention not to grant the motion: "Unless you can show some sound basis that contradicts between what happened in the Grand Jury room and his testimony before the Grand Jury and his testimony in this trial, I am not going to require the production of the Grand Jury records. It would be easy for any attorney to get access to the records of the Grand Jury by just such a motion as you are making here." Defense counsel protested, "we are not attempting that. We want just a transcript of his testimony before the Grand Jury *regarding the subjects to which he has testified on direct examination.*" (Emphasis supplied.) This request thus encompassed all of Jonas' grand jury testimony only if all of that testimony covered the subject matter of Jonas' trial testimony. The court replied, "You have stated what you want to ask him and I am denying your right to do it." Plainly defense counsel were not asking to see the minutes of the entire grand jury proceedings, nor even of all of Jonas' testimony before the grand jury unless all of it was on the same subject matter as his trial testimony. Their motion was carefully limited to a request for so much of Jonas' grand jury testimony as "covered the substance of his testimony on direct examination." This request that secrecy be "lifted discretely and limitedly," *United States* v. *Procter & Gamble,* 356 U. S. 677, 683, necessarily implied a request that the trial judge inspect the grand jury minutes and turn over to the defense only those parts dealing with Jonas' testimony on the same subject matter as his trial testimony. In this posture, then, the question for our decision is the narrow one whether the trial judge erred in denying the defense request for inspection of the grand jury testimony of a

key government witness which covered the subject matter of that witness' trial testimony.[2] I dissent from the Court's affirmance of the trial judge's ruling denying this carefully circumscribed request.

Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice. See *McNabb* v. *United States,* 318 U. S. 332. It is true that secrecy is not to be lifted without a showing of good reason, but it is too late in the day to say, as the Court as a practical matter does here, that the Government may insist upon grand jury secrecy even when the possible prejudice to the accused in a criminal case is crystal clear and none of the reasons justifying secrecy is present. "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 234. Thus grand jury minutes have been made available to a defendant accused of committing perjury before the grand jury so that he could adequately prepare his defense, *United States* v. *Remington,* 191 F. 2d 246; *United States* v. *Rose,* 215 F. 2d 617, and to a defendant who can show an inconsistency between the trial testimony and grand jury testimony of a government witness, *United States* v. *Alper,* 156 F. 2d 222; *Burton* v. *United States,* 175 F. 2d 960; *Herzog* v. *United States,* 226 F. 2d 561; *United States* v. *H. J. K. Theatre Corp.,* 236 F. 2d 502. On occasion the Government itself has recognized the fairness of permitting the defense access to the grand jury testimony of

---

[2] As the Court points out, discovery of grand jury minutes is not affected by the *Jencks* statute, 18 U. S. C. (Supp. V) § 3500.

government witnesses even though it considered that it was not bound to do so, *United States* v. *Grunewald,* 162 F. Supp. 621. This Court has implied that grand jury minutes would be discoverable by a defendant in a civil antitrust suit instituted by the Government on a showing of "particularized need," *United States* v. *Procter & Gamble,* 356 U. S. 677, 683.[3] Nor can we overlook that the Government uses grand jury minutes to further its own interests in litigation. It is apparently standard practice for government attorneys to use grand jury minutes in preparing a case for trial, see *United States* v. *Procter & Gamble,* 356 U. S. 677, 678, in refreshing the recollection of government witnesses at trial, see *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 233, and, when the need arises, in impeaching witnesses at trial, see *United States* v. *Cotter,* 60 F. 2d 689. Of course, when the Government uses grand jury minutes at trial the defense is ordinarily entitled to inspect the relevant testimony in those minutes. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 233; *United States* v. *Cotter,* 60 F. 2d 689. Indeed, Rule 6 (e) of the Federal Rules of Crim-

[3] *United States* v. *Procter & Gamble,* upon which the Court relies, actually is authority for permitting discovery in this case. The Court in that case recognized that grand jury minutes were discoverable where the need outweighed the advantages of secrecy, but held that such was not the case in the circumstances because, unlike this case, *Procter & Gamble* concerned a demand for a transcript of the entire grand jury proceedings to be used in pretrial preparation of a civil suit. This case, of course, concerns a demand for discovery of a particular witness' relevant testimony for use on cross-examination at trial in a criminal prosecution. The Court specifically stated in *Procter & Gamble:* "We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly." 356 U. S., at 683.

inal Procedure itself recognizes that grand jury testimony is discoverable under appropriate circumstances.[4]

The Court apparently agrees with the conclusion compelled by these precedents, for its opinion states that grand jury minutes are discoverable when " 'a particularized need' exists for the minutes which outweighs the policy of secrecy." But the Court pays only lip service to the principle in view of the result in this case. It is clear beyond question, I think, that the application of that principle to this case requires a holding that Jonas' grand jury testimony is discoverable to the limited extent sought. Since there are no valid considerations which militate in favor of grand jury secrecy in this case, simple justice requires that the petitioners be given access to the relevant portions of Jonas' grand jury testimony so that they have a fair opportunity to refute the Government's case.

Essentially four reasons have been advanced as justification for grand jury secrecy.[5] (1) To prevent the accused from escaping before he is indicted and arrested or from tampering with the witnesses against him. (2) To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted. (3) To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation. (4) To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.

---

[4] See *United States* v. *Alper*, 156 F. 2d 222, 226; *In re Bullock*, 103 F. Supp. 639.

[5] See *United States* v. *Rose*, 215 F. 2d 617, 628–629; *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261; 8 Wigmore, Evidence (3d ed. 1940), § 2360.

None of these reasons dictates that Jonas' grand jury testimony, to the limited extent it is sought, should be kept secret. The Court, while making obeisance to "a long-established policy" of secrecy, makes no showing whatever how denial of Jonas' grand jury testimony serves any of the purposes justifying secrecy. Certainly disclosure at this stage of the proceedings would not enable the defendants to escape from custody or to tamper with the witness who has already testified against them on direct examination. Certainly, also, protection of an innocent accused who has not been indicted has no bearing on this case. Discovery has been sought only of Jonas' grand jury testimony on the same subject matter as his testimony at trial. This testimony will have condemned someone to whom he did not refer at trial only if he has concealed information at the trial, and this creates the very situation in which it is imperative that the defense have access to the grand jury testimony if we are to adhere to the standards we have set for ourselves to assure the fair administration of criminal justice in the federal courts. Similarly, disclosure of Jonas' relevant grand jury testimony could not produce the apprehended results of retaliation or discomfort which might induce a reluctance in others to testify before grand juries. Jonas has already taken the stand and testified freely in open court against the defendants. His testimony has been extremely damaging. Disclosure of his testimony before the grand jury is hardly likely to result in any embarrassment that his trial testimony has not already produced. "If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm . . . which his testimony on the open trial does not equally tend to produce." 8 Wigmore, Evidence (3d ed. 1940), § 2362, at 725. Witnesses before a grand jury necessarily know that once called by the Government to testify at trial they cannot

remain secret informants quite apart from whether their grand jury testimony is discoverable. Finally, the defense seeks nothing which would disclose the votes or opinions of any of the grand jurors involved in these proceedings. All that is sought is the relevant testimony of Jonas. If there are questions by grand jurors intertwined with Jonas' testimony disclosure of which would indicate the jurors' opinions or be embarrassing to them, the names of the grand jurors asking the questions can be excised. Cf. *United States* v. *Grunewald*, 162 F. Supp. 621.

Plainly, then, no reason justifying secrecy of Jonas' relevant grand jury testimony appears. The Court's insistence on secrecy exalts the principle of secrecy for secrecy's sake in the face of obvious possible prejudice to the petitioners' defense against Jonas' seriously damaging testimony on the trial. Surely "Justice requires no less," *Jencks* v. *United States*, 353 U. S. 657, 669, than that the defense be permitted every reasonable opportunity to impeach a government witness, and that a criminal conviction not be based on the testimony of untruthful or inaccurate witnesses. The interest of the United States in a criminal prosecution, it must be emphasized, "is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U. S. 78, 88.

Obviously the impeachment of the Government's key witness on the basis of prior inconsistent or contradictory statements made under oath before a grand jury would have an important effect on a trial. Thus it has long been held that a defendant may have access to inconsistent grand jury testimony for use in cross-examination if he can somehow show that an inconsistency between the trial and grand jury testimony exists. *United States* v. *Alper*, 156 F. 2d 222; *Burton* v. *United States*, 175 F. 2d 960; *Herzog* v. *United States*, 226 F. 2d 561; *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502. But in an analogous situation we have pointed

509615 O–59–29

out the folly of requiring the defense to show inconsistency between the witness' trial testimony and his previous statements on the same subject matter before it can obtain access to those very statements. In *Jencks* v. *United States,* 353 U. S. 657, we said that it offers no protection to permit a defendant to obtain inconsistent statements to impeach a witness unless he may inspect statements to determine if in fact they are inconsistent with the trial testimony. We said in *Jencks:*

> "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in *Gordon,* [*Gordon* v. *United States,* 344 U. S. 414] the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected." 353 U. S., at 667–668.

The considerations which moved us to lay down this principle as to prior statements of government witnesses made to government agents obviously apply with equal force to the grand jury testimony of a government witness. For the defense will rarely be able to lay a foundation for obtaining grand jury testimony by showing it is inconsistent with trial testimony unless it can inspect the grand jury testimony, and, apparently in recognition of this fact, the Court holds today that a preliminary showing of inconsistency by the defense would not be necessary in order for it to obtain access to relevant grand jury minutes. It is suggested by the Government, however, that rather than permit the defense to inspect the

relevant grand jury minutes for possible use on cross-examination, the trial judge should inspect them and turn over to the defense only those portions, if any, that the *judge* considers would be useful for purposes of impeachment. This procedure has sometimes been utilized in the past as a way to limit discovery of grand jury minutes. See *United States* v. *Alper,* 156 F. 2d 222; *United States* v. *Consolidated Laundries,* 159 F. Supp. 860. But we pointed out in *Jencks* the serious disadvantages of such a procedure and expressly disapproved of it. We said:

> "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.
>
> . . . . . .
>
> ". . . We hold . . . that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." 353 U. S., at 667–669.

From Jonas' own admission it appears that his grand jury testimony covered the subject matter of his trial testimony. The reasons for permitting the defense counsel rather than the trial judge to decide what parts of that testimony can effectively be used on cross-examination are certainly not less compelling than in regard to the FBI reports involved in *Jencks.* For grand jury

testimony is often lengthy and involved, and it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness. See *United States* v. *Spangelet,* 258 F. 2d 338. His task should be completed when he has satisfied himself what part of the grand jury testimony covers the subject matter of the witness' testimony on the trial, and when he has given that part to the defense. Then the defense may utilize the grand jury testimony for impeachment purposes as it may deem advisable in its best interests, subject of course to the applicable rules of evidence.

I would reverse the Court of Appeals and order a new trial for failure of the trial judge to order the production of Jonas' relevant grand jury testimony.

SOUTHWESTERN SUGAR & MOLASSES CO., INC., *v.* RIVER TERMINALS CORP.

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

No. 155. Argued March 3, 1959.—Decided June 22, 1959.

On petitioner's libel against respondent, a common carrier by water certificated by the Interstate Commerce Commission, a Federal District Court held respondent liable to petitioner for damages for loss of its cargo and for expenses incurred in raising and repairing a barge chartered by petitioner and towed by respondent from Louisiana to Texas, where it sank at dockside. On appeal, respondent urged that the District Court had committed four errors. Although all had been fully argued and were ripe for decision, the Court of Appeals did not pass on three of respondent's claims which, if sustained, would have disposed of the case; but it reversed the judgment and remanded the case to the District Court with directions to give effect to an exculpatory clause in a tariff filed by respondent with the Interstate Commerce Commission, unless petitioner should obtain from the Commission within a reasonable time a ruling that such clause was invalid. *Held:*

1. The Court of Appeals erred in ordering what was in substance a referral of the issue of the validity of the exculpatory clause to the Commission without first passing on the other claims of error tendered by respondent. Pp. 414–415.

2. The Court of Appeals correctly ruled that the exculpatory clause here at issue should not be struck down as a matter of law and that the parties should be afforded a reasonable opportunity to obtain the views of the Commission, if necessary to a disposition of the case. *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, distinguished. Pp. 415–421.

3. The case is remanded to the Court of Appeals with instructions to pass on respondent's first three assignments of error. Should the resolution of those issues not dispose of the case, the Court of Appeals will remand the case to the District Court with instructions to hold it in abeyance while the parties seek the Commission's views as to factors bearing on the validity of the exculpatory clause. Pp. 421–422.

253 F. 2d 922, cause remanded to Court of Appeals with instructions.

Amos L. Ponder, Jr. argued the cause for petitioner. With him on the brief was *Clem H. Sehrt.*

Selim B. Lemle argued the cause for respondent. With him on the brief was *Carl G. Stearns.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

On September 24, 1944, the barge *Peter B,* carrying a cargo of molasses, sank in 30 feet of water at dockside in Texas City, Texas. Although the barge was eventually raised, the cargo, allegedly valued at some $26,000, was largely or totally lost.

Petitioner, Southwestern Sugar & Molasses Co., charterer of the barge and owner of the cargo, filed a libel against respondent, River Terminals Corporation, a water carrier certificated under Part III of the Interstate Commerce Act, 49 U. S. C. § 901 *et seq.,* seeking recovery of damages for the loss of cargo and for expenses occasioned in the raising and repair of the barge, which had been towed by respondent from Reserve, Louisiana, to Texas City and there berthed. The District Court first tried the issue of liability, separating the question of damages for subsequent determination, and held that the barge had sunk and the cargo had been lost as a result of respondent's negligence in the navigation or management of the tow and that respondent was liable for all damage to the cargo and for the cost of raising and repairing the barge.[1] 153 F. Supp. 923.

[1] The District Court found that the sinking of the *Peter B* was occasioned by the shipping of water through a crack in the starboard shell plate of one of its cargo tanks which had been discovered by petitioner's local manager while the barge was being loaded with molasses under his supervision, and that respondent's employees were negligent in various respects in failing to take proper precautions to avoid the sinking after it should have become evident that the barge was shipping water.

Respondent appealed from the interlocutory decree adjudging liability, 28 U. S. C. § 1292 (3), urging that the trial court had erred in holding (1) that petitioner had an interest in the *Peter B* sufficient to entitle it to maintain a libel for damage thereto, (2) that the sinking of the barge and loss of cargo were due to respondent's negligence, (3) that § 3 of the Harter Act [2] did not establish respondent's freedom from liability as a matter of law, and (4) that certain provisions in tariffs filed by respondent with the Interstate Commerce Commission, which purported to release respondent from liability for its negligence, and which were assumed by the District Court to have been applicable to the transportation here involved, were invalid as a matter of law and constituted no defense to the libel.[3]

The Court of Appeals did not consider any of the first three claims of error, although if sustained they would wholly have disposed of the case. Instead, the court directed its attention to respondent's contention that the exculpatory clause in respondent's tariff, incorporated by

---

[2] 46 U. S. C. § 192: "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . . ."

[3] The pertinent provisions of the tariff provided:

"When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the Carriers parties to this Tariff, such barges and (or) cargoes will be handled at owner's risk only, whether loss or damage is caused by negligence or otherwise.

. . . . . .

"Presentation of a shipment in barge furnished by shipper, consignee or owner for movement on rates named herein shall constitute a guarantee to the Carriers parties to this Tariff that such barge is seaworthy and barge and cargo are in suitable condition for voyage in prospect. . . ."

reference in the bill of lading issued in connection with the transportation, must be given effect. The court concluded that because the clause was embodied in a tariff filed with the I. C. C. it could not in the first instance declare it invalid, but was bound to give it effect unless and until the Commission, after appropriate investigation, reached a contrary conclusion.[4] Accordingly, it reversed the judgment of the District Court "in order to afford . . . [petitioner] reasonable opportunity to seek administrative action before the Commission to test the validity of the challenged provision, otherwise to give full effect to the exculpatory clause . . . ." 253 F. 2d 922.

Petitioner sought certiorari, contending that the refusal of the Court of Appeals to strike down the exculpatory clause as a matter of law was contrary to the decision of this Court in *Bisso* v. *Inland Waterways Corporation*, 349 U. S. 85, where it was held that a clause in a private contract of towage purporting altogether to exculpate the tug from liability for its own negligence was void as against public policy. We granted the writ. 358 U. S. 811.

At the outset, we hold that the Court of Appeals erred in ordering what was in substance a referral of the issue of the validity of the exculpatory clause to the Commission without first passing on the other claims of error tendered by respondent below. As we have noted, those other claims, if accepted, would have required a reversal of the judgment of the District Court and the entry of judgment for respondent. The case had been fully argued before the Court of Appeals, and those claims were plainly ripe for decision.

---

[4] In reaching this conclusion the court relied on "the rule frequently stated by the Supreme Court that 'Until changed, tariffs bind both carriers and shippers with the force of law.' *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520 . . . ; *Crancer* v. *Lowden*, 315 U. S. 631, 635 . . . ." 253 F. 2d 922, 925.

Under these circumstances, we think that sound and expeditious judicial administration should have led the Court of Appeals not to leave these issues undecided while a course was charted requiring the institution and litigation of an altogether separate proceeding before the I. C. C.—a proceeding which might well assume substantial dimensions—to test the sufficiency of only one of respondent's several defenses. If in consequence of findings made by the Commission in such a proceeding it should be determined that the exculpatory clause cannot be given effect, the Court of Appeals would then have to decide the very questions which it can now decide without the necessity for any collateral proceeding. Conversely, a present ruling on those other questions might entirely obviate the necessity for proceedings in the Commission which would further delay the final disposition of this already protracted litigation. We conclude, therefore, that the Court of Appeals should have passed upon those issues as to which the expert assistance of the I. C. C. is concededly not appropriate, before invoking the processes of the Commission.

Despite the fact that disposition of respondent's other claims by the Court of Appeals may ultimately render moot the question of the validity of the exculpatory clause as a defense in the circumstances of this case, we deem it appropriate now to review the holding of that court that the exculpatory clause was not void as a matter of law. Were the Court of Appeals on remand to decide the other questions tendered by respondent adversely to it, it would otherwise then be necessary for petitioner once more to seek review here on this very question. The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred; it is squarely presented on the record before us; and the exigencies of this litigation clearly

call for its resolution at this stage. Accordingly, to this question we now turn.

In *Bisso* this Court held that a towboat owner might not, as a defense to a suit alleging loss due to negligent towage, rely on a contractual provision which purported to exempt the towboat altogether from liability for negligent injury to its tow. There a barge, while being towed on the Mississippi River by a steam towboat under a private towage contract, was caused by the negligence of those operating the towboat to collide with a bridge pier and sink. The Court reviewed prior cases in the field, and concluded that the conflict of decision found in those cases should be resolved by declaring private contractual provisions of the kind there involved altogether void as contrary to "public policy." The Court relied on "two main reasons" for its conclusion, (1) that such a rule was necessary "to discourage negligence," and (2) that the owner of the tow required protection from "others who have power to drive hard bargains." As was pointed out explicitly in a concurring opinion, the Court's decision was perforce reached without consideration of particularized economic and other factors relevant to the organization and operation of the tugboat industry.

Petitioner argues that *Bisso* is dispositive of this case, on the theory that an inherently illegal condition gains nothing from being filed as part of a tariff with the Commission.[5] We think that this reasoning begs the true

[5] Compare *Boston & Maine R. Co.* v. *Piper,* 246 U. S. 439, 445, where this Court held a limitation of liability clause void although filed as part of a tariff with the I. C. C. by a rail carrier, saying that: "While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body [citation] . . . but not so of conditions and limitations which are, as is this

question here presented, which is whether considerations of public policy which may be called upon by courts to strike down private contractual arrangements between tug and tow are necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body. In *Bisso* the clause struck down was part of a contract over the terms of which the I. C. C., the body primarily charged by Congress with the regulation of the terms and conditions upon which water carriers subject to its jurisdiction shall offer their services, had no control. In the present case the courts below have assumed, and petitioner does not challenge, the applicability to the transportation which resulted in loss to petitioner of a duly filed tariff containing this exculpatory clause.

In these circumstances we would be moving too fast were we automatically to extend the rule of *Bisso* to govern the present case.[6] For all we know, it may be that

---

one, illegal, and consequently void." The decisive difference between *Piper* and this case is that there the exculpatory clause was specifically declared illegal by the Interstate Commerce Act itself. See 49 U. S. C. § 20 (11).

[6] It may be noted that the tug-tow relationship has not been assimilated by the law to that between a common carrier and shipper so far as liability is concerned. See, *e. g.*, *The Steamer Syracuse*, 12 Wall. 167. Thus although at common law a common carrier was liable, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively showed that the damage was occasioned by the shipper, acts of God, the public enemy, public authority, or the inherent vice or nature of the commodity, *Secretary of Agriculture* v. *United States*, 350 U. S. 162, 165, n. 9, and cases cited, the District Court in the present case held that respondent could not be held liable in the absence of its negligence and petitioner did not assail that determination on appeal.

Part III of the Interstate Commerce Act has made tugboats common carriers for regulatory purposes under certain circumstances. See *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634. Section

the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the towboat owner of the expense of insuring itself against liability for damage caused tows by the negligence of its servants, and is a reasonable rate so computed. If that were so, it might be hard to say that public policy demands that the tow should at once have the benefit of a rate so computed and be able to repudiate the correlative obligation of procuring its own insurance with knowledge that the towboat may be required to respond in damages for any injury caused by its negligence despite agreement to the contrary. For so long as the towboat's rates are at all times subject to regulatory control, prospectively and by way of reparation, the possibility of an overreaching whereby the towboat is at once able to exact high rates and deny the liabilities which transportation at such rates might be found fairly to impose upon it can be aborted by the action of the I. C. C. The rule of *Bisso,* however applicable where the towboat owner has "the power to drive hard bargains," may well call for modification when that power is effectively controlled by a pervasive regulatory scheme.[7]

---

320 (d) of that Act, 49 U. S. C. § 920 (d), explicitly provides, however, that the statute is not to be construed to affect "liabilities of vessels and their owners for loss or damage . . . ." The settled common-law rule that common carriers may not "by any form of agreement secure exemption from liability for loss or damage caused by their own negligence," *Sun Oil Co.* v. *Dalzell Towing Co.,* 287 U. S. 291, 294; *Railroad Co.* v. *Lockwood,* 17 Wall. 357; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, thus has no application here.

[7] Under Part III of the Interstate Commerce Act all "common carriers by water" as therein defined (see 49 U. S. C. § 902 (d)) are required to file with the Commission and keep open to public inspection "tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation . . . of . . . property" and stating "any rules or regulations which in anywise

Further, it may be noted that the clause relied on in this case is by its terms restricted to the situation where shipments are transported in barges furnished by others than the towboat owner. Whatever may be the considerations involved in forbidding a towboat to contract for exemption from liability for negligence in other circumstances, it may be that different considerations apply when the towboat moves barges which are delivered to it loaded, so that it never has an opportunity adequately to inspect them below the waterline, and which, if defective, may create emergency situations where a small degree of negligence can readily lead to very substantial monetary loss.[8] If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, it may be that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to

---

change, affect, or determine any part of the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee." 49 U. S. C. § 906 (a). Contract carriers are subject to similar requirements. 49 U. S. C. § 906 (e). The Commission may suspend newly filed tariffs while it investigates them, 49 U. S. C. § 907 (g), (i), and may at any time initiate an investigation, upon complaint or on its own initiative, into the reasonableness of filed tariffs. 49 U. S. C. § 907 (b), (h).

[8] It is of course open to the I. C. C. to consider any other factors which it may deem relevant to the question of the propriety of exculpatory clauses in regulated towage tariffs, such as the availability to shippers of arrangements whereby use of the tower's barge, or payment of a higher alternative rate, results in an assumption by the tower of liability for its negligence, and the relative practicality and cost of the securing of insurance against the kind of risk here involved by shipper and by tower. We do not intimate any view as to the relative weight of the factors herein mentioned.

fashion a particularized rule to deal with particularized circumstances.[9]

We may assume that the question whether a clause of this kind offends against public policy is one appropriate ultimately for judicial rather than administrative resolution. But that does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well equipped to marshal and initially to evaluate. As was said in *Far East Conference* v. *United States,* 342 U. S. 570, 574–575, this Court has frequently recognized and applied

> ". . . a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized com-

---

[9] Congress has in some instances declared by statute the circumstances under which carriers may contract for release from or limitation of liability, or rules governing the liability or exemption from liability of carriers irrespective of contract. See 46 U. S. C. §§ 181–196, 1300–1315 (water carriers); 49 U. S. C. §§ 20 (11), 319 (rail and motor carriers). Where such statutes apply of course no agreement in derogation of them, even if embodied in a tariff, is valid. See, *e. g., Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Boston & Maine R. Co.* v. *Piper, supra.*

As we have noted above, respondent claims that § 3 of the Harter Act, 46 U. S. C. § 192, applies to exempt it from liability in this case irrespective of the effect given its tariff exculpatory clause. Be that as it may, the cited provision is ample demonstration that there is no general congressional policy requiring water carriers to be held liable for damage caused by the negligence of their servants in all cases.

> petence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

We hold that the Court of Appeals correctly ruled that the exculpatory clause here at issue should not be struck down as a matter of law, and that the parties should be afforded a reasonable opportunity to obtain from the I. C. C., in an appropriate form of proceeding, a determination as to the particular circumstances of the tugboat industry which lend justification to this form of clause, if any there be, or which militate toward a rule wholly invalidating such provisions regardless of the fact that the carrier which seeks to invoke them is subject to prospective and retrospective rate regulation. "Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 498. This principle has particular force when the courts are asked to strike down on grounds of public policy a contractual arrangement on its face consensual.

The case is remanded to the Court of Appeals with instructions to pass upon the first three assignments of error specified by respondent in its appeal from the judgment of the District Court. Should resolution of those issues not dispose of the case, the Court of Appeals is directed to remand the case to the District Court with instructions to hold it in abeyance while the parties seek

the views of the I. C. C., in any form of proceeding which that body may deem appropriate, as to the circumstances bearing on the validity of respondent's exculpatory clause in the context of this litigation, and for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS believe that the rule of law announced in *Bisso* should not be changed by the Interstate Commerce Commission, and would therefore reverse this judgment.

Syllabus.

RALEY ET AL. *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 175. Argued April 22–23, 1959.—Decided June 22, 1959.*

The four appellants were convicted in state courts for refusing to answer questions about Communistic or subversive activities put to them at sessions of the "Un-American Activities Commission" established in the legislative branch of the Ohio Government. Each was led by the Commission to believe that the privilege against self-incrimination afforded by the Ohio Constitution was generally available to him, and each relied on that privilege; but the Ohio Supreme Court sustained their convictions on the ground that the privilege was not available to them, because a state immunity statute deprived them of the protection of that privilege. *Held:*

1. The appeals are dismissed for want of jurisdiction under 28 U. S. C. § 1257 (2), since appellants have not demonstrated that an attack was made by them in the state courts on the validity of a state statute under the Federal Constitution; but certiorari is granted, since various rights, privileges and immunities under the Federal Constitution were claimed in the state courts, as required by 28 U. S. C. § 1257 (3). Pp. 434–437.

2. The convictions of three of the appellants violated the Due Process Clause of the Fourteenth Amendment, since they were entrapped by being convicted for exercising a privilege which the Commission had led them to believe was available to them. Pp. 437–440.

3. The conviction of the other appellant for refusing to state where he lived after being directed by the Commission to do so is affirmed by an equally divided Court. Pp. 440–442, 442–445.

167 Ohio St. 295, 147 N. E. 2d 847, affirmed in part and reversed in part.

Morse Johnson argued the cause and filed a brief for appellants in No. 175.

Thelma C. Furry and *Ann Fagan Ginger* argued the cause and filed a brief for appellant in No. 463.

---

*Together with No. 463, *Morgan* v. *Ohio*, also on appeal from the same Court, argued April 23, 1959.

509615 O–59–30

C. Watson Hover and *Carl B. Rubin* argued the cause and filed a brief for appellee in No. 175.

Earl W. Allison argued the cause and filed a brief for appellee in No. 463.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These two appeals involve convictions of four appellants for refusal to answer certain questions put to them at sessions of the "Un-American Activities Commission" of the State of Ohio, established in the legislative branch of the Ohio Government.[1] The appellants had claimed the privilege against self-incrimination in refusing to answer each of the questions. The cases are before us for the second time; on prior appeals the judgments below were vacated and the causes remanded for reconsideration in the light of *Sweezy* v. *New Hampshire,* 354 U. S. 234, and *Watkins* v. *United States,* 354 U. S. 178. See 354 U. S. 929. The remand resulted in a reaffirmance of the prior judgment without discussion, 167 Ohio St. 295, 147 N. E. 2d 847, and on the present appeals we postponed

---

[1] The three appellants in No. 175, Raley, Stern, and Brown, were convicted in a joint trial in a different Common Pleas Court from the one in which appellant in No. 463, Mrs. Morgan, was convicted. The judgments as to Raley, Stern, and Brown were affirmed in the Court of Appeals for Hamilton County, 100 Ohio App. 75, 136 N. E. 2d 295, and that of Mrs. Morgan in the Court of Appeals for Franklin County. The cases were decided by the Ohio Supreme Court in a single opinion, 164 Ohio St. 529, 133 N. E. 2d 104, which affirmed the convictions.

Raley, Stern, and Brown were convicted under the then applicable provisions of Ohio General Code § 12137, which provided that "a failure . . . to answer as a witness, when lawfully required" may be punished "as . . . for a contempt." Mrs. Morgan was convicted under Ohio General Code § 12845, which punished those, summoned before a Committee of the State Legislature, who refuse "to answer a question pertinent to the matter under inquiry."

further consideration of the jurisdictional questions presented until the arguments on the merits. 358 U. S. 862, 863.

The issues tendered by the parties range broadly and involve the power of the Ohio Legislature, in view of existing federal legislation, to investigate activities deemed subversive of the forms of government within the Nation, cf. *Pennsylvania* v. *Nelson,* 350 U. S. 497; the power of the State to compel disclosure of matters interconnected with the protected freedoms of speech and assembly, cf. *NAACP* v. *Alabama,* 357 U. S. 449; *Sweezy* v. *New Hampshire, supra;* the existence of an expressed legislative interest for such an inquiry, and its definition and articulation to the person summoned, cf. *Watkins* v. *United States, supra; Sweezy* v. *New Hampshire, supra; Scull* v. *Virginia,* 359 U. S. 344; and the effect on testimonial compulsion of state immunity statutes not affording immunity from federal prosecution, cf. *Knapp* v. *Schweitzer,* 357 U. S. 371. But our disposition of these cases makes it unnecessary to consider the application of the principles of the cases just cited. The appellants were informed by the Commission that they had a right to rely on the privilege against self-incrimination afforded by Art. I, § 10, of the Ohio Constitution. The Ohio Supreme Court, however, held that the appellants were presumed to know the law of Ohio—that an Ohio immunity statute deprived them of the protection of the privilege—and that they therefore had committed an offense by not answering the questions as to which they asserted the privilege. We hold that in the circumstances of these cases, the judgments of the Ohio Supreme Court affirming the convictions violated the Due Process Clause of the Fourteenth Amendment and must be reversed, except as to one conviction, as to which we are equally divided. After the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judg-

ment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him. We agree with that part of Judge Stewart's dissenting opinion in the Ohio Supreme Court in which he said: "since the defendants were apprised by the commission at the time they were testifying that they had a right to refuse to answer questions which might incriminate them, they could not possibly in following the admonition of the commission be in contempt of it . . . ." 164 Ohio St., at 563, 133 N. E. 2d, at 125. A rather detailed description of the proceedings below must be made to illuminate the basis of decision below and the turning point of our review of it here.

Mrs. Morgan, appellant in No. 463, was summoned before the Commission and interrogated mainly in regard to Communist Party activities. She appeared without counsel. To each question put she answered, "I regret that I cannot answer your question under the Fifth Amendment of the Constitution, because to do so would give your Committee an opportunity to incriminate me," or some more abbreviated form of words to the same effect. Such responses were given to virtually all the questions and in almost every case the Commission proceeded directly to ask its next question after receiving the response. In no case did the Commission direct that she answer its question. In one or two cases Commission members expressed surprise that she might consider an answer incriminating, and on such an occasion the Chairman asked her, "Mrs. Morgan, are you aware of the fact that your failure to answer questions—some questions of this Commission, might also tend to put you in an embarrassing situation?" At another point, the Chairman positively informed her, "I should like to advise you under the Fifth Amendment, you are permitted to refuse to answer questions that might tend to incriminate

you. . . . But you are not permitted to refuse to answer questions simply for your own convenience."

Raley, Stern, and Brown, appellants in No. 175, appeared before the Commission successively on another occasion, about six months later. They were interrogated about subversive activities in the labor movement. Raley answered some questions, but to most of them asserted the privilege against self-incrimination of the Federal and Ohio Constitutions. Most of his assertions of the privilege, including his initial ones, were not made the subject of comment or question by the Commission, the next question in the inquiry being put at once. On some few occasions, when Raley claimed the privilege, the Commission members indicated their doubts whether any answer to a specific question put could be incriminating. On one occasion, the Commission asked Raley as to whether he recollected a certain interview. Raley claimed the privilege. The Chairman took the view that Raley was required to speak as to whether he recalled the interview, but assured him that the privilege existed as to the details of the interview: "If you recall it, and we ask you as to your recollection, then you are privileged to claim your rights under the Constitution . . . ." This and one other occasion were the only ones in which the Commission even approached directing an answer to a question by Raley; but in one case the Chairman finally asked Raley to confer with his counsel to determine whether in his opinion the privilege applied, and in another Raley did so of his own accord; then, upon an affirmative reply by Raley's counsel, the Commission passed at once to the next question.[2]

---

[2] After the Chairman's initial statement quoted in the text, and some exchange between the Chairman and Raley's counsel, the following occurred:

"Chairman Renner: I should like for you to consult with counsel to determine whether in his opinion you are required to answer

Stern was the next person to appear at the inquiry. After giving his name, he claimed the privilege against self-incrimination at the very next question, which called for his address. Commission counsel asked him, "Is there something about the nature or character of the home in which you live that to admit you live there would make you subject to criminal prosecution?" On Stern's continued refusal to answer, the Chairman directed an answer to the question, which was refused. To most subsequent questions, Stern again claimed the privilege against self-incrimination, and on the great majority of questions, the Commission simply passed on to the next question. The Chairman and Stern worked out a short form of words whereby he would be understood to be claiming the priv-

---

the question, whether you recollect having had such an interview.

"The Witness: I have been advised by counsel that the privilege does apply, if I desire to use it.

"Chairman Renner: Counsel [for the Commission] may proceed."

Whereupon the next question was put. In the other instance Raley appears to have consulted with counsel of his own accord:

"Chairman Renner: Mr. Raley, would you explain to the Commission how you could incriminate yourself by acknowledging the location of the headquarters of Local 766 on that date?

"The Witness: I don't believe, Mr. Chairman, that I have to give a reason for asserting the privileges of the Constitution, so my answer would be the same to that that I gave Mr. Isaacs. [The Commission Counsel.] I will assert my privileges.

"Chairman Renner: I nevertheless request an answer.

"The Witness: Just a second while I confer with counsel.

"Mr. Berger [Raley's counsel]: I would like to hear the question read.

"Chairman Renner: Read the question, please.

"(Several questions and answers read by the reporter.)

"Mr. Berger: That is what I thought.

"(The witness conferred with counsel.)

"The Witness: I think I was correct in view of the line of questions that I have to assert my privileges under the Constitution.

"Chairman Renner: Counsel will proceed."

And again the next question was forthwith put.

ilege as to a particular question.[3] At one point Stern asked the Commission if the Commission had the right to go into his opinions and to require him to speak as to them. The Chairman informed him, "Not if in your opinion by so doing, you might tend to incriminate yourself." On a few occasions the Chairman requested that Stern answer a question, but except for the question as to his residence, the occasions were those in which Stern had neither given a direct answer nor invoked the privilege, and upon assertion of the privilege in these cases the request was not renewed.[4]

---

[3] "Chairman Renner: Counsel, just a moment. When you say you claim the privilege, you claim the privilege of not replying by reason of the fact that your answer might tend to incriminate you?

"The Witness: I claim the privilege of not answering under the Fifth Amendment of the United States Constitution, and Section 1, Article 10 of the Ohio Constitution, as I understand them.

"Chairman Renner: I do not insist that you recite in full the precise article or section of the Bill of Rights of the state of Ohio, or the Federal Constitution, but in your reply, if you are resorting to those sections, make it clear that you are resorting to those sections, or let us have an understanding that when you say, 'The same answer,' that that is what it means.

"The Witness: It means that I claim the privilege of the Fifth Amendment, of the United States Constitution, and Article 1, Section 10 of the Ohio Constitution, as I understand them.

"Chairman Renner: And when you say, 'I claim the privilege,' that is what you mean in full; is that correct?

"The Witness: That is correct."

[4] One such exchange was as follows:

"Chairman Renner: The chair will ask the witness to answer the question that has been placed by Counsel. It is to be presumed that the witness is excused from answering the previous question. We are trying to make it easier for you, Mr. Stern.

"The Witness: I plead the privilege.

"By Mr. Isaacs:

"Q. I take it you are not making the denial that you started to make before?

"A. I invoke the privilege."

Whereupon the next question was put.

Brown then was subjected to inquiry. He claimed the privilege as to self-incrimination to most of the questions put to him. While the Chairman never told him in so many words (as he had told the other three appellants) that the privilege was available, Brown and the Chairman engaged in long colloquies in an attempt by the Chairman to clarify that by using a certain form of words Brown was claiming the privilege.[5] The Chairman's con-

[5] "Chairman Renner: What do you mean when you say 'The answer is the same'?

"The Witness: I mean when I say 'The answer is the same,' the preceding question that was asked me, linking up with the next question that is asked me, I answered the first question. I said I invoked the Fifth Amendment of the United States Constitution.

"Chairman Renner: You mean you refuse to answer?

"The Witness: I did not say I refuse. I didn't refuse and I don't know what you mean. I said, 'invoked.' Do you know what the word 'invoked' means?

"Chairman Renner: Do you refuse to answer?

"The Witness: The answer is the same."

Later, the Chairman tried again:

"Chairman Renner: Each time you have replied by saying, 'The answer is the same,' that full explanation that you have given, is that what you mean; is that correct?

"The Witness: I understand this amendment to mean that I can't be forced to testify against myself.

"Chairman Renner: And each time that you say the answer is the same, you mean to invoke that right; is that correct?

"The Witness: When a question is projected to me—

"Chairman Renner: Will you answer my question?

"The Witness: By you, I will answer that question on the basis of that question that is projected at that time. . . .

"Chairman Renner: I am simply trying to clarify for the record what you mean each time you say, 'The answer is the same.'"

On another occasion, the Chairman had the matter cleared up, at least for a while:

"Chairman Renner: What do you mean, 'the answer is the same'?

"The Witness: In regard to that question, in the manner in which

cern is inexplicable on any other basis than that he deemed the privilege available at the inquiry, and his statements would tend to create such an impression in one appearing at the inquiry. When once he made it clear that he was claiming the privilege as to a question, Brown was never directed to answer. He was on a couple of occasions directed to answer a question when he was engaging in a colloquy with the Commission without either having answered it directly or having claimed the privilege; upon his claim of the privilege, the next question was at once put.[6]

The Ohio immunity statute extends, so far as is here relevant, to any person appearing before a legislative committee and grants immunity from state prosecutions or penalties "on account of a transaction, matter, or thing, concerning which he testifies"; the statute declares that the testimony given on such an appearance "shall not be used as evidence in a criminal proceeding" against the person testifying. Ohio Rev. Code § 101.44. For reasons unexplained, the existence of this immunity was never suggested by the Commission to any of the appellants, and in fact, as the above statement makes evident,

---

that question was phrased, I again invoke—see—the Fifth Amendment of the Constitution of the United States, see? Do you understand what that means?

"Chairman Renner: That is what I wanted."

[6] The following is illustrative:

"Q. I ask you if it is not a fact that in February of 1950, you caused to be distributed a leaflet stated to be issued by the Workers Club, Emmett C. Brown, Chairman, 1064 Flint Street?

"A. Is that a fact?

"Q. I am asking you to affirm or deny that fact.

"A. If you know it, why ask me to affirm?

"Chairman Renner: Answer the question, Mr. Brown.

"The Witness: I invoke the privileges of the Fifth Amendment."

Whereupon the next question was asked.

the Commission's actions were totally inconsistent with a view on its part that the privilege against self-incrimination was not available. The Commission thought the privilege available, and it gave positive advice that it could be used. As the Chairman testified in the proceedings below: "It was the policy of the commission not [to] press questions which we felt would be of an incriminating nature. For instance, whenever a witness was asked a question—I believe every witness before the commission was asked the question—Are you or have you ever been a member of the communist party, and if the witness refused to answer that question, we did not press it. Frequently I made statements which indicated the policy of the commission."

Indictments were found against the four appellants for failure to answer various of the questions put to them at the inquiry. In the cases of Raley, Stern, and Brown—who were indicted at the same time and tried together, but in a different court from Mrs. Morgan—only a few of the questions were made the subject of the indictment.[7] There appears to have been some effort to restrict their indictments to those questions to which the prosecution thought no answer could have been incriminating. On the other hand, virtually every question asked Mrs. Morgan was made the subject of her indictment.[8]

A jury was waived by Raley, Stern, and Brown, and they were found guilty on each of the relatively few counts found against them, the trial court filing no opinion or conclusions of law. The Court of Appeals affirmed the

---

[7] Sixteen against Raley, two against Stern, four against Brown. These were minor fractions of the numbers of questions put them to which the privilege was pleaded.

[8] The only omissions appear to be in regard to several pleas of self-incrimination made by Mrs. Morgan, when, in handing a statement to the Commission for the record, she was asked whether it was her statement.

convictions on some of the counts as to Raley, on one of the two counts as to Stern, and on all the counts as to Brown, and reversed the convictions on some of the counts as to Raley and on one count as to Stern.[9] 100 Ohio App. 75, 99–100, 136 N. E. 2d 295, 315–316. It held that there was sufficient direction to the witnesses to answer the questions involved, so that their refusal was willful. The touchstone by which it affirmed some of the counts of the convictions and reversed others was whether, in the court's view, an answer to the question might have in fact been incriminating. While the court indicated that the immunity statute applied, it did not rely upon it in its judgment—as it expressly stated, 100 Ohio App., at 99, 136 N. E. 2d, at 315, and as its reversals of certain of the counts indicated.

A jury was also waived by Mrs. Morgan and she too was found guilty by a trial judge. The judge acquitted her on a few counts as to questions found not pertinent to the inquiry or duplicative of other questions. But as to the remaining counts, he ruled that her plea of self-incrimination was not valid, because she had referred solely to the Fifth Amendment and not to the appropriate provision of the Ohio Constitution guaranteeing freedom from compulsory self-incrimination. Ohio Const., Art. I, § 10. Because of this, he held that it was unnecessary to have directed Mrs. Morgan to answer the questions or to have advised her at the inquiry that her plea of the privilege against self-incrimination was rejected. Further constitutional claims were summarily rejected. The Court of Appeals—a different one from that which passed on the appeal of Raley, Stern, and Brown—affirmed the judgment for the reasons stated in the trial court's opinion.

On appeal, the Supreme Court of Ohio, though affirming the convictions, abandoned reliance on the theories

---

[9] The State did not appeal the reversals.

under which the appellants were found guilty by the courts below. It ruled that a fair reference to the privilege against self-incrimination of the United States Constitution was adequate to invoke the privilege under the Ohio Constitution, finding such reference made. 164 Ohio St., at 538–539, 133 N. E. 2d, at 111–112. And it did not discuss the theory on which the Court of Appeals relied in the case of Raley, Stern, and Brown; its basis for affirming the judgment was entirely independent of that of the Court of Appeals. The Supreme Court placed its reliance entirely on the immunity statute. It held that the immunity under the statute was automatically available to the appellants, that even though it did not preclude federal prosecution it was adequate to make answers compellable, and that since "the immunity granted . . . precluded the possibility of justifying a refusal" to answer on the grounds of self-incrimination, 164 Ohio St., at 553, 133 N. E. 2d, at 120, a direction by the Commission to the appellants to answer was not necessary. Various objections to the convictions under state law were also passed on and rejected. As we have noted, on remand from this Court, the Ohio Supreme Court passed on contentions made under *Sweezy* v. *New Hampshire, supra,* and *Watkins* v. *United States, supra,* and adhered to its former judgments.

First. We must examine our jurisdiction over these appeals. Appellants assert jurisdiction under 28 U. S. C. § 1257 (2), a grant of jurisdiction on appeal, "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." In their notices of appeal to this Court, appellants have phrased some of their federal constitutional claims as attacks on the constitutionality of the Ohio statute authorizing the Commission and the statute providing for immunity. But this does not suf-

fice: "It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U. S. 182, 185. Despite the import of our order postponing the consideration of jurisdiction till the hearing on the merits, see Rule 16 (4) of this Court,[10] appellants have made no effort to support their burden of demonstrating an attack made by them on the validity of a state statute in the state courts, and we have found none. Accordingly the appeals are dismissed. See *Sweezy* v. *New Hampshire, supra,* at 236. But since various rights, privileges and immunities under the Federal Constitution were claimed below, 28 U. S. C. § 1257 (3), we consider the appeal papers as petitions for certiorari, and in view of the public importance of the questions presented, grant certiorari. 28 U. S. C. § 2103.

The view we take of the merits of the case requires us to examine whether the appellants made a proper challenge to their convictions below, on federal constitutional grounds, on the theory that they were being convicted for claiming the privilege against self-incrimination after not being given to understand at the time of the inquiry that such a privilege was unavailable. In the lower Ohio courts, federal constitutional questions as to the adequacy of the insistence of the Commission on an answer to its questions were involved in the lower courts' discussion of the cases. In the appeal of Raley, Stern and Brown, the Court of Appeals discussed the extent to which the Commission gave the defendants to understand that answers were in fact desired to particular questions, and this as

[10] "If consideration of the question of jurisdiction is postponed, counsel should address themselves, at the outset of their briefs and oral argument, to the question of jurisdiction."

part of its consideration of constitutional claims under both the Federal and Ohio Constitutions. 100 Ohio App., at 87–90, 136 N. E. 2d, at 308–310. The trial court's opinion in Mrs. Morgan's case refers to the contention that a direction to answer was not given to the defendant, and also recites that a due process claim under the Federal Constitution was made.

The assignments of error made by Mrs. Morgan in the State Supreme Court show that she claimed in that court that the judgment of conviction was violative of due process, as guaranteed by the Federal Constitution, in that while she claimed the privilege, she was not "charged with refusal to answer any questions asked by members of the Commission and that she was not notified that her claim of the privilege was rejected by the Commission." The State Supreme Court passed on this claim,[11] holding that a direction to answer was unnecessary because of the immunity statute, and stated generally that its reasoning and conclusions in her case "apply with equal force to the appeal of Raley, Stern and Brown." 164 Ohio St., at 532, 133 N. E. 2d, at 108. There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. See *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134. We think this sufficient here to satisfy the statutory requirement that the federal

[11] Said the court: "It is argued also that the *Quinn case, supra,* [*Quinn* v. *United States,* 349 U. S. 155] is, in effect, a mandate by the Supreme Court of the United States to all legislative bodies, both national and state, that they must specifically direct a witness to answer before he may be cited for contempt, and a directive to all judicial tribunals in the nation that such must be the case before a witness may be convicted of contempt." 164 Ohio St., at 545, 133 N. E. 2d, at 115. Clearly this was a discussion of whether the theory of the *Quinn* case, that a witness must be apprised of the rejection of the privilege, was binding on the States as a matter of the Federal Constitution.

right sought to be vindicated in this Court be one claimed below. 28 U. S. C. § 1257 (3).[12]

Second. We conclude that the judgments of conviction rendered below violate the Due Process Clause of the Fourteenth Amendment, with an exception to be later noted. We need not decide whether there is demanded of state investigating bodies as explicit a rejection of a claimed privilege against self-incrimination as has been held to be necessary under the statute punishing contempts of Congress. *Quinn* v. *United States,* 349 U. S. 155; *Emspak* v. *United States,* 349 U. S. 190, 202; *Bart* v. *United States,* 349 U. S. 219. Nor need we decide whether it would be a sufficient basis for reversal here simply that the appellants were not given notice of the immunity law at the inquiry, though in analogous contexts we have insisted that state investigators make clear to those before them the basis on which an answer is required. *Scull* v. *Virginia,* 359 U. S. 344, 353. This case is more than that; here the Chairman of the Commission, who clearly appeared to be the agent of the State in a position to give such assurances, apprised three of the appellants that the privilege in fact existed, and by his behavior toward the fourth obviously gave the same impression. Other members of the Commission and its counsel made statements which

[12] It is true that the assertion of violation of federal rights through the lack of a direction to answer, passed on below, does not precisely match the dispositive ground of the case, that is, not merely the absence of a direction to answer on the part of the Commission, but the positive assurances that the privilege was available. But this is really only a variation of the former theme, put into sharper focus by the State Supreme Court's theory of decision. See *Dewey* v. *Des Moines,* 173 U. S. 193, 198. The claim made and passed on was, in essence, lack of knowledge by the appellants, because of the Commission's actions, that they were being considered as unlawfully refusing to answer the questions. The Supreme Court's conclusion added more force to the contention but did not change its nature.

were totally inconsistent with any belief in the applicability of the immunity statute, and it is fair to characterize the whole conduct of the inquiry as to the four as identical with what it would have been if Ohio had had no immunity statute at all. Yet here the crime said to have been committed by the appellants, as defined by the State Supreme Court, was simply that of declining to answer any relevant question on the ground of possible self-incrimination. This was because the Court held that the Ohio immunity statute automatically removed any basis for a valid claim of the privilege, which generally exists under Ohio law.[13] Ohio Const., Art. I, § 10. Accordingly, any refusal to answer, based on a claim of the privilege, was said to constitute the offense. While there is no suggestion that the Commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him. Cf. *Sorrells* v. *United States,* 287 U. S. 435, 442. A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them. *Lanzetta* v. *New Jersey,* 306 U. S. 451. Inexplicably contradictory commands in statutes ordaining criminal penalties have, in the same fashion, judicially been denied the force of criminal sanctions. *United States* v. *Cardiff,* 344 U. S. 174. Here there were more than commands simply vague or even contradictory. There was active misleading. Cf. *Johnson* v. *United States,* 318 U. S. 189, 197. The State Supreme Court dismissed the statements of

[13] Accordingly, the applicability of *Twining* v. *New Jersey,* 211 U. S. 78, to the present case need not be discussed.

the Commission as legally erroneous, but the fact remains that at the inquiry they were the voice of the State most presently speaking to the appellants.[14] We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances.

We cannot reach a contrary conclusion by joining with the speculation of the court below that some of appellants might have behaved the same way regardless of what the Commission told them. We think it impermissible in a criminal case to excuse fatal defects by assuming that a person summoned to an inquiry, simply because he expresses defiance beforehand, will continue to be defiant even if a proper explanation is made of what the inquiry wants of him and the basis on which it is wanted. See *Flaxer* v. *United States,* 358 U. S. 147, 151. It is alleged that the personal attitudes of the appellants toward the Commission were defective in various ways, but of course the indictments and convictions were had simply for refusing to answer questions. Neither can we find any ground for affirmance in the fact that certain refusals to answer occurred before the Chairman's assurances to the various appellants that the privilege existed became explicit. Certainly such assurances removed any reason for the appellants to reconsider their prior assertions of the privilege. And the positive assurances given only made explicit an attitude that the Commission had manifested throughout its interviews with these appel-

[14] The State Supreme Court relied on *Sinclair* v. *United States,* 279 U. S. 263, 299, in support of its holding. *Sinclair* dealt with a witness at an investigation who refused to answer questions by reason of a legal theory he entertained, where the Committee rejected his legal theory explicitly and ordered him to answer. He refused and was convicted. The Court found his legal theory in error, and held that under the circumstances the entertaining of this erroneous legal theory in good faith was no defense to the witness. That *Sinclair* is wholly inapposite here requires no further statement.

509615 O–59–31

lants. We cannot carve the inquiry into segments; the record does not suggest any picture of the Commission's negation of the privilege followed by an acquiescence in its use.

Finally, it is argued that the convictions may be supportable here as to those questions which an appellant was directed to answer after claiming the privilege. As the statement of the case we have made indicates, it is not shown that there was such a direction as to any question except one put to Stern,[15] which stands as the basis for the sole count on which his conviction rests. As to the conviction based on this question, the Court is equally divided. To four of us, the matter is plain. Under the circumstances of the inquiry, the direction to answer given Stern was obviously not given because of the immunity statute, but because the Commission took the position that a generally available privilege did not

---

[15] It is suggested that Brown declined to answer one question other than on grounds of self-incrimination. No such finding was made by the Ohio Supreme Court, which treated the entire case as involving pleas of self-incrimination; accordingly, so do we. No direction to answer as to this question was given by the Commission. It may be well to quote the entire context:

"Q. And what has been your educational background?

"A. I refuse to answer that question. I invoke my rights and privileges under the Fifth Amendment.

"Q. Is there some particular illegal institution which you attended or some Communist Party school that you attended that makes you hesitate to reveal where you were educated?

"A. No, I just don't think it is your business.

"Chairman Renner: We will determine that, Mr. Brown.

"By Mr. Isaacs:

"Q. Do I understand, for the record, you are refusing to answer the question because you feel it is not our business?

"A. The answer is the same.

"Mr. Isaacs: May the record show that, please.

"Q. [Going on to the next question] What has been your employment record in recent years, Mr. Brown?"

exist as to a particular question, since no answer to it could possibly incriminate. Stern made his decision not to answer, it must be assumed, in the light of the Commission's attitude that the privilege generally applied, and on the basis of his own determination that the answer would tend to incriminate him. The Ohio Supreme Court has not disagreed with him on the issue on which he was directed to answer; it made no finding that the Commission was correct on the basis on which it ordered the answer—that no response to the question possibly could incriminate.[16] Four of us think that the same affront to the Due Process Clause as is generally presented in this case is presented by a judgment ignoring the grounds on which the Commission's direction to answer was given, and affirming the conviction by reason of an immunity statute whose existence the Commission negated. To four of us, it is obvious that Stern was as much "entrapped" as the others. It is hardly an answer, in our view, to say he was directed to answer the question. In effect, the Commission said to Stern: "We recognize your privilege against self-incrimination in this inquiry, but you must take care that you claim it only where your answer might really tend to be incriminating. We do not see how saying where you live might incriminate you, so as to this question we reject your claim of privilege and order you to answer." Stern's refusal to answer after

[16] While one of the Ohio Courts of Appeals put its affirmance of some of the counts on this basis, the issue whether any particular questions were free of the possibility of an incriminating answer was not considered by the Ohio Supreme Court, and was in fact irrelevant to the court, under the view it took of the case. We review its judgment here, and it is basic that after finding constitutional error in a state court judgment we cannot affirm it here by postulating some ground of state law not relied on below. *Murdock* v. *Memphis*, 20 Wall. 590, 636, proposition 7; cf. *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 444.

the direction opened him to the risk that a court might hold that he was wrong and that the Commission properly ruled that no answer could be incriminatory. But the Ohio Supreme Court has not held this; it has not held that Stern's decision that the answer would tend to incriminate him was wrong, but only that the Commission was wrong in telling him that the privilege applied at all. It may have been at his peril that Stern made his decision that the answer was incriminatory, but four of us cannot see how consistently with the Due Process Clause it can be said that he thereby also assumed the very different peril that the basic premise of what the Commission was telling him—that the privilege existed—was one hundred percent in error. We four regret that our Brethren remain unpersuaded on this score, and that accordingly as to Stern the judgment must be affirmed by an equally divided Court.

Appeals dismissed.

On writs of certiorari, judgments reversed as to Raley, Brown and Morgan; judgment affirmed as to Stern by an equally divided Court.

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

MR. JUSTICE CLARK, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join.

We think the conviction of Stern must be affirmed. Like our Brethren who would reverse as to him we, too, agree with Judge Stewart, of Ohio's Supreme Court. But, as we read his opinion, he swept with a whisk broom not a carpet sweeper. Our Brothers take too broad a swath.

Judge Stewart said that since Ohio's Commission advised appellants that they had a right to refuse to answer questions which might incriminate them, "they could not possibly in following the admonition of the Commission be in contempt of it" in refusing to answer any such queries. Brother BRENNAN's opinion characterizes the action of the Commission as an "indefensible sort of entrapment . . . convicting a citizen for exercising a privilege which the State clearly had told him was available to him." We agree that such was true as to three of these appellants, and therefore concur in the opinion as to Brown, Raley and Morgan. But, as Judge Stewart went on to point out, the record clearly shows that Stern was not so entrapped.[1]

Stern was convicted for refusal to answer the question, "Where do you reside, Mr. Stern?" The Chairman refused to accept Stern's plea of the privilege [2] and twice

---

[1] Judge Stewart said that the witnesses could not have been in contempt "except as to the few questions which two of them were directed to answer." 164 Ohio St., at 564, 133 N. E. 2d, at 126. The second witness whom Judge Stewart had in mind would seem from the record before us to be Brown. The first count of Brown's indictment was based on a refusal to answer the question, "And what has been your educational background?" After pleading the privilege, Brown was pressed for an explanation as to why his answer would be incriminating. Brown responded "I just don't think it is your business." When pressed further, Brown reverted to the privilege. On the record here, we find no specific direction to Brown to answer, and thus we must concur in the reversal of Brown's conviction. The question of the sufficiency of the plea will, of course, be open on remand.

[2] The pertinent colloquy following Stern's refusal to answer was as follows:

"Q. What is there in either of those constitutions [Ohio and federal] that permits a witness to refuse to state where he resides?

"A. I claim the privilege under the Fifth Amendment of the

unequivocally directed him to answer the question. Stern persisted in his refusal. The due process ground used in our Brother BRENNAN's opinion to invalidate the convictions of Brown, Raley and Morgan is, therefore, not present as to Stern. There was no "entrapment" in the above question upon which he was convicted, since it was made clear, even without reference to the Ohio immunity statute, that as to that question the privilege was not available. The reason given by the Commission, except where bad faith is necessary which is not true here,[3] is irrelevant. The test is whether the witness was commanded to answer regardless. Neither Morgan nor Raley was so directed, but Stern was categorically instructed to do so.[4]

United States Constitution, and Section 1, Article 10 of the Ohio Constitution.

"Q. Is there something about the nature or character of the home in which you live that to admit you live there would make you subject to criminal prosecution?

"A. The same answer.

"Chairman Renner: The chair will request that the witness answer the question.

"The Witness: I have answered the question.

"Mr. Isaacs [the Commission's Counsel]: Mr. Chairman, I ask that the witness be ordered and directed to answer the question.

"Chairman Renner: The chairman directs the witness to answer the question relating to his address, the address of his residence in Cincinnati.

"The Witness: The same answer.

. . . . .

"Q. [By Mr. Isaacs]: As a matter of fact, Mr. Stern, you reside at 3595 Wilson Avenue in the city of Cincinnati, Ohio; is that not correct?

"A. The same answer."

[3] Under Ohio law as announced in the opinion below it is not necessary to show a "willful" or "deliberate" refusal to answer. 164 Ohio St., at 543, 133 N. E. 2d, at 114.

[4] As to Brown, see note 1, *supra*.

Admitting that the direction to answer was "obviously . . . [given] because the Commission took the position that a generally available privilege did not exist," four members of the Court still refuse to affirm as to Stern because the State Supreme Court did not go on that ground. But they overlook the sweep of their own opinion. It is the Federal Due Process Clause that is being applied and the Court must take the facts as shown by the record. It clearly shows that Stern was not entrapped by the statements of the Chairman as to the availability of the privilege for the question forming the basis of the only count of the indictment before us. Unlike the others, he was specifically ordered to answer. In this posture of the facts there could be no entrapment and hence no lack of due process. We would therefore affirm as to Stern.

COMMISSIONER OF INTERNAL REVENUE *v.* HANSEN ET UX.

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

No. 380. Argued April 29–30, 1959.—Decided June 22, 1959.*

The taxpayers here involved are two retail automobile dealers and a house trailer dealer who keep their books and make their income tax returns on the accrual basis. Obligations of purchasers for deferred payments on instalment sales are discounted or sold by them to finance companies, which pay the dealers most of the amounts in cash but credit to each dealer in a "reserve account" a small percentage thereof, which is retained by the finance company to secure performance of the dealer's obligations under his guaranties or endorsements. *Held:* The amounts thus credited to the dealers in "reserve accounts" on the books of the finance companies must be reported as income accrued during the tax years in which they are credited to such reserve accounts. Pp. 447–469.

(a) The retained percentages of the purchase price of the instalment paper, from the time they are entered on the books of the finance companies as liabilities to the respective dealers, were vested in and belonged to the respective dealers, subject only to their pledges thereof to the respective finance companies as collateral security for the payment of their then contingent liabilities to the finance companies. Pp. 460–463.

(b) The percentages of the purchase price of the instalment paper that were withheld by the finance companies constituted accrued income to these dealers at the time the withheld amounts were entered on the books of the finance companies as liabilities to the dealers, for at that time the dealers acquired a fixed right to receive the amounts so retained by the finance companies. Pp. 463–466.

---

*Together with No. 381, *Commissioner of Internal Revenue* v. *Glover*, on certiorari to the United States Court of Appeals for the Eighth Circuit, argued April 29–30, 1959; and No. 512, *Baird et ux.* v. *Commissioner of Internal Revenue*, on certiorari to the United States Court of Appeals for the Seventh Circuit, argued April 30, 1959.

(c) That this holding will require taxpayers to pay taxes upon funds which are not available to them for that purpose is but a normal result of the accrual basis of accounting. Pp. 466–467.

(d) The respective taxpayers here involved have wholly failed to sustain the burden of showing that any part of the amounts credited to them on the books of the finance companies was entitled to special treatment. Pp. 468–469.

258 F. 2d 585 and 253 F. 2d 735, reversed.
256 F. 2d 918, affirmed.

Meyer Rothwacks argued the causes for the Commissioner of Internal Revenue. With him on the brief for the Commissioner were *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten.*

Lester M. Ponder argued the cause for petitioners in No. 512. With him on the brief were *W. Byron Sorrell, John C. Williamson, Cullen B. Jones, Jr.* and *Thomas M. Scanlon.*

Emmett E. McInnis, Jr. argued the cause and filed a brief for respondents in No. 380.

William S. Miller, Jr. argued the cause for respondent in No. 381. With him on the brief were *E. Chas. Eichenbaum* and *Leonard L. Scott.*

Briefs of *amici curiae* in support of the taxpayers were filed by *James C. Moore* and *L. W. Anderson* for the National Automobile Dealers Association, and by *William Waller* for Vance L. Wiley et al.

Mr. Justice Whittaker delivered the opinion of the Court.

These federal income tax cases present questions concerning the proper and timely accrual of gross income deriving from sales of commercial installment paper by retail dealers to finance companies. The taxpayers involved in these cases are two retail automobile dealers and a house trailer dealer. All keep their books on the accrual

basis. Most of their sales are "credit sales." It appears that they generally negotiate, consummate, and finance such sales in accordance with a common pattern. The dealer and his customer agree upon a "Cash Delivered Price" for a particular vehicle owned by the dealer. In part payment of that price the customer makes a down payment to the dealer in cash or "trade in," or both. To the remaining balance of that cash price there is added the cost of insurance on the vehicle and a "finance charge." The aggregate is sometimes called the "Deferred Balance." It is evidenced and secured by an assignable or negotiable instrument retaining defeasible title to or a lien on the vehicle—generally on a form supplied by the finance company with which the dealer may then be doing business—and the instrument is signed by the customer, delivered to the dealer, and made payable to him in monthly installments over an agreed period—one to three years on automobiles and three to five years on house trailers. Thereupon, the dealer delivers the vehicle to his customer, with such memoranda or bill of sale as will enable him to register, license and use it.

Soon after completion of these procedures, these dealers sell (discount) those instruments (hereafter called "installment paper") to finance companies for an agreed or formula fixed price, and the dealers guarantee payment, in whole or in part, of the installment paper.

Under contracts between the respective dealers and finance companies here concerned, the latter, upon receipt and acceptance of installment paper, are obligated to pay immediately to the dealers a major percentage of the purchase price, but they are thereby also authorized to retain the remaining percentage of the price and to credit it on their books to a "Dealers Reserve Account" in the name of the particular dealer, for the purpose of securing performance by him of his guarantor, endorser, and other liabilities to the finance company.

The dealers involved in these cases recorded on their books in the years the installment paper was sold, and included in their income tax returns for those years, the cash received from the finance companies, but they did not accrue on their books or include in their returns the percentage of the price that was retained by the finance companies and credited to their reserve accounts.

The Commissioner contends that in the year of their sales of installment paper to the finance companies, the taxpayers acquired a *fixed right to receive*—even though not until a later year—the percentage of the purchase money that was retained by the finance companies and credited on their books to the dealers' reserve accounts in that year, and, hence, those amounts constituted accrued income to the taxpayers in that year, and should have been accrued on their books and included in their returns for that year. The taxpayers, on the other hand, contend that the amounts so retained and credited were never under or subject to their control, and were always subject to such contingent liabilities of the taxpayers to the finance companies that it could not have been known, in the year of the sales, how much, if any, of the reserves would actually be received by them in cash, and hence they did not acquire, in the year of any of the sales, a fixed right to receive—in a later year or at any time—the amounts credited to them in the reserves, and, therefore, the reserves did not constitute accrued income to them. This presents, in essence, the issue for decision in these cases.

On the grounds stated, the Commissioner proposed assessment of income tax deficiencies for certain years against the respective taxpayers here involved. The taxpayers each petitioned the Tax Court for a redetermination. After hearings, the Tax Court sustained the Commissioner in each case. The taxpayers petitioned for review. In No. 380, the *Hansen* case, the Ninth Circuit

reversed, 258 F. 2d 585; in No. 381, the *Glover* case, the Eighth Circuit reversed, 253 F. 2d 735; and in No. 512, the *Baird* case, the Seventh Circuit affirmed, 256 F. 2d 918. Because of an asserted conflict between those circuits in these cases, and between other circuits on the question involved,[1] and because of the importance of the question to the proper administration of the revenue laws, we granted certiorari in all three cases.

Inasmuch as these cases turn on the same issue, and the *Hansen* and *Glover* cases were consolidated for argument and argued together in this Court, and the *Baird* case was argued immediately following, it will be convenient to decide the three cases in one opinion. Although the relevant facts in the three cases are very similar and follow the pattern just explained, there are variations which we think should be set forth.

Respondents in No. 380, John R. Hansen and Shirley G. Hansen, are husband and wife and filed joint federal income tax returns for the taxable years 1951, 1952 and 1953 here involved. During those years, John R. Hansen ("taxpayer"), was a motorcar dealer in Bellevue, Wash-

[1] The Sixth Circuit in *Schaeffer* v. *Commissioner,* 258 F. 2d 861, sustained the Commissioner's position. Also the Tax Court since *Shoemaker-Nash, Inc.,* v. *Commissioner,* 41 B. T. A. 417 (1940), has by a long line of decisions consistently sustained the Commissioner's position.

On the other hand the Fourth Circuit has sustained the taxpayers' position in *Johnson* v. *Commissioner,* 233 F. 2d 952. And the Fifth Circuit has sustained the taxpayers' position in *Texas Trailercoach, Inc.,* v. *Commissioner,* 251 F. 2d 395, *West Pontiac, Inc.,* v. *Commissioner,* 257 F. 2d 810, and in several judgments (without opinions) entered on stipulations specifically presenting anew the same issue which that court had decided in *Texas Trailercoach, Inc.,* v. *Commissioner, supra.* In entering those judgments (in *United States* v. *Hines Pontiac,* 2 P–H Fed. Tax Rep. 2d 5694, *United States* v. *Modern Olds, Inc.,* 2 P–H Fed. Tax Rep. 2d 5713, and *Kilborn* v. *Commissioner,* 2 P–H Fed. Tax Rep. 2d 5812), the Fifth Circuit adhered to its decision in *Texas Trailercoach, Inc.,* v. *Commissioner, supra.*

ington, and kept his books on the accrual basis. He frequently sold automobiles on "time payments." The taxpayer was not bound by any contract to sell his installment paper, but because of his needs for operating capital he consistently sold it to General Motors Acceptance Corporation ("GMAC").

Although before selling installment paper to GMAC the taxpayer did not have an express contract with that company concerning the terms and conditions of such sales and purchases, he had received its manual covering its policies on those subjects and apparently acted under them. That manual was not put in evidence, but it is intimated in the evidence and findings and stated in the briefs, without contradiction, that it contained provisions to the effect that upon receipt and acceptance of a duly assigned conditional sale contract guaranteed by the dealer, GMAC would pay to the dealer the major percentage (not specified in the evidence or findings) of the agreed price therefor, but would retain the remaining percentage of the price and credit the same on its books to a "Dealers Reserve Account" in the name of the dealer, as security for performance of his obligations to GMAC under his guaranty of payment of the installment paper and for the payment of any other obligation which he might incur to GMAC. Once in each year GMAC would remit to the dealer so much of his accumulated reserve as exceeded 5% of the then aggregate unpaid balances on installment paper which GMAC had purchased from the dealer.

Upon negotiating a time sale of an automobile and receiving the down payment and any other sum immediately payable, the taxpayer prepared, on forms supplied by GMAC, a conditional sale contract setting forth a compilation of the figures, including insurance and a finance charge, involved in the time sale and concluding with a statement of the "Time (Deferred) Balance" which was

payable at the office of GMAC in fixed monthly installments. When the customer signed and delivered to the taxpayer the conditional sale contract, the automobile was delivered to the customer and, as recited in that contract, he acknowledged "delivery and acceptance of [it] in good order." [2]

It was the taxpayer's consistent practice immediately thereafter to assign the conditional sale contract (and guarantee its payment) to GMAC by executing the form of assignment printed at the foot of the form and forwarding it to GMAC for purchase.[3] Upon receipt and accept-

---

[2] At the very beginning of the form there is a recital that "The undersigned seller [the dealer] hereby sells, and the undersigned purchaser or purchasers, jointly and severally, hereby purchase(s), subject to the terms and conditions hereinafter set forth, the following property, delivery and acceptance of which in good order are hereby acknowledged by purchaser," and then follows a detailed description of the automobile, and a computation of the amounts which support the "Time (Deferred) Balance" that is payable by the purchaser in monthly installments.

The reverse side of the form recites that "[f]or the purpose of securing payment of the obligation hereunder, seller reserves title, and shall have a security interest, in said property until said amount is fully paid in cash." It then goes on to specify the various conditions to be observed by the purchaser, which are usually found in conditional sale contracts.

[3] That assignment, so far as pertinent, provides:

"For value received, undersigned [the dealer] does hereby sell, assign and transfer to the General Motors Acceptance Corporation his . . . right, title and interest in and to the within contract, herewith submitted for purchase by it, and the property covered thereby and authorizes said General Motors Acceptance Corporation to do every act and thing necessary to collect and discharge the same.

. . . . . .

"In consideration of your purchase of the within contract, undersigned [the dealer] guarantees payment of the full amount remaining unpaid hereon, and covenants if default be made in payment of any instalment herein to pay the full amount then unpaid to General Motors Acceptance Corporation upon demand. . . ."

ance of the conditional sale contract and assignment, GMAC remitted to the taxpayer the major percentage of the price it was to pay therefor, but retained the remaining percentage and credited it on its books to a "Dealers Reserve Account" in the name of the taxpayer, for the purpose of securing performance by him of his obligations to GMAC.

The taxpayer recorded on his books in the year such installment paper was sold, and included in his income tax return for that year, the cash received from GMAC, but he did not accrue on his books, or include in his return, the percentage of the price that was retained by GMAC and credited to his reserve account.

The Commissioner proposed the assessment of deficiencies in income taxes against the taxpayer and his wife for the years involved upon the grounds earlier stated. The taxpayer sought a redetermination in the Tax Court which, after hearing, sustained the Commissioner, but on taxpayer's petition for review the Ninth Circuit reversed, 258 F. 2d 585, and we granted certiorari for the reasons already stated, 358 U. S. 879.

Respondent in No. 381, Burl P. Glover ("taxpayer"), during the years 1949, 1950 and 1951 here involved, was a motorcar dealer in Pine Bluff, Arkansas, and kept his books and filed his income tax returns on a calendar year accrual basis. He frequently sold automobiles on time payments, the unpaid balance of the purchase price of each automobile, including insurance and a finance charge, being evidenced by the customer's promissory note payable to the dealer, or his order, in monthly installments over a fixed period, and secured by a chattel mortgage on the automobile.

Before the note and mortgage sales transactions here involved, the taxpayer signed a letter addressed to Universal C. I. T. Credit Corporation (obviously written on a form prepared by the addressee) proposing to sell to

Universal C. I. T. Credit Corporation ("C. I. T.") such of his notes and mortgages as he chose to sell and as were "acceptable to" C. I. T., and agreeing, among other things, to endorse with "full recourse" certain of the notes accepted and purchased by C. I. T., and to purchase from C. I. T. any automobile that it repossessed or recovered under a note and mortgage bought from him, at a cash price, payable on demand, equal to the then unpaid balance of the note and mortgage, or, failing in that obligation, to pay to C. I. T. the amount of any loss incurred by it in selling such repossessed automobile. The letter also stated that the provisions for "reserves as outlined in [C. I. T.'s] reserve arrangement effective at the time paper [was] purchased by [it]," would apply to such sales,[4] and that 3 times in each 12-month period, if the dealer was not then indebted to C. I. T., the latter would pay to the dealer so much of his reserves as exceeded 3% of the then aggregate unpaid balances on paper purchased from the dealer.[5]

---

[4] This record does not contain C. I. T.'s "reserve arrangement."

[5] The pertinent parts of the taxpayer's letter, referred to in the text, may be more fully summarized as follows: C. I. T. was to buy from the taxpayer such of his notes and mortgages as he chose to sell and as were "acceptable to" C. I. T. Some of the notes and mortgages were to be endorsed by the dealer to C. I. T. without recourse, but "paper covering commercial cars used for long distance hauling, commercial cars of more than two tons capacity, busses, cars used for taxi, jitney, 'drive-yourself' service, or cars sold to relatives or employees" was to bear the dealer's "full recourse endorsement."

Provisions for "reserves as outlined in [C. I. T.'s] reserve arrangement effective at the time paper [was] purchased by [it]," were to be applicable to such sales, but as earlier observed this record does not contain C. I. T.'s "reserve arrangement." Three times in each 12-month period, if the dealer was not then indebted to C. I. T., the latter would pay to the dealer his "accumulated reserves in excess of 3% of the then aggregate unpaid balances on paper purchased from [him]," but if C. I. T. stopped buying installment paper from

Upon consummating a time sale of an automobile with his customer in the manner stated, the taxpayer delivered the automobile to his customer, along with a bill of sale, subject to the mortgage, which enabled the customer to register, license and use it.

Soon afterward the taxpayer, pursuant to his letter to C. I. T. just referred to, endorsed the note (and assigned the mortgage) to C. I. T., in some cases without recourse and in others with full recourse, and forwarded the same to C. I. T. for purchase. Upon receipt and acceptance of the note and mortgage, C. I. T. remitted to the taxpayer the major percentage (not specified in the evidence or findings) of the agreed price therefor, but retained the remaining percentage and credited it on its books to a "Dealers Reserve Account" in the name of the taxpayer, for the purpose of securing performance by him of his obligations to C. I. T.

As in the *Hansen* case, the taxpayer recorded on his books in the year the installment paper was sold, and included in his income tax return for that year, the cash received from C. I. T., but he did not accrue on his books, or include in his return, the percentage of the price that was retained by C. I. T. and credited to his reserve

---

the dealer the former was authorized to "hold and apply all reserves until liquidation of all paper purchased from [the dealer was] completed."

The taxpayer was to purchase from C. I. T. "each repossessed or recovered car tendered at [the dealer's] place of business within 90 days after maturity of the earliest instalment still unpaid," at a price, payable on demand, equal to "the unpaid balance due on the car," or, if the dealer failed to do so, he was to pay to C. I. T. the amount of "any deficiency incurred by [C. I. T.] in the resale of such repossessed cars. . . ."

If because of prepayment of a note by a maker, C. I. T. refunded any part of a "service charge," the taxpayer agreed to pay to C. I. T. the same percentages, if any, of the refund as had originally been credited to his reserve account.

509615 O–59–32

account. And, as in the *Hansen* case, the Commissioner proposed the assessment of deficiencies in income taxes against the taxpayer for the years involved upon the grounds earlier stated. The taxpayer sought a redetermination in the Tax Court which, after hearing, sustained the Commissioner, but, on the taxpayer's petition for review, the Eighth Circuit reversed, 253 F. 2d 735, and we granted certiorari for the reasons already stated, 358 U. S. 879.

Petitioners in No. 512, Clifton E. Baird and Violet L. Baird ("taxpayers"), are husband and wife and, during the years 1952, 1953 and 1954 here involved, they were also partners in a firm known as "Baird Trailer Sales" ("the partnership") which was engaged primarily in selling house trailers at Salem, Indiana. The partnership kept its books and filed its partnership (informational) income tax returns on a fiscal year accrual basis, but the taxpayers kept their personal books, and filed their returns, on a calendar year cash basis. During the years involved the partnership sold many of its trailers on "the installment basis," the unpaid purchase price of each trailer being evidenced and secured by an assignable or negotiable instrument, retaining in the partnership defeasible title to or a lien on the trailer, signed by the customer, delivered to the partnership, and payable to it in monthly installments over an agreed period.

The partnership was not legally obligated to sell its installment paper but its limited operating capital made it necessary, as a practical matter, to do so. Prior to the transactions here involved the partnership entered into contracts with Minnehoma Financial Company ("Minnehoma"), of Tulsa, Oklahoma, Michigan National Bank, of Grand Rapids, Michigan, and Midland Discount Corporation ("Midland"), of Cincinnati, Ohio, providing for the sale and purchase of such of the partnership's installment paper as it offered for sale and as those companies

were willing to buy, and throughout the years in question the partnership sold installment paper to each of those companies under those contracts.

It was provided in the Minnehoma contract that the partnership, among other liabilities assumed by it to Minnehoma, would unconditionally guarantee payment when due of all sums called for by any installment paper purchased from it, and that Minnehoma, upon receipt and acceptance of such installment paper, would remit to the partnership 95% of the agreed price to be paid therefor, but would retain the remaining 5% of the price and credit it (and also, if it wished, a portion of the "finance charge") to a reserve account on its books in the name of the partnership, as security for performance of all endorser, guarantor, and other liabilities of the partnership to Minnehoma.[6]

---

[6] The material parts of the contract between the partnership and Minnehoma may be summarized as follows: Upon receipt and acceptance of installment paper from the partnership, Minnehoma would remit to the partnership 95% of the price to be paid therefor, but would retain the remaining 5% of the price and credit it (and also, if it wished, a portion of the "finance charge" paid by the maker) to a reserve account on its books in the name of the partnership. The partnership unconditionally guaranteed payment when due of all sums called for by the installment paper, and guaranteed that the makers would perform all obligations assumed by them under that paper, and that in the event the makers failed to pay any installment when due or to keep any obligation assumed by them under the installment paper, the partnership would repurchase such installment paper from Minnehoma, upon demand, at a price equal to the unpaid balance thereon.

Minnehoma was authorized to charge against the partnership's reserve account any sums for which the partnership might be or become indebted to Minnehoma; and at such times as—after the payment of all contingent liabilities of the partnership to Minnehoma—the amount then credited to the partnership's reserve account exceeded 15% of the aggregate unpaid balances of all outstanding installment paper so sold and purchased, Minnehoma would pay

Under an oral contract with Michigan National Bank, the bank agreed that, upon receipt and acceptance of installment paper endorsed by the partnership with full recourse, it would immediately pay to the partnership a percentage (not specified in the evidence or findings) of the price to be paid therefor, but that the remaining percentage of the price would be retained and credited to a "reserve account" in the bank in the name of the partnership. That reserve account was contemporaneously assigned to the bank by the partnership under the "collateral assignment" shown in the margin.[7]

---

such excess, once each month, to the partnership; and when all installment paper purchased by Minnehoma from the partnership had been paid in full, Minnehoma would pay to the partnership the balance of its reserve account.

[7] "Collateral Assignment.

"For Valuable Consideration, the receipt of which is hereby acknowledged, the undersigned hereby sells, assigns, transfers, and conveys unto Michigan National Bank, of Grand Rapids, Michigan, its successors, and assigns forever, irrevocably, all of his, its, or their right, title and interest in certain sums of money now on deposit or that may hereafter be deposited in the Michigan National Bank, of Grand Rapids, Michigan, and identified and represented by Reserve account in the name of the undersigned in the Michigan National Bank.

"This Assignment and Transfer is made as collateral security for the payment of the direct and indirect liability of the undersigned to the said Michigan National Bank, of Grand Rapids, Michigan, and to secure the payment of the several notes representing said direct and indirect liability and any renewal or renewals thereof, or any installment payment or payments and to secure any obligation . . . which the undersigned may owe to said Michigan National Bank, of Grand Rapids, Michigan.

"In the event of default in the payment of said liability or any installment thereof, or any of the several notes at the time when same shall fall due or in the payment of the interest thereon or any part of the principal of said liability then the Michigan National Bank, of Grand Rapids, Michigan, at their election, notice of said election being hereby expressly waived, may apply the total of said

The contract with Midland was evidenced by two letters. In essence they stated that upon receipt and acceptance of installment paper, endorsed by the partnership with full recourse, Midland would "advance" 97% of the price to be paid therefor if on new trailers and 95% of the price if on used trailers, and that the "differentials of 3% and 5%" would be retained and credited on Midland's books to a reserve account in the name of the partnership, for the purpose of securing performance of its obligations to Midland.[8] They also stated that, when a particular note has been paid out, the amount credited to the reserve on account of that note would be immediately paid to the dealer, and that when the "reserve fund exceeds 10% of [the partnership's] outstandings, the excess will be paid [to the partnership] automatically."

Here, as in the *Hansen* and *Glover* cases, the partnership did not accrue on its books, and the taxpayers did not include in their individual returns, in any of the

---

sums of money represented by said Reserve account at the date of election or any part thereof to meet the default in the liability.

"Whenever the indebtedness secured hereby is paid in full the Michigan National Bank, of Grand Rapids, Michigan, shall reassign said sums of money represented by said Reserve account along with all right, title and interest back to the undersigned.

"If in the opinion of the bank the undersigned dealer's account is in good standing, all sums in this reserve account in excess of ten per cent (10%) of the gross unpaid balance of all contracts outstanding on February 28 of each year will promptly be returned to the undersigned dealer."

[8] Midland's vice president who handled these transactions with the partnership testified relative to the purpose of the reserve as follows:

"A. Well, we buy this paper from all of our dealers on a straight endorsed basis, in other words, it's fully recoursed. If a trailer is given to a note-maker and the note-maker can't pay for it, the dealer has to take it back, [and] if he can't pay us . . . the net pay-off on the trailer, we would take the reserve money to liquidate the account."

years here involved, the amounts that were retained by Minnehoma, Michigan National Bank and Midland and credited on their respective books to the partnership's reserve accounts, and, again, as in the *Hansen* and *Glover* cases, the Commissioner proposed assessment against the taxpayers of deficiencies in income taxes for the years involved upon the grounds previously stated. Similarly, the taxpayers sought a redetermination in the Tax Court which, after hearing, sustained the Commissioner. On the taxpayers' petition for review, the Seventh Circuit affirmed, 256 F. 2d 918, and we granted certiorari for the reasons already stated, 358 U. S. 918.

We turn, first, to the taxpayers' contention that, in substance, the purchaser, not the dealer, obtains the loan directly from a finance company, and that the percentage of the loan which is retained by the finance company—although credited on its books to a reserve account in the name of the dealer as collateral security for the payment of his liabilities to the finance company—is the property of the purchaser of the vehicle, not the dealer, and therefore may not be regarded as accrued income to the dealer.

The basis of the contention (filling in the omitted but necessarily involved steps) is that each of these transactions is a single, "three-cornered" one between the dealer, the finance company and the purchaser; that, in substance, the dealer agrees to sell the vehicle to the purchaser for "a down payment plus cash" (the term "cash" as here used must necessarily refer to the unpaid balance of the purchase price); that the purchaser agrees immediately to obtain from the finance company, and it agrees to make to the purchaser, a loan, on the security of the vehicle, in an amount at least equal to the unpaid balance of the purchase price owing by the purchaser to the dealer for the vehicle; and that the purchaser agrees immediately to pay, or to direct the finance company to pay, to the dealer, out of the proceeds of the loan, an

amount equal to 95% (in most instances) of the unpaid balance of the purchase price owing by the purchaser to the dealer for the vehicle. Although this leaves an unpaid balance of the purchase price of the vehicle (5% in most instances) still owing by the purchaser to the dealer, it also leaves in possession of the finance company, out of the proceeds of the loan, an amount at least equal to that 5%. Nevertheless the purchaser, with the consent of the dealer, agrees with the finance company that the latter shall retain that 5% and credit it on its books to a reserve account in the name of the dealer, as collateral security for the payment of his contingent liabilities to the finance company. On these assumptions of fact the taxpayers contend that the reserves retained by the finance companies, though credited on their books to the dealers' reserve accounts, are only contingently so credited and are subject to cancellation if the purchaser fails to pay out his loan and, at all events, the reserves belong to the purchasers, and should not be regarded as accrued income of the dealers.

The Ninth Circuit in the *Hansen* case, heavily relying upon the opinion of the Fifth Circuit in *Texas Trailercoach, Inc.*, v. *Commissioner*, 251 F. 2d 395, adopted this theory and largely rested its decision upon that ground, 258 F. 2d, at 588, and, to a lesser extent, so did the Eighth Circuit in the *Glover* case, 253 F. 2d, at 737. The taxpayers contend here that such is the substance, if not the form, of their transactions and that, inasmuch as taxation depends on substance and not on form, the *Hansen* and *Glover* cases should be affirmed and the *Baird* case should be reversed on this ground alone.

We agree, of course, that the incidence of taxation depends upon the substance, not the form, of the transaction, *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, 334; *Helvering* v. *F. & R. Lazarus & Co.*, 308 U. S. 252, 255; *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, 174;

Weiss v. *Stearn,* 265 U. S. 242, 254; *United States* v. *Phellis,* 257 U. S. 156, 168, but we think that the taxpayers have assumed facts which are contrary to the records and are wholly without substance.

These records clearly show that, in every instance, the installment paper was executed by the purchaser and made payable to the dealer (though in the *Hansen* case "at the office of" GMAC, and in the *Baird* case "at the office of" Minnehoma), and that the same was later assigned or endorsed by the dealer and sent to the finance company for purchase, under and subject to the dealer's contractually assumed contingent liabilities to the finance company respecting it,[9] and that, in every instance,

---

[9] The record in the *Hansen* case shows that the conditional sale contracts were made between the dealer and the purchaser of the vehicle, and that the latter acknowledged to the dealer "delivery and acceptance of [the automobile] in good order" (see Note 2); that the dealer consistently assigned his conditional sale contracts to GMAC by executing the form of assignment printed at the foot of the form and sending the same to GMAC for purchase, guaranteeing payment of the full amount remaining unpaid thereon and covenanting that if default be made in the payment of any installment thereof to pay the full amount then unpaid to GMAC upon demand (see Note 3).

The record in the *Glover* case shows that the notes and mortgages were payable to the dealer and that, upon a sale of them, he endorsed them, in some cases without recourse and in others with "full recourse," and forwarded them to C. I. T. for purchase, subject, of course, to the various obligations he had undertaken to C. I. T. in respect thereto that are shown in Note 5.

The record in the *Baird* case shows that the partnership entered into contracts with its customers, taking assignable or negotiable instruments retaining defeasible title to or a lien on the trailers evidencing and securing the unpaid purchase price of the trailers; that it assigned its conditional sale contracts to Minnehoma with the guaranties and covenants shown in Note 6; that it endorsed with full recourse, sold and delivered to Michigan National Bank certain of its notes and mortgages, under the further guaranties contained

the finance company, upon receipt and acceptance of the installment paper and of the dealer's obligations respecting it, immediately paid to the dealer a major percentage of the agreed or formula fixed price for the paper; but, pursuant to the terms of the dealer's contract with the finance company, the latter retained the remaining percentage of the price and credited it on its books to the dealer's reserve account, as collateral security for the payment of his contingent liabilities to the finance company on such installment paper.

It is therefore clear that the retained percentages of the purchase price of the installment paper, from the time they were entered on the books of the finance companies as liabilities to the respective dealers, were vested in and belonged to the respective dealers, subject only to their several pledges thereof to the respective finance companies as collateral security for the payment of their then contingent liabilities to the finance companies.

This brings us to the question whether amounts of purchase price withheld by finance companies as security to cover possible losses on installment paper purchased from dealers, who employ the accrual method of accounting, constitute income to them at the time the withheld amounts are recorded on the books of the finance companies as liabilities to the dealers.

The principles governing the accrual and reporting of income by taxpayers who employ the accrual basis have long been settled by the opinions of this Court, *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281; *Spring City Foundry Co.* v. *Commissioner,* 292 U. S. 182, 184;

---

in the "collateral assignment" shown in Note 7; and that it also endorsed with full recourse, sold and delivered other of its notes and mortgages to Midland, and authorized it to retain a percentage of the purchase price to secure performance of its endorser liabilities to Midland. See Note 8.

Brown v. *Helvering,* 291 U. S. 193, 199. In *Spring City Foundry Co.* v. *Commissioner, supra,* Chief Justice Hughes, speaking for the Court, said:

> "Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income. When the right to receive an amount becomes fixed, the right accrues." 292 U. S., at 184–185.

Those principles are not questioned here, but the parties differ respecting their application to the facts of these cases. The taxpayers contend, first, that they cannot *presently* compel the finance companies to pay to them the amounts of their reserve accounts, and therefore they have not acquired a *presently enforcible right to recover* those reserves, and, hence, they should not be deemed to constitute accrued income to them. Inasmuch as these records show that the pay-out period for automobiles varies from 12 to 36 months and for house trailers from 36 to 60 months, it is doubtless true that the taxpayers, having pledged their reserve accounts to the finance companies as collateral security, cannot presently compel the finance companies to pay over their reserves. But the question is not whether the taxpayers can presently recover their reserves, for, as stated, it is the time of acquisition of the *fixed right to receive* the reserves and not the time of their *actual receipt* that determines whether or not the reserves have accrued and are taxable.

The taxpayers next contend that the amounts that were retained by the finance companies and entered on their books as liabilities to the dealers under their reserve accounts, were subject to such contingencies that it could not have been known, in the year of such reten-

tions and credits, what amount of those reserves would actually be received by them and, hence, they did not acquire, in the year of such retentions and credits, a fixed right to receive—in a later year or at any time—the amounts so withheld and credited to them, and therefore those amounts did not constitute accrued income to them.

It is true that the amounts retained by any one of the finance companies, and entered on its books as a liability to a particular dealer, are subject to such liabilities as the dealer may have contractually assumed to the finance company, but only the obligations of the dealer to the finance company arising from those liabilities may be offset against a like amount in the dealer's reserve account. Hence, those liabilities and obligations provide the only conditions that can affect full cash payment to the dealer of his reserve account. No amount may be charged by the finance company against the dealer's reserve account which he has not thus authorized.

It follows that only one or the other of two things can happen to the dealer's reserve account: (1) the finance company is bound to pay the full amount to the dealer in cash, or (2) if the dealer has incurred obligations to the finance company under his guaranty, endorsement, or contract of sale, of the installment paper, the finance company may apply so much of the reserve as is necessary to discharge those obligations, and is bound to pay the remainder to the dealer in cash.

Does the dealer "receive" funds which are so taken from his reserve account and applied to the payment of his obligations to the finance company? The dealer agreed in his contract with the finance company to receive his reserve in offset payment of his obligations to the finance company and the balance in cash. It would therefore seem that funds in the dealer's reserve which are applied to the payment of his obligations to the finance

company are as much "received" by him as those which the finance company pays to him in cash. The Seventh Circuit took that view in the *Baird* case, saying:

> "Ultimately only two things could happen to the funds in the dealer's reserve accounts: either the amounts would be paid to the partnership in cash or they would be used to satisfy the partnership's other obligations to the finance companies." 256 F. 2d, at 924.

In any realistic view we think that the dealer has "received" his reserve account whether it is applied, as he authorized, to the payment of his obligations to the finance company, or is paid to him in cash.[10]

It follows that the amounts (of purchase price of the installment paper) that were withheld by the finance companies constituted accrued income to these accrual basis dealers at the time the withheld amounts were entered on the books of the finance companies as liabilities to the dealers, for at that time the dealers acquired a fixed right to receive the amounts so retained by the finance companies.

The taxpayers complain that such a holding will unfairly require them to pay taxes upon funds which are not available to them for that purpose. Though the funds are not presently available to the taxpayers for the payment of taxes, they are nevertheless owned by the taxpayers, and the latter cannot expect to collateralize their liabilities, for periods running from 1 to 5 years, by the use of their accrued but untaxed funds. Moreover, it is a normal result of the accrual basis of accounting and reporting that taxes frequently must be paid on accrued

---

[10] Cf. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 729; *Douglas* v. *Willcuts,* 296 U. S. 1, 9; *Tressler* v. *Commissioner,* 228 F. 2d 356, 359, n. 6 (C. A. 9th Cir.).

funds before receipt of the cash with which to pay them, just as the Ninth Circuit stated in the *Hansen* case, 258 F. 2d, at 587. See *Security Flour Mills Co.* v. *Commissioner,* 321 U. S. 281, 284–285.

To permit accrual basis taxpayers to escape accrual and taxation, in a particular year, of such portions of their sales as they may permit to be retained by buyers, as collateral security, well might violate § 42 (a) of the 1939 Internal Revenue Code as amended,[11] and, moreover, might well afford opportunities to accrual basis taxpayers to allocate income to years deemed most advantageous.

The Commissioner has broad powers in determining whether accounting methods used by a taxpayer clearly reflect income, *Lucas* v. *American Code Co.,* 280 U. S. 445, 449; *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180, 189–190, and under § 41 of the Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.) § 41, the Commissioner, believing that the accounting method employed by a taxpayer "does not clearly reflect the income," may require that "computation shall be made in accordance with such method as in [his] opinion . . . does clearly reflect the income." Since 1931 the Internal Revenue Service has consistently maintained that amounts withheld by finance companies to cover possible losses on notes purchased from dealers constitute income to dealers, who employ the accrual method of accounting, from the time the amounts are recorded on the books of

---

[11] Section 42 (a) (as amended by § 114, Revenue Act of 1941, c. 412, 55 Stat. 687), 26 U. S. C. (1952 ed.) § 42, so far as pertinent, provides:

"(a) *General Rule*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period."

the finance companies as liabilities to the dealers.[12] That position, in general, accords with our view.

The taxpayers have argued that portions of the Dealers Reserve Accounts consist of percentages of "finance charges" [13] which the finance companies agreed to allow them, and that such percentages of the "finance charges," not being a part of the purchase price of the installment paper, should in no event be regarded as accrued income to the dealers. However, the respective taxpayers, each of whom had the burden of showing that he did not owe the taxes which the Commissioner proposed to assess against him, wholly failed to adduce evidence to support their claims. They failed even to adduce evidence showing whether any percentages of the "finance charges" that may have been allowed to them by the respective finance companies were entered on the books of the finance companies as credits to the respective "Dealers Reserve Accounts," and if so, whether such percentages of the "finance charges" so credited had been identified and separated in character and amount from the percentages of the purchase price of the installment paper that were retained by the finance companies and entered on their

[12] The first publication of its views was in G. C. M. 9571, X–2 Cum. Bull. 153 (1931). Its most recently published views on the subject are contained in Rev. Rul. 57–2, 1957–1 Cum. Bull. 17, which, so far as pertinent, provides:

"Amounts withheld by banks or finance companies to cover possible losses on notes purchased from dealers constitute income to dealers employing the accrual method of accounting, to the extent of their interest therein at the time the amounts are recorded on the books of the bank or finance company as a liability to the dealer . . . ."

[13] As to the term "finance charges," the records and briefs in these cases make one thing clear: it is not a term of art. Its meaning appears to be both erratic and elastic. Nor have we been told by any one of these taxpayers what he intends to be included in his use of the term.

books as liabilities to the dealers in their respective Dealers Reserve Accounts. For these reasons the respective taxpayers have wholly failed to sustain the burden of showing that any part of the amounts credited on the books of the finance companies to the respective Dealers Reserve Accounts was entitled to special treatment.

The judgments in No. 380 and No. 381 are reversed and the judgment in No. 512 is affirmed.

MR. JUSTICE DOUGLAS dissents.

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

LEV *v.* UNITED STATES.

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

No. 435. Argued April 27–28, 1959.—Decided June 22, 1959.*

Judgment affirmed by an equally divided Court.
Reported below: 258 F. 2d 9.

Anthony Bradley Eben argued the cause and filed a brief for petitioner in No. 435.

Albert H. Treiman argued the cause and filed a brief for petitioner in No. 436.

John T. Sullivan argued the cause for petitioner in No. 437. On the brief was *Isidor Enselman.*

Oscar H. Davis argued the causes for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg, Julia P. Cooper* and *Jerome M. Feit.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

---

*Together with No. 436, *Wool* v. *United States,* and No. 437, *Rubin* v. *United States,* also on certiorari to the same Court.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., *v.* BENNETT, ATTORNEY GENERAL OF ARKANSAS, ET AL.

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

No. 757. Decided June 22, 1959.

Case challenging constitutionality of state statute should not automatically be referred by federal district court to state courts for construction of statute.

Robert O. Carter and *Herbert O. Reid* for appellant.

PER CURIAM.

When the validity of a state statute, challenged under the United States Constitution, is properly for adjudication before a United States District Court, reference to the state courts for construction of the statute should not automatically be made. The judgment is vacated and the case is remanded to the United States District Court for the Eastern District of Arkansas for consideration in light of *Harrison* v. *N. A. A. C. P., ante,* p. 167.

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

While I agree that the case should be remanded to the District Court, I think that court should be directed to pass on the constitutional issues presented without prior reference to the state courts. My reasons are stated in my dissent in *Harrison* v. *N. A. A. C. P., ante,* p. 179.

509615 O–59–33

COFIELD *v.* UNITED STATES.

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

No. 677, Misc. Decided June 22, 1959.

Certiorari granted; sentence vacated; and cause remanded with instructions to allow petitioner to withdraw his plea of guilty and plead anew.

Reported below: 263 F. 2d 686.

William F. McKenna for petitioner.

Solicitor General Rankin, Assistant Attorney General Wilkey and *Beatrice Rosenberg* for the United States.

PER CURIAM.

In view of all the circumstances under which this defendant entered a plea of guilty and the plea was accepted, the petition is granted and the sentence is vacated and the cause remanded with instructions to allow petitioner to withdraw his plea of guilty and plead anew.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent, believing that this case should not be disposed of without plenary consideration.

BELLEW ET AL. *v.* MISSISSIPPI.

APPEAL FROM AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 806. Decided June 22, 1959.

Appeal dismissed and certiorari denied.
Reported below: — Miss. —, 106 So. 2d 146.

Mrs. Clare Sekul Hornsby, John M. Sekul and *Albert Sidney Johnston, Jr.* for appellants-petitioners.

PER CURIAM.

The appeal is dismissed and the petition for writ of certiorari is denied.

McDANIEL ET AL. *v.* ROSE.

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

No. 830, Misc. Decided June 22, 1959.

Appeal dismissed.
Reported below: 315 S. W. 2d 368.

Richard E. McDaniel for appellants.

Beverly Tarpley for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

GREENE *v.* McELROY ET AL.

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

No. 180. Argued April 1, 1959.—Decided June 29, 1959.

Petitioner, an aeronautical engineer, was general manager of a private corporation engaged in developing and producing for the Armed Forces goods involving military secrets, under contracts requiring the corporation to exclude from its premises persons not having security clearances. Under regulations promulgated by the Secretary of Defense without explicit authorization by either the President or Congress, and after administrative hearings in which he was denied access to much of the information adverse to him and any opportunity to confront or cross-examine witnesses against him, petitioner was deprived of his security clearance on the grounds of alleged Communistic associations and sympathies. As a consequence, the corporation discharged him and he was unable to obtain other employment as an aeronautical engineer. He sued for a judgment declaring that the revocation of his security clearance was unlawful and void and an order restraining the Secretaries of the Armed Forces from acting pursuant to it. *Held:* In the absence of explicit authorization from either the President or Congress, the Secretaries of the Armed Forces were not authorized to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination. Pp. 475–508.

(a) Neither Executive Order No. 10290 nor Executive Order No. 10501 empowers any executive agency to fashion security programs whereby persons are deprived of their civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest. Pp. 500–502.

(b) Neither the National Security Act of 1947 nor the Armed Services Procurement Act of 1947, even when read in conjunction with 18 U. S. C. § 798, making it a crime to communicate to unauthorized persons information concerning cryptographic or intelligence activities, and 50 U. S. C. § 783 (b), making it a crime

for an officer or employee of the United States to communicate classified information to agents of foreign governments or officers and members of "Communist organizations," constitutes an authorization to create an elaborate clearance program under which persons may be seriously restrained in their employment opportunities through a denial of clearance without the safeguards of cross-examination and confrontation. Pp. 502–504.

(c) Congressional ratification of the security clearance procedures cannot be implied from the continued appropriation of funds to finance aspects of the program fashioned by the Department of Defense. Pp. 504–505.

(d) In this area of questionable constitutionality, this Court will not hold that a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted and cross-examined, when neither the President nor Congress has explicitly authorized such procedure. Pp. 506–508.

103 U. S. App. D. C. 87, 254 F. 2d 944, reversed and cause remanded.

Carl W. Berueffy argued the cause and filed a brief for petitioner.

Assistant Attorney General Doub argued the cause for respondents. With him on the brief were *Solicitor General Rankin, Samuel D. Slade* and *Bernard Cedarbaum.*

David I. Shapiro filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

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

This case involves the validity of the Government's revocation of security clearance granted to petitioner, an aeronautical engineer employed by a private manufacturer which produced goods for the armed services. Petitioner was discharged from his employment solely as a consequence of the revocation because his access to classified information was required by the nature of his job. After his discharge, petitioner was unable to secure

employment as an aeronautical engineer and for all practical purposes that field of endeavor is now closed to him.

Petitioner was vice president and general manager of Engineering and Research Corporation (ERCO), a business devoted primarily to developing and manufacturing various mechanical and electronic products. He began this employment in 1937 soon after his graduation from the Guggenheim School of Aeronautics and, except for a brief leave of absence, he stayed with the firm until his discharge in 1953. He was first employed as a junior engineer and draftsman. Because of the excellence of his work he eventually became a chief executive officer of the firm. During his career with ERCO, he was credited with the expedited development of a complicated electronic flight simulator and with the design of a rocket launcher, both of which were produced by ERCO and long used by the Navy.

During the post-World War II period, petitioner was given security clearances on three occasions.[1] These were required by the nature of the projects undertaken by ERCO for the various armed services.[2] On November 21,

---

[1] Petitioner was given a Confidential clearance by the Army on August 9, 1949, a Top Secret clearance by the Assistant Chief of Staff G–2, Military District of Washington on November 9, 1949, and a Top Secret clearance by the Air Materiel Command on February 3, 1950.

[2] ERCO did classified contract work for the various services. In 1951, in connection with a classified research project for the Navy, it entered into a security agreement in which it undertook "to provide and maintain a system of security controls within its . . . own organization in accordance with the requirements of the Department of Defense Industrial Security Manual . . . ." The Manual, in turn, provided in paragraphs 4 (e) and 6:

"The Contractor shall exclude (this does not imply the dismissal or separation of any employee) from any part of its plants, factories, or sites at which work for any military department is being performed, any person or persons whom the Secretary of the military

1951, however, the Army-Navy-Air Force Personnel Security Board (PSB) advised ERCO that the company's clearances for access to classified information were in jeopardy because of a tentative decision to deny petitioner access to classified Department of Defense information and to revoke his clearance for security reasons.[3] ERCO was invited to respond to this notification. The corporation, through its president, informed PSB that petitioner had taken an extended furlough due to the Board's action. The ERCO executive also stated that in his opinion petitioner was a loyal and discreet United States citizen and that his absence denied to the firm the services of an outstanding engineer and administrative executive. On December 11, 1951, petitioner was informed by the Board that it had "decided that access by you to contract work and information [at ERCO] . . . would be inimical to

---

department concerned or his duly authorized representative, in the interest of security, may designate in writing.

. . . . . .

"No individual shall be permitted to have access to classified matter unless cleared by the Government or the Contractor, as the case may be, as specified in the following subparagraphs and then he will be given access to such matter only to the extent of his clearance. . . ."

[3] The PSB was created pursuant to an interim agreement dated October 9, 1947, between the Army, Navy, and Air Force and pursuant to a memorandum of agreement between the Provost Marshal General and the Air Provost Marshal, dated March 17, 1948. "It was a three-man board, with one representative from each of the military departments . . . . Its functions were to grant or deny clearance for employment on aeronautical or classified contract work when such consent was required, and to suspend individuals, whose continued employment was considered inimical to the security interests of the United States, from employment on classified work." Report of the Commission on Government Security, 1957, S. Doc. No. 64, 85th Cong., 1st Sess. 239. It established its own procedures which were approved by the Secretaries of the Army, Navy, and Air Force. See "Procedures Governing the Army-Navy-Air Force Personnel Security Board, dated 19 June 1950."

the best interests of the United States." Accordingly, the PSB revoked petitioner's clearances. He was informed that he could seek a hearing before the Industrial Employment Review Board (IERB), and he took this course.[4] Prior to the hearing, petitioner received a letter informing him that the PSB action was based on information indicating that between 1943 and 1947 he had associated with Communists, visited officials of the Russian Embassy, and attended a dinner given by an allegedly Communist Front organization.[5]

On January 23, 1952, petitioner, with counsel, appeared before the IERB. He was questioned in detail concerning his background and the information disclosed in the IERB letter. In response to numerous and searching questions he explained in substance that specific "suspect" persons with whom he was said to have associated were actually friends of his ex-wife. He explained in some detail that during his first marriage, which lasted from

---

[4] The IERB was a four-member board which was given jurisdiction to hear and review appeals from decisions of the PSB. Its charter, dated 7 November 1949 and signed by the Secretaries of the Army, Navy, and Air Force, contemplated that it would afford hearings to persons denied clearance. And see "Procedures Governing Appeals to the Industrial Employment Review Board, dated 7 November 1949."

[5] The letter read, in part:

"That over a period of years, 1943–1947, at or near Washington, D. C., you have closely and sympathetically associated with persons who are reported to be or to have been members of the Communist Party; that during the period 1944–1947 you entertained and were visited at your home by military representatives of the Russian Embassy, Washington, D. C.; that, further, you attended social functions during the period 1944–1947 at the Russian Embassy, Washington, D. C.; and on 7 April 1947 attended the Southern Conference for Human Welfare, Third Annual Dinner, Statler Hotel, Washington, D. C. (Cited as Communist Front organization, Congressional Committee on Un-American Activities)."

1942 through 1947, his then wife held views with which he did not concur and was friendly with associates and other persons with whom he had little in common. He stated that these basic disagreements were the prime reasons that the marriage ended in failure. He attributed to his then wife his attendance at the dinner, his membership in a bookshop association which purportedly was a "front" organization, and the presence in his home of "Communist" publications. He denied categorically that he had ever been a "Communist" and he spoke at length about his dislike for "a theory of Government which has for its object the common ownership of property." Lastly, petitioner explained that his visits to persons in various foreign embassies (including the Russian Embassy) were made in connection with his attempts to sell ERCO's products to their Governments. Petitioner's witnesses, who included top-level executives of ERCO and a number of military officers who had worked with petitioner in the past, corroborated many of petitioner's statements and testified in substance that he was a loyal and discreet citizen. These top-level executives of ERCO, whose right to clearance was never challenged, corroborated petitioner's testimony concerning his reasons for visiting the Russian Embassy.

The Government presented no witnesses. It was obvious, however, from the questions posed to petitioner and to his witnesses, that the Board relied on confidential reports which were never made available to petitioner. These reports apparently were compilations of statements taken from various persons contacted by an investigatory agency. Petitioner had no opportunity to confront and question persons whose statements reflected adversely on him or to confront the government investigators who took their statements. Moreover, it seemed evident that the Board itself had never questioned the investigators and

had never seen those persons whose statements were the subject of their reports.

On January 29, 1952, the IERB, on the basis of the testimony given at the hearing and the confidential reports, reversed the action of the PSB and informed petitioner and ERCO that petitioner was authorized to work on Secret contract work.

On March 27, 1953, the Secretary of Defense abolished the PSB and IERB and directed the Secretaries of the three armed services to establish regional Industrial Personnel Security Boards to coordinate the industrial security program.[6] The Secretaries were also instructed to establish uniform standards, criteria, and procedures.[7]

---

[6] The Boards were abolished pursuant to a memorandum of March 27, 1953, issued by the Secretary of Defense to the Secretaries of the Army, Navy, and Air Force and to the Chairman of the Munitions Board. It provided in part:

"5. The Department of the Army, Navy and Air Force shall establish such number of geographical regions within the United States as seems appropriate to the work-load in each region. There shall then be established within each region an Industrial Personnel Security Board. This board shall consist of two separate and distinct divisions, a Screening Division and an Appeal Division, with equal representation of the Departments of the Army, Navy and Air Force on each such division. The Appeal Division shall have jurisdiction to hear appeals from the decision of the Screening Division and its decisions shall be determined by a majority vote which shall be final, subject only to reconsideration on its own motion or at the request of the appellant for good cause shown or at the request of the Secretary of any military department."

[7] The memorandum from the Secretary of Defense also provided:

"6. The Secretaries of the Army, Navy and Air Force, shall within thirty days (30), establish such geographical regions and develop joint uniform standards, criteria, and detailed procedures to implement the above-described program. In developing the standards, criteria, and procedures, full consideration shall be given to the rights of individuals, consistent with security requirements. After approval by

Cases pending before the PSB and IERB were referred to these new Boards.[8] During the interim period between the abolishment of the old program and the implementation of the new one, the Secretaries considered themselves charged with administering clearance activities under previously stated criteria.[9]

On April 17, 1953, respondent Anderson, the Secretary of the Navy, wrote ERCO that he had reviewed petitioner's case and had concluded that petitioner's "continued access to Navy classified security information [was] inconsistent with the best interests of National Security." No hearing preceded this notification. He requested ERCO to exclude petitioner "from any part of your plants, factories or sites at which classified Navy projects are being carried out and to bar him access to all Navy classified information." He also advised the corporation that petitioner's case was being referred to the Secretary of Defense with the recommendation that the IERB's decision of January 29, 1952, be overruled. ERCO had no choice but to comply with the request.[10]

---

the Secretaries of the Army, Navy, and Air Force, the standards, criteria, and procedures shall govern the operations of the Board."

[8] The memorandum provided:

"7. All cases pending before the Army-Navy-Air Force Personnel Security Board and the Industrial Employment Review Board shall be referred for action under this order to the appropriate Industrial Personnel Security Board."

[9] The memorandum further provided:

"4. The Criteria Governing Actions by the Industrial Employment Review Board, dated 7 November 1949, as revised 10 November 1950, and approved by the Secretaries of the Army, Navy, and Air Force, shall govern security clearances of industrial facilities and industrial personnel by the Secretaries of the Army, Navy and Air Force until such time as uniform criteria are established in connection with paragraph 6 of this memorandum."

[10] See note 2, *supra.*

This led to petitioner's discharge.[11] ERCO informed the Navy of what had occurred and requested an opportunity to discuss the matter in view of petitioner's importance to the firm.[12] The Navy replied that "[a]s far as the Navy

---

[11] The Chairman of the Board of ERCO, Colonel Henry Berliner, later testified by affidavit as follows:

"During the year 1953, and for many years previous thereto, I was the principal stockholder of Engineering and Research Corporation, a corporation which had its principal place of business at Riverdale, Maryland. I was also the chairman of the board, and the principal executive officer of this corporation.

"I am acquainted with William Lewis Greene. Prior to the month of April, 1953, Mr. Greene was Vice-President in charge of engineering and General Manager of Engineering and Research Corporation. He has been employed by this corporation since 1937. His progress in the company had been consistent. He was one of our most valued and valuable employees, and was responsible for much of the work which Engineering and Research Corporation was doing. In April, 1953, the company received a letter from the Secretary of the Navy advising us that clearance had been denied to Mr. Greene and advising us that it would be necessary to bar him from access to our plant. In view of his position with the company, there was no work which he could do in light of this denial of clearance by the Navy. As a result, it was necessary for the company to discharge him. There was no other reason for Mr. Greene's discharge, and in the absence of the letter referred to, he could have continued in the employment of Engineering and Research Corporation indefinitely."

[12] The President of ERCO wrote to the Secretary of the Navy as follows:

"The Honorable R. B. Anderson
"Secretary of the Navy
"Washington 25, D. C.

"My dear Mr. Secretary:

"Receipt is acknowledged of your letter of April 17, 1953 in which you state that you have reviewed the case history file on William Lewis Greene and have concluded that his continued access to Navy classified security information is inconsistent with the best interests of National Security.

"You request this company to exclude Mr. Greene from our plants,

Department is concerned, any further discussion on this problem at this time will serve no useful purpose."

Petitioner asked for reconsideration of the decision. On October 13, 1953, the Navy wrote to him stating that it had requested the Eastern Industrial Personnel Security Board (EIPSB) to accept jurisdiction and to arrive at a final determination concerning petitioner's status.[13] Var-

---

factories or sites and to bar him from information, in the interests of protecting Navy classified projects and classified security information.

"In accordance with your request, please be advised that since receipt of your letter this company has excluded Mr. Greene from any part of our plants, factories or sites and barred him access to all classified security information.

"For your further information, Mr. Greene tendered his resignation as an officer of this corporation and has left the plant. We shall have no further contact with him until his status is clarified although we have not yet formally accepted his resignation.

"Mr. Greene is Vice President of this company in charge of engineering. His knowledge, experience and executive ability have proven of inestimable value in the past. The loss of his services at this time is a serious blow to company operations. Accordingly, we should like the privilege of a personal conference to discuss the matter further.

"Furthermore, you state that you are referring the case to the Secretary of Defense recommending that the Industrial Employment Review Board's decision of January 29, 1952 be overruled. If it is appropriate, we should like very much to have the privilege of discussing the matter with the Secretary of Defense.

"Please accept our thanks for any official courtesies which you are in a position to extend.

"Respectfully yours,
"Engineering and Research Corporation
"By /s/ L. A. Wells"

[13] On May 4, 1953, pursuant to the memorandum of the Secretary of Defense dated March 27, 1953, see note 6, *supra,* the Secretaries of the military departments established regional Industrial Personnel Security Boards governed by generalized standards, criteria, and procedures.

ious letters were subsequently exchanged between petitioner's counsel and the EIPSB. These resulted finally in generalized charges, quoted in the margin, incorporating the information previously discussed with petitioner at his 1952 hearing before the IERB.[14]

---

[14] The specifications were contained in a letter to petitioner's counsel dated April 9, 1954, which was sent nineteen days before the hearing. That letter provided in part:

"Security considerations permit disclosure of the following information that has thus far resulted in the denial of clearance to Mr. Greene:

"1. During 1942 SUBJECT was a member of the Washington Book Shop Association, an organization that has been officially cited by the Attorney General of the United States as Communist and subversive.

"2. SUBJECT's first wife, Jean Hinton Greene, to whom he was married from approximately December 1942 to approximately December 1947, was an ardent Communist during the greater part of the period of the marriage.

"3. During the period of SUBJECT's first marriage he and his wife had many Communist publications in their home, including the 'Daily Worker'; 'Soviet Russia Today'; 'In Fact'; and Karl Marx's 'Das Kapital.'

"4. Many apparently reliable witnesses have testified that during the period of SUBJECT's first marriage his personal political sympathies were in general accord with those of his wife, in that he was sympathetic towards Russia; followed the Communist Party 'line'; presented 'fellow-traveller' arguments; was apparently influenced by 'Jean's wild theories'; etc. [Nothing in the record establishes that any witness "testified" at any hearing on these subjects and everything in the record indicates that they could have done no more than make such statements to investigative officers.]

"5. In about 1946 SUBJECT invested approximately $1000. in the Metropolitan Broadcasting Corporation and later became a director of its Radio Station WQQW. It has been reliably reported that many of the stockholders of the Corporation were Communists or pro-Communists and that the news coverage and radio programs of Station WQQW frequently paralleled the Communist Party 'line.' [This station is now Station WGMS, Washington's "Good Music Station." Petitioner stated that he invested money in the station

On April 28, 1954, more than one year after the Secretary took action, and for the two days thereafter, petitioner presented his case to the EIPSB and was cross-examined in detail. The hearing began with a

---

because he liked classical music and he considered it a good investment.]

"6. On 7 April 1947 SUBJECT and his wife Jean attended the Third Annual Dinner of the Southern Conference for Human Welfare, an organization that has been officially cited as a Communist front. [This dinner was also attended by many Washington notables, including several members of this Court.]

"7. Beginning about 1942 and continuing for several years thereafter SUBJECT maintained sympathetic associations with various officials of the Soviet Embassy, including Major Constantine I. Ovchinnikov, Col. Pavel F. Berezin, Major Pavel N. Asseev, Col. Ilia M. Saraev, and Col. Anatoly Y. Golkovsky. [High-level executives of ERCO, as above noted, testified that these associations were carried on to secure business for the corporation.]

"8. During 1946 and 1947 SUBJECT had frequent sympathetic association with Dr. Vaso Syrzentic of the Yugoslav Embassy. Dr. Syrzentic has been identified as an agent of the International Communist Party. [Petitioner testified that he met this individual once in connection with a business transaction.]

"9. During 1943 SUBJECT was in contact with Col. Alexander Hess of the Czechoslovak Embassy, who has been identified as an agent of the Red Army Intelligence. [This charge was apparently abandoned as no adverse finding was based on it.]

"10. During 1946 and 1947 SUBJECT maintained close and sympathetic association with Mr. and Mrs. Nathan Gregory Silvermaster and William Ludwig Ullman. Silvermaster and Ullman have been identified as members of a Soviet Espionage Apparatus active in Washington, D. C., during the 1940's. [Silvermaster was a top economist in the Department of Agriculture and the direct superior of petitioner's ex-wife who then worked in that department.]

"11. SUBJECT had a series of contacts with Laughlin Currie during the period 1945–48. Currie has also been identified as a member of the Silvermaster espionage group. [Petitioner met Currie in the executive offices of the President at a time when Currie was a Special Assistant to the President.]

"12. During the period between 1942 and 1947 SUBJECT maintained frequent and close associations with many Communist Party

statement by the Chairman, which included the following passage:

> "The transcript to be made of this hearing will not include all material in the file of the case, in that, it will not include reports of investigation conducted by the Federal Bureau of Investigation or other investigative agencies which are confidential. Neither will it contain information concerning the identity of confidential informants or information which will reveal the source of confidential evidence. The transcript will contain only the Statement of Reasons, your answer thereto and the testimony actually taken at this hearing."

Petitioner was again advised that the revocation of his security clearance was based on incidents occurring between 1942 and 1947, including his associations with alleged Communists, his visits with officials of the Russian Embassy, and the presence in his house of Communist literature.

Petitioner, in response to a question, stated at the outset of the hearing that he was then employed at a salary of $4,700 per year as an architectural draftsman and that he had been receiving $18,000 per year as Vice President and General Manager of ERCO. He later explained that

---

members, including R——— S———, and his wife E———, B——— W——— and his wife M———, M——— P———, M——— L. D———, R——— N——— and I——— S———. [These persons were apparently friends of petitioner's ex-wife.]

"13. During substantially the same period SUBJECT maintained close association with many persons who have been identified as strong supporters of the Communist conspiracy, including S——— J. R———, S——— L———, O——— L———, E——— F——— and V——— G———. [These persons were apparently friends of his ex-wife.]

"It is noted that all of the above information has previously been discussed with Mr. Greene at his hearing before the Industrial Employment Review Board, and that a copy of the transcript of that hearing was made available to you in August of last year."

after his discharge from ERCO he had unsuccessfully tried to obtain employment in the aeronautics field but had been barricaded from it because of lack of clearance.[15]

Petitioner was subjected to an intense examination similar to that which he experienced before the IERB in 1952. During the course of the examination, the Board injected new subjects of inquiry and made it evident that it was relying on various investigatory reports and statements of confidential informants which were not made available to petitioner.[16] Petitioner reiterated in great detail the

---

[15] Petitioner stated by affidavit in support of his motion for summary judgment that "[a]fter my discharge from Engineering and Research Corporation, I made every possible effort to secure other employment at a salary commensurate with my experience, but I was unable to do so because all of my work history had been in the field of aeronautics. In spite of everything I could do, the best position I could obtain was a draftsman-engineer in an architectural firm. I was obliged to go to work for a salary of $4,400 per year, because the basis upon which a higher salary would be justified was experience in a field which was not particularly useful in the type of work which I was able to obtain. As a result of the actions of the defendants complained of, the field of aeronautical engineering was closed to me."

[16] For instance, the following questions were asked in connection with the so-called "left wing" radio station in which petitioner owned stock, petitioner's acquaintanceship with alleged subversives, and petitioner's business relationships with foreign governments:

"Q. We have information here, Mr. Greene, that one particular individual specifically called your attention to the fact that [Congressman] Rankin and [Senator] Bilbo had characterized this station as a Communist station, run by and for Communists?

. . . . . .

"Q. We have information here, this has come from an informant characterized to be of known reliability in which he refers to conversations he had with you about January of 1947 in which you told him that you had visited M——— P——— the previous evening and had become rather chummy with him, do you wish to comment on that?

. . . . . .

"Q. Concerning your relationship with S——— L———, we have

explanations previously given before the IERB. He was subjected to intense cross-examination, however, concerning reports that he had agreed with the views held by his ex-wife.

---

information here from an informant characterized as being one of known reliability, in which S——— L——— told this informant that shortly following her Western High School speech in 1947, she remarked to you that probably many people will learn things about Russia and she quoted you as replying, 'Well I hope they learn something good, at least.' Do you wish to say anything about that?

. . . . .

"Q. Information we have, Mr. Greene, indicates first of all, that you didn't meet these Russians in 1942 but you met them in early 1943.

. . . . .

"Q. Now, we have further information, Mr. Greene, indicating that the initiative of these contacts came from Col. Berezin.

. . . . .

"Q. We have information here indicating that as a matter of fact, sir, we do know that the meeting between you and Col. Berezin was arranged through Hess and Hochfeld as you indicated. We also have information from a source identified as being one of known reliability referring to a conversation that this source had with Hess in April 1943 in which Hess stated that he had been talking to one Harry, not further identified but presumed to be Hochfeld and that Harry said to Hess that he had a young engineer who is a good friend of ours and of our cause and Harry wanted Hess to set up a meeting between Berezin and yourself. Can you give us some reason why Harry might have referred to you as a good friend of our cause?

. . . . .

"Q. Of course, we can make certain assumptions as to why Col. Berezin might have wanted to meet you back in December 1942 when we look at a statement like this indicating that you were considered a good friend of their's and of their cause. Of course, some weight is lent to this assumption by the fact that your wife was strongly pro-Communist and after she left you she became very active in Communist affairs, in case you don't know that, I'll pass it on to you."

And the following questions were asked of various witnesses presented

Petitioner again presented a number of witnesses who testified that he was loyal, that he had spoken approvingly of the United States and its economic system, that he was a valuable engineer, and that he had made valuable and significant contributions to this country's war efforts during World War II and the Korean War.

Soon after the conclusion of the hearing, the EIPSB notified petitioner that it had affirmed the Secretary's action and that it had decided that the granting of clearance to petitioner for access to classified information was "not clearly consistent with the interests of national security." Petitioner requested that he be furnished with a detailed statement of findings supporting the Board's decision. He was informed, however, that security con-

---

by petitioner evidently because the Board had confidential information that petitioner's ex-wife was "eccentric."

"Q. Now you were in Bill's home, that red brick house that you're talking about.

. . . . . .

"Q. Was there anything unusual about the house itself, the interior of it, was it dirty?

. . . . . .

"Q. Were there any beds in their house which had no mattresses on them?

. . . . . .

"Q. Did you ever hear it said that Jean slept on a board in order to keep the common touch?

. . . . . .

"Q. When you were in Jean's home did she dress conventionally when she received her guests?

. . . . . .

"Q. Let me ask you this, conventionally when somebody would invite you for dinner at their home would you expect them, if they were a woman to wear a dress and shoes and stockings and the usual clothing of the evening or would you expect them to appear in overalls?"

siderations prohibited such disclosure.[17] On September 16, 1955, petitioner requested review by the Industrial Personnel Security Review Board.[18] On March 12, 1956, almost three years after the Secretary's action and nearly one year after the second hearing, he received a letter from the Director of the Office of Industrial Personnel Security Review informing him that the EIPSB had found that from 1942–1947 petitioner associated closely with his then wife and her friends, knowing that they were active in behalf of and sympathized with the Communist Party, that during part of this period petitioner maintained a sympathetic association with a number of officials of the Russian Embassy, that during this period petitioner's political views were similar to those of his then wife, that petitioner had been a member of a suspect bookshop association, had invested money in a suspect radio station, had attended a suspect dinner, and had, on occasion, Communist publications in his home, and that petitioner's credibility as a witness in the proceedings was doubtful. The letter also stated that the doubts concerning petitioner's credibility affected the Board's evaluation of his trustworthiness and that only trustworthy persons could be afforded access to classified information.[19] The EIPSB determination was affirmed.

After the EIPSB decision in 1954, petitioner filed a complaint in the United States District Court for the Dis-

---

[17] The notification stated:

"Security considerations prohibit the furnishing to an appellant of a detailed statement of the findings on appeal inasmuch as the entire file is considered and comments made by the Appeal Division panel on security matters which could not for security reasons form the basis of a statement of reasons."

[18] This Board was created by the Secretary of Defense on February 2, 1955, and given power to review adverse decisions rendered by the regional boards.

[19] This was the first time that petitioner was charged or found to be untrustworthy.

trict of Columbia asking for a declaration that the revocation was unlawful and void and for an order restraining respondents from acting pursuant to it.[20] He also asked for an order requiring respondents to advise ERCO that the clearance revocation was void. Following the affirmance of the EIPSB order by the Industrial Personnel Review Board, petitioner moved for summary judgment in the District Court. The Government cross-filed for dismissal of the complaint or summary judgment. The District Court granted the Government's motion for summary judgment, 150 F. Supp. 958, and the Court of Appeals affirmed that disposition, 103 U. S. App. D. C. 87, 254 F. 2d 944.

The Court of Appeals recognized that petitioner had suffered substantial harm from the clearance revocation.[21] But in that court's view, petitioner's suit presented no "justiciable controversy"—no controversy which the courts could finally and effectively decide. This conclusion followed from the Court of Appeals' reasoning that the Executive Department alone is competent to evaluate the competing considerations which exist in determining the persons who are to be afforded security clearances.

---

[20] The complaint was filed before the establishment of the Industrial Personnel Security Review Board. See note 18, *supra*.

[21] The Court of Appeals stated: "We have no doubt that Greene has in fact been injured. He was forced out of a job that paid him $18,000 per year. He has since been reduced, so far as this record shows, to working as an architectural draftsman at a salary of some $4,400 per year. Further, as an aeronautical engineer of considerable experience he says (without real contradiction) that he is effectively barred from pursuit of many aspects of his profession, given the current dependence of most phases of the aircraft industry on Defense Department contracts not only for production but for research and development work as well. . . . Nor do we doubt that, following the Government's action, some stigma, in greater or less degree, has attached to Greene." 103 U. S. App. D. C. 87, 95–96, 254 F. 2d 944, 952–953.

The court also rejected petitioner's claim that he was deprived of his livelihood without the traditional safeguards required by "due process of law" such as confrontation of his accusers and access to confidential reports used to determine his fitness. Central to this determination was the court's unwillingness to order the Government to choose between disclosing the identities of informants or giving petitioner clearance.

Petitioner contends that the action of the Department of Defense in barring him from access to classified information on the basis of statements of confidential informants made to investigators was not authorized by either Congress or the President and has denied him "liberty" and "property" without "due process of law" in contravention of the Fifth Amendment. The alleged property is petitioner's employment; the alleged liberty is petitioner's freedom to practice his chosen profession. Respondents admit, as they must, that the revocation of security clearance caused petitioner to lose his job with ERCO and has seriously affected, if not destroyed, his ability to obtain employment in the aeronautics field. Although the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment, *Dent* v. *West Virginia,* 129 U. S. 114; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232; *Peters* v. *Hobby,* 349 U. S. 331, 352 (concurring opinion); cf. *Slochower* v. *Board of Education,* 350 U. S. 551; *Truax* v. *Raich,* 239 U. S. 33, 41; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589–590; *Powell* v. *Pennsylvania,* 127 U. S. 678, 684, respondents contend that the admitted interferences which have occurred are indirect by-products of necessary governmental action to protect the integrity of secret information and hence are not unreasonable and do not constitute deprivations within the meaning of the Amendment.

Alternatively, respondents urge that even if petitioner has been restrained in the enjoyment of constitutionally protected rights, he was accorded due process of law in that he was permitted to utilize those procedural safeguards consonant with an effective clearance program, in the administration of which the identity of informants and their statements are kept secret to insure an unimpaired flow to the Government of information concerning subversive conduct. But in view of our conclusion that this case should be decided on the narrower ground of "authorization," we find that we need not determine the answers to these questions.[22]

The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination.

Prior to World War II, only sporadic efforts were made to control the clearance of persons who worked in private establishments which manufactured materials for national defense. Report of the Commission on Government Security, 1957, S. Doc. No. 64, 85th Cong., 1st Sess. 236. During World War II the War Department instituted a

[22] We note our agreement with respondents' concession that petitioner has standing to bring this suit and to assert whatever rights he may have. Respondents' actions, directed at petitioner as an individual, caused substantial injuries, *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 152 (concurring opinion), and, were they the subject of a suit between private persons, they could be attacked as an invasion of a legally protected right to be free from arbitrary interference with private contractual relationships. Moreover, petitioner has the right to be free from unauthorized actions of government officials which substantially impair his property interests. Cf. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

formalized program to obtain the discharge from war plants of persons engaged in sabotage, espionage, and willful activity designed to disrupt the national defense program. *Id.*, at 237. In 1946, the War Department began to require contractors, before being given access to classified information, to sign secrecy agreements which required consent before their employees were permitted access to Top Secret or Secret information. *Id.*, at 238. At the outset, each armed service administered its own industrial clearance program. *Id.*, at 239. Later, the PSB and IERB were established by the Department of Defense and the Secretaries of the armed services to administer a more centralized program. *Ibid.* Confusion existed concerning the criteria and procedures to be employed by these boards. *Ibid.* Eventually, generalized procedures were established with the approval of the Secretaries which provided in part that before the IERB "[t]he hearing will be conducted in such manner as to protect from disclosure information affecting the national security or tending to compromise investigative sources or methods . . . ." See "Procedures Governing Appeals to the Industrial Employment Review Board, dated 7 November 1949," note 4, *supra*, § 4 (c). After abolition of these boards in 1953, and the establishment of the IPSB, various new sets of procedures were promulgated which likewise provided for the non-disclosure of information "tending to compromise investigative sources or methods or the indentity of confidential informants." [23]

---

[23] The Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553, recommended by the Secretaries of the Army, Navy, and Air Force, and approved by the Secretary of Defense, provided:

"§ 67.1–4. *Release of information.* All personnel in the Program will comply with applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might com-

All of these programs and procedures were established by directives issued by the Secretary of Defense or the Secretaries of the Army, Navy, and Air Force. None was the creature of statute or of an Executive Order issued by the President.[24]

Respondents maintain that congressional authorization to the President to fashion a program which denies security clearance to persons on the basis of confidential information which the individuals have no opportunity to confront and test is unnecessary because the President has inherent authority to maintain military secrets inviolate. And respondents argue that if a statutory grant of power is necessary, such a grant can readily be *inferred* "as a necessarily implicit authority from the generalized provisions" of legislation dealing with the armed services.

---

promise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives, or to any other person not authorized to have access to such information. In addition, in a case involving a contractor employee the contractor concerned will be advised only of the final determination in the case to grant, deny, or revoke clearance, and of any decision to suspend a clearance granted previously pending final determination in the case. The contractor will not be given a copy of the Statement of Reasons issued to the contractor employee except at the written request of the contractor employee concerned."

[24] See "Charter of the Industrial Employment Review Board, dated 7 November 1949," note 4, *supra;* "Charter of the Army-Navy-Air Force Personnel Security Board, dated 19 June 1950," note 3, *supra;* Memorandum issued by the Secretary of Defense to the Secretaries of the Army, Navy, and Air Force and to the Chairman of the Munitions Board, dated March 27, 1953, notes 6, 7, 8 and 9, *supra;* "The Industrial Personnel and Facility Security Clearance Program," effective May 4, 1953, note 13, *supra;* "The Industrial Personnel Security Review Regulation," 20 Fed. Reg. 1553, 32 CFR Part 67 (1958 Supp.); Industrial Security Manual for Safeguarding Classified Information, 20 Fed. Reg. 6213, 21 Fed. Reg. 2814.

But the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather, it is whether either the President or Congress exercised such a power and delegated to the Department of Defense the authority to fashion such a program.

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.[25] They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with

---

[25] When Festus more than two thousand years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to have stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him." Acts 25:16.

Professor Wigmore explains in some detail the emergence of the principle in Anglo-American law that confrontation and cross-examination are basic ingredients in a fair trial. 5 Wigmore on Evidence (3d ed. 1940) § 1364. And see O'Brian, National Security and Individual Freedom, 62.

the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, *e. g., Mattox* v. *United States,* 156 U. S. 237, 242–244; *Kirby* v. *United States,* 174 U. S. 47; *Motes* v. *United States,* 178 U. S. 458, 474; *In re Oliver,* 333 U. S. 257, 273, but also in all types of cases where administrative and regulatory actions were under scrutiny. *E. g., Southern R. Co.* v. *Virginia,* 290 U. S. 190; *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292; *Morgan* v. *United States,* 304 U. S. 1, 19; *Carter* v. *Kubler,* 320 U. S. 243; *Reilly* v. *Pinkus,* 338 U. S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-Fascist Committee* v. *McGrath,* 341 U. S. 168–169 (concurring opinion).

Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

Little need be added to this incisive summary statement except to point out that under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies,

lapses of recollection, and bias,[26] but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the in-

---

[26] For instance, in the instant case, to establish the charge that petitioner's "personal political sympathies were in general accord with those of his wife," the EIPSB apparently relied on statements made to investigators by "old" friends of petitioner. Thus, the following questions were asked petitioner:

"Q. I'd like to read to you a quotation from the testimony of a person who had identified himself as having been a very close friend of yours over a long period of years. He states that you, as saying to him one day that you were reading a great deal of pro-Communist books and other literature. Do you wish to comment on that?

. . . . . .

"Q. Incidentally this man's testimony concerning you was entirely favorable in one respect. He stated that he didn't think you were a Communist but he did state that he thought that you had been influenced by Jean's viewpoints and that he had received impressions definite that it was your wife who was parlor pink and that you were going along with her.

. . . . . .

"Q. This same friend testified that he believed that you were influenced by Jean's wild theories and he decided at that time to have no further association with you and your wife . . . .

. . . . . .

"Q. . . . Here's another man who indicates that he has been a friend of yours over a long period of time who states that he was a visitor in your home on occasions and that regarding some of these visits, he met some of your wife's friends, these people we've been talking about in the past and that one occasion, he mentioned in particular, the topic of conversation was China and that you set forth in the conversation and there seemed general agreement among all of you at that time that the revolutionists in China were not actually Communists but were agrarian reformists which as you probably know is part of the Communist propaganda line of several years back. . . .

. . . . . .

"Q. Mr. Greene we've got some information here indicating that during the period of your marriage to your first wife that she was

formant said without even examining the investigator personally.[27]

We must determine against this background, whether the President or Congress has delegated to the Depart-

---

constantly finding fault with the American institutions, opposing the American Capitalistic System and never had anything but praise for the Russians and everything they attempted to do. Did you find that to be the case?

. . . . . .

"Q. We have a statement here from another witness with respect to yourself in which he states that you felt that the modern people in this country were too rich and powerful, that the capitalistic system of this country was to the disadvantage of the working people and that the working people were exploited by the rich.

. . . . . .

"Q. I have a statement from another one of your associates to the effect that you would at times, present to him a fellow-traveler argument. This man indicated to us that he was pretty well versed on the Communist Party line himself at that time and found you parroting arguments which he assumed that you got from your wife. Do you wish to comment on that?"

Confrontation of the persons who allegedly made these statements would have been of prime importance to petitioner, for cross-examination might have shown that these "witnesses" were hazy in recollecting long-past incidents, or were irrationally motivated by bias or vindictiveness.

[27] This is made clear by the following testimony of Jerome D. Fenton, Director, Industrial Personnel Security, Department of Defense, before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, given on November 23, 1955:

"[Q.] . . . What other type of evidence is received by the hearing boards besides the evidence of persons under oath?

"[A.] The reports from the various governmental investigative agencies.

"[Q.] And the reports of the various governmental investigations might, themselves, be hearsay, might they not?

"[A.] I think that is a fair statement.

"[Q.] In fact, they might be, as the Court of Appeals for the Ninth District [*sic*] said with respect to the port security program, second,

ment of Defense the authority to by-pass these traditional and well-recognized safeguards in an industrial security clearance program which can operate to injure individuals substantially by denying to them the opportunity to follow chosen private professions. Respondents cite two Executive Orders which they believe show presidential delegation. The first, Exec. Order No. 10290, 16 Fed. Reg. 9795, was entitled "Prescribing Regulations Establishing Minimum Standards For The Classification, Transmission, And Handling, By Departments And

---

or third, or fourth-hand hearsay, might they not? [This question refers to the opinion of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F. 2d 708.]

. . . . . .

"[A.] The answer is 'Yes.'

. . . . . .

"[Q.] Can you tell me what type of help is given to the hearing board in these reports with respect to the matter of evaluation? What is the nature of the evaluation that is used for this purpose?

"[A.] Well, each board has a person who is called a security adviser, who is an expert in that particular area. Each screening board has one, and those individuals are well-trained people who know how to evaluate reports and evaluate information. They know how to separate the wheat from the chaff, and they assist these boards.

"[Q.] This expert, then, has to take the report and make his own determination in assisting the board as to the reliability of a witness that he has never seen, or perhaps hasn't even had the opportunity to see the person who interviewed the witness?

"[A.] Well, he has nothing to do with the witness; no.

"[Q.] What is that?

"[A.] He has not interviewed the witness; no."

Hearings before Subcommittee on Constitutional Rights, Senate Judiciary Committee, on S. Res. 94, 84th Cong., 2d Sess. 623–624. And cf. Richardson, The Federal Employee Loyalty Program, 51 Col. L. Rev. 546, and Hearings before a Subcommittee of the Senate Foreign Relations Committee on S. Res. 231, 81st Cong., 2d Sess. 327–339 (statement of J. Edgar Hoover, Director, Federal Bureau of Investigation).

Agencies of the Executive Branch, Of Official Information Which Requires Safeguarding In The Interest Of The Security Of The United States." It provided, in relevant part:

"PART V—DISSEMINATION OF CLASSIFIED SECURITY INFORMATION

"29. *General.* a. No person shall be entitled to knowledge or possession of, or access to, classified security information solely by virtue of his office or position.

"b. Classified security information shall not be discussed with or in the presence of unauthorized persons, and the latter shall not be permitted to inspect or have access to such information.

"c. The head of each agency shall establish a system for controlling the dissemination of classified security information adequate to the needs of his agency.

"30. *Limitations on dissemination*—a. *Within the Executive Branch.* The dissemination of classified security information shall be limited to persons whose official duties require knowledge of such information. Special measures shall be employed to limit the dissemination of 'Top Secret' security information to the absolute minimum. Only that portion of 'Top Secret' security information necessary to the proper planning and appropriate action of any organizational unit or individual shall be released to such unit or individual.

"b. *Outside the Executive Branch.* Classified security information shall not be disseminated outside the Executive Branch by any person or agency having access thereto or knowledge thereof except under conditions and through channels authorized by

> the head of the disseminating agency, even though such person or agency may have been solely or partly responsible for its production."

The second, Exec. Order No. 10501, 18 Fed. Reg. 7049, which revoked Exec. Order No. 10290, is entitled "Safeguarding Official Information In The Interests Of The Defense Of The United States" and provides in relevant part:

> "Sec. 7. *Accountability and Dissemination.*
>
> . . . . .
>
> "(b) *Dissemination Outside the Executive Branch.* Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production."

Clearly, neither of these orders empowers any executive agency to fashion security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest.[28]

Turning to the legislative enactments which might be deemed as delegating authority to the Department of Defense to fashion programs under which persons may be

---

[28] No better, for this purpose, is Exec. Order No. 8972, 6 Fed. Reg. 6420, filed on December 12, 1941, which empowered the Secretary of War "to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities . . . ." Even if that order is relevant authority for programs created after World War II, which is doubtful, it provides no specific authorization for non-confrontation hearings.

seriously restrained in their employment opportunities through a denial of clearance without the safeguards of cross-examination and confrontation, we note the Government's own assertion, made in its brief, that "[w]ith petitioner's contention that the Industrial Security Program is not explicitly authorized by statute we may readily agree . . . ."

The first proffered statute is the National Security Act of 1947, as amended, 5 U. S. C. § 171 *et seq.* That Act created the Department of Defense and gave to the Secretary of Defense and the Secretaries of the armed services the authority to administer their departments. Nowhere in the Act, or its amendments, is there found specific authority to create a clearance program similar to the one now in effect.

Another Act cited by respondents is the Armed Service Procurement Act of 1947, as amended. It provides in 10 U. S. C. § 2304 that:

> "(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—
>
> . . . . .
>
> "(12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components."

It further provides in 10 U. S. C. § 2306:

> "(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and subject to subsections (b)–(e), the head of an agency may, in negotiating contracts under section 2304 of this title, make any kind of contract that he considers will promote the best interests of the United States."

509615 O–59–35

Respondents argue that these statutes, together with 18 U. S. C. § 798, which makes it a crime willfully and knowingly to communicate to unauthorized persons information concerning cryptographic or intelligence activities, and 50 U. S. C. § 783 (b), which makes it a crime for an officer or employee of the United States to communicate classified information to agents of foreign governments or officers and members of "Communist organizations," reflect a recognition by Congress of the existence of military secrets and the necessity of keeping those secrets inviolate.

Although these statutes make it apparent that Congress recognizes the existence of military secrets, they hardly constitute an authorization to create an elaborate clearance program which embodies procedures traditionally believed to be inadequate to protect affected persons.[29]

Lastly, the Government urges that if we refuse to adopt its "inferred" authorization reasoning, nevertheless, congressional ratification is apparent by the continued appropriation of funds to finance aspects of the program fashioned by the Department of Defense. Respondents refer us to Hearings before the House Committee on Appropriations on Department of Defense Appropriations for 1956, 84th Cong., 1st Sess. 774–781. At those hearings, the Committee was asked to approve the appropriation of funds to finance a program under which reimbursement for lost wages would be made to employees of government contractors who were temporarily denied, but later granted, security clearance. Apparently, such reim-

[29] As far as appears, the most substantial official notice which Congress had of the non-confrontation procedures used in screening industrial workers was embodied in S. Doc. No. 40, 84th Cong., 1st Sess., a 354-page compilation of laws, executive orders, and regulations relating to internal security, printed at the request of a single Senator, which reproduced, among other documents and without specific comment, the Industrial Personnel Security Review Regulation.

bursements had been made prior to that time out of general appropriations. Although a specific appropriation was eventually made for this purpose, it could not conceivably constitute a ratification of the hearing procedures, for the procedures were in no way involved in the special reimbursement program.[30]

---

[30] At the hearings to which we have been referred, the following passage from the testimony of the Department of Defense representative constitutes the only description made to the Committee concerning the procedures used in the Department's clearance program:

"In connection with the procurement programs of the Department of Defense, regulations have been prescribed to provide uniform standards and criteria for determining the eligibility of contractors, contractor employees, and certain other individuals, to have access to classified defense information. The regulations also establish administrative procedures governing the disposition of cases in which a military department, or activity thereof, has made a recommendation or determination (a) with respect to the denial, suspension, or revocation of a clearance of a contractor or contractor employee; and (b) with respect to the denial or withdrawal of authorization for access by certain other individuals.

"While the Department of Defense assumes, unless information to the contrary is received, that all contractors and contractor employees are loyal to the Government of the United States, the responsibilities of the Military Establishment necessitate vigorous application of policies designed to minimize the security risk incident to the use of classified information by such contractors and contractor employees. Accordingly, measures are taken to provide continuing assurance that no contractor or contractor employee will be granted a clearance if available information indicates that the granting of such clearance may not be clearly consistent with the interests of national security. At the same time, every possible safeguard within the limitations of national security will be provided to ensure that no contractor or contractor employee will be denied a clearance without an opportunity for a fair hearing." *Id.*, at 774.

This description hardly constitutes even notice to the Committee of the nature of the hearings afforded. Thus the appropriation could not "plainly show a purpose to bestow the precise authority which is claimed." *Ex parte Endo,* 323 U. S. 283, 303, n. 24. Likewise,

Respondents' argument on delegation resolves itself into the following: The President, in general terms, has authorized the Department of Defense to create procedures to restrict the dissemination of classified information and has apparently acquiesced in the elaborate program established by the Secretary of Defense even where application of the program results in restraints on traditional freedoms without the use of long-required procedural protections. Similarly, Congress, although it has not enacted specific legislation relating to clearance procedures to be utilized for industrial workers, has acquiesced in the existing Department of Defense program and has ratified it by specifically appropriating funds to finance one aspect of it.

If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred. Thus, even in the absence of specific delegation, we have no difficulty in finding, as we do, that the Department of Defense has been authorized to fashion and apply an industrial clearance program which affords affected persons the safeguards of confrontation and cross-examination. But this case does not present that situation. We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted

---

appropriations of specific amounts for the Munitions Board or its successors, agencies with multifold objectives, without any mention of the uses to which the funds could be put, cannot be considered as a ratification of the use of the specified hearing procedures.

notions of fair procedures.[31] Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. Cf. *Watkins* v. *United States,* 354 U. S. 178; *Scull* v. *Virginia,* 359 U. S. 344. Such decisions cannot be assumed by acquiescence or non-action. *Kent* v. *Dulles,* 357 U. S. 116; *Peters* v. *Hobby,* 349 U. S. 331; *Ex parte Endo,* 323 U. S. 283, 301–302. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, see *Peters* v. *Hobby, supra,* but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, *e. g., The Japanese Immigrant Case,* 189 U. S. 86, 101; *Dismuke* v. *United States,* 297 U. S. 167, 172; *Ex parte Endo,* 323 U. S. 283, 299–300; *American Power Co.* v. *Securities and Exchange Comm'n,* 329 U. S. 90, 107–

[31] It is estimated that approximately three million persons having access to classified information are covered by the industrial security program. Brown, Loyalty and Security (1958), 179–180; Association of the Bar of the City of New York, Report of the Special Committee on the Federal Loyalty-Security Program (1956), 64.

108; *Hannegan* v. *Esquire,* 327 U. S. 146, 156; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49. Cf. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337; *United States* v. *Rumely,* 345 U. S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition.

In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.

Accordingly, the judgment is reversed and the case is remanded to the District Court for proceedings not inconsistent herewith.

It is so ordered.

Mr. Justice Frankfurter, Mr. Justice Harlan and Mr. Justice Whittaker concur in the judgment on the ground that it has not been shown that either Congress or the President authorized the procedures whereby petitioner's security clearance was revoked, intimating no views as to the validity of those procedures.

MR. JUSTICE HARLAN, concurring specially.

What has been written on both sides of this case makes appropriate a further word from one who concurs in the judgment of the Court, but cannot join its opinion.

Unlike my brother CLARK who finds this case "both clear and simple," I consider the constitutional issue it presents most difficult and far-reaching. In my view the Court quite properly declines to decide it in the present posture of the case. My unwillingness to subscribe to the Court's opinion is due to the fact that it unnecessarily deals with the very issue it disclaims deciding. For present purposes no more need be said than that we should not be drawn into deciding the constitutionality of the security-clearance revocation procedures employed in this case until the use of such procedures in matters of this kind has been deliberately considered and expressly authorized by the Congress or the President who alone are in a position to evaluate in the first instance the totality of factors bearing upon the necessity for their use. That much the courts are entitled to before they are asked to express a constitutional judgment upon an issue fraught with such important consequences both to the Government and the citizen.

Ample justification for abstaining from a constitutional decision at this stage of the case is afforded by the Court's traditional and wise rule of not reaching constitutional issues unnecessarily or prematurely. That rule indeed has been consistently followed by this Court when faced with "confrontation" issues in other security or loyalty cases. See *Peters* v. *Hobby,* 349 U. S. 331; *Vitarelli* v. *Seaton,* 359 U. S. 535; cf. *Service* v. *Dulles,* 354 U. S. 363; *Kent* v. *Dulles,* 357 U. S. 116. Adherence to that rule is, as I understand it, the underlying basis of today's decision, and it is on that basis that I join the judgment of the Court.

It is regrettable that my brother CLARK should have so far yielded to the temptations of colorful characterization as to depict the issue in this case as being whether a citizen has "a constitutional right to have access to the Government's military secrets," and to suggest that the Court's action today requires "the President's Cabinet members to revoke their refusal to give" the petitioner "access to military secrets," despite any views they may have as to his reliability. Of course this decision involves no such issue or consequences. The basic constitutional issue is not whether petitioner is entitled to access to classified material, but rather whether the particular procedures here employed to deny clearance on security grounds were constitutionally permissible. With good reason we do not reach that issue as matters now stand. And certainly there is nothing in the Court's opinion which suggests that petitioner must be given access to classified material.

MR. JUSTICE CLARK, dissenting.

To me this case is both clear and simple. The respondents, all members of the President's Cabinet, have, after a series of hearings, refused to give Greene further access to certain government military information which has been classified "secret." The pertinent Executive Order defines "secret" information as

> "defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelli-

> gence operations." Exec. Order No. 10501, Nov. 5, 1953, 18 Fed. Reg. 7049, 3 CFR (1949–1953 Comp.), p. 979, § 1 (b).

Surely one does not have a constitutional right to have access to the Government's military secrets.[1] But the Court says that because of the refusal to grant Greene further access, he has lost his position as vice president and general manager, a chief executive officer, of ERCO, whose business was devoted wholly to defense contracts with the United States,[2] and that his training in aeronautical engineering, together with the facts that ERCO engages solely in government work and that the Government is the country's largest airplane customer, has in some unaccountable fashion parlayed his employment with ERCO into "a constitutional right." What for anyone else would be considered a privilege at best has for Greene been enshrouded in constitutional protection. This sleight of hand is too much for me.

But this is not all. After holding that Greene has constitutional protection for his private job, the Court has ordered the President's Cabinet members to revoke their refusal to give Greene access to military secrets.[3] It

---

[1] My brother HARLAN very kindly credits me with "colorful characterization" in stating this as the issue. While I take great pride in authorship, I must say that in this instance I merely agreed with the statement of the issue by the Solicitor General and his co-counsel in five different places in the Brief for the United States. See pp. 2, 17, 19, 29, 59.

[2] ERCO agreed in its government contract, as was well known to Greene, to exclude any individual from any part of its plant at which work under the contract was being performed who had not been cleared by the Navy for access to military secrets.

[3] Brother HARLAN states that I suggest "that the Court's action today requires 'the President's Cabinet members to revoke their refusal to give' the petitioner 'access to military secrets,' despite any views they may have as to his reliability . . . ." Government officials, well versed in the application of this Court's judgments to the practicalities

strikes down the present regulations as being insufficiently authorized by either the President or the Congress because the procedures fail to provide for confrontation or cross-examination at Board hearings. Let us first consider that problem.

I. THE CONSTITUTIONAL ISSUE.

After full consideration the Court concludes "that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." In so doing, as I shall point out, it holds for naught the Executive Orders of both President Roosevelt and President Truman and the directives pursuant thereto of every Cabinet officer connected with our defense since 1942 plus the explicit order of General Dwight D. Eisenhower as Chief of Staff in 1946. In addition, contrary to the Court's conclusion, the Congress was not only fully informed but had itself published the very procedures used in Greene's case.

I believe that the Court is in error in holding, as it must, in order to reach this "authorization" issue, that Greene's "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference" is protected by the Fifth Amendment. It cites four cases in support of this proposition and says compare four others. As I read those cases not

---

of government operation, say that the relief which Greene seeks here—and which the Court now grants—is "in substance, a mandatory injunction requiring that the Government show him (or, in practice, allow contractors to show him) defense secrets, notwithstanding the judgment of the executive branch that such disclosure might jeopardize the national safety." Brief for the United States, 48.

one is in point.[4] In fact, I cannot find a single case in support of the Court's position. Even a suit for damages on the ground of interference with private contracts does not lie against the Government. The Congress specifically exempted such suits from the Tort Claims Act. 28 U. S. C. § 2680 (h). But the action today may have the effect of by-passing that exemption since Greene will now claim, as has Vitarelli, see *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959), reimbursement for his loss of wages. See *Taylor* v. *McElroy*, *post*, p. 709. This will date back to 1953. His salary at that time was $18,000 a year.

In holding that the Fifth Amendment protects Greene the Court ignores the basic consideration in the case, namely, that no person, save the President, has a constitutional right to access to governmental secrets. Even though such access is necessary for one to keep a job

---

[4] *Dent* v. *West Virginia*, 129 U. S. 114 (1889), held that a West Virginia statute did not deprive one previously practicing medicine of his rights without due process by requiring him to obtain a license under the Act. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957), likewise a license case, did not pass upon the "right" or "privilege" to practice law, merely holding that on the facts the refusal to permit Schware to take the examination was "invidiously discriminatory." In *Peters* v. *Hobby*, 349 U. S. 331 (1955), the Court simply held the action taken violated the Executive Order involved. The concurring opinion, DOUGLAS, J., p. 350, went further but alone on the question of "right." The Court did not discuss that question, much less pass upon it. *Slochower* v. *Board of Education*, 350 U. S. 551 (1956), held that the summary dismissal without further evidence by New York of a school teacher because he had pleaded the Fifth Amendment before a United States Senate Committee violated due process. The case merely touched on the "right" to plead the Fifth Amendment, not to "property" rights. *Truax* v. *Raich*, 239 U. S. 33 (1915); *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897); and *Powell* v. *Pennsylvania*, 127 U. S. 678 (1888), were equal protection cases wherein discrimination was claimed. Greene alleges no discrimination.

in private industry, he is still not entitled to the secrets. It matters not if as a consequence he is unable to secure a specific job or loses one he presently enjoys. The simple reason for this conclusion is that he has no constitutional right to the secrets. If access to its secrets is granted by the Government it is entirely permissive and may be revoked at any time. That is all that the Cabinet officers did here. It is done every day in governmental operation. The Court seems to hold that the access granted Greene was for his benefit. It was not. Access was granted to secure for the Government the supplies or services it needed. The contract with ERCO specifically provided for the action taken by the Cabinet officers. Greene as General Manager of ERCO knew of its provisions. If every person working on government contracts has the rights Greene is given here the Government is indeed in a box. But as was said in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–128 (1940):

> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. . . . Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government."

The Court refuses to pass on the constitutionality of the procedures used in the hearings. It does say that the hearings provided for in the program permit the restraint of "employment opportunities through a denial of clearance without the safeguards of confrontation and cross-examination." I think the Court confuses admin-

istrative action with judicial trials. This Court has long ago and repeatedly approved administrative action where the rights of cross-examination and confrontation were not permitted. *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103 (1948); *Carlson* v. *Landon*, 342 U. S. 524 (1952); *United States* v. *Nugent*, 346 U. S. 1 (1953); *United States* v. *Reynolds*, 345 U. S. 1 (1953); *Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950); *Shaughnessy* v. *Mezei*, 345 U. S. 206 (1953); and *Jay* v. *Boyd*, 351 U. S. 345 (1956).

At no time since the programs now in vogue were established in 1942 have the rights of cross-examination and confrontation of witnesses been required. In fact the present regulations were patterned after the Employee Loyalty Program, first inaugurated upon the passage of the Hatch Act in 1939, in which the rights of confrontation and cross-examination have never been recognized. Every Attorney General since that time has approved these procedures, as has every President. And it should be noted, though several cases here have attacked the regulations on this ground, this Court has yet to strike them down.[5]

I shall not labor the point further than to say that in my opinion the procedures here do comport with that fairness required of administrative action in the security field. A score of our cases, as I have cited, support me in this position. Not one is to the contrary. And the action of the Court in striking down the program for lack of specific authorization is indeed strange, and hard for me to understand at this critical time of national emergency. The defense establishment should know—and now—whether its program is constitutional and, if not, wherein

---

[5] See *Bailey* v. *Richardson*, 86 U. S. App. D. C. 248, 182 F. 2d 46, affirmed by an equally divided Court, 341 U. S. 918 (1951); *Peters* v. *Hobby*, 349 U. S. 331 (1955).

it is deficient. I am sure that it will remember that in other times of emergency—no more grave than the present—it was permitted, without any hearing whatsoever—much less with confrontation and cross-examination—to remove American citizens from their homes on the West Coast and place them in concentration camps. See *Hirabayashi* v. *United States,* 320 U. S. 81 (1943); *Korematsu* v. *United States,* 323 U. S. 214 (1944). My examination of the Japanese exclusion orders indicates clearly that the Executive Order was a general authorization just as the two here. Congress at the time only created criminal offenses for violation of exclusion or curfew orders of the military commander. Likewise we have criminal statutes here. And while the Japanese orders were in time of war, those involved here had their inception in war and have been continued during the national emergency declared by the President. No one informed in present world affairs would say that our safety is less in jeopardy today. In fact we are now spending nearly as much money to protect it as during the war period. In this light it is inescapable that the existing authorizations are entirely sufficient. Let us examine them.

II. THE PRESIDENT AND THE CONGRESS HAVE GRANTED SUFFICIENT AUTHORITY TO THE CABINET OFFICERS.

Since 1941 the industrial security program has been in operation under express directives from the President. Within a week after the attack on Pearl Harbor, President Roosevelt issued Exec. Order No. 8972, 6 Fed. Reg. 6420, Dec. 12, 1941, which authorized both the Secretary of War and the Secretary of the Navy "to establish and maintain military guards and patrols, *and to take other appropriate measures,* to protect from injury and destruction national-defense material, national-defense premises, and national-defense utilities, . . ." (Emphasis added.)

In 1942, under the authority of that Executive Order, the Secretary of War undertook the formulation and execution of a program of industrial security.[6] The procedures in operation from 1942 and 1943 are outlined in a 1946 publication of the Department of War entitled "Suspension of Subversives from Privately Operated Facilities of Importance to the Security of the Nation's Army and Navy Programs."[7] Interestingly enough, the instructions were issued in time of peace, did not give the suspect a hearing, and were signed by the then Chief of Staff—now President—Dwight D. Eisenhower.

In 1947, the National Security Act, 61 Stat. 495, effected a reorganization of the military departments and placed the Secretary of Defense at the head of the National Military Establishment. Section 305 (a) of the Act transferred to the new organization "[a]ll laws, orders, regulations, and other actions applicable with respect to any function . . . transferred under this Act . . . ." Section 213 created a Munitions Board

---

[6] Report of the Commission on Government Security (1957), S. Doc. No. 64, 85th Cong., 1st Sess. 237, n. 7.

[7] War Department Pamphlet No. 32–4 (1946) provided both criteria and procedures for removal of subversives. The basic criterion was "good cause to suspect an employee of subversive activity . . . ," the latter being defined as "sabotage, espionage, or any other wilful activity intended to disrupt the national defense program." The basic procedure for removal was set out in ¶ 10:

"10. When adequate investigation has revealed that there is good cause to suspect an employee of subversive activity on a national defense project of importance to Army or Navy procurement, the vital success of the project, as well as the security of the loyal employees, may require that the Army or Navy, without revealing the nature or source of its evidence, request the immediate removal of such individual from the project. To this end the cooperation of the organizations representative of organized labor is solicited for the following program: . . ."

Clearly this procedure did not anticipate confrontation or cross-examination.

within the military establishment and under the supervision of the Secretary of Defense. Among its functions were

> "(1) to coordinate the appropriate activities within the National Military Establishment with regard to industrial matters, including procurement . . . plans . . . ; (2) to plan for the military aspects of industrial mobilization; . . . and (10) to perform such other duties as the Secretary of Defense may direct." [8]

In his first report to the President in 1948, Secretary of Defense Forrestal reported that:

> ". . . the Munitions Board is responsible for necessary action to coordinate internal security within the National Military Establishment with regard to industrial matters. This work is being planned and in some phases carried forward by the following programs:
>
> . . . . . .
>
> "*c.* Development of plans and directives to protect classified armed forces information in the hands of industry from potential enemies;
>
> "*d.* Establishment of uniform methods of handling of personnel clearances and secrecy agreements . . . ." First Report of the Secretary of Defense (1948) 102–103.

The forerunner of the exact program now in effect was put in operation in 1948 under the supervision of that Board. And, in the Annual Report to the President, in 1949, the Secretary, then Louis Johnson, reported that

> "*Industrial Security.*—A program to coordinate and develop uniform practices to protect classified mili-

[8] The National Security Act Amendments of 1949, 63 Stat. 578, amended § 213 so as to delete subparagraph 10.

> tary information placed in the hands of industry under procurement and research contracts was continued by the Munitions Board. Criteria were developed for the granting or denial of personnel and facility clearances in the performance of classified contracts. Work was started to establish a central security clearance register to centralize clearance data for ready reference by all departments and to prevent duplication in making clearance investigations. A joint Personnel Security Board administers this program, and the Industrial Employment Review Board hears appeals from security clearance denials." Second Report of the Secretary of Defense, for the Fiscal Year 1949 (1950), 85.

Transmitted with that report to the President was the Annual Report of the Secretary of the Army, where the number of security cases processed by the Army-Navy-Air Force Personnel Board, and the number of appeals handled by the Industrial Employment Review Board were detailed.[9]

Again in 1950 the Secretary of Defense informed the President, in a report required by law, of the status of the industrial security program.

> "In the past 6 months, the Munitions Board activated the Industrial Employment Review Board, established procedures under which the latter will operate, and developed a set of uniform criteria stipulating the circumstances under which security clearances will be denied. The Munitions Board also established a Central Index Security Clearance File to serve as a clearing house for all individual and facility clearances and denials, [and] developed a standard security requirements check list . . . .

[9] Annual Report of the Secretary of the Army for the Fiscal Year 1949 (1950), 192.

> Uniform standards for security investigations of facility and contractors' personnel are being developed . . . . A standard military security agreement is being coordinated to bind potential suppliers to security regulations before a classified contract is awarded, and a manual to give security guidance to industry is being prepared." Semiannual Report of the Secretary of Defense, July 1 to Dec. 31, 1949 (1950), 97.

The President, in 1953, in Reorganization Plan No. 6, 67 Stat. 638, transferred all of the "functions of the Munitions Board" to the Secretary of Defense and dissolved that Board. Since then the program has been in operation under the authority of the Secretary. Also in 1953, the President issued Exec. Order No. 10450, Apr. 27, 1953, 18 Fed. Reg. 2489, 3 CFR (1949–1953 Comp.), p. 936. That order dealt with the criteria and procedures to be used in the Federal Loyalty Security Program, which had been instituted under Exec. Order No. 9835, 12 Fed. Reg. 1935, 3 CFR (1943–1948 Comp.), p. 630, Mar. 21, 1947. The latter order made clear that federal employees suspected of disloyalty had no right of confrontation.[10] And the regulations promulgated under the order provided no such right. See 13 Fed. Reg. 9365, 5 CFR (1949), § 210, Dec. 31, 1948. These procedures were revised under Exec. Order No. 10450, *supra,* although again, confrontation and cross-examination were not provided. See

---

[10] Part IV, § 2 of Exec. Order No. 9835 specifically stated that: ". . . the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. . . ."

19 Fed. Reg. 1503, 32 CFR, p. 288, Mar. 19, 1954. Thus, it was clear that the President had not contemplated that there would be a right of confrontation in the Federal Loyalty Security Program. And the report of the Secretary of the Army—transmitted to the President by the Secretary of Defense—made clear that the criteria of Exec. Order No. 10450 were being utilized not only where the loyalty of a government employee was in doubt, but also in carrying out the industrial security program. Semiannual Report of the Secretary of the Army, Jan. 1, 1954, to June 30, 1954, 135–136.

Thus we see that the program has for 18 years been carried on under the express authority of the President, and has been regularly reported to him by his highest Cabinet officers. How the Court can say, despite these facts, that the President has not sufficiently authorized the program is beyond me, unless the Court means that it is necessary for the President to write out the Industrial Security Manual in his own hand.

Furthermore, I think Congress has sufficiently authorized the program, as it has been kept fully aware of its development and has appropriated money to support it. During the formative period of the program, 1949–1951, the Congress, through appropriation hearings, was kept fully informed as to the activity. In 1949 D. F. Carpenter, Chairman of the Munitions Board, appeared before a Subcommittee of the House Committee on Appropriations to testify concerning the requested appropriation for the Board. While the report indicates much of the testimony was "off the record," it does contain specific references to the program here under attack.[11] Significantly the appropriation bill for 1950 included an item

[11] House of Representatives, Hearings before the Subcommittee of the Committee on Appropriations on the National Military Establishment Appropriation Bill for 1950, 81st Cong., 1st Sess. 91.

of $11,300,000 for the maintenance, *inter alia,* of the Board.

Again, in 1950 General Timberlake, a member of the Board, testified:

> "Then we are going to intensify the industrial mobilization planning within the Department of Defense, with particular emphasis on industrial security . . . ." House of Representatives, Hearings before a Subcommittee of the Committee on Appropriations on the Supplemental Appropriation for 1951, 81st Cong., 2d Sess. 264.

While, again, some of the testimony was "off the record" it was sufficiently urgent and detailed for the Congress to appropriate additional funds for the Board for 1951.[12]

By the 1953 Reorganization Plan, the functions of the Munitions Board were transferred to various Assistant Secretaries of Defense. The industrial security program was put under the Assistant Secretary of Defense for Manpower, Personnel, and Reserve Forces. Of course, this office received an appropriation each year. These hearings, to cite but two, certainly indicate an awareness

---

[12] The reason for the dearth of legislative reference to the program appears in some 1955 hearings on an appropriation bill. Under consideration at the time was a proposal for a fund to reimburse contractor employees who had been suspended during a security check and subsequently cleared. General Moore testified that, in the past, such reimbursement had been made by the service secretaries out of their contingency funds. Then followed this colloquy:

"Mr. Mahon. Under that [the contingency fund] you can buy a boy a top, or a toy, provided the Secretary of Defense thinks it is proper?

"Gen. Moore. That is right, and we come down here and explain to this committee with respect to this in a very secret session how much we have spent and precisely what we have spent it for." House of Representatives, Hearings before the Subcommittee of the Committee on Appropriations on Department of Defense Appropriations for 1956, 84th Cong., 1st Sess. 780.

on the part of Congress of the existence of the industrial security program, and the continued appropriations hardly bespeak an unwillingness on the part of Congress that it be carried on. In 1955, the Eighty-fourth Congress, on the motion of Senator Wiley for unanimous consent, caused to be printed the so-called Internal Security Manual, S. Doc. No. 40, 84th Cong., 1st Sess. It is a compilation of all laws, regulations, and congressional committees relating to the national security. Contained in the volume is the "Industrial Personnel Security Review Regulation," *i. e.*, a verbatim copy of the regulations set up by the Secretary of Defense on February 2, 1955. This Manual outlined in detail the hearing procedures which are here condemned by the Court. And it is important to note that the final denial of Greene's clearance was by a Board acting under these very regulations. Still not one voice was raised either within or without the Halls of Congress that the Defense Department had exceeded its authority or that contractor employees were being denied their constitutional rights. In other cases we have held that the inaction of the Congress, in circumstances much less specific than here, was a clear ratification of a program as it was then being carried out by the Executive. Why, I ask, do we not do that here where it is so vital? We should not be "that blind Court . . . that does not see what '[a]ll others can see and understand . . . .'" *United States* v. *Rumely*, 345 U. S. 41, 44 (1953).

While it certainly is not clear to me, I suppose that the present fastidiousness of the Court can be satisfied by the President's incorporating the present industrial security program into a specific Executive Order or the Congress' placing it on the statute books. To me this seems entirely superfluous in light of the clear authorization presently existing in the Cabinet officers. It also subjects the Government to multitudinous actions—and perhaps large

damages—by reason of discharges made pursuant to the present procedures.

And I might add a *nota bene*. Even if the Cabinet officers are given this specific direction, the opinion today, by dealing so copiously with the constitutional issues, puts a cloud over both the Employee Loyalty Program and the one here under attack. Neither requires that hearings afford confrontation or cross-examination. While the Court disclaims deciding this constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy. Let us hope that the winds may change. If they do not the present temporary debacle will turn into a rout of our internal security.

FARMERS EDUCATIONAL & COOPERATIVE UNION OF AMERICA, NORTH DAKOTA DIVISION, *v.* WDAY, INC.

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA.

No. 248. Argued March 23, 1959.—Decided June 29, 1959.

Section 315 (a) of the Federal Communications Act of 1934 provides, in effect, that, if anyone licensed to operate a radio broadcasting station shall permit any person who is a legally qualified candidate for public office to broadcast over such station, he shall "afford equal opportunities" to all other such candidates for that office and "shall have no power of censorship" over the material broadcast under this Section. *Held:*

1. Such a licensee may not delete material from a candidate's radio speech on the ground that such material may be defamatory. Pp. 527–531.

2. Regardless of state law, such a licensee is not liable for defamatory statements made in a speech broadcast over his station by a candidate for public office under § 315 (a). Pp. 531–535.

89 N. W. 2d 102, affirmed.

Edward S. Greenbaum and *Harriet F. Pilpel* argued the cause for petitioner. With them on the brief were *Morris L. Ernst, Nancy F. Wechsler* and *Charles F. Brannan.*

Harold W. Bangert argued the cause and filed a brief for respondent.

Douglas A. Anello argued the cause for the National Association of Broadcasters, as *amicus curiae,* urging affirmance. With him on the brief was *Walter R. Powell, Jr.*

Herbert Monte Levy filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging affirmance.

Solicitor General Rankin, Ralph S. Spritzer, Richard A. Solomon and *John L. Fitzgerald* were on a memorandum for the United States, as *amicus curiae.*

MR. JUSTICE BLACK delivered the opinion of the Court.

We must decide whether § 315 of the Federal Communications Act of 1934 bars a broadcasting station from removing defamatory statements contained in speeches broadcast by legally qualified candidates for public office, and if so, whether that section grants the station a federal immunity from liability for libelous statements so broadcast. Section 315 reads:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate." [1]

This suit for libel arose as a result of a speech made over the radio and television facilities of respondent, WDAY, Inc., by A. C. Townley—a legally qualified candidate in the 1956 United States senatorial race in North Dakota. Because it felt compelled to do so by the requirements of § 315, WDAY permitted Townley to broadcast his speech, uncensored in any respect, as a reply to previous speeches made over WDAY by two other senatorial candidates. Townley's speech, in substance, accused his opponents, together with petitioner, Farmers Educational and Cooperative Union of America, of conspiring to "establish

---

[1] 48 Stat. 1088, as amended, 47 U. S. C. § 315 (a). See also, § 18 of the Radio Act of 1927, 44 Stat. 1170.

a Communist Farmers Union Soviet right here in North Dakota." Farmers Union then sued Townley and WDAY for libel in a North Dakota State District Court. That court dismissed the complaint against WDAY on the ground that § 315 rendered the station immune from liability for the defamation alleged. The Supreme Court of North Dakota affirmed, stating: "Section 315 imposes a mandatory duty upon broadcasting stations to permit all candidates for the same office to use their facilities if they have permitted one candidate to use them. Since power of censorship of political broadcasts is prohibited it must follow as a corollary that the mandate prohibiting censorship includes the privilege of immunity from liability for defamatory statements made by the speakers." For this reason it held that the state libel laws could not apply to WDAY. 89 N. W. 2d 102, 110. We granted certiorari because the questions decided are important to the administration of the Federal Communications Act. 358 U. S. 810.

I.

Petitioner argues that § 315's prohibition against censorship leaves broadcasters free to delete libelous material from candidates' speeches, and that therefore no federal immunity is granted a broadcasting station by that section. The term censorship, however, as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of "objectionable" material. We find no clear expression of legislative intent, nor any other convincing reason to indicate Congress meant to give "censorship" a narrower meaning in § 315. In arriving at this view, we note that petitioner's interpretation has not generally been favored in previous considerations of the section. Although the first, and for years the only judicial decision dealing with the censorship provision did hold that a station may remove

defamatory statements from political broadcasts,[2] subsequent judicial interpretations of § 315 have with considerable uniformity recognized that an individual licensee has no such power.[3] And while for some years the Federal Communications Commission's views on this matter were not clearly articulated,[4] since 1948 it has continuously held that licensees cannot remove allegedly libelous matter from speeches by candidates.[5] Similarly, the legislative history of the measure both prior to its first enactment in 1927, and subsequently, shows a deep hostility to censorship either by the Commission or by a licensee.[6]

---

[2] *Sorensen* v. *Wood,* 123 Neb. 348, 243 N. W. 82. Following this decision the case was remanded for a new trial. Appeal from a judgment for plaintiff was dismissed by the Supreme Court of Nebraska. Appeal to this Court was dismissed *sub nom. KFAB Broadcasting Co.* v. *Sorensen,* 290 U. S. 599, because, as the records of this Court disclose, the Supreme Court of Nebraska's holding had been based on adequate state grounds, namely, that the case had become moot through settlement.

[3] See *Lamb* v. *Sutton,* 164 F. Supp. 928; *Yates* v. *Associated Broadcasters, Inc.,* 7 Pike and Fischer Radio Reg. 2088; *Felix* v. *Westinghouse Radio Stations, Inc.,* 89 F. Supp. 740, rev'd on other grounds, 186 F. 2d 1; *Charles Parker Co.* v. *Silver City Crystal Co.,* 142 Conn. 605, 116 A. 2d 440; *Josephson* v. *Knickerbocker Broadcasting Co.,* 179 Misc. 787, 38 N. Y. S. 2d 985. But see *Daniell* v. *Voice of New Hampshire, Inc.,* 10 Pike and Fischer Radio Reg. 2045; *Houston Post Co.* v. *United States,* 79 F. Supp. 199.

[4] See *In re Bellingham Broadcasting Co.,* 8 F. C. C. 159, 172.

[5] *In re Port Huron Broadcasting Co.,* 12 F. C. C. 1069; *In re WDSU Broadcasting Corp.,* 7 Pike and Fischer Radio Reg. 769; Public Notice (FCC 54–1155), Use of Broadcast Facilities by Candidates For Public Office, 19 Fed. Reg. 5948, 5951; Public Notice (FCC 58–936), Use of Broadcast Facilities by Candidates For Public Office, 23 Fed. Reg. 7817, 7820–7821.

[6] See S. Rep. No. 1567, 80th Cong., 2d Sess. 13–14 (1948), where, discussing S. 1333, the Committee Report stated:

"The flat prohibition against the licensee of any station exercising any censorship authority over any political or public question dis-

More important, it is obvious that permitting a broadcasting station to censor allegedly libelous remarks would undermine the basic purpose for which § 315 was passed—full and unrestricted discussion of political issues by legally qualified candidates. That section dates back to, and was adopted verbatim from, the Radio Act of 1927. In that Act, Congress provided for the first time a comprehensive federal plan for regulating the new and expanding art of radio broadcasting. Recognizing radio's potential importance as a medium of communication of political ideas, Congress sought to foster its broadest possible utilization by encouraging broadcasting stations to make their facilities available to candidates for office without discrimination, and by insuring that these candidates when broadcasting were not to be hampered by censorship of the issues they could discuss. Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the

---

cussion is retained and emphasized. This means that the Commission cannot itself or by rule or regulation require the licensee to censor, alter, or in any manner affect or control the subject matter of any such broadcast and the licensee may not in his own discretion exercise any such censorship authority. . . .

. . . . . .

"[S]ection 326 of the present act, which deals with the question of censorship of radio communications by the Commission . . . makes clear that the Commission has absolutely no power of censorship over radio communications and that it cannot impose any regulation or condition which would interfere with the right of free speech by radio."

And see, *e. g.*, H. R. Rep. No. 404, 69th Cong., 1st Sess. 17–18 (minority views); S. Rep. No. 772, 69th Cong., 1st Sess. 4; 67 Cong. Rec. 5480, 5484, 12356; 78 Cong. Rec. 10991–10992; Hearings before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess., pt. 2, 121, 125–134; Hearings before Senate Committee on Interstate Commerce on H. R. 7716, 72d Cong., 2d Sess., pt. 2, 9–13; Hearings before Senate Committee on Interstate Commerce on S. 814, 78th Cong., 1st Sess. 59–68, 943–945.

first emphatically forbidden the Commission to exercise any power of censorship over radio communication.[7] It is in line with this same tradition that the individual licensee has consistently been denied "power of censorship" in the vital area of political broadcasts.

The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, consideration of various legal defenses such as "truth" and the privilege of fair comment. Such issues have always troubled courts. Yet, under petitioner's view of the statute they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks evenly faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter. Because of the time limitation inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of consideration relevant to intelli-

---

[7] § 29 of the Radio Act of 1927, 44 Stat. 1172; § 326 of the Communications Act of 1934, 48 Stat. 1091, as amended, 47 U. S. C. § 326.

gent political decision. We cannot believe, and we certainly are unwilling to assume, that Congress intended any such result.

II.

Petitioner alternatively argues that § 315 does not grant a station immunity from liability for defamatory statements made during a political broadcast even though the section prohibits the station from censoring allegedly libelous matter. Again, we cannot agree. For under this interpretation, unless a licensee refuses to permit any candidate to talk at all, the section would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee. Accordingly, judicial interpretations reaching the issue have found an immunity implicit in the section.[8] And in all those cases concluding that a licensee had no immunity, § 315 had been construed—improperly as we hold—to permit a station to censor potentially actionable material.[9] In no case has a court even implied that the licensee would not be rendered immune were it denied the power to censor libelous material.

Petitioner contends, however, that the legislative history of § 315 shows that Congress did not intend to grant an immunity. Some of the history supports such an inference. As it reached the Senate, the provision which became § 18 of the Radio Act of 1927 provided in part that if a station permitted one candidate to use its facilities, it

---

[8] *Lamb* v. *Sutton; Yates* v. *Associated Broadcasters, Inc.; Josephson* v. *Knickerbocker Broadcasting Co., supra,* note 3. Cf. *Felix* v. *Westinghouse Radio Stations, Inc.; Charles Parker Co.* v. *Silver City Crystal Co., supra,* note 3.

[9] *Houston Post Co.* v. *United States, supra,* note 3; *Sorensen* v. *Wood, supra,* note 2; *Daniell* v. *Voice of New Hampshire, Inc., supra,* note 3.

should "be deemed a common carrier in interstate commerce . . ." and could not discriminate against other political candidates or censor material broadcast by them.[10] In the Senate, Senator Dill—the bill's floor manager—introduced an amendment to this provision which, among other things, specifically granted a station immunity from civil and criminal liability for "any uncensored utterances thus broadcast." [11] The amendment was adopted by the Senate, but its provision expressly granting immunity was removed by the Conference Committee without any explanation.[12] Section 18 was incorporated into the Communications Act of 1934 with no explanatory discussion. Subsequently, a great deal of pressure built up for legislation to remove all possible doubt as to broadcasters' liability for libel either by granting them a power to censor libelous statements or by providing an express legislative immunity. Many legislative proposals were made to accomplish these purposes,[13] but no legislation providing either was ever enacted. Thus, whatever adverse inference may be drawn from the failure of Congress to legislate an express immunity is offset by its refusal to permit stations to avoid liability by censoring broadcasts. And more than balancing any adverse inferences drawn from congressional failure

[10] H. R. 9971, 69th Cong., 1st Sess., as reported to the full Senate, May 6, 1926, p. 50, § 4.

[11] 67 Cong. Rec. 12501.

[12] H. R. Rep. No. 1886, 69th Cong., 2d Sess. 10, 18.

[13] See, *e. g.*, H. R. 9230, 74th Cong., 1st Sess.; S. 814, 78th Cong., 1st Sess., §§ 7, 9, 10, 11; S. 1333, 80th Cong., 1st Sess., § 15; 98 Cong. Rec. 7401. See also Hearings before the Senate Committee on Interstate Commerce on H. R. 7716, 72d Cong., 2d Sess., pt. 2, 9–11; Hearings before Senate Committee on Interstate Commerce on S. 2910, 73d Cong., 2d Sess. 63–67; Hearings before Senate Committee on Interstate Commerce on S. 814, 78th Cong., 1st Sess. 59–68, 162–163, 362–381, 943–945; Hearings before Select Committee of the House to Investigate the FCC, pursuant to H. Res. No. 691, 80th Cong., 2d Sess. 1–109.

to legislate an express immunity is the fact that the Federal Communications Commission—the body entrusted with administering the provisions of the Act—has long interpreted § 315 as granting stations an immunity.[14] Not only has this interpretation been adhered to despite many subsequent legislative proposals to modify § 315, but with full knowledge of the Commission's interpretation Congress has since made significant additions to that section without amending it to depart from the Commission's view.[15] In light of this contradictory legislative background we do not feel compelled to reach a result which seems so in conflict with traditional concepts of fairness.

Petitioner nevertheless urges that broadcasters do not need a specific immunity to protect themselves from liability for defamation since they may either insure against any loss, or in the alternative, deny all political candidates

---

[14] See note 5, *supra.* In *Port Huron* only two of the five Commissioners participating in the decision expressly concluded that § 315 barred state prosecutions for libel. Two of the others expressed no view on the subject. And one dissented. The Commission's 1948 report to Congress stated, however, that the Commission had interpreted § 315 to grant a federal immunity. 14 F. C. C. Ann. Rep. 28 (1948). And in *WDSU*, released November 26, 1951, a majority of the Commission affirmed the Commission's *Port Huron* decision. 7 Pike and Fischer Radio Reg. 769. See also 24 F. C. C. Ann. Rep. 123 (1958); *Lamb* v. *Sutton, supra,* note 3, at 932–933; *Daniell* v. *Voice of New Hampshire, Inc., supra,* note 3, at 2047; *Charles Parker Co.* v. *Silver City Crystal Co., supra,* note 3, 142 Conn., at 619, 116 A. 2d, at 446.

[15] The Commission's position with respect to § 315 was not only reported to Congress in an Annual Report of the Commission, 14 F. C. C. Ann. Rep. 28 (1948), but it was made the subject of a special investigation by a Select Committee of the House, expressly constituted for that purpose. See H. R. Rep. No. 2461, 80th Cong., 2d Sess. See also *In re WDSU Broadcasting Corp., supra,* note 5, at 772–773. Compare H. R. Rep. No. 2426, 82d Cong., 2d Sess. 20–21. For examples of legislative proposals to modify § 315 see, *e. g.,* S. 2539, 82d Cong., 2d Sess.; H. R. 4814, 84th Cong., 1st Sess.

use of station facilities.[16] We have no means of knowing to what extent insurance is available to broadcasting stations, or what it would cost them. Moreover, since § 315 expressly prohibits stations from charging political candidates higher rates than they charge for comparable time used for other purposes, any cost of insurance would probably have to be absorbed by the stations themselves. Petitioner's reliance on the stations' freedom from obligation "to allow use of its station by any such candidate," seems equally misplaced. While denying all candidates use of stations would protect broadcasters from liability, it would also effectively withdraw political discussion from the air. Instead the thrust of § 315 is to facilitate political debate over radio and television. Recognizing this, the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit.[17] Certainly Congress knew the obvious—that if a licensee could pro-

[16] A dissent here suggests that since WDAY's broadcast was required by federal law, there is a "strong likelihood" that the North Dakota courts might hold that the broadcast was not tortious under state law, or if tortious, was privileged. The North Dakota District Court, however, struck down a state statute which would have granted WDAY an immunity as in violation of a state constitutional provision saving to "every man" a court remedy for any injury done his "person or reputation." In this situation we do not think that the record justifies the inference that WDAY could have obtained an immunity by calling it a privilege. But whatever North Dakota might hold, the question for us is whether Congress intended to subject a federal licensee to possible liability under the law of some or all of the 49 States for broadcasting in a way required by federal law.

[17] *In re City of Jacksonville,* 12 Pike and Fischer Radio Reg. 113, 125–126, 180 i-j; *In re Loyola University,* 12 Pike and Fischer Radio Reg. 1017, 1099. See also *In re Homer P. Rainey,* 11 F. C. C. 898. Cf. F. C. C. Report, *In re* Editorializing by Broadcast Licensees, 1 Pike and Fischer Radio Reg., pt. 3, 91:201.

tect himself from liability in no other way but by refusing to broadcast candidates' speeches, the necessary effect would be to hamper the congressional plan to develop broadcasting as a political outlet, rather than to foster it.[18]

We are aware that causes of action for libel are widely recognized throughout the States. But we have not hesitated to abrogate state law where satisfied that its enforcement would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [19] Here, petitioner is asking us to attribute to § 315 a meaning which would either frustrate the underlying purposes for which it was enacted, or alternatively impose unreasonable burdens on the parties governed by that legislation. In the absence of clear expression by Congress we will not assume that it desired such a result. Agreeing with the state courts of North Dakota that § 315 grants a licensee an immunity from liability for libelous material it broadcasts, we merely read § 315 in accordance with what we believe to be its underlying purpose.

Affirmed.

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

The language of § 315 of the Federal Communications Act, "such licensee shall have no power of censorship over the material broadcast under the provisions of this section," [1] and the legislative history of this provision call for the conclusion reached in Part I of the Court's opinion, namely, that WDAY could not have lawfully deleted from

---

[18] See, *e. g.*, statement of Senator Fess, 67 Cong. Rec. 12356.

[19] *Bethlehem Steel Co.* v. *New York Labor Board,* 330 U. S. 767, 773; *Hill* v. *Florida,* 325 U. S. 538, 542. See also *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236; *California* v. *Taylor,* 353 U. S. 553.

[1] 48 Stat. 1088, as amended, 47 U. S. C. § 315 (a).

509615 O–59–37

A. C. Townley's broadcast his defamation of petitioner. But due regard for the principle of separation of powers limiting this Court's functions and respect for the binding principle of federalism, leaving to the States authority not withdrawn by the Constitution or absorbed by the Congress, are more compelling considerations than avoidance of a hardship legally imposed. Consequently the claim that WDAY cannot be held liable under constitutionally enacted state libel laws must be tested not by inquiring whether a particular result would be "unconscionable" but whether the result is or is not barred by federal legislation as construed and applied in accordance with settled principles of statutory and constitutional adjudication. When the question in this case is thus properly put, it is necessary to examine the three relevant legal concepts to which resort must be had in order to find that WDAY is not liable for defamatory remarks broadcast by it.

(1) If § 315 could be construed to contain implicitly, between the lines, a grant by Congress of immunity from state libel laws, the Court's result would follow. But it is not possible to find such implied grant of immunity. It is common ground that an express provision granting such immunity was excised from the bill which later became the Radio Act of 1927 and repeated attempts in later revisions of the Act to introduce similar provisions have failed.

(2) If there were consistent administrative rulings that the Communications Act required that immunity be granted, and if that administrative ruling had been acquiesced in by Congress even by implication, the Court's result would have support.

(3) If § 315 alone, or together with the remainder of the Communications Act, could be said to manifest a congressional purpose to oust state law from application to licensees, or if the state law could be said to be in clear

conflict with § 315 or the Act as a whole, then, in either event, it could be concluded that the libel law of the State had been pre-empted insofar as its applicability to a broadcaster acting within § 315 is concerned.

Because I believe that agreement with the Court's conclusion involves either disregard of the legislative and administrative history of § 315 or departure from the principles which have governed this Court in determining when state law must give way to overriding federal law, I dissent from Part II of the opinion of the Court and therefore from its judgment.

An administrative agency cannot, of course, determine the constitutional issue whether a federal statute has displaced state law, certainly not by way of determining what Congress has in fact done. In *In re Port Huron Broadcasting Co.*, 12 F. C. C. 1069, the case in which the Federal Communications Commission first held that stations could not censor, the Federal Communications Commission's dictum that stations would not be liable was not a relevant administrative interpretation of the meaning of § 315 but was a finding that the States were pre-empted from this area. It was said, not that the broadcasters operating under § 315 had a federally created defense, but that the state libel laws had been supplanted. "The conclusion is inescapable that Congress has occupied the field in connection with responsibility for libelous matter in broadcasts under section 315 . . . ." 12 F. C. C., at 1075–1076.

We have here not a course of administrative interpretation of an ambiguous statutory provision; it is not even a case of a single administrative application of a statute. This is a ruling of constitutional law—that the Supremacy Clause requires that the existence of the Communications Act of 1934 oust the States of jurisdiction to impose libel laws upon broadcasts made under the provisions of § 315. Such constitutional rulings are for this Court and not for

administrative agencies. I would suppose that a consistent administrative insistence on the constitutionality of § 315, were that a question, would not affect this Court's consideration of its constitutionality.

But suppose that, even as to pre-emption, we are to assume that Congress should be said to defer to consistent administrative interpretation. There was no such consistency here in the FCC. The Commission has never issued a regulation nor held in an adjudicatory proceeding that there is immunity. Dictum in the *Port Huron* case was affirmatively embraced by only two of the five Commissioners who presided. Since *Port Huron* the Commission has referred to its language in that case in increasingly tentative fashion. In *In re WDSU Broadcasting Corp.*, 7 Pike and Fischer Radio Reg. 769, 770, the FCC said of its dictum in *Port Huron:*

> "We said in the Port Huron case that in our view the station was relieved from liability, but that whether or not this was the case, the fact remained that a licensee is prohibited from censoring material broadcast under the provisions of § 315."

In a regulation issued in 1958 the Commission answered the question "If a legally qualified candidate broadcasts libelous or slanderous remarks, is the station liable therefor?" in this way:

> "In Port Huron Bctg. Co., 4 R. R. 1, the Commission expressed an opinion that licensees not directly participating in the libel might be absolved from any liability they might otherwise incur under state law, because of the operation of section 315, which precludes them from preventing a candidate's utterances." 23 Fed. Reg. 7820.

Thus the FCC has demonstrated apparent waning confidence in its *Port Huron* dictum—from "[t]he conclusion is inescapable" to "in our view the station was relieved

from liability, but . . . whether or not this was the case" to "an opinion that licensees . . . might be absolved from any liability."

Even if the FCC's position were of a type to which the principle of deference or acquiescence were applicable, even if that position were longer held than just the past decade, and were taken with more confidence than was true here, the history of congressional dealings with the question of liability of stations for libel would not support a conclusion that Congress had acquiesced in such a ruling. For when the last congressional discussion of an immunity provision took place in 1952, the Conference Committee, in reporting out the revised version of § 315, stated it had rejected a House immunity provision [2]

> ". . . because these subjects have not been adequately studied by the Committees on Interstate and Foreign Commerce of the Senate and House of Representatives. The proposal was adopted in the House after the bill had been reported from the House committee. The proposal involves many difficult problems and it is the judgment of the committee of the conference that it should be acted on only after full hearings have been held." H. R. Rep. No. 2426, 82d Cong., 2d Sess. 21.

This language negates rather than supports the conclusion that Congress in failing to enact proposed immunity measures was in fact acquiescing in the *Port Huron* dictum.[3]

---

[2] See 98 Cong. Rec. 7401–7416.

[3] The situation would not have appeared to Congress to be one in which acquiescence was a meaningful concept. Immediately after *Port Huron* the decision was criticized as being without statutory basis. *Houston Post Co.* v. *United States*, 79 F. Supp. 199. In discussing the *Port Huron* decision before a House Committee, FCC Chairman Coy insisted that that decision "only represents the views

For these many reasons a conclusion that in failing to change § 315 after the *Port Huron* decision Congress by its inaction effected the pre-emption which the Commission had found is an assumption wholly unsupported in fact. The attempt to use congressional acquiescence to support the constitutional ruling of supersession of state law raises political stalemate and legislative indecision [4] to the level of constitutional declaration. As we should go slow to read into what Congress has said the negation of state power, unless it speaks explicitly or there is obvious collision, we should even less willingly find such negation in what Congress has frankly refused to say.

The Court proceeds not only from an insupportable finding that Congress acquiesced in the Commission's *Port Huron* opinion. It also relies upon a determination that North Dakota's libel law could not constitutionally be applied to WDAY in this case since the State's libel

---

of the Commission" and that he did not think "this decision clarifies it as far as the industry is concerned." Hearings before House Select Committee to Investigate the Federal Communications Commission, 80th Cong., 2d Sess. 14. After *Port Huron* had been argued but before the decision, a bill, S. 1333, 80th Cong., 1st Sess., § 15, granting immunity was reported favorably by the Senate Committee on Interstate and Foreign Commerce, S. Rep. No. 1567, 80th Cong., 2d Sess. 13, but was never enacted. Every indication is persuasive that the question was regarded as open and highly debatable.

[4] Both before and after *Port Huron*, bills to permit censorship or grant total or partial immunity have been introduced. See H. R. 9230, 74th Cong., 1st Sess.; H. R. 3038, 75th Cong., 1st Sess.; S. 814, 78th Cong., 1st Sess., § 11; S. 1333, 80th Cong., 1st Sess., § 15; H. R. 3595, 80th Cong., 1st Sess., § 15; H. R. 6949, 81st Cong., 2d Sess., § 202; H. R. 5470, 82d Cong., 1st Sess.; S. 2539, 82d Cong., 2d Sess.; H. R. 7062, 82d Cong., 2d Sess.; H. R. 7756, 82d Cong., 2d Sess.; S. 1208, 84th Cong., 1st Sess.; H. R. 4814, 84th Cong., 1st Sess.; S. 1437, 85th Cong., 1st Sess., § 401. The congressional declination to act partakes not of satisfaction with the *Port Huron* decision but of indecision about the propriety and constitutionality of the alternative solutions to the broadcasters' plea of unfairness.

laws had been superseded by federal law for broadcasts made under § 315. A determination of supersession of state law rests on legal and political presuppositions which should be made explicit and not left clouded. States should not be held to have been ousted from power traditionally held in the absence of either a clear declaration by Congress that it intends to forbid the continued functioning of the state law or an obvious and unavoidable conflict between the federal and state directives. The first does not exist here. Indeed, congressional refusal to act has often been suggested as implied recognition of the opposite. Thus, it may well be urged that repeated refusal to relieve from state libel laws amounted to an affirmance that the state laws of defamation should continue in operation since the Congress debated the issue in terms of erecting a defense to these laws, and then declined to do so. In any event, the legislative history emphatically does not support the affirmative conclusion that Congress intended preclusion of state law. Congress can speak with drastic clarity when it so intends. It has not so spoken here; it has refused to speak with drastic clarity.

The nature of the conflict which necessitates striking down state law has been considered in numerous decisions of this Court. In the much-cited case of *Sinnot* v. *Davenport,* 22 How. 227, 243, this Court said:

> "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together."

Whether denying to WDAY the power to eliminate defamatory matter from broadcasts made under compulsion of § 315 while at the same time refusing to find in

§ 315 either immunity or a negation of state power to apply libel laws to programs required by the Federal Act is or is not fair, is not the question with which this Court must, consistent with the Supremacy Clause and the long history of this Court in construing it, begin. We are dealing with political power, not ethical imperatives. The most harmonious deduction to be drawn from the many cases in which the claim has been made that state action cannot survive some contradictory command of Congress is that state action has not been set aside on mere generalities about Congress having "occupied the field," or on the basis of loose talk instead of demonstrations about "conflict" between state and federal action. We are in the domain of government and practical affairs, and this Court has not stifled state action unless what the State has required, in the light of what Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden.

It is to be noted initially that since defamation is generally regarded as an intentional tort, it is a solid likelihood that the North Dakota courts would conclude that WDAY's compelled broadcast of Townley's speech lacked the necessary intent to communicate the defamation, and that therefore WDAY's conduct was not tortious, or, if prima facie tortious, that WDAY was privileged.[5] In no case has any state court held a station liable on finding that the station could not censor. Some forty States have enacted statutes granting various degrees of privilege.[6]

---

[5] See Developments in the Law of Defamation, 69 Harv. L. Rev. 875, 907–910; Remmers, Recent Legislative Trends in Defamation by Radio, 64 Harv. L. Rev. 727.

[6] Friedenthal and Medalie, The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act, 72 Harv. L. Rev. 445, 485.

In two States, exercising the flexibility of common-law principles, the courts have extended a defense of privilege to broadcasters compelled to carry broadcasts by § 315.[7] Thus, the largely abstract assumption on the basis of which the Court makes such heavy inroad on state laws—that broadcasters will be held without having committed a volitional act—may be entirely contradicted by experience.

How treacherous it is for this Court to be speculating about state law is well illustrated by a detailed examination of North Dakota law in the situation presented by this case. A North Dakota statute extending general immunity to all broadcasts by radio and television stations was found by the District Court of North Dakota to violate the North Dakota and United States Constitutions. WDAY, the appellee before the Supreme Court of North Dakota, did not except to this finding and therefore the Supreme Court of North Dakota declined to rule on the validity of the North Dakota statute. But no inference may be drawn from the District Court's conclusions that a station broadcasting under compulsion of § 315 would be liable under North Dakota law. On the contrary, the District Court found that WDAY had a valid defense not only under § 315 of the Communications Act but also within the provisions of Chapter 14–02 of the North Dakota Revised Statutes of 1943. One section of this chapter extends a privilege to "one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent." And so, rather than being justification for a belief that under North Dakota law WDAY would be liable for defamation, the District Court's opin-

[7] *Charles Parker Co.* v. *Silver City Crystal Co.*, 142 Conn. 605, 116 A. 2d 440; *Josephson* v. *Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N. Y. S. 2d 985 (Sup. Ct.).

ion is clear evidence that at least one North Dakota court believed that North Dakota law creates a privilege in favor of broadcasters who are compelled by federal law to broadcast the defamatory matter. In any event, the finding of unconstitutionality was by a lower court and not by the North Dakota Supreme Court which is, of course, the final interpreter of North Dakota law.

Even granting the Court's unsupported assumption about state law, however, there is not that conflict between federal and state law which justifies displacement of state power. Conflict between the North Dakota libel law and § 315 might be attributed to the fact that broadcasters, to avoid being held liable without fault, will refrain from permitting any political candidate to buy time. This result, the argument would conclude, is contrary to the congressional command that stations operate in the "public convenience, interest, or necessity." 48 Stat. 1083, as amended, 47 U. S. C. § 307. The Federal Communications Commission has determined that to fulfill this congressional command stations must carry some political broadcasts. But the state libel laws do not prohibit them from airing speeches by political candidates. They merely make such broadcasts potentially less profitable (or unprofitable) since the station may have to compensate someone libeled during the candidate's broadcast. The Federal Act was intended not to establish a mode of supervising the income of broadcasters—not of protecting or limiting their profits—but of insuring "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" for the benefit of "all the people of the United States." 48 Stat. 1064, as amended, 47 U. S. C. § 151.

We have held that the Communications Act does not govern relations between stations and third persons. *Radio Station WOW, Inc.*, v. *Johnson*, 326 U. S. 120. And

we have permitted a state court to award damages for breach of a contract despite the fact that that breach was ordered by the FCC as a condition for renewal of a license. *Regents of the University System of Georgia* v. *Carroll,* 338 U. S. 586. If North Dakota were to rule that its libel law applies to broadcasts made under compulsion of § 315, it would rule that broadcasters are liable without fault. There is nothing in such liability which conflicts with the necessity of broadcasting imposed by § 315. If Congress came to fear impairment of its policy on political broadcasts, Congress could act to alter the condition which it has created by declining to legislate immunity. There may be a burden, even unfairness to the stations. But there may be unfairness too, after all, in depriving a defamed individual of recovery against the agency by which the defamatory communication was magnified in its deleterious effect on his ability to earn a livelihood. Adjustment of what is fair to all should be done by a congressional change in the federal law, or in the absence of such enactment, by state law, through legislation or common-law rulings that the stations are partially or totally immune. Again, allocation of risk of loss through defamation does not necessarily imply the duty not to defame. The application of libel laws by North Dakota to WDAY merely means that since the harm could no more have been avoided by the person defamed than by WDAY, in balancing these conflicting undesirables the risk of loss should fall upon WDAY. Whether or not this would be a wise decision, it would not conflict with § 315's compulsion to broadcast speeches by opposing candidates for office.

In discussing in the Federalist Papers the respective areas of federal and state constitutional powers, Hamilton wrote that state powers would be superseded by federal authority if continued authority in the States would be "absolutely and totally *contradictory* and *repugnant.*"

"I use these terms," he wrote, "to distinguish this . . . case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority." The Federalist, No. 32, at 200 (Van Doren ed. 1945). Since this concurrent jurisdiction was "clearly admitted by the whole tenor" of the Constitution in Hamilton's view, "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preëxisting right of sovereignty." *Id.*, at 203.

Hamilton's suggestion, emanating from the contest of constitutional creation, is disregarded in the approach taken by the Court today on a precisely analogous if not identical question, for there exists here not an explicit conflict but, at the very most, an interference with policy. Hamilton said, and this Court has in the past begun from similar presuppositions, that alienation of an area of state sovereignty is not to be implied from occasional interferences by state law with federal policy. Particularly should this rule be adhered to where the precise nature of that federal policy on the issues involved rests on the conjectures of the Court. When a state statute is assailed because of alleged conflict with a federal law, the same considerations of forbearance, the same regard for the lawmaking power of States, should guide the judicial judgment as when this Court is asked to declare a statute unconstitutional outright.

In this decision a state law is invalidated by hypothesizing congressional acquiescence and by supposing "conflicting" state law which we cannot be certain exists and

which, if it does exist, is not incompatible with federal law when judged by the considerations governing supersession in the long course of our decisions, judged as a corpus.

I would reverse the North Dakota Supreme Court and remand the case to it with instructions that § 315 has left to the States the power to determine the nature and extent of the liability, if any, of broadcasters to third persons.

PENNSYLVANIA RAILROAD CO. *v.* DAY, ADMINISTRATOR.

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

No. 397. Argued March 26, 1959.—Decided June 29, 1959.

Claiming that, under a collective bargaining agreement entered into between his union and a railroad under the Railway Labor Act of 1934, he was entitled to extra pay for each time he had performed service for his employer on the tracks of another railroad, a locomotive engineer retired from railroad service and brought suit for such additional compensation against his former employer in a Federal District Court. *Held:* Notwithstanding his retirement from service, the National Railroad Adjustment Board had exclusive primary jurisdiction over this dispute arising under a collective bargaining agreement, and the District Court properly dismissed the complaint. Pp. 548–554.

258 F. 2d 62, reversed and cause remanded.

Richard N. Clattenburg argued the cause for petitioner. With him on the brief were *F. Morse Archer, Jr., John P. Hauch, Jr.* and *John B. Prizer.*

James M. Davis, Jr. argued the cause for respondent. With him on the brief was *John A. Matthews.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In April 1955 Charles A. DePriest began an action in the District Court for the District of New Jersey, claiming $27,000 in additional compensation from the Pennsylvania Railroad. DePriest had been employed as a locomotive engineer by the Railroad from May 1918 to March 1955, at which time he resigned his employment and applied for an annuity. He alleged that under the terms of a collective bargaining agreement between the Railroad

and Brotherhood of Locomotive Engineers of which he was a member, he was entitled to an extra day's pay for each of the 1,000–1,500 times he had been assigned to leave his switching limits and perform service for his employer on tracks belonging to the Baltimore and Ohio Railroad Co. He relied on a provision of the collective bargaining agreement which provided extra compensation for engineers who were used beyond their switching limits under specially defined circumstances. DePriest further alleged that his claim had been rejected by his employer's representatives, including the Railroad's chief operating officer for the region in which he was employed. His retirement from service occurred immediately after this alleged rejection. Jurisdiction was based on diversity of citizenship. The District Court stayed the proceedings awaiting the disposition of similar claims against the Pennsylvania Railroad then pending before the First Division of the National Railroad Adjustment Board, 145 F. Supp. 596. An appeal from this interlocutory decision, not one granting or denying an injunction, was dismissed. 243 F. 2d 485. In the interim DePriest died and was replaced by an administrator. Following a rejection by the National Railroad Adjustment Board of claims against the Pennsylvania Railroad involving the same provisions of the collective bargaining agreement, the District Court dismissed the complaint on the ground that the Board's interpretations were final and as such binding on respondent, 155 F. Supp. 695. The Court of Appeals reversed, 258 F. 2d 62, holding that the determination by the Board of claims to which respondent was not a party was not binding on him, and that the District Court had jurisdiction over the claim. We granted certiorari, 358 U. S. 878, since this decision raised an important question in the administration of the Railway Labor Act of 1934. That Act, 48 Stat. 1185, 45 U. S. C. § 151 *et seq.*, established a broad framework for the regula-

tion and adjustment of industrial controversies involving railroads.

The Act establishes, *inter alia,* the National Railroad Adjustment Board with the following purposes and functions:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." Railway Labor Act, § 3, First (i), 45 U. S. C. § 153, First (i).

The clash of economic forces which led to the passage of this Act, the history of its enactment, and the legislative policies which it expresses and which guide judicial interpretation have been too thoroughly and recently canvassed by this Court to need repetition.[1] On the basis of these guides to judicial construction we have held that the National Railroad Adjustment Board had exclusive primary jurisdiction over disputes between unions and carriers based on the provisions of a collective bargaining agreement. *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239. On the same day, we also decided *Order of*

---

[1] See, *e. g., Railroad Trainmen* v. *Chicago River & Ind. R. Co.,* 353 U. S. 30; *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239; *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561; *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711.

Railway Conductors v. *Southern R. Co.,* 339 U. S. 255, holding that the principles of *Slocum* were fully applicable to a claim by a group of conductors that they were entitled to extra compensation for certain "side trips" under the terms of their agreement with the carrier. That case, like the case now before us, involved claims for compensation which could only be adjudicated by a determination of the relevant facts and construction of the collective bargaining agreement. However, here, as was not the case in *Order of Railway Conductors,* the claimant has retired from railroad service. The immediate question is whether that factual difference makes a legal difference.

The Act grants jurisdiction to the Board of "disputes between an employee . . . and a carrier . . . ." It defines "employee" as including:

> ". . . every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission . . . ."

The National Railroad Adjustment Board was established as a tribunal to settle disputes arising out of the relationship between carrier and employee. All the considerations which led Congress to entrust an expert administrative board with the interpretation of collective bargaining agreements are equally applicable when, as here, the employee has retired from service after initiating a claim for compensation for work performed while on active duty. The nature of the problem and the need for experience and expert knowledge remain the same. The same collective bargaining agreement must be construed with the same need for uniformity of interpretation and orderly adjustment of differences. There is

509615 O–59–38

nothing in the Act which requires that the employment relationship subsist throughout the entire process of administrative settlement. The purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated. The Board itself has accepted this construction and adjudicates the claims of retired employees.[2] This uniform administrative interpretation is of great importance, reflecting, as it does, the needs and fair expectations of the railroad industry for which Congress has provided what might be termed a charter for its internal government. Moreover, the discharged employee may challenge the validity of his discharge before the Board, seeking reinstatement and back pay. See *Union Pacific R. Co.* v. *Price, post,* p. 601. Thus it is plain both from a reading of the Act in light of its purpose and the needs of its administration and from the settled administrative interpretation that the Board has jurisdiction over respondent's claim for compensation.

Since the Board has jurisdiction, it must have exclusive primary jurisdiction. All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service. A contrary conclusion would create a not insubstantial class of preferred claimants.[3]

---

[2] *E. g.*, National Railroad Adjustment Board, First Division, Award No. 15406; *id.*, Awards Nos. 11888 (with interpretation of this award contained in Volume 81 of awards), 12418, 16129.

[3] In the year 1956–1957 there were 361,000 retired railroad employees receiving benefits under the Railroad Retirement Act. H. R. Doc. No. 278, 85th Cong., 2d Sess.

The inapplicability of *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, to the problem of this case, like its inapplicability to the problem in *Union Pacific R. Co.* v. *Price, post,* p. 601, decided today, is dealt with in the Court's opinion in that case.

Retired employees would be allowed to bypass the Board specially constituted for hearing railroad disputes whenever they deemed it advantageous to do so, whereas all other employees would be required to present their claims to the Board. This case forcefully illustrates the difficulties of such a construction. Several active workers have had claims similar to that of respondent rejected by the Board. To allow respondent now to try his claim in the District Court would only accentuate the danger of inequality of treatment and its consequent discontent which it was the aim of the Railway Labor Act to eliminate. We can take judicial notice of the fact that provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application. Wholly apart from the adaptability of judges and juries to make such determinations, varying jury verdicts would imbed into such judgments varying constructions not subject to review to secure uniformity. Not only would this engender diversity of proceedings but diversity through judicial construction and through the construction of the Adjustment Board. Since nothing is a greater spur to conflicts, and eventually conflicts resulting in strikes, than different pay for the same work or unfair differentials, not to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act.

Our decision in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, does not stand in the way of this. The decision in that case has been given its proper, limited scope in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239. *Moore* carved out from the controlling doctrine of primary jurisdiction the unusual and special situation of wrongful discharge where the aggrieved employee had been expelled from the employment relationship. Moreover,

since the discharge had been accepted as final by the employee, it is probable that the damages accrued primarily after the employment relationship had terminated.

Our consistent regard for the importance of having disputes between railroad employees and carriers settled by the administrative Board which Congress established for that purpose requires respondent to resort to the NRAB for adjudication of his claim.

The judgment is reversed, and the cause remanded, in order that the case may be returned to the District Court, with instructions to dismiss the complaint for lack of jurisdiction.

Reversed and remanded.

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

I would affirm the judgment of the Court of Appeals for two reasons: I do not agree that the Railway Labor Act requires retired railroad employees to submit their back-wage claims to the National Railroad Adjustment Board; I believe that Act, as here construed to grant railroads court trials of wage claims against them while compelling the employees to submit their claims to the Board for final determination, denies employees equal protection of the law in violation of the Due Process Clause of the Fifth Amendment. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497.

I.

The Court holds that the Railway Labor Act gives the National Railroad Adjustment Board exclusive jurisdiction of back-pay disputes between retired railroad employees and their ex-employer railroads. I cannot read the Labor Act that way. The controlling provision, § 3 First (i), confers power on the Board to adjust "dis-

putes between an employee or a group of employees and a carrier or carriers . . . ." [1] Seemingly to highlight the fact that the Act is to govern active workers only, Congress defined "employee" as "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee . . . ." [2] The railway engineer who brought this suit was not an employee within this definition. Prior to suit he had resigned his job, and had claimed an annuity under the Railroad Retirement Act of 1937, which requires a worker making such a claim to relinquish all rights to return to railroad service in the future.[3] Under these circumstances, the retired employee could not be, and was not "in the service" of the railroad or "subject to its continuing authority to supervise the manner of rendition of his service." No other language in the Act brings retired railroad employees within the exclusive jurisdiction of the Adjustment Board. I think the Court's holding represents an altogether unjustifiable interpretative liberty.

There are perhaps few statutes providing less of an excuse for departing from congressional language than the Railway Labor Act, at least insofar as its coverage is concerned. It is but one step in a series of congressional efforts to establish machinery for peaceful settlement of quarrels between railroads and railroad workers in order to avoid strikes and resulting interruption of railroad service. The Act as a whole is a product of many years of thought, study, conferences, discussions, and experiments. Many witnesses, including representa-

---

[1] 48 Stat. 1191, 45 U. S. C. § 153 First (i).

[2] 44 Stat. 577, as amended, 45 U. S. C. § 151 Fifth.

[3] 50 Stat. 309, as amended, 45 U. S. C. § 228b.

tives of railroads and employees, have testified at many congressional hearings. The hearings show a solicitous interest by both groups in the language of the legislation. The Act touches sensitive subjects of importance to industrial peace, and represented as enacted a balance of interests reasonably satisfactory to all groups. As such, the plain meaning of its language should not lightly be disturbed.

The Court finds reasons outside the language of the Act, however, for expanding the Board's jurisdiction beyond the boundaries set by the definitions of Congress. These reasons, in my judgment, do not support the expansion of the Act's coverage which the Court makes. The Court argues that "All the considerations which led Congress to entrust an expert administrative board with the interpretation of collective bargaining agreements are equally applicable when, as here, the employee has retired from service after initiating a claim for compensation for work performed while on active duty." I am afraid this statement assumes a knowledge which the Court does not and cannot have. Of course some of the same considerations apply. I agree, for example, that the same collective bargaining agreement must be construed whether wages are claimed by an ex-employee or by an active employee. This is equally true, however, when an ex-employee sues for wrongful discharge under a collective bargaining agreement. Yet we have not hesitated on three separate occasions to say that such actions for wrongful discharge can be adjudicated in the courts, and that the courts themselves may construe the bargaining agreement. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239; *Transcontinental & Western Air, Inc.*, v. *Koppal*, 345 U. S. 653. Similarly, when the Board makes an award adverse to the railroad and the employee is forced to go

to the courts to have the award enforced, courts have felt free to interpret collective bargaining agreements differently from the way the Board had.[4]

Moreover, I do not agree with the Court that the problems involved in suits by ex-employees and active employees are necessarily the same. One cannot know all the complex of considerations which led Congress to adopt the Act. One can only surmise its reasons for carefully limiting the Act's scope to disputes between active railroad workers and their employers. It is clear, however, that active employees work together from day to day; their work frequently makes them live together in the same neighborhood; they, in fact, constitute almost a separate family of people, discussing their interests and affairs, and airing among themselves their complaints and grievances against the company. In such an atmosphere individual dissatisfactions tend to become those of the group, breeding industrial disturbances and strikes. We cannot know that this is true of retired employees, as the Court seems to take for granted. Instead, the very opposite would seem a much more likely assumption. Retired employees give up their daily work contact with active workers, frequently even move a long way off from their old working localities, and therefore their personal grievances are not so likely to breed group dissatisfaction leading to strikes. Consequently, it seems wrong to intimate that the grievances retired workers may have over claims for back pay are as likely to create strife productive of railroad strikes as the same grievances would, if entertained by active railroad workers. Certainly, the Court's questionable assumption to this effect supplies a very slim basis for departing from the clear language of the Act.

---

[4] *Brotherhood of Railway Clerks* v. *Railway Express Agency, Inc.*, 238 F. 2d 181; *Dahlberg* v. *Pittsburgh & L. E. R. Co.*, 138 F. 2d 121.

But if external considerations are to be used to interpret the statute, I think that the "lop-sided" effect courts have given to the Act's provisions for review of Board awards furnishes a very weighty reason for excluding retired employees from the exclusive jurisdiction of the Board. The Act provides that either a railroad worker or an employee can invoke the compulsory jurisdiction of the Adjustment Board.[5] Section 3 First (m) states that "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."[6] As construed, this provision prohibits an employee from seeking review of an adverse Board ruling in the courts.[7] And courts, determining that a Board denial of an employee's money claim is not a "money award" falling within the exception of § 3 First (m), have refused workers a judicial trial of their money claims against the railway after these have been rejected by the Board.[8] Today's decision in *Union Pacific R. Co.* v. *Price, post,* p. 601, appears to adopt this position. In contrast, however, a railroad may obtain a trial substantially *de novo* of any award adverse to it. For, under § 3 First (p)

---

[5] We recently held, over the vigorous protest of the railroad workers, that this jurisdiction is not only compulsory, but that a union can be enjoined from striking while the Board's jurisdiction is being exercised. *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.,* 353 U. S. 30.

[6] 48 Stat. 1191, 45 U. S. C. § 153 First (m).

[7] See, *e. g.,* note 8, *infra.* Courts have intimated, however, that review of Board rulings adverse to the employee is permissible to the extent of insuring that the employee was not deprived of procedural rights protected by due process. *Ellerd* v. *Southern Pacific R. Co.,* 241 F. 2d 541; *Barnett* v. *Pennsylvania-Reading Seashore Lines,* 245 F. 2d 579.

[8] *E. g., Reynolds* v. *Denver & R. G. W. R. Co.,* 174 F. 2d 673; *Parker* v. *Illinois Central R. Co.,* 108 F. Supp. 186; *Ramsey* v. *Chesapeake & O. R. Co.,* 75 F. Supp. 740.

of the Act, if a carrier does not voluntarily comply with the Board's award, including wage awards for money damages, a wage earner can enforce the Board's order only by bringing, in a United States District Court, a suit which "shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . ."[9]

Construed this way, the Act creates a glaring inequality of treatment between workers and railroads. After denial by the Adjustment Board, workers can get no judicial trial of their claims; railroads, however, can get precisely the same kind of trial they would have were there no Adjustment Board, except that the Board's findings constitute prima facie evidence in the case. For the reasons stated by MR. JUSTICE DOUGLAS in his dissent in *Price,* I think the Railway Labor Act should be construed to grant a railroad employee the same kind of redetermination by judge and jury of a Board order denying him a "money award" that the Act affords a railroad for a money award against it. The Court rejected this view in *Price.* The unfairness of the discriminatory procedure there upheld seems manifest to me. In my judgment, it is bound to incite the kind of bitter resentment among railroad workers which will produce discord and strikes interrupting the free flow of commerce and creating the very evil Congress sought to avoid by this Act. These reasons seem to me to provide compelling arguments against judicial expansion of the Act to retired railroad

---

[9] 48 Stat. 1192, 45 U. S. C. § 153 First (p).

The comparable provision in the Interstate Commerce Act has been construed to give very limited effect to the Board's findings in such a suit. *Meeker* v. *Lehigh Valley R. Co.,* 236 U. S. 412, 430; *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, 435. See also, *Dahlberg* v. *Pittsburgh & L. E. R. Co.,* 138 F. 2d 121.

workers plainly not covered by its language. Since the Court refuses to construe the Act to exclude such workers, however, I am forced to reach and consider the constitutional contentions raised by respondent.

II.

Respondent argues that giving the Adjustment Board jurisdiction to make a "final and binding" determination of his wage claim deprives him of a jury trial in violation of the Seventh Amendment since wage disputes were "Suits at common law . . . ." [10] His contention is all the more serious where, as here, he is *compelled* to submit his claim to the Board and—as I understand the Court's holding here and in *Price*—is never allowed to take it to the courts for trial. In a comparable situation, Congress amended the reparation provisions of the Interstate Commerce Act for the specific purpose of avoiding constitutional difficulties by guaranteeing a railroad a full jury trial of money claims against it.[11] Significantly, § 3 First (p) of the Railway Labor Act, which provides the kind of court trial a railway can get before an award

---

[10] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U. S. Const., Amend. VII.

[11] See *Lehigh Valley R. Co.* v. *Clark*, 207 F. 717; *Western New York & P. R. Co.* v. *Penn Refining Co.*, 137 F. 343, 349–350. See also *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, 444, 454–455 (dissenting opinion); *Councill* v. *Western & A. R. Co.*, 1 I. C. C. 339, 344–345; *Heck* v. *East Tennessee, V. & G. R. Co.*, 1 I. C. C. 495, 502. And in his dissent in *Union Pacific R. Co.* v. *Price*, *post*, p. 617, MR. JUSTICE DOUGLAS calls attention to the fact that the provisions of the Interstate Commerce Act have been construed, in *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, to provide for review of Commission reparation orders by shippers as well as by the railways.

against it can be enforced, is copied substantially verbatim from § 16 (2) of the amended Commerce Act.[12] That section (§ 16 (2)) had been construed by this Court long before the Railway Labor Act was passed so as to assure that it did not "abridge the right of trial by jury or take away any of its incidents." *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430. It is hard for me to believe that Congress enacted the Railway Labor Act on the assumption that a railroad worker is any less entitled to a jury trial under the Constitution than is a railroad. And I would construe the Act on the basis that Congress believed both are entitled to such a trial. See *Union Pacific R. Co.* v. *Price, post,* p. 617 (dissenting opinion) decided today. Instead the Court in *Price* rejects this construction, from which it must follow that respondent here is deprived of a jury trial, although the railroad can get one.

It would surely not be easy to uphold the constitutionality of a procedure which takes away from both parties to a wage dispute their ancient common-law right

---

[12] Section 3 First (p) of the Railway Labor Act reads in part: "Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . ." 48 Stat. 1192, 45 U. S. C. § 153 First (p).

Section 16 (2) of the Interstate Commerce Act reads in part: "Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated." 34 Stat. 590, as amended, 49 U. S. C. § 16 (2).

"Since both Acts [Interstate Commerce Act and Railway Labor Act] came out of the same Congressional Committees one finds, naturally enough, that the provisions for enforcement and review of the Adjustment Board's awards were based on those for reparation orders by the Interstate Commerce Commission." *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 749, 760 (dissenting opinion).

to a trial by court and jury.[13] It should be impossible to uphold it when, as here, the procedure grants both parties an administrative hearing and then gives one of them a second chance before a judge and jury while denying it to the other. Such an unequal procedure cannot be a fair trial since it gives one side a far better chance to win than the other. Analogous practices in both criminal and civil cases have been consistently struck down by this and many other courts.[14] Yet today the Court upholds this

---

[13] See 3 Blackstone Commentaries (15th ed. 1809) 162; 2 *id.*, at 442.

If an employee can be compelled to submit his wage claim to the Adjustment Board for final determination, there would seem to be no reason, despite the clear mandate of the Seventh Amendment, why he could not also be compelled to submit common-law tort claims for negligent injury to an administrative or semi-administrative board. Cf. *Barnett* v. *Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579 (Board adjudication of contract action between railroad and injured railroad worker who claimed that he had been given contract of employment for life in settlement of prior negligent injury suit held to preclude court suit by employee).

[14] *E. g.*, *Burns* v. *Ohio*, *ante*, p. 252 (state required to allow indigent defendant to appeal *in forma pauperis* from criminal conviction where appeal as of right allowed other defendants); *Griffin* v. *Illinois*, 351 U. S. 12 (same); *Spartanburg* v. *Cudd*, 132 S. C. 264, 128 S. E. 360 (right to jury redetermination of administrative award in condemnation suit must be allowed municipality if permitted to property owner); *Georgia Power Co.* v. *Brooks*, 207 Ga. 406, 62 S. E. 2d 183 (statute allowing one party to a condemnation valuation suit to introduce evidence of "similar sales" while other party is not, held invalid); *People* v. *Sholem*, 238 Ill. 203, 87 N. E. 390 (appeal from administrative determination of valuation of an estate for tax purposes must be allowed State if allowed other party); *Hecker* v. *Illinois Central R. Co.*, 231 Ill. 574, 83 N. E. 456 (statute providing for state supreme court review of facts after trial court's findings reversed without grant of new trial by intermediate appellate court, but denying such review if trial court's findings upheld, found invalid).

It is not surprising in view of this long history that courts and judges have questioned the constitutionality of compelling railroad workers to submit disputes to the Adjustment Board while denying

procedure without so much as discussing it. It does this although I can hardly think of a case where discrimination between litigants is less justified. Indeed, the only "justification" that has been attempted is that at the time the Railway Labor Act was passed certain representatives of the Railroad Brotherhoods were willing to forego their right to trial by judge and jury in exchange for certain benefits the law allegedly gave them. See *Union Pacific R. Co.* v. *Price, post,* p. 601. Taken as a whole I do not read the legislative history of the law as supporting any such concession by the unions. But even if it did, I would not be able to uphold the procedure here involved. For, assuming that an individual can contract away his constitutional right to an equal trial, and assuming additionally the still more doubtful proposition that representatives of an organization can, by contract, estop its members from claiming equal treatment in the courts in cases or controversies arising thereafter, I cannot agree that the statements of some union leaders to Congress when it enacted this law can be taken to have such an effect. A fair trial is too valuable a safeguard of our liberty for us to allow it to be so easily discarded. I would hold that respondent has a right to jury trial equal to that accorded the railroad, and that his constitutional contention is well taken.

For all these reasons I would affirm the judgment of the Court of Appeals.

---

them the same trial by jury which is allowed a railroad. See *Washington Terminal Co.* v. *Boswell,* 75 U. S. App. D. C. 1, 11, 124 F. 2d 235, 245, aff'd by an equally divided Court, 319 U. S. 732; *Barnett* v. *Pennsylvania-Reading Seashore Lines,* 245 F. 2d 579, 581. See also *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, 444, 459 (dissenting opinion); *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 719.

BARR *v.* MATTEO ET AL.

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

No. 350. Argued April 20, 1959.—Decided June 29, 1959.

When petitioner was Acting Director of the Office of Rent Stabilization and respondents were subordinate officials of the same office, petitioner caused to be issued a press release announcing his intention to suspend respondents because of the part which they had played in formulating a plan for the utilization of certain agency funds. The plan had been severely criticized on the floor of Congress, and the congressional criticism had been widely reported in the press. Respondents sued petitioner for libel, alleging malice. *Held:* Petitioner's plea of absolute privilege in defense of the alleged libel must be sustained. Pp. 564–578.

103 U. S. App. D. C. 176, 256 F. 2d 890, reversed.

For judgment of the Court and opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER, see pp. 564–576.

For concurring opinion of MR. JUSTICE BLACK, see p. 576.

For dissenting opinion of MR. CHIEF JUSTICE WARREN, joined by MR. JUSTICE DOUGLAS, see p. 578.

For dissenting opinion of MR. JUSTICE BRENNAN, see p. 586.

For dissenting opinion of MR. JUSTICE STEWART, see p. 592.

Daniel M. Friedman argued the cause for petitioner. On the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Bernard Cedarbaum.*

Byron N. Scott argued the cause for respondents. With him on the brief was *Richard A. Mehler.*

MR. JUSTICE HARLAN announced the judgment of the Court, and delivered an opinion, in which MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK, and MR. JUSTICE WHITTAKER join.

We are called upon in this case to weigh in a particular context two considerations of high importance

which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.

This is a libel suit, brought in the District Court of the District of Columbia by respondents, former employees of the Office of Rent Stabilization. The alleged libel was contained in a press release issued by the office on February 5, 1953, at the direction of petitioner, then its Acting Director.[1] The circumstances which gave rise to the issuance of the release follow.

In 1950 the statutory existence of the Office of Housing Expediter, the predecessor agency of the Office of Rent Stabilization, was about to expire. Respondent Madigan, then Deputy Director in charge of personnel and fiscal matters, and respondent Matteo, chief of the personnel branch, suggested to the Housing Expediter a plan designed to utilize some $2,600,000 of agency funds earmarked in the agency's appropriation for the fiscal year 1950 exclusively for terminal-leave payments. The effect of the plan would have been to obviate the possibility that the agency might have to make large terminal-leave payments during the next fiscal year out of general agency funds, should the life of the agency be extended by Congress. In essence, the mechanics of the plan were that agency employees would be discharged, paid accrued annual leave out of the $2,600,000 earmarked for terminal-leave payments, rehired immediately as temporary em-

[1] Petitioner was appointed Acting Director of the agency effective February 9, 1953. On February 5 he occupied that position by designation of the retiring Director, who was absent from the city.

ployees, and restored to permanent status should the agency's life in fact be extended.

Petitioner, at the time General Manager of the agency, opposed respondents' plan on the ground that it violated the spirit of the Thomas Amendment, 64 Stat. 768,[2] and expressed his opposition to the Housing Expediter. The Expediter decided against general adoption of the plan, but at respondent Matteo's request gave permission for its use in connection with approximately fifty employees, including both respondents, on a voluntary basis.[3] Thereafter the life of the agency was in fact extended.

Some two and a half years later, on January 28, 1953, the Office of Rent Stabilization received a letter from Senator John J. Williams of Delaware, inquiring about the terminal-leave payments made under the plan in 1950. Respondent Madigan drafted a reply to the letter, which he did not attempt to bring to the attention of petitioner, and then prepared a reply which he sent to petitioner's office for his signature as Acting Director of the agency. Petitioner was out of the office, and a secretary signed the submitted letter, which was then delivered by Madigan to Senator Williams on the morning of February 3, 1953.

On February 4, 1953, Senator Williams delivered a speech on the floor of the Senate strongly criticizing the

---

[2] This statute, part of the General Appropriation Act of 1951, provided that:

"No part of the funds of, or available for expenditure by any corporation or agency included in this Act, including the government of the District of Columbia, shall be available to pay for annual leave accumulated by any civilian officer or employee during the calendar year 1950 and unused at the close of business on June 30, 1951 . . . ."

[3] The General Accounting Office subsequently ruled that the payments were illegal, and respondents were required to return them. Respondent Madigan challenged this determination in the Court of Claims, which held that the plan was not in violation of law. *Madigan* v. *United States*, 142 Ct. Cl. 641.

plan, stating that "to say the least it is an unjustifiable raid on the Federal Treasury, and heads of every agency in the Government who have condoned this practice should be called to task." The letter above referred to was ordered printed in the Congressional Record. Other Senators joined in the attack on the plan.[4] Their comments were widely reported in the press on February 5, 1953, and petitioner, in his capacity as Acting Director of the agency, received a large number of inquiries from newspapers and other news media as to the agency's position on the matter.

On that day petitioner served upon respondents letters expressing his intention to suspend them from duty, and at the same time ordered issuance by the office of the press release which is the subject of this litigation, and the text of which appears in the margin.[5]

---

[4] The plan was referred to by various Senators as "a highly questionable procedure," a "raid on the Federal Treasury," "a conspiracy to defraud the Government of funds," "a new racket," and as "definitely involv[ing] criminal action." It was suggested that it might constitute "a conspiracy by the head of an agency to defraud the Government of money," and that "it is highly irregular, if not actually immoral, for the heads of agencies to use any such device . . . ." 99 Cong. Rec. 868–871.

[5] "William G. Barr, Acting Director of Rent Stabilization today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash.

"Mr. Barr's appointment as Acting Director becomes effective Monday, February 9, 1953, and the suspension of these employees will be his first act of duty. The employees are John J. Madigan, Deputy Director for Administration, and Linda Matteo, Director of Personnel.

" 'In June 1950,' Mr. Barr stated, 'my position in the agency was not one of authority which would have permitted me to stop the action. Furthermore, I did not know about it until it was almost completed.

" 'When I did learn that certain employees were receiving cash

509615 O–59–39

Respondents sued, charging that the press release, in itself and as coupled with the contemporaneous news reports of senatorial reaction to the plan, defamed them to their injury, and alleging that its publication and terms had been actuated by malice on the part of petitioner. Petitioner defended, *inter alia,* on the ground that the issuance of the press release was protected by either a qualified or an absolute privilege. The trial court overruled these contentions, and instructed the jury to return a verdict for respondents if it found the release defamatory. The jury found for respondents.

Petitioner appealed, raising only the issue of absolute privilege. The judgment of the trial court was affirmed by the Court of Appeals, which held that "in explaining his decision [to suspend respondents] to the general public [petitioner] . . . went entirely outside his line of duty" and that thus the absolute privilege, assumed otherwise to be available, did not attach. 100 U. S. App. D. C. 319, 244 F. 2d 767. We granted certiorari, vacated the Court of Appeals' judgment, and remanded the case "with directions to pass upon petitioner's claim of a qualified

---

annual leave settlements and being returned to agency employment on a temporary basis, I specifically notified the employees under my supervision that if they applied for such cash settlements I would demand their resignations and the record will show that my immediate employees complied with my request.

" 'While I was advised that the action was legal, I took the position that it violated the spirit of the Thomas Amendment and I violently opposed it. Monday, February 9th, when my appointment as Acting Director becomes effective, will be the first time my position in the agency has permitted me to take any action on this matter, and the suspension of these employees will be the first official act I shall take.'

"Mr. Barr also revealed that he has written to Senator Joseph McCarthy, Chairman of the Committee on Government Operations, and to Representative John Phillips, Chairman of the House Subcommittee on Independent Offices Appropriations, requesting an opportunity to be heard on the entire matter."

privilege." 355 U. S. 171, 173. On remand the Court of Appeals held that the press release was protected by a qualified privilege, but that there was evidence from which a jury could reasonably conclude that petitioner had acted maliciously, or had spoken with lack of reasonable grounds for believing that his statement was true, and that either conclusion would defeat the qualified privilege. Accordingly it remanded the case to the District Court for retrial. 103 U. S. App. D. C. 176, 256 F. 2d 890. At this point petitioner again sought, and we again granted certiorari, 358 U. S. 917, to determine whether in the circumstances of this case petitioner's claim of absolute privilege should have stood as a bar to maintenance of the suit despite the allegations of malice made in the complaint.

The law of privilege as a defense by officers of government to civil damage suits for defamation and kindred torts has in large part been of judicial making, although the Constitution itself gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session.[6] This Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, *Bradley* v. *Fisher,* 13 Wall. 335, and that a like immunity extends to other officers of government whose duties are related to the judicial process. *Yaselli* v. *Goff,* 12 F. 2d 396, aff'd *per curiam,* 275 U. S. 503, involving a Special Assistant to the Attorney General.[7] Nor has the privilege been confined to officers of the legislative and judi-

[6] U. S. Const., Art. I, § 6. See *Kilbourn* v. *Thompson,* 103 U. S. 168.

[7] See also *Cooper* v. *O'Connor,* 69 App. D. C. 100, 99 F. 2d 135; compare *Brown* v. *Shimabukuro,* 73 App. D. C. 194, 118 F. 2d 17.

cial branches of the Government and executive officers of the kind involved in *Yaselli.* In *Spalding* v. *Vilas,* 161 U. S. 483, petitioner brought suit against the Postmaster General, alleging that the latter had maliciously circulated widely among postmasters, past and present, information which he knew to be false and which was intended to deceive the postmasters to the detriment of the plaintiff. This Court sustained a plea by the Postmaster General of absolute privilege, stating that (498–499):

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals." [8]

[8] The communication in *Spalding* v. *Vilas* was not distributed to the general public, but only to a particular segment thereof which had a special interest in the subject matter. Statements issued at the direction of Cabinet officers and disseminated to the press in the form of press releases have also been accorded an absolute privilege, so long as their contents and the occasion for their issuance relate to the duties and functions of the particular department. *Mellon* v. *Brewer,* 57 App. D. C. 126, 18 F. 2d 168; *Glass* v. *Ickes,* 73 App. D. C. 3, 117 F. 2d 273.

The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alter-

native. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581.

We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts.[9] The privilege is not a badge or emolument of exalted office, but an expression of a policy

---

[9] As to suits for defamation see, *e. g., Taylor* v. *Glotfelty,* 201 F. 2d 51; *Smith* v. *O'Brien,* 66 App. D. C. 387, 88 F. 2d 769; *De Arnaud* v. *Ainsworth,* 24 App. D. C. 167; *Farr* v. *Valentine,* 38 App. D. C. 413; *United States to use of Parravicino* v. *Brunswick,* 63 App. D. C. 65, 69 F. 2d 383; *Carson* v. *Behlen,* 136 F. Supp. 222; *Tinkoff* v. *Campbell,* 86 F. Supp. 331; *Miles* v. *McGrath,* 4 F. Supp. 603. See also, as to other torts, *Jones* v. *Kennedy,* 73 App. D. C. 292, 121 F. 2d 40; *Adams* v. *Home Owners' Loan Corp.,* 107 F. 2d 139; *Gregoire* v. *Biddle, supra; De Busk* v. *Harvin,* 212 F. 2d 143; *Lang* v. *Wood,* 67 App. D. C. 287, 92 F. 2d 211.

designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.[10]

To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," *Spalding* v. *Vilas, supra,*

---

[10] See the striking description in Cummings and McFarland, Federal Justice (1937), pp. 80–81, quoted in *Cooper* v. *O'Connor, supra,* 69 App. D. C. 100, 107, 99 F. 2d 135, 142, n. 28, of the office of Attorney General of the United States in the early days of the Republic:

"Not only were there no records but the government provided neither an office nor clerical assistance. As far back as December 1791, Attorney General Randolph, through President Washington, without success had urged Congress to provide a clerk. President Madison, when it became evident that residence at Washington had greatly increased the Attorney General's labor, in 1816 urged that he be supplied with 'the usual appurtenances to a public office.' A bill to provide offices and a clerk came to the Senate floor on January 10, 1817. . . . Thirty years had passed since the federal government was first organized. Now, Congress provided offices in the Treasury and a clerk at $1,000 a year, with an additional small contingent fund of $500 for such essentials as stationery, fuel, and 'a boy to attend the menial duties.'"

at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

Judged by these standards, we hold that petitioner's plea of absolute privilege in defense of the alleged libel published at his direction must be sustained. The question is a close one, but we cannot say that it was not an appropriate exercise of the discretion with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this record. Petitioner was the Acting Director of an important agency of government,[11] and was clothed by redelegation with "all powers, duties, and functions conferred on the President by Title II of the Housing and Rent Act of 1947 . . . ." [12] The integrity of the internal operations of the agency which he headed, and thus his own integrity in his public capacity, had been directly and severely challenged in charges made on the floor of the Senate and given wide publicity; and without his knowledge correspondence which could reasonably be read as impliedly defending a position very different from that which he had from the beginning taken in the matter had been sent to a Senator over his signature and incorporated in the Congressional Record. The issuance of press releases was standard agency practice, as it has become with many governmental agencies in these times. We think that under these circumstances a publicly expressed statement of the position of the agency head, announcing personnel action which he planned to take in reference to the charges so widely disseminated to

---

[11] The record indicates that in 1950 the Office of Housing Expediter had some 2,500 employees.

[12] 61 Stat. 193. See 16 Fed. Reg. 7630.

the public, was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively. It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty. That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.[13]

The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint, for as this Court has said of legislative privilege:

> "The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney* v. *Brandhove,* 341 U. S. 367, 377.

---

[13] Compare *United States* v. *Macdaniel,* 7 Pet. 1, 14; *United States* v. *Birdsall,* 233 U. S. 223, 230–231.

We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings.

Reversed.

MR. JUSTICE BLACK, concurring.

I concur in the reversal of this judgment but briefly summarize my reasons because they are not altogether the same as those stated in the opinion of MR. JUSTICE HARLAN.

The petitioner Barr, while acting as Director of the Office of Rent Stabilization, a United States Government Agency, issued a press release in which he gave reasons why he intended to suspend the respondents Matteo and Madigan, who were also officers of the Agency. There is some indication in the record that there was an affirmative duty on Mr. Barr to give press releases like this, but however that may be it is clear that his action was forbidden neither by an Act of Congress nor by any governmental rule duly promulgated and in force. It is also clear that

the subject matter discussed in the release was germane to the proper functioning of the Rent Stabilization Agency and Mr. Barr's duties in relation to it. In fact, at the time the release was issued congressional inquiries were being made into the operations of the Agency and the controversy upon which the threatened suspensions were based, and the press release revealed that Barr had requested an opportunity to testify before a Congressional Committee with respect to the whole dispute.

The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.

Mr. Barr was peculiarly well qualified to inform Congress and the public about the Rent Stabilization Agency. Subjecting him to libel suits for criticizing the way the Agency or its employees perform their duties would certainly act as a restraint upon him. So far as I am concerned, if federal employees are to be subjected to such restraints in reporting their views about how to run the government better, the restraint will have to be imposed expressly by Congress and not by the general libel laws of the States or of the District of Columbia.* How far the Congress itself could go in barring federal officials and employees from discussing public matters consistently with the First Amendment is a question we need not reach in this case. It is enough for me here that the press release was neither unauthorized nor plainly

*This case concerns District of Columbia law. In a companion case, *Howard* v. *Lyons*, *post*, p. 593, the Court rejects an attempt to hold a federal employee liable under the libel law of Massachusetts.

beyond the scope of Mr. Barr's official business, but instead related more or less to general matters committed by law to his control and supervision. See *Spalding* v. *Vilas,* 161 U. S. 483, 493, 498–499.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The principal opinion in this case purports to launch the Court on a balancing process in order to reconcile the interest of the public in obtaining fearless executive performance and the interest of the individual in having redress for defamation. Even accepting for the moment that these are the proper interests to be balanced, the ultimate disposition is not the result of a balance. On the one hand, the principal opinion sets up a vague standard under which no government employee can tell with any certainty whether he will receive absolute immunity for his acts. On the other hand, it has not given even the slightest consideration to the interest of the individual who is defamed. It is a complete annihilation of his interest.

I could understand it—though I could not agree—if the Court adopted a broad absolute privilege for certain classes of government officials, or indeed for the entire executive, by broadly extending *Spalding* v. *Vilas,* 161 U. S. 483. At least that result would yield certainty by allowing government officials to know in advance whether they might issue absolutely privileged statements. But the opinion's test sets no standard to guide executive conduct. As the Government acknowledged on oral argument, Congress, when it creates executive agencies, almost never expressly authorizes the new agency to issue press releases as part of its functions. Nor does it decree which employees of the new agency will have such duties and which will not. By necessity, therefore, the decision will require a *de novo* appraisal of almost every charge of

defamation by a government official. The records will probably be no more satisfactory than the one now before us—with little more than bald assertions that a specific official has the power to do what resulted in the defamation. The principal opinion cannot even say that Barr's position authorized the press release; the most it can and does say is that it cannot say that the release was not an appropriate exercise of discretion by Barr in this precise situation, *ante*, p. 574. This creates a presumption that the challenged action is within the officer's scope of duty unless the plaintiff can prove otherwise. Since it has been admitted that, as in this case, these duties are rarely enumerated, an executive assertion on the official's behalf may place an impossible burden of proof on the plaintiff seeking to avoid the defense of absolute privilege. By this unusual approach, the traditional rule that it is the defendant who must sustain his affirmative defense of privilege—and not the plaintiff who must negate that defense—is apparently disregarded.[1]

I.

The history of the privileges conferred upon the three branches of Government is a story of uneven development. Absolute legislative privilege dates back to at least 1399.[2] This privilege is given to Congress in the United States Constitution [3] and to State Legislatures in the Constitutions of almost all of the States of the Union.[4] The abso-

---

[1] See, *e. g.*, Restatement, Torts, § 613, and Prosser, Torts (2d ed. 1955), 629 and cases cited.

[2] See Veeder, Absolute Immunity in Defamation: Legislative and Executive Proceedings, 10 Col. L. Rev. 131, 132. See also *Tenney* v. *Brandhove*, 341 U. S. 367, 372.

[3] U. S. Const., Art. I, § 6.

[4] See *Tenney* v. *Brandhove*, 341 U. S. 367, 375, n. 5.

However, this immunity has not been extended to inferior deliberative bodies. As to city councils, see, *e. g.*, *Mills* v. *Denny*, 245 Iowa

lute immunity arising out of judicial proceedings existed at least as early as 1608 in England.[5]

But what of the executive privilege? Apparently, the earliest English case presenting the problem of immunity outside the legislative and judicial branches of government is *Sutton* v. *Johnstone,* 1 T. R. 493, decided in 1786. There, the plaintiff, captain of a warship, sued the commander-in-chief of his squadron for charging plaintiff, maliciously and without probable cause, with disobedience of orders and putting him under arrest and forcing him to face a court-martial. The Court of Exchequer took jurisdiction of the case but was reversed, 1 T. R. 510, on the ground that purely military matters were not within the cognizance of the civil courts.[6] Dur-

---

584, 63 N. W. 2d 222; *Greenwood* v. *Cobbey,* 26 Neb. 449, 42 N. W. 413; *Ivie* v. *Minton,* 75 Ore. 483, 147 P. 395; but cf. *Tanner* v. *Gault,* 20 Ohio App. 243, 153 N. E. 124. See also *Weber* v. *Lane,* 99 Mo. App. 69, 71 S. W. 1099 (board of aldermen); *Bradford* v. *Clark,* 90 Me. 298, 38 A. 229 (town meeting); *Smith* v. *Higgins,* 16 Gray (Mass.) 251 (town meeting).

[5] *Floyd* v. *Barker,* 12 Co. Rep. 23. See also *The King* v. *Skinner,* Lofft 55. An excellent history of the development of this privilege may be found in Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Col. L. Rev. 463. For the development of this privilege in the United States, see *Bradley* v. *Fisher,* 13 Wall. 335.

[6] This conclusion was justified on the following basis:

"Commanders, in a day of battle, must act upon delicate suspicions; upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers, and put others in their places.

"A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature?

. . . . . .

"The person unjustly accused is not without his remedy. He has the properest among military men. Reparation is done to him by

ing the next century several other military cases were decided.[7]

In *Chatterton* v. *Secretary of State for India,* [1895] 2 Q. B. 189, the defendant had been apprised that his action with respect to the plaintiff would be made the subject of a parliamentary inquiry. In the communication alleged to be libelous, the defendant told his Under Secretary what answer should be made if the question were asked him in Parliament. The court affirmed dismissal of the complaint relying on Fraser on The Law of Libel and Slander (1st ed.), p. 95, where the author, with no citations, observed, after relating the history of the military cases:

> "For reasons of public policy the same protection would, no doubt, be given to anything in the nature of an act of state, e. g., to every communication relating to state matters made by one minister to another, or to the Crown." [8]

---

an acquittal. And he who accused him unjustly is blasted for ever, and dismissed the service." 1 T. R., at 549–550.
The House of Lords affirmed. 1 Bro. P. C. 76.

[7] In *Home* v. *Bentinck,* 2 B. & B. 130 (1820), the court upheld a privilege asserted by the defendant against producing in court the document alleged to contain the libel. This effectively foreclosed the action. See also *Dickson* v. *The Earl of Wilton,* 1 F. & F. 419 (1859); *Keighly* v. *Bell,* 4 F. & F. 763 (1866); *Dawkins* v. *Lord F. Paulet,* L. R. 5 Q. B. 94 (1869); *Grant* v. *Secretary of State for India,* L. R. 2 C. P. D. 445 (1877). Though this last case was a suit against a civil officer, it arose out of a military situation.

[8] In 1895 the Secretary of State for India was an important figure in the Government and was a member of the Cabinet. The Statesman's Year-Book (1895) 10.

Throughout these years, suits were brought against members of the executive branches of the British Government but were dismissed on the theory that the officer had acted solely as an agent for the Government and therefore was not personally liable. *E. g., Macbeath* v. *Haldimand,* 1 T. R. 172 (1786); *Gidley* v. *Lord Palmerston,* 3 B. & B. 275 (1822).

This was the actual birth of executive privilege in England.

Such was the state of English law when, the next year, this Court decided *Spalding* v. *Vilas, supra.* In granting the Postmaster General absolute immunity for "matters committed by law to his control or supervision," this Court relied exclusively on the judicial privilege cases and the English military cases. Thus, leaving aside the military cases, which are unique, the executive privilege in defamation actions would appear to be a judicial creature of less than 65 years' existence. Yet, without statute, this relatively new privilege is being extended to open the possibility of absolute privilege for innumerable government officials.

It may be assumed, *arguendo,* that a government employee should have absolute immunity when according to his duty he makes internal reports to his superior or to another upon his superior's order. Cf. *Taylor* v. *Glotfelty,* 201 F. 2d 51; *Farr* v. *Valentine,* 38 App. D. C. 413; *DeArnaud* v. *Ainsworth,* 24 App. D. C. 167. This might be a practical necessity of government that would find its justification in the need for a free flow of information within every executive department. It may not be unreasonable to assume that if a maliciously false libel is uttered in an internal report, it will be recognized as such and discredited without further dissemination.

Spalding v. *Vilas, supra,* presents another situation in which absolute privilege may be justified. There the Court was dealing with the Postmaster General—a Cabinet officer personally responsible to the President of the United States for the operation of one of the major departments of government. Cf. *Glass* v. *Ickes,* 73 App. D. C. 3, 117 F. 2d 273; *Mellon* v. *Brewer,* 57 App. D. C. 126, 18 F. 2d 168. The importance of their positions in government as policymakers for the Chief Executive and the fact that they have the expressed trust and

confidence of the President who appointed them and to whom they are personally and directly responsible suggest that the absolute protection partakes of presidential immunity. Perhaps the *Spalding* v. *Vilas* rationale would require the extension of such absolute immunity to other government officials who are appointed by the President and are directly responsible to him in policy matters even though they do not hold Cabinet positions.[9] But this extension is not now before us, since it is clear that petitioner Barr was not appointed by the President nor was he directly responsible to the President. Barr was exercising powers originally delegated by the President to the Director of Economic Stabilization who redelegated them to the Director of Rent Stabilization.[10] And it is not contended that petitioner was under any order to issue a statement in this matter.

I would not extend *Spalding* v. *Vilas* to cover public statements of lesser officials. Releases to the public from the executive branch of government imply far greater dangers to the individual claiming to have been defamed than do internal libels. First, of course, a public statement—especially one arguably libelous—is normally in-

---

[9] This might well, for example, include Barr's superior in 1953—the Director of Economic Stabilization.

[10] Barr's position as Deputy Director was such, on the date of the libel, that he recognized that he was not then entitled to suspend or fire the respondents and could not do so until several days later. (The Government asserted on oral argument that the full powers of the Director would devolve upon anyone who—by virtue of his superiors' leaving town—was in fact the highest ranking member of the agency at the moment. It was in this light that Barr was "Acting" Director on the date of the libel.) Even after Barr officially became Acting Director on February 9, 1953, the Government admitted that the Director of Economic Stabilization "could have" directed Barr either to make or not to make press releases. When Barr took action against respondents, they appealed the decision to the Director of Economic Stabilization and ultimately were reinstated.

509615 O-59-40

tended for and reaches a larger audience than an internally communicated report. Even if the release can later be shown libelous, it is most unusual for a libeled person to obtain the same hearing that was available for the original press release. Second, a release is communicated to a public in no position to evaluate its accuracy; where the report is made internally, the superior is usually in a position to do so. If the report is false, the superior can undo much of the harm of the report by countermanding it or halting its spread.

Giving officials below cabinet or equivalent rank qualified privilege for statements to the public would in no way hamper the internal operation of the executive department of government, nor would it unduly subordinate the interest of the individual in obtaining redress for the public defamation uttered against him. Cf. *Colpoys* v. *Gates,* 73 App. D. C. 193, 118 F. 2d 16.

II.

The foregoing discussion accepted for the purpose of argument the majority's statement of the interests involved here. But as so often happens in balancing cases, the wrong interests are being balanced. Cf. *Barenblatt* v. *United States, ante,* p. 134 (dissenting opinion). This is not a case where the only interest is in plaintiff's obtaining redress of a wrong. The public interest in limiting libel suits against officers in order that the public might be adequately informed is paralleled by another interest of equal importance: that of preserving the opportunity to criticize the administration of our Government and the action of its officials without being subjected to unfair—and absolutely privileged—retorts. If it is important to permit government officials absolute freedom to say anything they wish in the name of public information, it is at least as important to preserve and

foster public discussion concerning our Government and its operation.

It is clear that public discussion of the action of the Government and its officials is accorded no more than qualified privilege. In most States, even that privilege is further restricted to situations in which the speaker is accurate as to his facts and where the claimed defamation results from conclusions or opinions based on those facts. Only in a minority of States is a public critic of Government even qualifiedly privileged where his facts are wrong.[11] Thus, at best, a public critic of the Government has a qualified privilege. Yet here the Court has given some amorphous group of officials—who have the most direct and personal contact with the public—an absolute privilege when their agency or their action is criticized. In this situation, it will take a brave person to criticize government officials knowing that in reply they may libel him with immunity in the name of defending the agency and their own position. This extension of *Spalding* v. *Vilas* can only have the added effect of deterring the desirable public discussion of all aspects of our Government and the conduct of its officials. It will sanctify the powerful and silence debate. This is a much more serious danger than the possibility that a government official might occasionally be called upon to defend his actions and to respond in damages for a malicious defamation.

III.

The principal opinion, while attempting to balance what it thinks are the factors to be weighed, has not effectuated the goal for which it originally strove.

---

[11] An extensive compilation of which States adhere to each view may be found in Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 896–897, n. 102–106.

Rather, its result has been an uncertain standard whose effect can unfold only on a case-to-case basis, and which does not provide a guide for executive conduct. But more important, the opinion has set out the wrong interests and by its extension of absolute privilege in this case has seriously weakened another great public interest—honest and open discussion and criticism of our Government.

I would affirm.

MR. JUSTICE BRENNAN, dissenting.*

I think it is demonstrable that the solution of MR. JUSTICE HARLAN'S opinion to the question whether an absolute privilege should be allowed in these cases is not justified by the considerations offered to support it, and unnecessarily deprives the individual citizen of all redress against malicious defamation. Surely the opinion must recognize the existence of the deep-rooted policy of the common law generally to provide redress against defamation. But the opinion in sweeping terms extinguishes that remedy, if the defamation is committed by a federal official, by erecting the barrier of an absolute privilege. In my view, only a qualified privilege is necessary here, and that is all I would afford the officials. A qualified privilege would be the most the law would allow private citizens under comparable circumstances.[1] It would protect the government officer unless it appeared on trial that his communication was (a) defamatory, (b) untrue, and (c) "malicious."[2] We write on almost a clean slate here,

*[REPORTER'S NOTE: This opinion applies also to No. 57, *Howard* v. *Lyons et al.*, *post*, p. 593.]

[1] Prosser, Torts (2d ed. 1955), § 95.

[2] Actual "malice" is required to vitiate a qualified privilege, not simply the "constructive" malice that is inferred from the publication. See Harper and James, Torts (1956), § 5.27. Definitions of actual

and even if *Spalding* v. *Vilas,* 161 U. S. 483, allows a Cabinet officer the defense of an absolute privilege in defamation suits,[3] I see no warrant for extending its doctrine to the extent done—apparently to include every official having some color of discretion to utter communications to Congress or the public. As Judge Magruder pointed out below, 250 F. 2d 912, 915, present applications of the doctrine of absolute privilege of public officials are narrowly confined,[4] and I think in the light of the considerations involved very rightly so. But MR. JUSTICE HARLAN'S approach seems to clothe with immunity the most obscure subforeman on an arsenal production line who has been delegated authority to hire and fire and who maliciously defames one he discharges.

"malice" are essayed in Prosser, Torts (2d ed. 1955), pp. 625–629; Harper and James, Torts (1956), § 5.27. See Restatement, Torts, §§ 599–605.

[3] The suit in *Spalding* seems to have been as much, if not more, a suit for malicious interference with advantageous relationships as a libel suit. The Court reviewed the facts and found no false statement. See 161 U. S., at 487–493. The case may stand for no more than the proposition that where a Cabinet officer publishes a statement, not factually inaccurate, relating to a matter within his Department's competence, he cannot be charged with improper motives in publication. The Court's opinion leaned heavily on the fact that the contents of the statement (which were not on their face defamatory) were quite accurate, in support of its conclusion that publishing the statement was within the officer's discretion, foreclosing inquiry into his motives. *Id.*, at 489–493. Different considerations suggest themselves where a statement is defamatory and untrue; it is one thing to say that public officers must answer as to their motives for any official action adversely affecting private interests and another that they must as to the publication of defamatory, untrue matter.

[4] The opinion's rationale covers the entire federal bureaucracy, as compared to the numerically much less extensive legislative and judicial privileges. And as to the former, the Constitution speaks, and the resolution of the factors involved in the latter is very obviously within the courts' special competence.

A qualified privilege, as I have described, would, in giving the official protection against the consequences of his honest mistakes, give him all the protection he could properly claim. As is quoted, if that were all that there were to the matter, it would be indeed "monstrous" to grant the absolute defense and preclude all examination of the matter at the suit of a citizen claiming legal injury. But what more is involved? The opinion's position is simply that there are certain societal interests in relieving federal officials from judicial inquiry into their motives that outweigh all interest in affording relief. There is adopted Judge Learned Hand's statement of this added factor that is said to make an absolute privilege imperative: "it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581. In the first place, Professors Harper and James have, I think, squarely met and refuted that argument on its own terms: "Where the charge is one of honest mistake we exempt the officer because we deem that an *actual holding of liability* would have worse consequences than *the possibility of an actual mistake* (which under the circumstances we are willing to condone). But it is stretching the argument pretty far to say that the *mere inquiry into malice* would have worse consequences than the *possibility of actual malice* (which we would not, for a minute, condone). Since the danger that official power will be abused is greatest where motives are improper, the balance here may well swing the other way." Harper and James, Torts (1956), p. 1645. And in the second place, the courts should be wary of any argument based on the fear that subjecting government

officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of the public business. Such a burden is hardly one peculiar to public officers; citizens generally go through life subject to the risk that they may, though in the right, be subject to litigation and the possibility of a miscarriage of justice. It is one of the goals of a well-operating legal system to keep the burden of litigation and the risks of such miscarriages to a minimum; in this area, which is governed by federal law, proof of malice outside of the bare fact of the making of the statement should be forthcoming,[5] and summary judgment practice offers protection to the defendant; but the way to minimizing the burdens of litigation does not generally lie through the abolition of a right of redress for an admitted wrong. The method has too much of the flavor of throwing out the baby with the bath—today's sweeping solution insures that government officials of high and low rank will not be involved in litigation over their allegedly defamatory statements, but it achieves this at the cost of letting the citizen who is defamed even with the worst motives go without remedy.

There is an even more basic objection to the opinion. It deals with large concepts of public policy and purports to balance the societal interests involved in them. It denies the defamed citizen a recovery by characterizing the policy favoring absolute immunity as "an expression of a policy designed to aid in the effective functioning of government." The explanation is said to be that it is "important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the

---

[5] See note 2, *supra*.

fearless, vigorous, and effective administration of policies of government." This, I fear, is a gossamer web self-spun without a scintilla of support to which one can point. To come to this conclusion, and to shift the line from the already extensive protection given the public officer by the qualified privilege doctrine, demands the resolution of large imponderables which one might have thought would be better the business of the Legislative Branch. To what extent is it in the public interest that the Executive Branch carry on publicity campaigns in relation to its activities? (Without reviewing all the history, one can say this is a matter on which Congress and the Executive have not always seen eye to eye. See 38 Stat. 212, 5 U. S. C. § 54.) To what extent does fear of litigation actually inhibit the conduct of officers in carrying out the public business? To what extent should it? Where does healthy administrative frankness and boldness shade into bureaucratic tyranny? To what extent is supervision by an administrator's superiors effective in assuring that there will be little abuse of a freedom from suit? To what extent can the referral of constituent complaints by Congressmen to the executive agencies (already myriad in number and quite routinized in processing) take the place of actions in the courts of law in securing the injured citizen redress? Can it be assumed, as the opinion appears to assume, that an absolute privilege so broadly enjoyed will not be subject to severe abuse? Does recent history afford instructive parallels in the experience with constitutionally recognized forms of governmental privilege—say the legislative privilege? I do not purport to know the answers to these questions, and I simply submit that the nature of the questions themselves should lead us to forsake any effort on our own to modify over so wide an area the line the common law generally indicates is to be drawn here. This is particularly so in an area not

foreclosed by our previous cases, and one combining the maximum exposure of the citizen's reputation with the most attenuated of interests in the operation of the Government.

The courts, it must be remembered, are not the only agency for fashioning policy here. One would think, in fact, if the solution afforded through a qualified privilege (which would apply between private parties under analogous circumstances) [6] were to be modified on the strength of considerations such as those discussed today, that Congress would provide a more appropriate forum for the determination. The presence of the imponderables I have discussed, their political flavor, and their intimate relation to the practicalities of government management would support this conclusion. If the fears expressed materialized and great inconvenience to the workings of the Government arose out of allowing defamation actions subject to a showing of malice, Congress might well be disposed to intervene. And its intervention might take a less drastic form than the solution today. Pursuant to an Act of Congress, the inconvenience to the government officials made defendants in these suits has been alleviated through the participation of the Department of Justice. Rev. Stat. § 359, as amended, 5 U. S. C. § 309; *Booth* v. *Fletcher,* 69 App. D. C. 351, 101 F. 2d 676. Congress might be disposed to intervene further and pay the judgments rendered against executive officers, or provide for a Tort Claims Act amendment to encompass such actions,[7] eliminating the officer as a formal party. We ought not, as I fear we do today, for all practical purposes foreclose such consideration of the problem by expanding on the comparable common-law

[6] See the opinion of the court below in No. 350, 103 U. S. App. D. C. 176, 177, 256 F. 2d 890, 891.

[7] They presently are excluded. 28 U. S. C. § 2680 (h).

privilege and wholly immunizing federal officials from defamation suits whenever they can show that their act was incidental to their jobs.[8]

MR. JUSTICE STEWART, dissenting.

My brother HARLAN'S opinion contains, it seems to me, a lucid and persuasive analysis of the principles that should guide decision in this troublesome area of law. Where I part company is in the application of these principles to the facts of the present case.

I cannot agree that the issuance by the petitioner of this press release was "action in the line of duty." The statement to the press (set out in note 5 of MR. JUSTICE HARLAN'S opinion) did not serve to further any agency function. Instead, it represented a personally motivated effort on the petitioner's part to disassociate himself from the alleged chicanery with which the agency had been charged.

By publicizing the action which he intended to take when he became permanent Acting Director, and his past attitude as a lesser functionary, the petitioner was seeking only to defend his own individual reputation. This was not within, but beyond "the outer perimeter of petitioner's line of duty."

---

[8] There is controversy as to whether it was mandatory upon petitioner in No. 57 to make his report to the Congressmen. It is not contended that it was mandatory for him to use the words he did, and only if this were so, under my approach, could there possibly be an absolute defense. See *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, *ante*, pp. 525, 531.

HOWARD *v.* LYONS ET AL.

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

No. 57. Argued December 8–9, 1958.—Restored to the calendar for reargument December 15, 1958.—Reargued April 20–21, 1959.—Decided June 29, 1959.

While petitioner was a Captain in the Navy and Commander of the Boston Naval Shipyard, he withdrew recognition of the Federal Employees Veterans Association, of which respondents were officers, and sent an official report of his action, reciting his dissatisfaction with the activities of the Association, to the Chief of the Bureau of Ships and the Chief of Industrial Relations of the Department of the Navy. In accordance with the policy and usual practice of the Navy, he also sent copies of the report to the members of the Massachusetts congressional delegation. Respondents sued him in a Federal District Court for libel, alleging malice. In defense, he pleaded absolute privilege. *Held:*

1. The validity of petitioner's claim of absolute privilege in the performance of his duties as an officer of the Federal Government must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress. P. 597.

2. On the record in this case, it appears that the sending of copies of the report to the Massachusetts congressional delegation, the only publication before this Court, was in the discharge of petitioner's official duties and in relation to matters committed to him for determination. Therefore, his plea of absolute privilege must be sustained. *Barr* v. *Matteo, ante,* p. 564. Pp. 597–598.

250 F. 2d 912, reversed.

Paul A. Sweeney argued the cause and *Daniel M. Friedman* reargued the cause for petitioner. On the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Bernard Cedarbaum.*

Claude L. Dawson argued and reargued the cause, and filed a brief, for respondents.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This is a companion case to *Barr* v. *Matteo, ante,* p. 564, decided today. Petitioner Howard in 1955 was a Captain in the United States Navy and Commander of the Boston Naval Shipyard. Respondent Lyons was National Commander of the Federal Employees Veterans Association, Inc., and respondent McAteer a local officer of that Association. Both respondents were at all material times civilian employees at the Boston Naval Shipyard, and for several years before September 8, 1955, the Association was recognized by the shipyard as an employees' representative group. On that date petitioner withdrew official recognition of the Association—an action which is not here challenged.

Respondents brought suit in the Massachusetts District Court, invoking diversity jurisdiction, and making the following allegations: that on September 8, 1955, petitioner circulated a statement defaming them; that the statement purported to be an official memorandum to the Chief of the Bureau of Ships and the Chief of Navy Industrial Relations, but was released by petitioner "outside of his official duties" to various newspapers and wire services and to the members of the Massachusetts delegation in the Congress of the United States; that in circulating the statement petitioner acted "maliciously, wilfully, wickedly, recklessly and falsely and with malice aforesight [*sic*]"; and that the statement was intended to and did injure the reputation of respondents.

A copy of the statement complained of was filed with the complaint. It is in the form of an official report directed to the Chief of the Bureau of Ships and the Chief of Industrial Relations of the Department of the Navy, reciting petitioner's dissatisfaction with the activities

of the Federal Employees Veterans Association at the shipyard and announcing his intention to withdraw the recognition previously accorded it.[1]

Petitioner answered, stating that the statement complained of was in fact an official communication, and that in sending copies of it to the Massachusetts congressional delegation he was acting within the scope of his duties and pursuant to Department of the Navy policy; and denying that outside of his official duties he had released copies of the communication to the newspapers. He thereupon moved for summary judgment, attaching to the motion his own affidavit essentially repeating the statements from his answer above summarized, and an affidavit from the Commandant of the First Naval District. That affidavit stated that the Commandant was petitioner's commanding officer; that the making of reports to the Bureau of Ships relative to any significant personnel action at the shipyard was one of petitioner's official duties; that also among those duties was the furnishing of copies of such

---

[1] No purpose would be served by setting out the entire, lengthy report. It is adequately summarized in the Court of Appeals' opinion as follows:

"This letter alleged that plaintiff Lyons by name, and the other plaintiff by description, 'exercise a predominant influence' in the organizational activities; that the organization has been giving wide distribution to a newsletter or bulletin; that this bulletin has become more and more unfairly critical of the shipyard administration, for the purpose of not only thwarting the aims of the shipyard administration in the accomplishment of its mission, but also to further personal aims and self-interests of the individuals in control of the labor organization; that these 'editorial expletives' have adversely affected the general morale of employees of the shipyard, who are entitled to be protected against such 'overt subversion' by any labor group 'whose methods and whose motives are unethical, uninhibited, and lack the integrity of purpose that could reasonably be expected.'" 250 F. 2d 912, 913.

reports to the Massachusetts congressional delegation; and that the dissemination of the report of September 8, 1955, to the newspapers had been made through official channels and approved by the acting Commandant of the First Naval District.

The District Court granted summary judgment for petitioner, holding that the uncontradicted affidavits conclusively showed that the statement complained of was published by petitioner "in the discharge of his official duties and in relation to matters committed to him for determination," and that it was therefore absolutely privileged. On respondents' appeal, the Court of Appeals held that the sending of the official report to petitioner's superior officers was protected by an absolute privilege, and noted that reliance on the dissemination to the newspapers had been abandoned by respondents on appeal in the face of petitioner's sworn statement that he had not been responsible for that publication. As to the publication to the Massachusetts congressional delegation, however, the court, one judge dissenting, refused to allow more than a qualified privilege, although recognizing that "it is true that these members of Congress did have an official interest in being kept advised of important developments in labor relations at the Boston Naval Shipyard," and that "the Commander of the Boston Naval Shipyard might have conceived it to be a proper exercise of his official functions to see to it that the members of Congress should receive copies of such official report . . . ." Accordingly, it reversed the judgment of the District Court and remanded the case for trial. 250 F. 2d 912.

We granted certiorari to consider petitioner's contention that the Court of Appeals had erred in failing to recognize his plea of absolute privilege in respect of the publication to members of Congress. 357 U. S. 903. Respondents did not cross-petition for certiorari.

At the outset, we take note of a question which the Court of Appeals, on its view of the case, did not find it necessary to resolve—whether the extent of the privilege in respect of civil liability for statements allegedly defamatory under state law which may be claimed by officers of the Federal Government, acting in the course of their duties, is a question as to which the federal courts are bound to follow state law. We think that the very statement of the question dictates a negative answer. The authority of a federal officer to act derives from federal sources, and the rule which recognizes a privilege under appropriate circumstances as to statements made in the course of duty is one designed to promote the effective functioning of the Federal Government. No subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States. Cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. We hold that the validity of petitioner's claim of absolute privilege must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress.

Our decision in *Barr* v. *Matteo, ante,* p. 564, governs this case. As has been observed, petitioner and his commanding officer both stated in uncontradicted affidavits that the sending of copies of the report here at issue to members of the Massachusetts congressional delegation was part of petitioner's official duties. Although of course such an averment by the defendant cannot foreclose the courts from examination of the question, we think that the affidavit of petitioner's commanding officer, and a Memorandum of Instructions issued by the Secretary of the Navy which petitioner has with our leave filed in this Court,[2]

[2] SECNAV Instruction 5730.5, issued February 3, 1955, paragraph 12: "*Congressional Notification of Actions of Interest.* Members of

plainly show that the District Court was correct in finding that the circulation of the report to the Massachusetts congressional delegation was "in the discharge of [petitioner's] . . . official duties and in relation to matters committed to him for determination."

Reversed.

MR. JUSTICE BLACK concurs for the reasons stated in his concurring opinion in *Barr* v. *Matteo, ante,* p. 576.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante,* p. 586.]

MR. CHIEF JUSTICE WARREN with whom MR. JUSTICE DOUGLAS joins, dissenting.

I cannot agree that Captain Howard's action in sending a copy of his report to the Massachusetts Congressional Delegation was absolutely privileged.[1] In its argument in this case, the Government consistently distinguished this case from *Barr* v. *Matteo, ante,* p. 564, decided today, by characterizing Captain Howard as a man who was acting under strict orders and who had no discretion.

Until reargument in this Court, the only indications that it was mandatory for Captain Howard to report matters of this sort to Congress were the bald assertions to that effect in Captain Howard's affidavit and in the affidavit of his superior, Admiral Schnackenberg, in the District Court. No naval regulation was cited and no

---

Congress are very anxious to keep in touch with what is going on in their respective states and districts. Navy agencies shall keep them advised, if possible in advance, of any new actions or curtailment of actions which may affect them."

[1] I agree with the Court in its determination that federal law controls this matter.

other authority was offered. It is significant that, in the same affidavit, when Captain Howard was explaining why he had transmitted copies of the report to a superior, he was able to cite chapter and verse of the U. S. Navy Public Information Manual as authority for that action.

For the first time on reargument in this Court, the Government produced the letter from the Secretary of the Navy referred to in the Court's opinion. The paragraph relied on is nothing more than a general policy statement applicable only to "Navy agencies." [2] The letter was in no way directed toward labor problems—and the quoted portion is but a few lines in a five-page letter sent to a general distribution list and apparently never inserted in the Federal Register or any Navy Manual. Obviously, this letter was not cited by Captain Howard because he was unaware of its existence—or its applicability.

The short explanation is that the Captain thought that since the plaintiffs had attacked the administration of the shipyard by sending copies of their newsletters and charges to Congress, he should send Congress his side of the story. This he had a right to do but in doing so he should have no greater privilege than his critic. The plaintiffs in this case at most received qualified privilege for their complaints to Congress,[3] yet the Captain's answer is given absolute privilege.

---

[2] "Navy agencies" is defined in paragraph 2b of the same letter as follows:

"This term includes the Civilian Executive Assistants to the Secretary, the Naval Professional Assistants to the Secretary and the Heads of Offices and Boards of the Navy Department."

Surely it was never intended that every naval officer who thought that he knew something in which Congress might be interested, was required to contact Congress directly.

[3] See, *e. g.*, *Sweeney* v. *Higgins,* 117 Me. 415, 104 A. 791; *Tyree* v. *Harrison,* 100 Va. 540, 42 S. E. 295; *Hancock* v. *Mitchell,* 83 W. Va. 156, 98 S. E. 65.

509615 O–59–41

As my dissent in *Barr* v. *Matteo* indicates, the burden of proof is on the defendant to sustain his claim of privilege, *ante,* p. 579. I do not read this record as placing a mandatory duty on Captain Howard to make the report in question to Congress.[4]

I would affirm.

---

[4] On this record, I cannot believe that Captain Howard would have been derelict in his duty if he had not sent the report to Congress—and it has never been suggested that such action would have warranted disciplinary measures.

UNION PACIFIC RAILROAD CO. *v.* PRICE.

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

No. 414. Argued March 31, 1959.—Decided June 29, 1959.

Claiming that respondent had been discharged by petitioner railroad in violation of a collective bargaining agreement, his union, acting on his behalf and with his consent, submitted the grievance to the National Railroad Adjustment Board, which found that his dismissal was justified. Thereafter, respondent sued the railroad in a Federal District Court to recover damages for wrongful dismissal. *Held:* Respondent's submission of his grievances as to the validity of his dismissal to the Board precludes him from seeking damages for that dismissal in a common-law action. Pp. 602–617.

(a) The Board's decision was not based solely on the ground that the railroad had followed the proper procedure in discharging respondent but also included a determination that he was discharged for good cause. Pp. 606–607.

(b) The clear language of § 3 First (m) of the Railway Labor Act, the scheme of the Act, and its legislative history compel the conclusion that an award by the Board, holding that an employee was properly discharged, precludes him from relitigating the same issue in a common-law damage suit. Pp. 608–614.

(c) Although an enforcement proceeding against a non-complying carrier under § 3 First (p) affords a defeated carrier some opportunity to relitigate issues decided by the Board, Congress did not provide a similar opportunity for a defeated employee. Pp. 614–617.

255 F. 2d 663, reversed and cause remanded.

James A. Wilcox argued the cause for petitioner. With him on the brief were *E. C. Renwick, Malcolm Davis, Calvin M. Cory* and *W. R. Rouse.*

Samuel S. Lionel argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is a diversity common-law action brought by the respondent, a former employee of petitioner railroad, in the United States District Court for the District of Nevada to recover damages from the railroad for allegedly wrongfully discharging him in violation of the collective bargaining agreement between it and the Brotherhood of Railroad Trainmen. The validity of the discharge was previously challenged upon the same grounds before the National Railroad Adjustment Board, First Division, in a proceeding brought by the Brotherhood on respondent's behalf under § 3 First (i) of the Railway Labor Act,[1] seeking the respondent's reinstatement with back pay. The Board rendered an award in favor of the petitioner. The question for decision here is whether the respondent may pursue a common-law remedy for damages for his allegedly wrongful dismissal after having chosen to pursue the statutory remedy which resulted in a determination by the National Adjustment Board that his dismissal was justified.

The respondent was employed by petitioner as a swing brakeman (an extra brakeman who is not a regularly assigned member of a train crew) and was a member of

---

[1] Section 3 First (i) of the Railway Labor Act, 48 Stat. 1191, 45 U. S. C. § 153 First (i), provides:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

the Brotherhood of Railroad Trainmen. The collective bargaining agreement between the Brotherhood and the petitioner contained two provisions involved in the dispute over his discharge. One provision, Article 32 (b), provided that: "Swing brakemen will not be tied up nor released at points where sleeping and eating accommodations are not available." The other provision, Article 33 (a), provided that: "When a trainman is suspended for an alleged fault, no punishment will be fixed without a thorough investigation, at which the accused may have a trainman of his choice present."

On July 12, 1949, the respondent was called to "deadhead" on Train No. 37 from Las Vegas, Nevada, to Nipton, California, at which point he was to detrain and await assignment to another train traveling to Las Vegas. Train No. 37 arrived at Nipton at 10:30 p. m., and the train dispatcher assigned respondent to train No. X 1622E, which was due to arrive at Nipton around 4 a. m., en route to Las Vegas. The respondent complained that there were no facilities available in Nipton for eating or sleeping and told the dispatcher he would go back to Las Vegas and return after getting something to eat. The dispatcher refused to release him and ordered him to wait the arrival of train X 1622E. The respondent disobeyed this instruction and deadheaded back to Las Vegas on a train which left Nipton at 11:10 p. m.

The railroad suspended the respondent on the morning of July 13. On July 16 he received a notice to appear at 10 a. m. on July 17 before an Assistant Superintendent of the railroad for an investigation. At the respondent's request the investigation was postponed to the morning of July 18, at which time the respondent requested a further postponement until his representative, the Brotherhood's Local Chairman, could be present. A postponement was again granted, until 2:30 p. m. of the 18th, but

the respondent's Local Chairman apparently was still not available at that time. When respondent failed to appear for the 2:30 hearing, the Assistant Superintendent proceeded with the investigation in his absence. The testimony of railroad witnesses was taken stenographically and transcribed; no evidence was received in respondent's behalf. On July 24 the railroad notified the respondent that he was discharged.

The Brotherhood processed respondent's grievance through the required management levels, and when settlement could not be reached, nor agreement arrived at for a joint submission to the National Railroad Adjustment Board, the Brotherhood, in January 1951, filed an *ex parte* submission with the Board's First Division.[2] Hearing was waived by the parties and the submission was considered on the papers filed by them. The Adjustment Board, on June 25, 1952, rendered its award "Claim denied," with supporting findings.[3]

---

[2] It is conceded that respondent authorized the Brotherhood to bring his claim before the Adjustment Board. Compare *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, aff'd on rehearing, 327 U. S. 661.

[3] The pertinent excerpts from the findings are the following:

"If the carrier is to have efficient operations on its railroad, employees must be relied on to obey operating instructions and orders. Claimant was found to have wilfully disobeyed his orders. This was insubordination and merited discipline.

"The employee . . . seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.

"Basically, the complaint is that the hearing was held when the claimant was not present.

. . . .

". . . The right of the employee to be heard before being disciplined is a personal right which he can waive by action, inaction, or failure to act in good faith. . . .

". . . his position here would have been strengthened had he personally appeared at all stages of the proceeding to labor as best

Some three years after the filing of the award, the respondent, on June 6, 1955, brought the instant suit. His complaint alleges a cause of action predicated on the same grounds of allegedly wrongful dismissal in violation of the collective bargaining agreement which had been urged on the Adjustment Board, namely, (1) that he "was dismissed without cause" and (2) that he was dismissed without a "thorough investigation" because not "afforded an opportunity to have a trainman of his choice present at the investigation held" nor "afforded a reasonable opportunity to prepare his defense," "to present his defense," "to have witnesses present" or "to participate in his own defense." After filing an answer, the railroad moved for summary judgment on affidavits and other papers on file upon the ground that "any judicially enforceable cause of action arising from the termination of the employment relationship . . . is now barred by the adjudication and determination of the validity of such termination by the National Railroad Adjustment Board under the terms and conditions of said collective bargaining agreement, and pursuant to and in conformance with the Railway Labor Act . . . ." The District Court, without opinion, granted the motion and entered summary judgment in favor of the petitioner. The respondent appealed to the Court of Appeals for the Ninth Circuit, assigning as the single point on the appeal that the District Court "erred in holding that the award of the National Railroad Adjustment Board entitled . . . [the railroad] to Summary Judgment." The Court of Appeals, one judge dissenting, reversed, 255 F. 2d 663. Although the Court of Appeals held that the District Court would

---

he could to preserve his record and to get his story to us first hand. All that the transcript reflects does claimant no credit, but leaves us with the feeling that the things of which he now complains were planned by him that way."

be "without jurisdiction to entertain the action if the Board award represents a determination on the merits," *id.*, at 666, the court concluded that while the question whether the railroad was entitled to discharge the respondent "was one of the two questions which Price submitted for Board determination," "the Board made no determination on the merits" but determined only that in "the manner in which the investigation was conducted by the carrier . . . none of Price's rights in that regard was abridged," and held that the District Court therefore had jurisdiction to entertain the action. *Id.*, at 666–667. We granted certiorari to decide the important question raised by the case of the interpretation of the Railway Labor Act. 358 U. S. 892.

We do not agree with the Court of Appeals' holding that the Board's award was based solely on its decision that Article 33 (a) was not violated by the railroad because respondent's dismissal followed a "thorough investigation." Rather we think the award also reflects the Board's determination that respondent was discharged for good cause. Thus we agree with Judge Healy, dissenting in the Court of Appeals, that on the face of the customarily brief findings of the Board [4] it appears "plain that

---

[4] Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567, 584, describes the awards of the First Division of the National Adjustment Board as follows:

"It will be noted that, except for the purely jurisdictional recitals, the findings consist of a single sentence ('The evidence indicates that the movements made did not constitute switching under Article I–R') which constitutes the nub of the whole decision. Rarely does this central finding consist of more than a sentence or two. To a lay reader the sentence quoted above is meaningless. In order that it may be more intelligible the findings in their printed form are preceded by the employees' statement of facts taken from their submission, and a statement of their position (likewise extracted from the submission), followed by the management's statement of facts

the Board was of opinion, and in substance held, that the asserted violation by the Company of Article 32, even if true, would not serve to justify an employee's violation of direct operating instructions and his abandonment of his post." 255 F. 2d, at 667–668. Since the discharge could be set aside by the Board if either ground of the submission was sustained, the unqualified denial of the claim necessarily implied, we think, that the Board decided both grounds submitted adversely to the respondent. Even if the procedure followed by the railroad constituted a proper investigation, the Board's outright denial of the claim is explicable only on the ground that the Board also held that Article 32 (b) did not justify the respondent in disobeying the dispatcher's instruction to remain at Nipton. We conclude that both issues were decided by the Board against the respondent,[5] and therefore reach the question whether the respondent, despite the adverse determination of the Adjustment Board, could pursue the common-law remedy for damages in the District Court.[6]

---

and a statement of its position derived similarly from its submission. From these rival statements it is easy to determine what the controversy is about, but it is not easy to determine from the laconic findings the real basis upon which the decision was reached."

[5] In an interpretation announced on November 26, 1958, sought by the railroad under § 3 First (m) of the Railway Labor Act, the Board declared that its award reflected its conclusion that the railroad was justified in discharging respondent. This interpretation was not before the Court of Appeals in this case, and we refer to it only as further substantiation of our conclusion based on the record in the case.

[6] Since respondent, instead of bringing his claim in court as was his right under *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, chose to pursue that claim before the Adjustment Board, he does not even argue that a holding that the Railway Labor Act precludes a relitigation of that claim in the courts would deprive him of any constitutional right to a jury trial.

Congress has said in § 3 First (m) of the Railway Labor Act[7] that the Adjustment Board's "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." Respondent does not argue that a "money award" is anything other than an award directing the payment of money. Indeed, it would distort the English language to interpret that term as including a refusal to award a money payment. Thus, the plain language of § 3 First (m), on its face, imports that Congress intended that the Board's disposition of a grievance should preclude a subsequent court action by the losing party. Furthermore, we have said of the Railway Labor Act that "the specification of one remedy normally excludes another." *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 301. Thus, our duty to give effect to the congressional purpose compels us to hold that the instant common-law action is precluded unless the overall scheme established by the Railway Labor Act and the legislative history clearly indicate a congressional intention contrary to that which the plain meaning of the words imports. Our understanding of the statutory scheme and the legislative history, however, reinforces what the statutory language already makes clear, namely, that Congress barred the employee's subsequent resort to the common-

[7] 48 Stat. 1191–1192, 45 U. S. C. § 153 First (m). That section provides:

"The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

law remedy after an adverse determination of his grievance by the Adjustment Board.[8]

The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to "insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies." H. R. Rep. No. 328, 69th Cong., 1st Sess., p. 1. Congress did not, however, in the original 1926 Act, create the National Railroad Adjustment Board or make the use of such an agency compulsory upon the parties; rather the Act contemplated that settlement of disputes would be achieved through "machinery for amicable adjustment of labor disputes agreed upon by the parties . . . ." S. Rep. No. 606, 69th Cong., 1st Sess., p. 4. Congress, therefore, provided that adjustment boards should be "created by agreement between any carrier or group of carriers, or the carriers as a whole, or its or their employees." § 3 First of the Railway Labor Act of 1926, 44 Stat. 578. These adjustment boards, intended for use in settling what are termed minor disputes in the railroad industry, primarily grievances arising from the application of collective bargaining agreements to particular situations, see *Railroad*

[8] Despite the clear import of the statutory language and the legislative history the respondent argues that this Court's holding in *Moore* v. *Illinois R. Co.*, 312 U. S. 630, requires us to hold that the instant suit is not precluded. However, the holding in *Moore* was simply that a common-law remedy for damages might be pursued by a discharged employee who did not resort to the statutory remedy before the Board to challenge the validity of his dismissal. A different question arises here where the employee obtained a determination from the Board, and, having lost, is seeking to relitigate in the courts the same issue as to the validity of his discharge.

Trainmen v. *Chicago River & I. R. Co.*, 353 U. S. 30, were thus to be established by voluntary agreement. Congress, even in 1926 however, recognized that the boards would not be useful in bringing about industrial peace unless their decisions were binding on the parties. Thus the 1926 Act required that agreements creating adjustment boards must stipulate "that decisions of adjustment boards shall be final and binding on both parties to the dispute; and it shall be the duty of both to abide by such decisions . . . ." § 3 First (e) of the Railway Labor Act of 1926, 44 Stat. 579.

But the 1926 Act provided no sanctions to force the carriers and their employees to make agreements establishing adjustment boards and many railroads refused to participate on such boards or so limited their participation that the boards were ineffectual.[9] Moreover, the boards which were created were composed of equal numbers of management and labor representatives and deadlocks over particular cases became commonplace. Since no procedure for breaking such deadlocks was provided, many disputes remained unsettled. As reported to Congress in 1934 by Mr. Eastman, Federal Coordinator of Transportation: "Another difficulty with the present law [the 1926 Act], even where an adjustment board has been established, is that, although its decisions are final and binding upon both parties, there can be no certainty that there will be a decision." Hearings before Senate Com-

[9] See Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., p. 15. The Chairman of the United States Board of Mediation described § 3 First of the 1926 Act as follows: "The provision in the present [1926] act for adjustment boards is in practice about as near a fool provision as anything could possibly be. I mean this—that on the face of it they shall, by agreement, do so and so. Well, you can do pretty nearly anything by agreement, but how can you get them to agree?" Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., p. 137.

mittee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., p. 17. Strike threats became frequent in an atmosphere of mutual recriminations which presented the danger of creating the very strife which the statute had been designed to avoid. Mr. Eastman reported to the House Rules Committee: "[G]rievances on a number of roads have in the past few years accumulated to such an extent that the only remedy the men could see was to threaten a strike and thus secure appointment by the President of a fact finding board which could go into the whole situation. That has happened on several occasions. Some of these grievances have accumulated up into the hundreds on the various roads and when the situation finally became intolerable the men would threaten a strike . . . ." Hearings before the House Rules Committee, 73d Cong., 2d Sess., p. 25; see also p. 14; see also Hearings before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess., p. 17; and see *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 725–726.

The railroad labor organizations were particularly dissatisfied. They urged that effective adjustment of grievances could be attained only by amendments to the 1926 Act that would establish a National Adjustment Board in which both carriers and employees would be required to participate, that would permit an employee to compel a carrier to submit a grievance to the Board, that would provide for a neutral person to break deadlocks occurring when the labor and management representatives divided equally, and, finally, that would make awards binding on the parties and enforceable in the courts, when favorable to the employees.[10] These views prevailed in the Con-

[10] Provision for judicial enforcement of awards against employees was thought to be unnecessary since grievances are usually asserted by employees challenging some action by the carrier, and if the grievance is not sustained by the Board, the award simply denies the claim and requires no affirmative action by the employee. If an

gress and resulted in the 1934 amendments which drastically changed the scheme of the Act. Act of June 21, 1934, 48 Stat. 1185.[11] The National Railroad Adjustment Board was created and the carriers were required to participate through representatives selected by them, § 3 First (a) through (g). The Board is composed of four divisions each having jurisdiction over different employees and whose proceedings are independent of one another, § 3 First (h). Disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements must be handled in the usual manner up to and including the chief operating officers of the carrier designated to handle such disputes, but failing adjustment the disputes may be referred by the parties or by either party to the appropriate division, § 3 First (i). Upon failure of a division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, the division must appoint a neutral referee to sit with the division as a member thereof and make an award, § 3 First (l). Awards are final and binding except insofar as they contain a money award; in case of dispute involving an interpretation of the award either party may request the division to interpret the award in the light of the dispute, § 3 First (m). In case of an award favorable to the petitioner, the division shall make an order, directed to the carrier, to make the award effec-

---

unfavorable award results in a strike the carrier may obtain injunctive relief. *Railroad Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30; see also Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess., pp. 58–65.

[11] For discussion of the statutory scheme enacted in the Railway Labor Act and the 1934 amendments thereto, see *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711; *Railroad Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30; *Washington Terminal Co.* v. *Boswell*, 75 U. S. App. D. C. 1, 124 F. 2d 235, aff'd by an equally divided Court, 319 U. S. 732.

tive and if the payment of money is required to pay such sum to the employee, § 3 First (o). If the carrier does not comply with an order, enforcement may be sought by a suit in a District Court of the United States as provided in § 3 First (p).

The labor spokesman for the proposal made it crystal clear that an essential feature of the proposal was that Board awards on grievances submitted by or on behalf of employees were to be final and binding upon the affected employees. The employees were willing to give up their remedies outside of the statute provided that a workable and binding statutory scheme was established to settle grievances. Mr. George Harrison, President of the Brotherhood of Railroad Clerks, stated: "Grievances come about because the men file them themselves. Railroads don't institute grievances. Grievances are instituted against railroad officers' actions, and we are willing to take our chances with this national board because we believe, out of our experience, that the national board is the best and most efficient method of getting a determination of these many controversies . . . ." Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., p. 33. "[W]e are now ready to concede that we can risk having our grievances go to a board and get them determined . . . [but] if we are going to get a hodgepodge arrangement by law, rather than what is suggested by this bill, then we don't want to give up that right, because we only give up the right because we feel that we will get a measure of justice by this machinery that we suggest here." *Id.*, at 35. Mr. Eastman echoed this thought: "decisions of the adjustment board . . . are made final and binding by the terms of this act, and as I understand it, the labor organizations, none of them, are objecting to that provision. They have their day in court and they have their members on the adjustment board, and if an agreement cannot be reached between the parties

representing both sides on the adjustment board, a neutral man steps in and renders the decision, and they will be required to accept that decision when made . . . ." Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess., p. 59. See also *id.*, at 58–65.

Thus the employees considered that their interests would be best served by a workable statutory scheme providing for the final settlement of grievances by a tribunal composed of people experienced in the railroad industry. The employees' representatives made it clear that, if such a statutory scheme were provided, the employees would accept the awards as to disputes processed through the scheme as final settlements of those disputes which were not to be raised again.

Despite the conclusion compelled by the over-all scheme of the Railway Labor Act and its legislative history, it is suggested that because an enforcement proceeding against a noncomplying carrier under § 3 First (p) affords the defeated carrier some opportunity to relitigate the issues decided by the Adjustment Board,[12] unfairness results if

[12] Section 3 First (p) of the Railway Labor Act, 48 Stat. 1192, 45 U. S. C. § 153 First (p), provides:

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner . . . may file in the District Court of the United States . . . a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attor-

§ 3 First (m) is construed so as to deny the employee the right to maintain this common-law action. We are referred to the emphasis upon the consideration of avoiding unfairness expressed in *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, which held that a denial by the Interstate Commerce Commission of a claim of a shipper for money reparations is reviewable in the federal courts, pointing out that a Commission award favorable to a shipper was not final and binding upon the railroad. But that holding rested upon an interpretation of 28 U. S. C. (1946 ed.) § 41 (28) providing that "The district courts shall have original jurisdiction . . . Of cases brought to enjoin, set aside, annul, or suspend in whole or in part *any* order of the Interstate Commerce Commission." (Italics supplied.) In contrast, § 3 First (m) here involved commands that the Adjustment Board's "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." The Adjustment Board's award in controversy denied respondent's claim for reinstatement and back pay, which, we have said, was not a "money award." Although the provisions for enforcement of money awards in the Railway Labor Act, § 3 First (o) and (p), establish procedures similar to those under 49 U. S. C. § 16 (1) and (2) for enforcement of reparations orders of the Interstate Commerce Commission, § 3 First (m) with which we are here concerned has no counterpart in the Interstate Commerce Act. The disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created

---

ney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

509615 O-59—42

by Congress, and it is for Congress to say whether it ought be removed.

Plainly the statutory scheme as revised by the 1934 amendments was designed for effective and final decision of grievances which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements. This grist of labor relations is such that the statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board, past the action under § 3 First (p) authorized against the noncomplying carrier, see *Washington Terminal Co.* v. *Boswell,* 75 U. S. App. D. C. 1, 124 F. 2d 235, aff'd by an equally divided Court, 319 U. S. 732, or the review sought of an award claimed to result from a denial of due process of law, see *Ellerd* v. *Southern Pacific R. Co.,* 241 F. 2d 541; *Barnett* v. *Pennsylvania-Reading Seashore Lines,* 245 F. 2d 579, 582. So far as appears, all of the Courts of Appeals [13] and District Courts [14] which have

[13] *Barnett* v. *Pennsylvania-Reading Seashore Lines,* 245 F. 2d 579 (C. A. 3d Cir.); *Bower* v. *Eastern Airlines, Inc.,* 214 F. 2d 623 (C. A. 3d Cir.); *Michel* v. *Louisville & N. R. Co.,* 188 F. 2d 224 (C. A. 5th Cir.); *Reynolds* v. *Denver & R. G. W. R. Co.,* 174 F. 2d 673 (C. A. 10th Cir.); *Washington Terminal Co.* v. *Boswell,* 75 U. S. App. D. C. 1, 10, 124 F. 2d 235, 244 (C. A. D. C. Cir.), aff'd by an equally divided Court, 319 U. S. 732.

[14] *Weaver* v. *Pennsylvania R. Co.,* 141 F. Supp. 214 (D. C. S. D. N. Y.), aff'd *per curiam,* 240 F. 2d 350 (C. A. 2d Cir.); *Byers* v. *Atchison, T. & S. F. R. Co.,* 129 F. Supp. 109 (D. C. S. D. Cal.); *Greenwood* v. *Atchison, T. & S. F. R. Co.,* 129 F. Supp. 105 (D. C. S. D. Cal.); *Farris* v. *Alaska Airlines, Inc.,* 113 F. Supp. 907 (D. C. W. D. Wash.); *Parker* v. *Illinois Central R. Co.,* 108 F. Supp. 186 (D. C. N. D. Ill.); *Futhey* v. *Atchison, T. & S. F. R. Co.,* 96 F. Supp. 864 (D. C. N. D. Ill.); *Kelly* v. *Nashville, C. & St. L. R. Co.,* 75 F. Supp. 737 (D. C. E. D. Tenn.); *Ramsey* v. *Chesapeake & O. R. Co.,* 75 Supp. 740 (D. C. N. D. Ohio); *Berryman* v. *Pullman Co.,* 48 F. Supp. 542 (D. C. W. D. Mo.).

dealt with this problem have reached the conclusion we reach here. To say that the discharged employee may litigate the validity of his discharge in a common-law action for damages after failing to sustain his grievance before the Board is to say that Congress planned that the Board should function only to render advisory opinions, and intended the Act's entire scheme for the settlement of grievances to be regarded "as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision . . . [a contention] inconsistent with the Act's terms, purposes and legislative history." *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 720–721.

We therefore hold that the respondent's submission to the Board of his grievances as to the validity of his discharge precludes him from seeking damages in the instant common-law action.

The judgment of the Court of Appeals is reversed and the case is remanded with direction to affirm the judgment of the District Court.

It is so ordered.

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

The basic question in this case is the one reserved in *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 719, 720. It is whether an award that denies a claim for money damages comes within the exception of § 3 First (m) of the Railway Labor Act which provides that "the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

It was pointed out in the dissent in that case (325 U. S., at 760–761) that the provision for finality of these awards

was close in origin to the reparation orders under the Interstate Commerce Act.

> "Since both Acts came out of the same Congressional Committees one finds, naturally enough, that the provisions for enforcement and review of the Adjustment Board's awards were based on those for reparation orders by the Interstate Commerce Commission. Compare Railway Labor Act, § 3, First (p) with Interstate Commerce Act, as amended by § 5 of the Hepburn Act, 34 Stat. 584, 590, 49 U. S. C. § 16 (1), (2). If a carrier fails to comply with a reparation order, as is true of non-compliance with an Adjustment Board award, the complainant may sue in court for enforcement; the Commission's order and findings and evidence then become *prima facie* evidence of the facts stated. But a denial of a money claim by the Interstate Commerce Commission bars the door to redress in the courts. *Baltimore & Ohio R. Co.* v. *Brady,* 288 U. S. 448; *I. C. C.* v. *United States,* 289 U. S. 385, 388; *Terminal Warehouse* v. *Pennsylvania R. Co.,* 297 U. S. 500, 507."

Since the decision in the *Burley* case the situation described in the dissenting opinion has changed. Subsequently, *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, was decided; and it held, contrary to earlier precedents cited in the dissent in the *Burley* case, that orders in reparations cases which denied the claims of shippers were reviewable in the federal courts. It pointed out that the "negative order" doctrine, which we abandoned in *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, had greatly influenced those prior decisions.

We refused to follow that discarded doctrine there; and it should find no place here. An award of no damages is, as I see it, as much a "money award" as an award of 6 cents. The words "money award" are descriptive of the

nature of the claim, setting that class apart from other suits which involve, for example, a declaration of seniority rights.

Tolerance of judicial review has been more and more the rule as against the claim of administrative finality.[1] See *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, 183; *Stark* v. *Wickard,* 321 U. S. 288, 309–310; *Harmon* v. *Brucker,* 355 U. S. 579, 581–582; *Leedom* v. *Kyne,* 358 U. S. 184, 190. The weight of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, is on the side of judicial review, the finality of administrative action being sanctioned only where it is clear from the statutory scheme that judicial review is precluded.

Respondent argues that it would be grossly unfair to construe § 3 First (m) so as to deny judicial review to a defeated employee but not to a defeated railroad. That would indeed be the result if an employee asserting a money claim cannot get court review if he loses, while the employer can obtain it if the employee wins. It is difficult for me to believe that Congress designed and approved such a lopsided, preferential system. No rhyme or reason is apparent for such discrimination. The attempt throughout was to equalize the advantages of the contending parties, not to prefer the employer who had long been dominant. *Washington Terminal Co.* v. *Boswell,* 75 U. S. App. D. C. 1, 6–7, 124 F. 2d 235, 240–241. Some have said that an award denying payment cannot be a "money award" in the intendment of the Act. *Berryman* v. *Pullman Co.,* 48 F. Supp. 542. But that is a narrow reading, not in keeping with the harmony of the Act. I would read § 3 First (m) so as not to preclude judicial

---

[1] Cases like *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297, and *General Committee* v. *M-K-T R. Co.,* 320 U. S. 323, are no true exception, for those cases involved mediation, not adjudication—mediation being "the antithesis of justiciability." 320 U. S., at 337.

review in any suit for "money awards" no matter which party wins.

It is true that the Act does not provide the method of review in a case of this kind. Section 3 First (p) only covers the case where an award has been granted an employee and the carrier "does not comply." In that case the order of the Board "shall be prima facie evidence of the facts therein stated." § 3 First (p). But this action is properly maintainable if the District Court otherwise has jurisdiction. No question of election of remedies is involved because of the express provision in the Act that the award of the Board is not final. Since there is no provision in the Act that specifies what judicial review may be obtained, there are preserved whatever judicial remedies are available. One of those is a suit for damages for wrongful discharge. In three separate decisions we have said that actions for wrongful discharge can be maintained in the courts by the employee. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244; *Transcontinental Air* v. *Koppal*, 345 U. S. 653, 661. We stated in the *Slocum* case that "A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide . . . ." The Board has power to reinstate the discharged employee and award back pay; and that was the relief which this employee sought before the Board. But the common-law action for wrongful discharge may include other items of damages as well. Here the employee claimed not only lost earnings but future earnings, seniority rights, retirement rights, hospitalization rights, and transportation rights. Whether Nevada law that governs this contract would grant as much is not now important. The point is that the measure of the recovery in a suit for damages is not necessarily the same and may in fact be greater, including an

award of attorney fees.[2] It is difficult to believe that this cause of action triable before a jury is lost, wiped out, or abolished merely because the employee loses out when he pursues the lesser or more restrictive remedy before the Board. If there is to be equality between employer and employee in the assertion of rights and the assumption of duties under the Act, the employee cannot be held to have merely one chance if he proceeds before the Board, while the employer has a remedy first before the Board and, if he loses there, another one before the court.

In my view the Court's contrary reading of § 3 raises questions of constitutional magnitude. For if an employee is to be denied any review of the Board's decision when the railroad prevails, while the latter can obtain judicial review with a jury trial before complying with a Board order, there would appear to be an unjustifiable discrimination in violation of the Due Process Clause of the Fifth Amendment. It is not the usual practice in this country to permit one party to a lawsuit two chances to prevail, while the other has only one, nor to permit one party but not the other to get a jury determination of his case. See *Pennsylvania R. Co.* v. *Day, ante,* p. 554 (dissent).

The result is that I would remand the case to the District Court for trial.

---

[2] See, *e. g.*, Wis. Stat. Ann., § 103.39 (3); Tex. Civ. Stat., Art. 2226. Cf. Fair Labor Standards Act, § 16 (b); 29 U. S. C. § 216 (b).

IN RE SAWYER.

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

No. 326. Argued May 19–20, 1959.—Decided June 29, 1959.

While actively participating as one of the defense counsel in a protracted and highly publicized trial in a Federal District Court in Hawaii of several defendants for conspiracy under the Smith Act, petitioner appeared with one of the defendants at a public meeting and made a speech which led to charges that she had impugned the impartiality and fairness of the presiding judge in conducting the trial and had thus reflected upon his integrity in dispensing justice in the case. These charges were preferred by the Bar Association of Hawaii before the Territorial Supreme Court; that Court referred the charges to the Ethics Committee of the Bar Association, which held a hearing, and found the charges sustained. The Territorial Supreme Court, upon review of the record, also sustained the charges, and ordered that petitioner be suspended from the practice of law for one year. The Court of Appeals for the Ninth Circuit affirmed. *Held:* The record does not support the charge and the findings growing out of petitioner's speech, and the judgment is reversed. Pp. 623–640, 646–647.

260 F. 2d 189, reversed.

For judgment of the Court and opinion of MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, see pp. 623–640.

For appendix to the opinion of MR. JUSTICE BRENNAN, see p. 640.

For concurring opinion of MR. JUSTICE BLACK, see p. 646.

For opinion of MR. JUSTICE STEWART, concurring in the result, see p. 646.

For dissenting opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER, see p. 647.

For dissenting opinion of MR. JUSTICE CLARK, see p. 669.

John T. McTernan argued the cause and filed a brief for petitioner.

A. William Barlow, attorney for the Bar Association of Hawaii, argued the cause for respondent. With him on the brief was *Morio Omori,* Special Deputy Attorney General of the Territory of Hawaii.

Joseph A. Forer filed a brief for the National Lawyers Guild, as *amicus curiae,* urging reversal.

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

This case is here on writ of certiorari, 358 U. S. 892, to review petitioner's suspension from the practice of law for one year, ordered by the Supreme Court of the Territory of Hawaii, 41 Haw. 403, and affirmed on appeal by the Court of Appeals for the Ninth Circuit, 260 F. 2d 189.[1]

Petitioner has been a member of the Territorial Bar in Hawaii since 1941. For many months beginning in late 1952 she participated, in the United States District Court at Honolulu, as one of the defense counsel in the trial of an indictment against a number of defendants for conspiracy under the Smith Act, 18 U. S. C. § 2385. The trial was before Federal District Judge Jon Wiig and a jury. Both disciplinary charges against petitioner had to do with the Smith Act trial. One charge related to a speech she made about six weeks after the trial began. The speech was made on the Island of Hawaii, at Honokaa, a village some 182 miles from Honolulu, Oahu, on a Sunday morning. The other charge related to interviews she had with one of the jurors after the trial concluded.

---

[1] The affirmance was by a 4–3 vote. The appeal was heard *en banc* by 9 judges but was decided by 7 because of the retirement of one judge and the death of another.

The Bar Association of Hawaii preferred the charges [2] which were referred by the Territorial Supreme Court to the Association's Legal Ethics Committee for investigation. The prosecutor who represented the Government at the Smith Act trial conducted the investigation and presented the evidence before the Committee. The Committee submitted the record and its findings to the Territorial Supreme Court. Because the suspension seems to us to depend on it, see pp. 637–638, *infra,* we deal first with the charge relating to the speech. The gist of the Committee's findings was that the petitioner's speech reflected adversely upon Judge Wiig's impartiality and fairness in

---

[2] At the conclusion of the Smith Act trial, District Judge Wiig requested the local Bar Association to investigate the conduct of petitioner. The Bar Association took no action as the Attorney General of the Territory conducted an investigation. As the Rules of the Supreme Court of the Territory then stood, only the Attorney General or a person aggrieved could file charges of unprofessional conduct against an attorney. After investigating the matter, the Attorney General did not file a complaint. A Committee of the Bar Association then proceeded to study the question of bringing charges against petitioner, and, in the words of the then President of the Association:

"The committee subsequently made a report to the Executive Board of the Association, ruling that a complaint be filed against Mrs. Bouslog. However, under the rules then in existence—that is, the rules of the Supreme Court, the Bar Association could not be a complainant. Consequently, the matter was again referred to the Committee on Legal Ethics to study amendments to the Rules of the Supreme Court, and the Chairman of the Committee on Legal Ethics took the matter up with the Chief Justice. And as I recall, the amendment to Rule 19—that is the rule on complaints for unprofessional conduct—I think was amended in April of 1954.

"Thereafter, the chairman of the Committee on Legal Ethics submitted a proposed draft of the Complaint. The Executive Board studied the draft, recommended certain changes, and then, finally, the form of the complaint was, as filed, was [*sic*] agreed upon, and I, as president of the Bar Association, was authorized to file that complaint in the name of the Bar Association."

the conduct of the Smith Act trial and impugned his judicial integrity. The Committee concluded that petitioner "in imputing to the Judge unfairness in the conduct of the trial, in impugning the integrity of the local Federal courts and in other comments made at Honokaa, was guilty of violation of Canons 1 and 22 of the Canons of Professional Ethics of the American Bar Association [3] and

---

[3] Canon 1 is entitled "The Duty of the Lawyer to the Courts." It reads:

"It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

Canon 22 is entitled "Candor and Fairness." It reads:

"The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

"It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

"It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

"A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the

should be disciplined for the same." The Territorial Supreme Court held that ". . . she engaged and participated in a willful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein . . . and thus tended to also create disrespect for the courts of justice and judicial officers generally. . . . She has thus committed what this court considers gross misconduct." 41 Haw., at 422–423.

We think that our review may be limited to the narrow question whether the facts adduced are capable of supporting the findings that the petitioner's speech impugned Judge Wiig's impartiality and fairness in conducting the Smith Act trial and thus reflected upon his integrity in the dispensation of justice in that case. We deal with the Court's findings, not with "misconduct" in the abstract. Although the opinions in the Court of Appeals and the argument before us have tended in varying degrees to treat the petitioner's suspension as discipline imposed for obstructing or attempting to obstruct the administration of justice, in a way to embarrass or influence the tribunal trying the case, such was neither the charge nor the finding of professional misconduct upon which the suspension was based. Since no obstruction or attempt at obstruction of the trial was charged, and since it is clear to us that the finding upon which the suspension rests is not supportable by the evidence adduced, we have no occasion

---

court, remarks or statements intended to influence the jury or bystanders.

"These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice."

We do not perceive any specification by the Committee of the respect in which Canon 22 was thought to have been violated by petitioner's speech, and such a violation does not occur to us.

to consider the applicability of *Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida,* 328 U. S. 331; or *Craig* v. *Harney,* 331 U. S. 367, which have been extensively discussed in the briefs. We do not reach or intimate any conclusion on the constitutional issues presented.

Petitioner's clients included labor unions, among them the International Longshoremen's and Warehousemen's Union. Some of the defendants in the Smith Act trial were officers and members of that union and their defense was being supported by the union. The meeting at Honokaa was sponsored by the ILWU and was attended in large part by its members. The petitioner spoke extemporaneously and no transcript or recording was made of her speech. Precisely what she did say is a matter of dispute. Neither the Territorial Supreme Court nor the Court of Appeals saw the witnesses, but both courts, on reading the record, resolved matters of evidentiary conflict in the fashion least favorable to the petitioner. For the purposes of our review here, we may do the same. The version of the petitioner's speech principally relied upon by the Court of Appeals, 260 F. 2d, at 197–198, is derived from notes made by a newspaper reporter, Matsuoka, who attended the meeting and heard what the petitioner said. These were not Matsuoka's original notes—the originals were lost—but an expanded version prepared by him at the direction of his newspaper superiors after interest in the speech was aroused by Matsuoka's account of it in the newspaper.[4] We

[4] The portion of the article, in the Hilo Tribune-Herald, that deals with petitioner's speech is as follows:

"Mrs. Sawyer, speaking for a half hour, spoke of 'some rather shocking and horrible things that go on at the trial.'

"There's 'no such thing as a fair trial in a Smith act case,' she charged. 'All rules of evidence have to be scrapped or the government can't make a case.'

[*Footnote 4 continued on p. 628.*]

set forth the notes in full as an Appendix to this opinion, and summarize them here, as an account of what petitioner said. The summary will illumine the basis of our conclusion that the finding that the petitioner's speech impugned the integrity of Judge Wiig or reflected upon his impartiality and fairness in presiding at the Smith Act trial is without support. The fact finding below does not remove this Court's duty of examining the evidence to see whether it furnishes a rational basis for the characterization put on it by the lower courts. See *Fiske* v. *Kansas,* 274 U. S. 380. Speculation cannot take over where the proofs fail. We conclude that there is no support for any further factual inference than that petitioner was voicing strong criticism of Smith Act cases and the Government's manner of proving them, and that her references to the happenings at the Honolulu trial were illustrative of this, and not a reflection in any wise upon Judge Wiig personally or his conduct of the trial.

Petitioner said that the Honolulu trial was really an effort to get at the ILWU. She wanted to tell about some "rather shocking and horrible things that go on at the trial." The defendants, she said, were being tried for reading books written before they were born. Jack Hall, one of the defendants, she said, was on trial because he had read the Communist Manifesto. She spoke of the nature of criminal conspiracy prosecutions, as she saw

---

"They 'just make up the rules as they go along,' she told her listeners.

" 'Unless we stop the Smith act trial in its tracks here' there will be a 'new crime' that of knowing what's in books and will lead to 'dark ages of thought control,' asserted the chic and attractive woman lawyer.

"She referred to reading by the prosecution of books 'supposed to have been in a duffel bag' owned by a witness, Henry Johnson. She urged her listeners to tell others 'what a vicious thing the Smith Act is.' Persons are 'tried for books written years ago' by others, she said."

them, and charged that when the Government did not have enough evidence "it lumps a number together and says they agreed to do something." "Conspiracy means to charge a lot of people for agreeing to do something you have never done." She generally attacked the FBI, saying they spent too much time investigating people's minds, and next dwelt further on the remoteness of the evidence in the case and the extreme youth of some of the defendants at the time to which the evidence directly related. She said "no one has a memory that good, yet they use this kind of testimony. Why? Because they will do anything and everything necessary to convict." Government propaganda carried on for 10 years before the jurors entered the box, she charged, made it "enough to say a person is a communist to cook his goose." She charged that some of the witnesses had given prior inconsistent testimony but that the Government went ahead and had them "say things in order to convict." "Witnesses testify what Government tells them to." The Government, she claimed, read in evidence for two days Communist books because one of the defendants had once seen them in a duffel bag. Unless people informed on such defendants, the FBI would try to make them lose their jobs. "There's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the Government can't make a case." She related how in another case (in the territorial courts) she was not allowed to put in evidence of a hearsay nature to exonerate a criminal defendant she was representing,[5] but in

[5] The case was *Application of Palakiko and Majors*, 39 Haw. 167, aff'd *sub nom. Palakiko* v. *Harper*, 209 F. 2d 75. The case was a habeas corpus application, in which petitioner sought to put in evidence the statement of a woman that a police officer had said that he had beaten a confession out of petitioner's client. The Territorial Supreme Court held a lengthy evidentiary hearing on the petition, which covered many other matters, and at it excluded

the present case "a federal judge sitting on a federal bench permits Crouch [a witness] to testify about 27 years ago, what was said then . . . here they permit a witness to tell what was said when a defendant was five years old." She then declared, "There's no fair trial in the case. They just make up the rules as they go along." She gave the example of the New York Smith Act trial before Judge Medina, see *Dennis* v. *United States,* 341 U. S. 494, where she claimed "The Government can't make a case if it tells just what they did so they widened the rules and tell what other people did years ago, including everything including the kitchen sink." She declared, "Unless we stop the Smith trial in its tracks here there will be a new crime. People will be charged with knowing what is included in books—ideas." Petitioner said in conclusion that if things went on the freedom to read and freedom of thought and action would be subverted. She urged her auditors to go out and explain what a vicious thing the Smith Act was.

The specific utterances in the speech that the Legal Ethics Committee and the Supreme Court found as furnishing the basis for the findings that petitioner impugned Judge Wiig's integrity were the references (which we have quoted in full above) to "horrible and shocking" things at the trial; the impossibility of a fair trial; the necessity, if the Government's case were to be proved, of scrapping the rules of evidence; and the creation of new crimes unless the trial were stopped at once. We examine these points in particular, though of course we must do so in the context of the whole speech. In so doing we accept as obviously correct the ruling of the courts below that petitioner's remarks were not a mere generalized dis-

---

the evidence in question. The court's opinion does not discuss the point, but it is mentioned in the Court of Appeals' opinion on affirmance. 209 F. 2d, at 102–103.

course on Smith Act prosecutions but included particular references to the case going on in Honolulu.

I. We start with the proposition that lawyers are free to criticize the state of the law. Many lawyers say that the rules of evidence relative to the admission of statements by those alleged to be co-conspirators are overbroad or otherwise unfair and unwise; [6] that there are dangers to defendants, of a sort against which trial judges cannot protect them, in the trial of numerous persons jointly for conspiracy; [7] and that a Smith Act trial is apt to become

---

[6] One of the classic statements of this point of view is Mr. Justice Jackson's concurring opinion in *Krulewitch* v. *United States,* 336 U. S. 440, 453: "But the order of proof of so sprawling a charge [as conspiracy] is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

[7] "The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice. . . .

"The interchangeable use of conspiracy doctrine in civil as well as penal proceedings opens it to the danger, absent in the case of many crimes, that a court having in mind only the civil sanctions will approve lax practices which later are imported into criminal proceedings. . . .

"[T]he order of proof of so sprawling a charge is difficult for a judge to control. . . .

"There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate. . . .

"[A survey conducted] which accords with our observation, will hardly convince one that a trial of this kind is the highest exemplifi-

509615 O–59–43

a trial of ideas.[8] Others disagree. But all are free to express their views on these matters, and no one would say that this sort of criticism constituted an improper attack on the judges who enforced such rules and who presided at the trials. This is so, even though the existence of questionable rules of law might be said in a sense to produce unfair trials.[9] Such criticism simply cannot be equated with an attack on the motivation or the integrity or the competence of the judges. And surely permissible criticism may as well be made to a lay audience as to a professional; oftentimes the law is modified through popular criticism; [10] Bentham's strictures on the state of the common law and Dickens' novels come to mind.[11] And needless to say, a lawyer may criticize the law-enforcement agencies of the Government, and the prosecution, even to the extent of suggesting wrongdoing on their part, without by that token impugning the judiciary. Simply to charge, for example, the prosecution with the knowing use of perjured testimony in a case is

---

cation of the working of the judicial process." Jackson, J., concurring in *Krulewitch* v. *United States,* 336 U. S. 440, 445–446, 451–452, 453, 454.

[8] This idea has been expressed in this Court also. See the dissenting opinion of MR. JUSTICE DOUGLAS in *Dennis* v. *United States,* 341 U. S. 494, 581, 583, and the separate opinion of MR. JUSTICE BLACK in *Yates* v. *United States,* 354 U. S. 298, 343–344.

[9] "[L]oose practice as to this offense [conspiracy] constitutes a serious threat to fairness in our administration of justice." Jackson, J., concurring in *Krulewitch* v. *United States,* 336 U. S. 440, 446.

[10] "England has just completed a century of struggle for procedural reform, and it is to the energy and determination of the public, and not to the leadership of the bar, that the credit for the present English practice is due." Sunderland, The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725, 727 (1926).

[11] Both were at the bar. Bentham was of Lincoln's Inn and Dickens of the Middle Temple.

not to imply in the slightest any complicity by the judge in such actions. To charge that the Government makes overmuch use of the conspiracy form of criminal prosecution, and this to bolster weak cases, is not to suggest any unseemly complicity by the judiciary in the practice.[12]

In large part, if not entirely, Matsuoka's notes of petitioner's speech do not reveal her as doing more than this. She dwelt extensively on the nature of Smith Act trials and on conspiracy prosecutions. The Honolulu trial, to be sure, was the setting for her remarks, but they do not indicate more than that she referred to it as a typical, present example of the evils thought to be attendant on such trials. The specific statements found censurable (without which the bringing of the charge would have been inconceivable) are not in the least inconsistent with this, even though they must be taken to relate to the trial in progress. These specific statements are hardly damning by themselves, and clearly call for the light examination in context may give them; so examined, they do not furnish any basis for a finding of professional misconduct. She said that there were "horrible" and "shocking" things going on at the trial, but this remark, introductory to the speech, of course was in the context of what she further said about conspiracy prosecutions, Smith Act trials, and the prosecution's conduct. Petitioner's statement that a fair trial was impossible in context obviously related to the state of law and to the conduct of the prosecution and the FBI, not to anything that Judge Wiig personally was doing or failing to do. It occurred immediately after an account of the FBI's alleged pressuring of witnesses. The same seems clearly the case with the remark about the necessity of scrapping

[12] "[I]t is for prosecutors rather than courts to determine when to use a scatter-gun to bring down the defendant . . . ." Jackson, J., concurring in *Krulewitch* v. *United States*, 336 U. S. 440, 452.

the rules of evidence.[13] The statement that if the trial went on to a conviction, new crimes—those of thought or ideas—would be created [14] could hardly be thought to reflect on the trial judge's integrity no matter how divorced from context it be considered. How any of this reflected on Judge Wiig, except insofar as he might be thought to lose stature because he was a judge in a legal system said to be full of imperfections, is not shown. To say that "the law is a ass, a idiot" is not to impugn the character of those who must administer it. To say that prosecutors are corrupt is not to impugn the character of judges who might be unaware of it, or be able to find no method under the law of restraining them. Judge Wiig was not by name mentioned in the speech, and there was virtually none of petitioner's complaints that was phrased in terms of what "the judge" was doing. For aught that appears from petitioner's speech, Judge Wiig might have been totally out of sympathy, as a personal matter, with the Smith Act, the practice of trying criminal offenses on a conspiracy basis, and the rules of evidence in conspiracy trials, but felt bound to apply the law as laid down by higher courts.[15]

---

[13] Again cf. Jackson, J., concurring in *Krulewitch* v. *United States*, 336 U. S. 440, 453–454: "The hazard from loose application of rules of evidence is aggravated where the Government institutes mass trials."

[14] In *Yates* v. *United States*, 354 U. S. 298, 318, this Court said: "We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not."

The convictions of petitioner's Smith Act trial clients were all reversed in the Court of Appeals on the authority of *Yates*, and judgment ordered entered for them. *Fujimoto* v. *United States*, 251 F. 2d 342.

[15] Lower federal court judges have in the past questioned conspiracy indictment practice. See the statement of the 1925 Con-

Even if some passages can be found which go so far as to imply that Judge Wiig was taking an erroneous view of the law—perhaps the comparison made between the case in the Territorial Courts where a hearsay statement was excluded and the admission of evidence in the Smith Act case might be of this nature, and much is made of it here though the Committee and the courts below made nothing of it—we think there was still nothing in the speech warranting the findings. If Judge Wiig was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed. Petitioner did not say Judge Wiig was corrupt or venal or stupid or incompetent. The public attribution of honest error to the judiciary is no cause for professional discipline in this country. See *In re Ades,* 6 F. Supp. 467, 481. It may be said that some of the audience would infer improper collusion with the prosecution from a charge of error prejudicing the defense. Some lay persons may not be able to imagine legal error without venality or collusion, but it will not do to set our standards by their reactions. We can indulge in no involved speculation as to petitioner's guilt by reason of the imaginations of others.

But it is said that while it may be proper for an attorney to say the law is unfair or that judges are in error as a general matter, it is wrong for counsel of record to say so during a pending case. The verbalization is that it is impermissible to litigate by day and castigate by night. See 260 F. 2d, at 202. This line seems central to the Bar Association's argument, as it appears to have been to the

---

ference of Senior Circuit Judges, as quoted in Annual Report of the Attorney General, 1925, pp. 5–6; L. Hand, J., in *United States* v. *Falcone,* 109 F. 2d 579, 581.

reasoning of the court below,[16] and the dissent here is much informed by it, but to us it seems totally to ignore the charges made and the findings. The findings were that petitioner impugned the integrity of Judge Wiig and made an improper attack on his administration of justice in the Honolulu trial. A lawyer does not acquire any license to do these things by not being presently engaged in a case. They are equally serious whether he currently is engaged in litigation before the judge or not. We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, other than that they might tend to obstruct the administration of justice. Remarks made during the course of a trial might tend to such obstruction where remarks made afterwards would not. But this distinction is foreign to this case, because the charges and findings in no way turn on an allegation of obstruction of justice, or of an attempt to obstruct justice, in a pending case. To the charges made and found, it is irrelevant whether the Smith Act case was still pending. Judge Wiig remained equally protected from statements impugning him, and petitioner remained equally free to make critical statements that did not cross that line. We find that hers cannot be said to have done so. Accordingly, the suspension order, based on the charge relating to the speech, cannot stand.

II. Petitioner was also charged by the Committee, and found by the Supreme Court, to have misconducted herself by interviewing a juror shortly after the completion

---

[16] For example, the petitioner argued in the Court of Appeals that a law professor at Yale had made criticisms in more pungent terms than hers. Said the court: "We would uphold Professor Rodell's right to say from his Yale vantage point just about what he wants to say. But when he speaks he is not simultaneously harassing the very court in which he is trying an unfinished case." 260 F. 2d, at 200.

of the Smith Act trial. The juror had become mentally unsettled, in an obvious fashion, very shortly after the rendition of the verdict and apparently as a result of his participation on the jury. It was at this point that petitioner, having been first requested by his sister, several times interviewed him, and spoke with members of his family. The Supreme Court recognized that it had been common practice for attorneys in the Territory to interrogate jurors after the rendition of their verdicts and their discharges. Nevertheless, it found her action professional misconduct. The versions of the witnesses as to exactly what transpired at the interviews varied considerably, but the court made no findings of fact on the matter, and it is difficult to grasp the basis on which it singled petitioner's juror interviews out for censure against the pattern of a common practice of such interviews in the Territory.[17] While there is clearly some delicacy involved in approaching a juror who has become mentally unsettled, evidence that a juror was incompetent at the time of the rendition of the verdict might be admissible to impeach a verdict where evidence of the jury's mental and reasoning processes is not. While the inter-

[17] The court said: "It appears from the transcript which we have examined pursuant to the pretrial order herein, that her first visit to said David Fuller [the juror] was made by the respondent licensee upon request by his sister. It also appears that it has not been uncommon, if not in fact common practice, heretofore and within the Territory of Hawaii, for attorneys as well as others to interrogate jurors, after rendition of verdict by them, as to what may have been decisive in reaching a verdict.

"However, even if she relied upon the request of his sister when she first visited David Fuller, and upon a belief that it was common practice, locally, to interrogate trial jurors after verdict, such reliance thereon is not acceptable as excuse for her repeated visits to and studied interrogation of Fuller under the circumstances and as set forth in her affidavit, incorporated in the bill of particulars. . . ." 41 Haw., at 423–424.

views were undertaken under unusual circumstances, it is difficult to say whether the circumstances furnish more or less justification than is present in the average juror interview—which we do not read the Supreme Court's opinion as holding censurable, except as to the future.[18] The Legal Ethics Committee had charged petitioner with concealment of facts in her affidavit as to the juror interview filed with Judge Wiig in support of her motion for a new trial for the Smith Act defendants, but we do not find anything in the Supreme Court's opinion agreeing with these charges.

But we need not explore further what the basis was for the Territorial Supreme Court's finding on this charge. As to it, the court said that the suspension order it rendered on the charge relating to the speech would suffice.[19] The Court of Appeals was of opinion that if the charge as to the speech were insupportable, in the present posture of the case the suspension could not stand, 260 F. 2d, at 202, and we agree. We cannot read the Supreme Court's opinion as imposing any penalty solely by reason of the interview with the juror. Accordingly, we do not believe it would be appropriate in the posture of the case for us finally to adjudicate the validity of the finding of misconduct by reason of the interviews.

III. The Court of Appeals expressed doubt as to its jurisdiction to hear the appeal from the Territorial Supreme Court, and respondent here urges that that court

---

[18] The court gave a warning to the future conduct of the Bar that interrogation of jurors as to occurrences in the jury room and as to the reasons why the jury reached its verdict would be at the peril of the interrogator. 41 Haw., at 425.

[19] "However, in the instant matter, this court will let its hereinbefore expressed disciplinary order—suspending the said respondent licensee from the practice of law in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller." *Ibid.*

was without jurisdiction. Since our jurisdiction to hear the case on the merits must stand or fall with that of the Court of Appeals, we examine the objections. They are without merit. The Court of Appeals for the Ninth Circuit has jurisdiction of appeals from final judgments of the Supreme Court of the Territory of Hawaii, pursuant to 28 U. S. C. § 1293, in "civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs." [20] The suspension order would have the effect of removing petitioner from the practice of law for at least one year, and she filed an uncontroverted affidavit that her annual net income from the practice of law had been for years, and would continue foreseeably, in excess of $5,000.[21] It is insisted that petitioner's right cannot be reduced to monetary terms, because it is "priceless," and so it is, in a manner of speaking; but besides the professional aspects of her status, her continuance in a specific form of gainful employment is in issue, see *Bradley* v. *Fisher,* 13 Wall. 335, 355, and hence the jurisdictional amount was present.

Finally, we find no inhibition as to the scope of review we have given the judgment of the Territorial Court. The Territorial Court is one created under the sovereignty of the National Government, *O'Donoghue* v. *United States,* 289 U. S. 516, 535, and hence this Court (once the

---

[20] "The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs." 28 U. S. C. § 1293.

[21] "Where the power of any court of appeals to review a case depends on the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the case or by other competent evidence." 28 U. S. C. § 2108.

jurisdictional Act is satisfied) is not limited as it would be in reviewing the judgment of the highest court of a State. Of course this Court and the Courts of Appeals must give the Territorial Courts freedom in developing principles of local law, and in interpreting local legislation. See *Bonet* v. *Texas Co.*, 308 U. S. 463; *DeCastro* v. *Board of Commissioners*, 322 U. S. 451, 454–458. But it hardly needs elaboration to make it clear that the question of the total insufficiency of the evidence to sustain a serious charge of professional misconduct, against a backdrop of the claimed constitutional rights of an attorney to speak as freely as another citizen, is not one which can be subsumed under the headings of local practice, customs or law.

Reversed.

[For concurring opinion of MR. JUSTICE BLACK, see *post*, p. 646.]

[For opinion of MR. JUSTICE STEWART, concurring in the result, see *post*, p. 646.]

[For dissenting opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER, see *post*, p. 647.]

[For dissenting opinion of MR. JUSTICE CLARK, see *post*, p. 669.]

APPENDIX TO OPINION OF MR. JUSTICE BRENNAN.

THE EXPANDED NOTES OF THE REPORTER, MATSUOKA, RELATIVE TO PETITIONER'S SPEECH.

"She followed Samuel M. Bento, who said he wanted to say good morning to the Tribune-Herald, pointing generally toward the paper's reporter from Hilo and the

paper's Honokaa correspondent who were sitting side by side. Mrs. Sawyer preceded Jack W. Hall. She began speaking at 11 a. m. and ended 11:30 a. m.

"Notes on what she said in the order of how she proceeded: The trial is really a trial of Jack Hall to which has been added six others. It's to get at the ILWU.
"Said she wanted to tell about some rather shocking and horrible things that go on at the trial.

"She was appointed some years ago (3 or 4 years ago) by a court to defend a man who had no money to hire his own counsel. He was charged with pimping and procuring. The complaining witness in the case was a woman who had been in business 20 years in the territory who claimed she had reformed and repented but this vicious man had driven her back again into the business. It turned out that the hotel where he had kept her had 27 doors unlocked. Likened this to pukas in the Smith act.

"Said men in power are trying to put men in jail because of their thoughts. and books written before he was born.

"One of the reasons Jack Hall is on trial is because it is said he once got a book, the Communist Manifesto, written in 1898, before Jack Hall was a gleam in his father's eye.

"She quoted from manifesto: a spectre is haunting Europe; the spectre is communism. she explained spectre means ghost. said spectre still seems to be haunting people today.

"She turned next to conspiracy. noted there was a conspiracy trial in 1937 of filipino brothers. conspiracy to advocate violence and criminal sindicalism. explained conspiracy means agreement. government never has

used conspiracy when it had a case. when it hasn't got enough evidence it lumps a number together and says they agreed to do something. the government does not say . . advocated overthrow but says they agreed to. conspiracy means to charge a lot of people for agreeing to do something you have never done.

"touched on myth of agents of fbi. they're supposed to be extra special. radio programs, movies, publicity tell how wonderful they are. but when you see hundreds of tax fraud cases go by and when they spend most of their time investigating people's minds it's time to cut them down to size. said she had told this to a honolulu gathering. labor day? fbi agents should be called federal cops. said has slogan: put away your thoughts here come the federal cops. cops push people around.

"paul crouch. difficult to understand why he's witness. but he was here in 1924; because he was once in Hawaii, so guess that's why. he testified what he did in russia in 1927. he told what he was told by generals etc. usually you cannot testify on what people told you when there is no chance for those to be cross examined. aileen fujimoto was four years old then. what has crouch's galloping over the plains of russia got any bearing on her. jack hall was 13. but the government goes on with testimony for two weeks on what crouch did between 1927 and 1941 without ever mentioning the defendants. "he told of infiltration of the armed forces and plots . . . it used to be the idea that a man is responsible for what he did and said—not what someone else did. not a single one of the defendants was of age at the time he's talking about. the jury is not going to pay attention to what

Crouch says. but it's the old smear. The prosecution says crouch did this and that and we (prosecution) say the defendants are communist party members so they must have done the same.
"but government propaganda has been going on for 10 years before the jurors went into the jury box.

"it's enough to say a person is a communist to cook his goose. the government says there was an agreement to violate the smith act which was passed in 1940. then the defendants agreed to violate it before it was passed. crouch said he was at a communist meeting in 1941 and saw five or six people there. it was the first time he'd seen them. but he was satisfied when he came to honolulu 12 years later that one was Koji Ariyoshi. she urged audience try to recall what they did 12 years ago. said she can't recall details. god knows no one has a memory that good. yet they use this kind of testimony.

"why? because they will do anything and everything necessary to convict.
"some of the witnesses testified differently from what they testified previously. the government knows this but deliberately goes ahead and have him say things in order to convict. mentioned izuka in reinecke trial testimony. said something about izuka saying he didn't know the party advocated overthrow of government until he got out of party.
"witnesses testify what government tells them to. just as they read portions of books like overthrow the government and leave out the rest which says czarist government showing it dealt with russia.

"johnson testimony. said he came back from san francisco with communist books and literature in a duffle bag. he said when he got to Honolulu he told Jack Hall the names of some of the books. then the government for two days reads from books supposed to have been in the duffel bag. they're not dealing with what jack hall said. on cross examination johnson said he did not tell the names of the books but just showed jack hall the duffel bag. so jack hall violated the smith act because he saw a duffel bag with some books on overthrowing the government in it. it's silly. why does the government use your money and mine to put people in jail for thoughts

---

"the government has carried on a barrage of propaganda for many years and expects people in the jury to have hysteria just hearing about communist is enough to jail. said has a friend who worked for sears roebuck and has family of three children and wife. he made a terrible mistake one time. in 1941 he lived in the same house as jack hall. the fbi wanted him to testify. he said i feel jack hall is one of the finest people i have known. apparently the fbi didn't like this. so they suggested to sears and roebuck to fire him because he wouldn't cooperate with the government.

"he wasn't fired so they went to the Los Angeles and Chicago offices of sears and roebuck and convinced them he had to be fired. he was fired because he refused to be a stool pigeon and informer. the government gets away with it by making people fear that if they don't do as it wants they'll be branded red and lose their jobs.

"there's no such thing as a fair trial in a smith act case. all rules of evidence have to be scrapped or the government can't make a case.

"referred to her habeas corpus move in the palakiko—majors case.

"said a woman came to her with report she heard vernon stevens say he bet a confession out of one of them. she testified but the supreme court refused to let the evidence in because vernon stevens was not here and had no chance to deny this. with the same situation a federal judge sitting on a federal bench permits crouch to testify about 27 years ago. what was said then. in the previous case it was the life and death of one. and yet here they permit a witness to tell what was said when a defendant was five years old.

"there's no fair trial in the case. they just make up the rules as they go along. the first smith act case was in 1949 of the new york top leaders. attorneys contended they should have the right to say what they did from 1924. medina permitted them to say what the defendants themselves did from 1934 on. but the government can't make a case if it tells just what they did so they widened the rules and tell what other people did years ago, including everything including the kitchen sink.

"unless we stop the smith trial in its tracks here there will be a new crime. people will be charged with knowing what is included in books. ideas.

"mentioned los angeles trial in which someone said there was no evidence that someone had instructed persons not to read some books.

"said there'll come a time when the only thing to do is to keep your children from learning how to read. then not

only will unions be destroyed by [*sic*] so will freedom of thoughts and action. there'll be dark ages of thought control when people won't be able to speak freely in taverns and other places.
"she urged audience to go out and explain what a vicious thing the smith act is. people are tried for books written years ago."

MR. JUSTICE BLACK, concurring.

Assuming that there is a specific law of some kind in Hawaii which purports to authorize petitioner's suspension or disbarment upon the charges against her, I agree with MR. JUSTICE BRENNAN, for the reasons he gives, that the charges were not proved. My agreement is not to be considered however as indicating a belief that Hawaii has such a law, that it would be valid if it existed, or that petitioner was given the kind of trial which federal courts must constitutionally afford before imposing such a drastic punishment as was inflicted on petitioner.

MR. JUSTICE STEWART, concurring in the result.

If, as suggested by my Brother FRANKFURTER, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

Obedience to ethical precepts may require abstention from what in other circumstances might be constitution-

ally protected speech. For example, I doubt that a physician who broadcast the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline.

In the present case, if it had been charged or if it had been found that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial, this would be the kind of a case to which the language of the dissenting opinion seems largely directed.* But that was not the charge here, and it is not the ground upon which the petitioner has been disciplined. Because I agree with the conclusion that there is not enough in this record to support the charge and the findings growing out of the petitioner's speech in Honokaa, I concur in the Court's judgment.

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

Petitioner was suspended from the practice of law in the Territory of Hawaii for one year. The charges on which the suspension order was based related (1) to a speech made by petitioner at Honokaa, Hawaii, while a criminal trial was in progress, in Honolulu, in which she

*See Canon 20 of the Canons of Professional Ethics of the American Bar Association. "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement." Canons of Professional and Judicial Ethics, American Bar Association, 1957.

509615 O–59–44

was attorney of record and an active lawyer for the defense, and (2) to petitioner's interview of a juror, after the trial had terminated in a verdict of guilty. The judge presiding at the trial requested the Bar Association to investigate Mrs. Sawyer's conduct. Following investigation, charges and a recommendation of disciplinary action were filed with the Hawaii Supreme Court which referred the matter to its Legal Ethics Committee. Following a full hearing the Committee, in the main, agreed with the charges of the Bar Association and submitted its conclusion to the Hawaii Supreme Court which made a *de novo* examination of the record, resulting in the order now before us. The suspension order was based upon the Honokaa speech, although the Hawaii Supreme Court also found that the interview of the juror, in view of the circumstances under which it was made, constituted professional misconduct. The Court today finds the conclusions of the Hawaii Supreme Court, on which the suspension order is based, wanting in a reasonable foundation and directs the Hawaii court to readmit Mrs. Sawyer to the practice of law. Since this Court finds that the suspension order was grounded on the speech, it leaves unreviewed the finding of professional misconduct growing out of the juror interview. When the case goes back to Hawaii, the Hawaii Supreme Court is apparently free to take further disciplinary action. Putting to one side the charge of misconduct relating to the interview of the juror, I think the judgment below should stand since the suspension based on the misconduct relating to the Honokaa speech is fully supported by the record.

"We think," says the opinion of MR. JUSTICE BRENNAN, "that our review may be limited to the narrow question whether the facts adduced are capable of supporting the findings that the petitioner's speech impugned Judge

Wiig's impartiality and fairness in conducting the Smith Act trial and thus reflected upon his integrity in the dispensation of justice in that case." The limited reach of this question is illumined by the limited use made of the evidence in the record in MR. JUSTICE BRENNAN'S opinion. If the record contained no more than the portions of it that are drawn upon in MR. JUSTICE BRENNAN'S opinion, one would be led to conclude that the sole question in the case was whether the verbal content of the petitioner's speech, in disregard of all else, supported the findings of the Hawaii Supreme Court on which petitioner's suspension was based. Such is not the issue that the record as an entirety presents. In the law as elsewhere the answer to a problem largely depends on the way the question it presents is put. A wrong question is not likely to beget a right answer.

Brother BRENNAN'S formulation of the problem before us and the resulting restriction on its use of the record, misconceive the findings upon which petitioner's suspension was based and neglect important aspects of the relevant evidence. As a result, the Court seriously impairs the responsibility of the bar and, more particularly, of criminal lawyers engaged in the conduct of trials, by encouraging cases to be tried on the hustings and in the press, instead of within a court-room and subject to its constitutionally circumscribed safeguards.

Since the case must be seen in its true scope and perspective, it is important to state in full the findings of the Hawaii Supreme Court relevant to the speech:

> "It is the finding and conclusion of this court that the allegations contained in the complaint of the Bar Association of Hawaii, more particularly paragraphs 'I,' 'II,' and 'III' thereof . . . have been sustained by convincing proof, by credible evidence of more than a mere preponderance; that the said respondent

licensee, a member of the Bar of this court and an attorney at law, duly licensed and admitted to practice before all of the courts of the Territory of Hawaii . . . did, as charged in said paragraph II, being then an attorney of record for a defendant in a then pending case in the United States District Court for the District of Hawaii . . . during the course of trial of said case, to wit, on or about December 14, 1952, say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created. . . .

"Upon its finding and conclusion as stated *supra,* this court deems that in saying what she did in her speech to a public gathering at Honokaa, Hawaii, on December 14, 1952 . . . when there was then pending . . . a case under the Smith Act . . . she engaged and participated in a willful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case . . . and thus tended to also create disrespect for the courts of justice and judicial officers generally, contra to the obligations and duties assumed, as incident to the license, by her and by every person to whom a license has or shall have been issued by this court to practice in the courts of the Territory of Hawaii. She has thus committed what this court considers gross misconduct." 41 Haw. 403, at 421–423.

These conclusions, which essentially adopted the charges and conclusions of the Legal Ethics Committee,[1] rested on a *de novo* examination of the record of a full hearing before the Legal Ethics Committee, "unprejudiced" by the findings of that Committee or of the Bar Association. A majority of the Court of Appeals agreed

---

[1] After the Bar Association had filed a complaint against Mrs. Sawyer, a complaint that was essentially in terms of findings of fact as to what she had said at Honokaa, a full investigation was made by the Legal Ethics Committee. This Committee then reported its findings of fact, conclusions and charges to the Hawaii Supreme Court which heard argument and made a *de novo* examination of the record. It is clear that these charges fully encompassed the basis for the Hawaii Supreme Court's own findings and that Mrs. Sawyer was fully and fairly apprised of the charges against her and the factual matters that were in dispute.

The Report of the Legal Ethics Committee, insofar as it was relevant to the speech, charged as follows:

"The Legal Ethics Committee . . . has investigated a complaint filed by the Bar Association of Hawaii and makes this report of the charges, facts and conclusions of the Committee pursuant to Rule 19.

"The Charges:

"The two charges made in this complaint have to do with (1) the alleged improper conduct of Mrs. Harriet Bouslog Sawyer, referred to in this report as 'Mrs. Bouslog,' in making a speech at Honokaa, Hawaii, on December 14, 1952, and (2) the alleged improper conduct in connection with her interview of the juror David P. Fuller, as more fully set forth in the Bill of Particulars dated September 29, 1954.

"The Facts:

"The Committee finds that Mrs. Bouslog was one of the attorneys appearing for certain defendants in the United States District Court for the District of Hawaii entitled 'United States of America, Plaintiff, against Charles Kazuyuki Fujimoto, et als., Defendants,' being Criminal 10495 in that Court; that on December 14, 1952, during the course of the trial, she made a speech at a public gathering at Honokaa, at which she said, among other things, that horrible and shocking things were going on at the trial; that there was no fair

that the record supported the conclusions. 260 F. 2d 189. Of course we are not a court of first instance in reviewing these findings. We are not empowered to set aside the conclusions of the Supreme Court of Hawaii, affirmed by the Court of Appeals, if its conclusions find reasonable support—that is, if conscientious judges could not unreasonably have reached such a conclusion on the strength of the evidence disclosed by the record and the inferences fairly to be drawn from it.

Thus, the real issue before us is whether evidence supports the conclusion that Mrs. Sawyer in her speech, in the full setting and implications of what she said, engaged in a willful attack on the administration of justice in the particular trial in which she was then actively participating, and patently impugned, even if by clear implication rather than by blatant words, the integrity of the presiding judge, and thereby violated the obligations of one in her immediate situation, judged by conventional professional standards, so as to be reasonably deemed to have committed what the Hawaii Supreme Court termed "misconduct."

One of the elements of the misconduct found by the Hawaii Supreme Court and the Court of Appeals was, without doubt, the attack on the integrity of the judge

---

trial in the case; that they just made up the rules as they went along; that unless the Smith Act trial was stopped in its tracks in Honolulu there would be a new crime.

. . . . . .

"Conclusions and Recommendations:

"The Committee is of the unanimous opinion that the Bar Association of Hawaii has sustained the allegations in paragraphs II and III of its complaint and that Mrs. Bouslog, in imputing to the Judge unfairness in the conduct of the trial, in impugning the integrity of the local Federal courts and in other comments made at Honokaa, was guilty of violation of Canons 1 and 22 of the Canons of Professional Ethics of the American Bar Association and should be disciplined for the same."

presiding at the trial in which she was engaged. Surely that does not mean she must have referred to Judge Wiig by name. Nor does it mean, as the opinion of MR. JUSTICE BRENNAN seems to assume, that any evidence which does not consist of a direct attack on the judge is irrelevant to the ultimate question: could the Hawaii Supreme Court have found petitioner guilty of misconduct as set forth in its opinion?

By carefully isolating various portions of the Matsuoka notes,[2] concentrating on them as a self-contained, insulated document, the opinion of MR. JUSTICE BRENNAN labors to put a neutral, if indeed not an innocently attractive, patina on Mrs. Sawyer's remarks. But the speech must be interpreted in its entirety, not distorted as an exercise in disjointed parsing. It must be placed in its context of time and circumstances. Nor can we neglect the fact that what people say is what others reasonably hear and are meant to hear. When this is done what emerges is no abstract attack on the state of the law, no analysis of the dubieties of Smith Act trials with which even judges may agree or, at all events, which critics have an unquestioned right to make, no Dickensian strictures on the injustices of legal proceedings, but a plainly conveyed attack on the conduct of a particular trial, presided over by a particular judge, involving particular defendants in whose defense Mrs. Sawyer herself was professionally engaged. There is ample support for the reasonable conclusion that, in making the fairness of the conduct of this particular trial the target of her appeal to a crowd outside while the trial was proceeding inside the court-room, Mrs. Sawyer was including in her assault the judicial officer who both in fact and in common understanding bears ultimate responsibility for the fairness and evenhandedness of judicial proceedings—the

[2] The Matsuoka notes are reprinted at 260 F. 2d 205–207.

presiding judge. In examining this record sight must never be lost of the limited scope of our reviewing power. We are only concerned with whether the findings have fair support in the record. If the findings are so supported we have the right to strike down the suspension only if it transgresses constitutional limits. We must indeed have in mind, as the opinion of MR. JUSTICE BRENNAN reminds us, the entire "context" of this speech. We must endeavor to understand the complete utterance in its setting, as it sounded and was meant to sound to its auditors in Honokaa, Hawaii, on December 14, 1952.

The Honokaa meeting was sponsored by a committee for the defense of Jack Hall, one of the principal defendants in the Smith Act trial then under way in Honolulu,[3] in which Mrs. Sawyer was one of the group of lawyers for the defense. It was publicly announced and advertised that the topic of the meeting would be the Smith Act trial in Honolulu. The general public was invited and members of the press were present, as well they might be expected to be at a meeting where among the principal speakers were a defendant and a defense attorney in a highly controversial trial. It was controversial, not an obscure, run-of-the-mill trial; it had been receiving front-page publicity in the Hawaii press for weeks.[4] The defendant Hall himself was one of the principal speakers and Mrs. Sawyer was on the platform. Her function was, as stated by Mr. Hall, "to explain the legal aspects of the prosecution." Certainly this setting precludes a naive

---

[3] See *Fujimoto* v. *United States*, 251 F. 2d 342.

[4] See, *e. g.*, the Honolulu Star Bulletin for the month of December. In fact, the same day on which Mrs. Sawyer's speech was reported, a banner, lead headline announced the latest court-room developments, while the story of the action taken by the court in response to the speech occupied the front page for the next few days. See the Honolulu Star Bulletin for Dec. 15, 1952, *et seq.*

conclusion that Mrs. Sawyer was delivering herself of an abstract dissertation on Smith Act trials, using illustrations from the Honolulu trial merely as "typical present examples" of the evils of such prosecutions. The enveloping environment of her talk, intensified by much other evidence, gives substantial support to the conclusion that Mrs. Sawyer was, in the main, discussing and attacking the Honolulu trial and that her more general condemnations were directed toward, and designed to have particular applicability to, that trial.

The fullest account of the speech is found in the notes made by Matsuoka, a newspaperman covering the meeting. These notes, though not themselves contemporaneous, are a slightly expanded version of handwritten contemporaneous notes which Matsuoka took and used as the basis for his news story of the meeting.[5] Matsuoka testified that the notes were full and accurate and contained "almost everything" of what Mrs. Sawyer said. It is significant that more than half of the notes contain comments directly and solely relating to the Hono-

---

[5] The nature of the expansion was explained in the following colloquy between counsel and Matsuoka at the hearing before the Legal Ethics Committee:

"Q. You stated that the transcription of these notes were somewhat expanded from your original notes?

"A. Yes.

"Q. Would that also be true of the newspaper article?

"A. When I say expanded, I mean, like, when I take notes, I would not say, 'Robert Dodge yesterday,' I would say, 'Dodge,' or something like that, and expand that to make it understandable to the reader.

"Q. By expanding, not adding to it?

"A. No, not adding to.

"Q. Or an addition, or anything of that kind, but filling out what your notes indicated, is that it?

"A. That's right, by expanding on it."

lulu trial.[6] However, these notes were not the only evidence of the content of the speech. Several persons who had been in the audience at Honokaa testified before the Legal Ethics Committee, and their testimony was part of the record considered by the Hawaii Supreme Court. This testimony lends substantial support to the finding that the basic intent and purport of the speech was to attack the conduct of the trial in which Mrs. Sawyer had been engaged on the day she made her speech and would again be engaged the next morning.

Thus, Matsuoka testified that Mrs. Sawyer spoke about

> "The Smith Act trial; that was under way in Honolulu. She said she wanted to tell the people about some of the shocking, horrible things that went on, and that the Smith Act trial could not be a fair one, and that they just had to go around and make rules to fit the situation. That was, I think, the general trend."

Another witness testified that

> "She said that the trial was against Jack Hall, and six others were just brought in, and that its purpose was to get at the ILWU; she said that Jack Hall was being tried on something that he read many years ago, and she said that in the Smith Act trial there were no rules, and that they were making up the rules as they went along, and she said that the F. B. I. could be called Federal cops, and that when the government—they were stressing this case, and when

[6] It is fair to say that approximately 80 of the about 140 lines of the Matsuoka notes as reprinted in the record deal specifically with this particular trial and the evidence which was being introduced in Honolulu. Of course, as we have explained above, many of the more general comments could, in the context of this speech, be reasonably taken to refer to the Honolulu trial.

> the government—that witnesses were afraid to testify, and they testified usually what the government wanted them to testify."

Here is another quotation from the testimony before the Hawaii court:

> "Q. Will you tell the Committee what Mrs. Bouslog said?
>
> "A. Well, that the defendant in the Smith Act trial cannot get a fair trial.
>
> "Q. What Smith Act trial was she talking about?
>
> "A. The one in Honolulu."

When to this evidence is added the setting we have described, and the fact that to those who read the Hawaii papers "the" Smith Act trial, was the notorious, much-exploited trial of the "Hawaii Seven," how can one reasonably escape, on the basis of the record which determines our adjudication, the conclusion that Mrs. Sawyer was directly castigating the administration of the very trial in which she was then professionally engaged?[7] So viewed the specific statements which she made lose the aura of innocence the Court has cast about them and support the finding that Mrs. Sawyer was guilty of professional misconduct in attacking the administration of justice in the Honolulu trial and impugning the integrity of its presiding judge.

Matsuoka's notes reveal that Mrs. Sawyer began her speech by announcing that the Honolulu trial was "to get at the ILWU [International Longshoremen's and Ware-

---

[7] Petitioner's lawyer had no doubt regarding the meaning and purport of the speech.

"I will say to the Committee right now—I have read these speeches and I would agree with the conclusion implicit in Mr. Dodge's question; namely that this was a talk about what was going on in the Smith Act trial here in Honolulu. Now, let's not fool ourselves about that. We're lawyers here."

housemen's Union]." She next said that "she wanted to tell about some rather shocking and horrible things that go on at the trial." The opinion of MR. JUSTICE BRENNAN views these remarks as merely "introductory" to her later "general" comments, neglecting the fact that most of her later comments were not general at all but related directly to the trial of Hall, and similarly neglecting the entire milieu in which the speech was delivered. The remarks were "introductory," but introductory in that they set the tone and temper of all that followed. There is ample testimony that her audience so understood the remarks. Their understanding was justified by what she said, and that they so reasonably understood what she said establishes the reasonableness of the conclusion that she intended them so to understand. This is the way the speech was remembered by one of her audience.

> "I think she gave a very excellent speech, and what I can remember quite well was that she said she would like to tell the audience of the horrible and shocking things that went on at the Smith Act trial in Honolulu, and she also gave several illustrations, but, I am sorry, I cannot remember them . . . ."

Another witness when asked if Mrs. Sawyer had said that there were shocking and horrible things going on, responded that those phrases had been specifically directed at the "Jack Hall trial." Again, after testifying that Mrs. Sawyer had said the trial at Honolulu was not a fair trial, still another witness went on to say that "she gave various examples of things, that I don't recall, that were going on, in what she called the horrifying, shocking trial."

That this theme of "horrifying and shocking" so forcefully impressed itself on the people to whom she spoke strips the words of any neutral interpretation, and certainly justifies, if it does not compel, the inference that it formed the motif for the entire speech.

This evidence establishes more than that Mrs. Sawyer was attacking the conduct of the Honolulu trial at large. It clearly reflects on the judge who was permitting or participating in these "shocking and horrible" things; at the lowest it allows the inference to be drawn, as the Hawaii Supreme Court did draw the inference, that she did so reflect. To suggest that the only reasonable inference we may draw from her speech is that petitioner was indicting the general state of the law or merely reflecting on the prosecution, is to deny the obvious fact that when a lawyer harangues a lay audience, wholly unskilled in drawing subtle distinctions for exculpatory purposes, about the horrible and shocking things going on in a judicial proceeding, he inevitably reflects upon the total conduct of that trial and upon the integrity of all, not excluding the judge, responsible for the conduct of the trial. Certainly if we, as lawyers, were addressed by a doctor on the theme of the horrible and shocking things that go on at X hospital, and the speaker dwelt on specific examples of conduct at that particular hospital, we would not assume that merely the general sad state of medicine was being impugned rather than the doctors and the administrators at that hospital.

Petitioner also declared in her speech that "there's no fair trial in the case. they just make up the rules as they go along." And again, "there's no such thing as a fair trial in a smith act case. all rules of evidence have to be scrapped or the government can't make a case." By an evaporating reading these comments are made to say that they "obviously related to the state of the law, and to the conduct of the prosecution and the FBI . . . ." But the materials used to illustrate these charges were specific examples of the unconscionable use of evidence drawn from this particular trial, as the defendant Hall himself pointed out at the hearing before the Legal Ethics Committee. In fact, a large part of the speech was taken up

with such specific examples. To say that petitioner was attacking the "state of the law," or the "prosecution," or, what is more to the point, to suggest that this is the only conclusion the Hawaii court could reasonably draw, rejects the obvious force of the evidence that her references throughout were to the manner in which this particular trial was being conducted [8] and disregards, it cannot be too often emphasized, the whole tone, nature and setting of her speech.

To be sure, petitioner often did not specify who was guilty of the sins which she charged were being committed at this trial; the sins of unfairness, of ignoring or making up the rules, of doing "anything and everything necessary to convict." When such broadside attacks are made a court is not compelled to make the ingenuous assumption that they were directed only at those who are legitimately subject to such attack, when it is made by a trial lawyer in the midst of a case in a haranguing speech to a public gathering. It takes no master of psychology to know that if the speaker does not discriminate neither will the audience. Inevitably the accusation covers all those who in the common understanding have responsibility. Whatever secret reservations the speaker may have when he speaks does not infuse what he conveys. Even the most sophisticated audience is not so trained in withholding judgment that the heavy and repeated charges of unfairness in the conduct of this trial impliedly relieved the presiding judge, who bears basic responsibility

---

[8] Mrs. Sawyer herself, in explaining her remarks to the court, pointed out that part of her speech "was devoted to a discussion of the evidence on which the prosecution in this case is seeking to convict Jack Hall and the other six defendants in this case. . . ."

The record discloses that other witnesses also understood that her references were to the "rules being made up as they went along" at this particular trial.

for judicial proceedings, of all responsibility for this unfairness.

More than that, the attack on the judge presiding at the trial does not rest merely on implication. It was direct and clear. Again the remarks about unfairness and the rules that were "made up" must be read not in isolation but in context. After outlining several examples of what she considered to be the outrageous evidence being admitted in this case, petitioner made her remark that there was "no such thing as a fair trial in a smith act case. all rules of evidence have to be scrapped or the government can't make a case." Matsuoka's notes reveal that she then proceeded to illustrate this remark by relating that in an earlier case of hers, in which, the voluntariness of an accused's confession had been in issue, "a woman came to her with report she heard vernon stevens [Stevens was a police officer] say he bet [*sic*] a confession out of one of them. she testified but the supreme court [of Hawaii] refused to let the evidence in because vernon stevens was not here and had no chance to deny this. with the same situation a federal judge sitting on a federal bench permits crouch [9] to testify about 27 years ago. what was said then. in the previous case it was the life and death of one. and yet here they permit a witness to tell what was said when a defendant was five years old." This graphic illustration was followed by the remark that "there's no fair trial in the case. they just make up the rules as they go along." Crouch was a witness in the Honolulu trial whose testimony had been

[9] The fact that the notorious Crouch was involved is, of course, wholly irrelevant to the issues in this case. Any grievances arising out of Crouch's testimony were properly to be pursued in the orderly course of justice in trial and appellate courts and eventually here. See *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115.

attacked earlier in the speech, and the "federal judge" was Judge Wiig who was presiding over that trial. This portion of the speech dispels any illusions that the condemnatory remarks made by petitioner could not reasonably be thought to relate to the conduct of this trial. In the context of the entire speech it is inescapably a direct reflection on the fairness and integrity of this particular judge in this particular case. This was no abstract assault on the rigors of hearsay. Petitioner attacked the fairness of the trial and the scrapping of the rules of evidence. She then pointed to a ruling of Judge Wiig which she said was highly prejudicial and hardly left doubt that it was made in this particular trial. She then repeated her charge that the trial was unfair and the rules made up. To suggest that the only reasonable inference to be drawn from these remarks is that the conduct of the prosecution or the law of evidence in the abstract was impugned, is really asking too much from judges, even if we accept Mr. Justice Holmes' view that judges "are apt to be naif, simple-minded men." Holmes, Collected Legal Papers, p. 295. The attacks on fairness and the misuse of rules are made vivid by the illustration used—and that illustration directly involved Judge Wiig.[10]

---

[10] Certainly Mrs. Sawyer's explanation of these remarks does not help us rationally to avoid Holmes' characterization. After a discussion of the refusal of the Hawaii Supreme Court to admit the evidence in the previous trial referred to by Mrs. Sawyer, petitioner was asked:

"Mr. Barlow: In other words, would it be fair to say that you paralleled that with the phrase that Mr. Matsuoka attributes to you: 'With the same situation, a Federal judge, sitting on a Federal Bench, permits Crouch to testify about 27 years ago what was said then'?

"The Witness: I used the Palakiko-Majors case as a contrast to Mr. Crouch's testimony and the hearsay testimony in the conspiracy case.

[*Footnote 10 continued on p. 663.*]

It is true that the charges which were found proven as the basis of the suspension did not state in terms that petitioner intended to obstruct justice. To reverse the two courts below on this ground is to resurrect the worst niceties of long-interred common-law pleading. The charges on the basis of which the petitioner was found guilty of misconduct are not to be read with "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." *Paraiso* v. *United States,* 207 U. S. 368, 372. It was found that her attacks on the fairness of the trial and the integrity of the judge at a "public" meeting, while she was actively engaged in the conduct of the defense, rose to the level of "gross misconduct." This is not a charge of an attack made in a private conversation between friends. Whether there has been professional misconduct must depend upon the situation in which improper remarks were uttered. Thus, we would have to ignore what the Hawaii court had before it and was compelled to consider, did we not take into account the severely aggravating circumstances under which this speech was made. This attack was made at a public gathering announced as such. It was advertised as a discussion of the Smith Act trial then under way. That trial was a matter of great controversy and public interest

---

"Q. That Judge Wiig was allowing in the present Smith Act case, is that right?

"A. *The motions hadn't been argued yet.*

"Q. No, but that Judge Wiig was allowing in the present Smith Act case?

"A. Yes, he was.

"Q. That is what you were critical about? Is that right?

"A. *I was reporting. I left that to the audience.*" (Emphasis added.)

509615 O–59–45

and was being reported daily on the front page of the Honolulu newspapers.[11] It is true that the speech was made on the Island of Hawaii, not on Oahu where the trial took place. However, Hawaii in 1952 was not the inaccessible wilds of Africa in the time of Dr. Livingston, but part of a community bound together by modern means of communication and transportation, and news could be, and was in this very case, transmitted instantaneously by radiophone to Honolulu. See the Honolulu Star Bulletin for Dec. 15, 1952, p. 5. The news story of petitioner's speech was in the Honolulu newspapers the next day. *Ibid.* The speech was made at a time when motions concerning the very evidence which petitioner was castigating were still *sub judice*. The attacks on fairness, the descriptions of the trial as horrible and shocking, were made while the jury was open and receptive to media of communication, to the impregnating atmosphere to which juries, certainly in this country, are subjected. Even though petitioner may not have had a provable desire, the specific intent, to affect the pending trial and its outcome, are we really required to attribute to the petitioner a child-like unawareness of the inevitability that her remarks would be reported and find their way to judge or jury, as they did? The very next day the speech came to the judge's attention and registered so powerfully that he felt called upon to defend his conduct of the trial in open court.

The record is thus replete with evidence to support the conclusion that virtually the entire speech constituted a direct attack on the judicial conduct of this trial during its progress by one of the lawyers for the defense. When a lawyer attacks the fairness, the evenhandedness, and

---

[11] See, *e. g.*, the Honolulu Star Bulletin for the month of December. There are also references throughout the record to the notorious nature of the trial.

the integrity of the proceedings in a trial in which he himself is actively engaged, in the inflammatory, public fashion that this record reveals, supplemented with specific attack on the presiding judge, how can the conclusion be escaped that it was not rules of law in the abstract which were assailed, but the manner in which the processes of justice in the particular case were being conducted? More particularly, such an attack inescapably impugns the integrity of the judge. It is he who truly embodies the law as the guardian of the rights of defendants to justice under law. If a record is to be considered in its entirety, and not to be read through exculpatory glasses, the proof will be found to be conclusive that the findings of the Hawaii Supreme Court are supported by the evidence, and that, in relation to a pending trial, those findings constituted a fair basis for the conclusion that petitioner has "committed . . . gross misconduct."

Having arrived at this conclusion, our task is at an end, and the order suspending Mrs. Sawyer from the practice of law for one year should be affirmed. But throughout the opinion of MR. JUSTICE BRENNAN runs the strong intimation that if the findings are supportable, a suspension based on them would be unconstitutional. This must be the import of the opinion's discussion of a lawyer's right to criticize law. For if we find that the evidence supports the findings, no matter what we think of the wisdom of suspending an attorney on the basis of such findings, we can only reverse if the Constitution so commands. Nor does it matter whether the suspension was based on an act of the Hawaii Legislature or was an exercise of the judicial power of the Hawaii Supreme Court. The controlling question is the power of a Territory, like a State, as a whole, whatever the organ through which a State speaks. *Rippey* v. *Texas,* 193 U. S. 504, 509; *Castillo* v. *McConnico,* 168 U. S. 674, 683; *Missouri* v. *Dockery,* 191 U. S. 165, 171; *Iowa-Des Moines National*

Bank v. *Bennett,* 284 U. S. 239, 244; *Skiriotes* v. *Florida,* 313 U. S. 69, 79. (There is no basis for suggesting that Congress has restricted the judicial power of Hawaii so as to bar the action taken by the Supreme Court of Hawaii.)

The problem raised by this case—is the particular conduct in which this petitioner engaged constitutionally protected from the disciplinary proceedings of courts of law?—cannot be disposed of by general observations about freedom of speech. Of course, the free play of the human mind is an indispensable prerequisite of a free society. And freedom of thought is meaningless without freedom of expression. But the two great Justices to whom we mostly owe the shaping of the constitutional protection of freedom of speech, Mr. Justice Holmes and Mr. Justice Brandeis, did not erect freedom of speech into a dogma of absolute validity nor enforce it to doctrinaire limits. Time, place and circumstances determine the constitutional protection of utterance. The First Amendment and the Fourteenth Amendment, insofar as it protects freedom of speech, are no exception to the law of life enunciated by Ecclesiastes: "For everything there is a season, and a time for every purpose under heaven." And one of the instances specifically enumerated by the Preacher controls our situation: "[A] time to keep silence, and a time to speak." Eccles. 3:1, 7. Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer. If the prosecutor in this case had felt hampered by some of the rulings of the trial judge, and had assailed the judge for such rulings at a mass meeting, and a conviction had followed, and that prosecutor had been disciplined for such conduct according to the

orderly procedure for such disciplinary action, is it thinkable that this Court would have found that such conduct by the prosecutor was a constitutionally protected exercise of his freedom of speech, or, indeed, would have allowed the conviction to stand?

Only the other day, the Court of Appeals for the Second Circuit (Swan, Madden and Hincks, JJ.) severely reprimanded a United States attorney for a speech in response to a prior invitation by alumni of a law school but made while he was conducting an important criminal trial, although the speech contained no reference to the pending case or to any of its defendants but merely "expatiated on the menace of organized crime." *United States* v. *Stromberg,* 268 F. 2d 256, decided June 15, 1959. Even under the most favoring circumstances—an able, fearless, and fastidiously impartial judge, competent and scrupulous lawyers, a befittingly austere court-room atmosphere—trial by jury of a criminal case where public feeling is deeply engaged is no easy accomplishment, as every experienced lawyer knows, if due regard is to be had to the letter and spirit of the Constitution for such a trial. It is difficult enough to seal the court-room, as it were, against outside pressures. The delicate scales of justice ought not to be willfully agitated from without by any of the participants responsible for the fair conduct of the trial. To be sure, a prosecutor carries a somewhat heavier responsibility in the maintenance of the standards of criminal justice than does counsel for the defense. But the difference in responsibility is surely not so vast that counsel for defense has a constitutionally guarded freedom to conduct himself as this petitioner has been found to do, when that same conduct would bring condign punishment for the prosecutor.

What we are concerned with is the specific conduct, as revealed by this record, of a particular lawyer, and not whether like findings applied to an abstract situation

relating to an abstract lawyer would support a suspension. All the circumstances we have set forth must determine judgment. Here was a public meeting addressed by counsel for the defense, haranguing a crowd on the unfairness to the defendant of the proceedings in court, with the high probability indeed almost certainty under modern conditions that the goings-on of the meeting would come to the attention of the presiding judge and the jury. It took place in a case in which public interest and public tempers had been aroused. When the story of the meeting came to the attention of the judge, he felt obliged publicly to defend his conduct. It is hard to believe that this Court should hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press, and express to them his grievances against the conduct of the trial and the judge. "Legal trials," said this Court, "are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California,* 314 U. S. 252, 271.

Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution. An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded.

Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpen what he says but he imparts to his attack inflaming and warping significance. He says that the very court-room into which he walks to plead his case is a travesty, that the procedures and reviews established to protect his client from such conduct are a sham. "We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion." *In re Howell,* 10 N. J. 139, 142, 89 A. 2d 652, 653 (concurring opinion). No matter how narrowly conceived this role may be, it has been betrayed by a lawyer who has engaged in the kind of conduct here found by the Hawaii court. Certainly this Court, the supreme tribunal charged with maintaining the rule of law, should be the last place in which these attacks on the fairness and integrity of a judge and the conduct of a trial should find constitutional sanction.

I would affirm the judgment.

MR. JUSTICE CLARK, dissenting.

While I join in the dissenting opinion of MR. JUSTICE FRANKFURTER, I think it appropriate to add a few words by way of emphasis. Three different fact finders, including an administrative body, the Supreme Court of Hawaii, and a United States Court of Appeals, have agreed on the facts and conclusions of fact as shown by this record. Mrs. Sawyer, while of counsel in a Smith Act case then on trial before a jury, and Jack Hall, the chief defendant in the case, each made a speech before a large public

gathering sponsored by a committee for Hall's defense. In Mrs. Sawyer's speech, she charged "that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the Government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created." No one, least of all Mrs. Sawyer, denies that she said what she was charged with saying. Hawaii has declared her action gross misconduct violative of the Canons of Professional Ethics as adopted by its court.

But this Court says, strangely enough, that these facts are not "capable of supporting the findings" that in so doing Mrs. Sawyer "impugned the integrity of the judge presiding . . . in the said pending case . . . and thus tended to also create disrepect for the courts of justice and judicial officers generally." 41 Haw., at 422. The principal opinion says that Mrs. Sawyer's conduct was merely an innocent general attack on the Smith Act and judicial trials held thereunder.

But this broad brush leaves the whitewash too thin. For not only Mrs. Sawyer's testimony but also the statement of her own lawyer stand out clear and unanswerable. At the initial hearing in Hawaii, Mrs. Sawyer's then counsel said that hers "was a talk about what was going on in the Smith Act trial here in Honolulu. Now let's not fool ourselves about that." Her present counsel has talked the Court into doing just that and in so doing has also made a fool of our judicial processes.

To say that there is no reasonable support in the evidence for Hawaii's conclusion, as disclosed by a fair reading of the record some six and a half years later and some 5,000 miles away, is only to say that the 12 concurring officials, all of whom are trained in the law and who under oath made and passed upon these findings at trial and

on appeal, arrived at a conclusion no reasonable man could reach. By thus at this late date second-guessing those constituted authorities who in regular course have decided the facts to the contrary, the Court impugns the intelligence of the 12 individuals so participating and scatters to the winds the sincere effort of the Supreme Court of Hawaii to preserve and protect its own integrity and respect as well as that of the law. I regret that the highest court in our land has today set these winds into motion—particularly in our farthest outpost—when respect for the courts, the bar, and the law, as well as for orderly procedure, is so much needed in the world.

INGRAM ET AL. *v.* UNITED STATES.

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

No. 457. Argued April 30, 1959.—Decided June 29, 1959.

The four petitioners and certain others were convicted of violating 18 U. S. C. § 371 by conspiring to evade and defeat the payment of the federal taxes imposed on lottery operations. All of them had participated in the conduct of, and in an attempt to conceal, lottery operations which were violations of state law. Two of the petitioners were proprietors of the enterprise and were liable for the federal wagering taxes, and they failed to pay them. The other two were mere employees who were not liable for the payment of such taxes, and there was nothing in the record to show that they knew that the taxes had not been paid. *Held:*

1. The evidence was sufficient to support a conclusion that the two petitioners who were proprietors of the business were parties to an agreement to attempt to defeat or evade payment of the federal wagering taxes imposed upon them, and their convictions are sustained. Pp. 676–677.

2. Since there is nothing in the record to show that the two petitioners who were mere employees knew of the proprietors' liability for these taxes, the record is insufficient to show that they were parties to a conspiracy to evade and defeat the payment of such taxes, and their convictions cannot stand. Pp. 677–681.

259 F. 2d 886, affirmed in part and reversed in part.

Wesley R. Asinof argued the cause and filed a brief for petitioners.

J. Dwight Evans, Jr. argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *J. F. Bishop.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners and twenty-two others were indicted and tried for conspiracy to evade and defeat the payment

of the federal taxes imposed on lottery operations. The petitioners and six others were convicted.[1] Their convictions were affirmed by the Court of Appeals. 259 F. 2d 886. Certiorari was granted to examine the scope of the conspiracy statute in the context of these provisions of the Internal Revenue Code. 358 U. S. 905.

At the trial it was established by overwhelming evidence that the petitioners had engaged with numerous others in a closely organized and large-scale operation of the numbers game in Atlanta, Georgia, during the years

---

[1] Section 4401 of the Internal Revenue Code of 1954 provides:

"(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

. . . . . .

"(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery." 68A Stat. 525.

Section 4411 of the Code provides: "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." 68A Stat. 527.

Section 4421 of the Code includes in the definition of "wager" "any wager placed in a lottery conducted for profit" and includes in the definition of "lottery" "the numbers game, policy, and similar types of wagering." 68A Stat. 528.

Section 7201 of the Code provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . ." 68A Stat. 851.

18 U. S. C. § 371 provides: "If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . . ." 62 Stat. 701.

These were the links in the statutory chain under which the petitioners were indicted and convicted.

1954 to 1957, the period covered by the indictment.[2] That activity is a criminal offense under Georgia law.[3] The evidence also established in intricate detail that the participants in this large-scale enterprise had, through a variety of carefully planned stratagems, made every effort to conceal its operation.[4] Finally, the evidence showed that none of the petitioners had paid any of the federal taxes in question. There was no direct evidence to show that any of the petitioners knew of these taxes.

In addition to the conspiracy count, the indictment under which the petitioners were tried also contained two additional counts charging them with the substantive offenses of willful failure to pay the special tax imposed by § 4411 of the Internal Revenue Code,[5] in violation of § 7203 of the Code,[6] and of failure to register as required by § 4412 of the Code,[7] in violation of § 7272 of the

---

[2] Some of the items found when the headquarters of the operation was raided in 1957 were clearly indicative of the magnitude of the enterprise. Among the items found on that occasion were some 2,400 scratch pads of the type used in numbers operations, thousands of coin wrappers, a police alarm radio, with a secret code of police calls, two high-frequency radios, and six fictitious automobile registrations with license tags. Petitioner Ingram was alleged to have stated in 1955 that the "business is down to about" $3,500 per day.

[3] Georgia Code (1953 Revision), § 26–6502.

[4] There was extensive evidence, for example, that participants in the enterprise used false license plates on their automobiles, took evasive routes to the "check-up headquarters" of the operation, used false names on occasion, and attempted to bribe local law enforcement officers.

[5] See Note 1, *supra*.

[6] This section of the Code provides: "Any person required under this title to pay any . . . tax, . . . who willfully fails to pay such . . . tax, . . . shall . . . be guilty of a misdemeanor . . . ." 68A Stat. 851.

[7] This section of the Code provides: "Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district— . . . ." 68A Stat. 527.

Code.[8] The trial took place subsequent to the announcement of this Court's decision in *United States* v. *Calamaro,* 354 U. S. 351, and the district judge correctly instructed the jury that conviction of the substantive offenses would be justified only as to any defendants found to be "writers," "bankers," or to have "a proprietary interest in such lottery operation." Two of the petitioners, Ingram and Jenkins, were found guilty on both substantive counts and do not question these convictions, conceding the sufficiency of the evidence to show that Ingram was the banker and that Jenkins had a proprietary interest in the enterprise. The evidence showed that the other two petitioners, Smith and Law, were relatively minor clerical functionaries at the headquarters of the operation, and they were acquitted on the substantive counts.

In sum, what this record presents then is a picture of a large-scale and profitable gambling business conducted in Atlanta over a period of several years by petitioners Ingram and Jenkins. The business involved many participants, including the petitioners Smith and Law. It was a business made criminal by the laws of Georgia, and everyone in the organization participated in trying to keep its operation secret. Ingram and Jenkins were liable for the federal taxes imposed by §§ 4401 and 4411 of the Internal Revenue Code and willfully failed to pay them. They were required by § 4412 of the Code to register with the official in charge of the Internal Revenue District, and they failed to do so. Smith and Law were not themselves subject to any of the taxes here involved. The question presented is whether this factual foundation is sufficient to support a conviction of the petitioners, or any of them, for conspiracy to attempt to evade or defeat federal taxes,

[8] This section of the Code provides: "Any person who fails to register with the Secretary or his delegate as required by this title . . . shall be liable to a penalty of $50." 68A Stat. 866.

"the gravest of offenses against the revenues." *Spies* v. *United States,* 317 U. S. 492, 499. We hold that it was sufficient as to Ingram and Jenkins, and insufficient as to Smith and Law.

As to Ingram and Jenkins, the record is clear. They were entrepreneurs in a vast and profitable gambling business. They were clearly liable for the special taxes and registration requirements that the Federal Government has imposed upon the operators of that kind of business. *United States* v. *Kahriger,* 345 U. S. 22. Not only did they willfully fail and neglect to pay these taxes, but they conspired to conceal the operation of the business and the source of the income upon which the tax is imposed.

In *Spies* v. *United States* this Court had occasion to consider the quantum and type of evidence required to support a conviction for the substantive offense of attempting to defeat or evade federal taxes as contrasted with the lesser proof required to convict of the misdemeanor of willfully failing to file a return or to pay a tax. It was there said:

> "Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.
>
> "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or

> alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." 317 U. S., at 499.

In *Spies,* the Court was dealing with the substantive offense, not with a conspiracy to commit it. But the evidence of agreement between Ingram and Jenkins to operate this gambling enterprise, which operation made them liable for federal taxes, and to conceal its operation and its income is clear on this record, and is virtually conceded by the petitioners. The evidence was sufficient to support a conclusion that they were engaged not only in a conspiracy to operate and conceal their gambling enterprise, but that they were also parties to an agreement to attempt to defeat or evade the federal taxes imposed upon the operators of such a business.

As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law. Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter.

It is fundamental that a conviction for conspiracy under 18 U. S. C. § 371 cannot be sustained unless there is "proof

of an agreement to commit an offense against the United States." *Pereira* v. *United States,* 347 U. S. 1, 12. There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation. "Without the knowledge, the intent cannot exist." *Direct Sales Co.* v. *United States,* 319 U. S. 703, 711.

"[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." [9] The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge of willfulness. *Spies* v. *United States, supra.* Cf. *United States* v. *Falcone,* 311 U. S. 205.

Indulging, as of course we must, in that view of the evidence most favorable to the Government, we simply cannot discern adequate foundation in the present record for a finding that Smith and Law had such knowledge of Ingram's and Jenkins' wagering tax liability. The record is completely barren of any direct evidence of such knowledge. It was not shown, for example, that any reference had ever been made by any of the petitioners to possible tax liability, or that they had filed a return or paid a tax in previous years. The Government relied instead upon evidence which, it asserts, circumstantially proved the requisite knowledge on the part of Smith and Law. These circumstances were simply the intimate connection of Smith and Law with the operation of the lottery itself,

---

[9] See "Developments in the Law—Criminal Conspiracy," 72 Harv. L. Rev. 920, at 939, and authorities there cited.

their cooperation in conducting it secretly,[10] and their apparent knowledge that it was conducted at a profit. The Government points out that not only would payment of the taxes have decreased the profits to be derived from operation of the lottery, but in addition would have required registration, including the names and addresses of the bankers and writers, with the local internal revenue office and the posting of a wagering tax stamp at the place of business. 26 U. S. C. (Supp. V) §§ 4412, 6806 (c). The information contained in the registration would have been available to local law enforcement officials. 26 U. S. C. (Supp. V) § 6107.

Yet these circumstances actually are colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes. Certainly the secrecy of the operation did not go to show that knowledge. This is not a case where efforts at concealment would be reasonably explainable only in terms of motivation to evade taxation. Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted. A conspiracy, to be sure, may have multiple objectives, *United States* v. *Rabinowich,* 238 U. S. 78, 86, and if one of its objectives, even a minor one, be the evasion of

[10] The Court's decisions in *Grunewald* v. *United States,* 353 U. S. 391; *Lutwak* v. *United States,* 344 U. S. 604; and *Krulewitch* v. *United States,* 336 U. S. 440, do not, as petitioners appear to contend, prevent the jury from treating this subsidiary objective as an element of the conspiracy. Those cases hold only that the life of the conspiracy cannot be extended by evidence of concealment after the conspiracy's criminal objectives have been fully accomplished. ". . . [A] vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." *Grunewald* v. *United States, supra,* at 405.

509615 O–59–46

federal taxes, the offense is made out, though the primary objective may be concealment of another crime. See *Spies* v. *United States, supra,* at 499. But the fact that payment of the federal taxes by Ingram and Jenkins might have resulted in disclosure of the lottery and subsequent prosecution of Smith and Law by local authorities would permit an inference that concealment of the lottery was motivated by a purpose to evade payment of federal taxes only if, independently, there were proof that Smith and Law knew of the tax liability. Evidence that Smith and Law might have wanted the taxes to be evaded if they had known of them, and that they engaged in conduct which could have been in furtherance of a plan to evade the taxes if they had known of them, is not evidence that they did know of them.

What was said in *Direct Sales Co.* v. *United States* on behalf of a unanimous Court is of particular relevance here:

> "Without the knowledge, the intent cannot exist. . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." 319 U. S., at 711.

Smith and Law were not liable for the wagering tax. *United States* v. *Calamaro, supra.* They could not, therefore, have been convicted of the crime which they were charged with having conspired to commit. To sustain their conviction on this record would make of the crime of conspiracy just that "dragnet to draw in all substantive crimes" against which the Court warned in *Direct Sales.* Cf. *Gebardi* v. *United States,* 287 U. S. 112.

Accordingly, while affirming the convictions of Ingram and Jenkins, we hold that the motions for acquittal of Smith and Law should have been sustained by the District Court, and that the Court of Appeals was in error in affirming their convictions.

Judgment accordingly.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring in part and dissenting in part.

The constitutional validity of the occupational tax provisions on persons engaged in the business of accepting wagers has been established by *United States* v. *Kahriger,* 345 U. S. 22. In construing those provisions, however, we have held that no weight can be given to the suggestion that they must be interpreted on the premise that their enactment was " 'in part motivated by a congressional desire to suppress wagering.' " *United States* v. *Calamaro,* 354 U. S. 351. In that case we held that only "writers," "bankers," or those who have "a proprietary interest" in a lottery operation are subject to the taxing statutes, and that therefore only those persons can be held for violation of their substantive provisions.

In this case the Government has in effect sought to by-pass *Calamaro* by the simple expedient of indicting persons connected with a lottery operation not for the substantive offenses proscribed by the Internal Revenue Code, but instead for conspiring with those members of the lottery operation who are personally subject to the relevant excise taxes to evade payment of those taxes. Two essential elements of the crime, *first,* knowledge that the taxes are due, and, *second,* a "willful and positive

attempt to evade tax in any manner or to defeat it by any means," *Spies* v. *United States,* 317 U. S. 492, 499, are sought to be established here by the naked fact that the lottery operation was carefully concealed by all who participated in it. Since lotteries are unlawful in virtually every State, more particularly in Georgia where this enterprise was carried on, and therefore require concealment if they are to continue to operate, to permit a conviction on such evidence alone would relegate *Calamaro* to the status of an unmeaningful relic. The opinion of the Court convincingly demonstrates why the evidence in the case does not support a finding by the jury that petitioners Smith and Law knew that a tax was owing by petitioners Ingram and Jenkins, and that they undertook acts of concealment for the purpose, in whole or in part, of aiding an evasion of that tax.

But I think that the very considerations which lead the Court to reverse the conviction of Smith and Law equally require a reversal as to Ingram and Jenkins. An indispensable element of the crime of tax evasion is knowledge that a tax is imposed. This knowledge may be proved directly or circumstantially. Here there is no direct proof, and the sole circumstantial evidence relied on by the Government is the fact of concealment of the lottery operation. But if, as the Court holds, "certainly the secrecy of the operation did not go to show . . . knowledge" by Smith and Law that their superiors were liable for a federal tax, I am at a loss to understand how this factor can at the same time suffice to show knowledge on the part of petitioners Ingram and Jenkins that they themselves were liable for a federal tax. The latter no less than the former must be shown to have actual knowledge that a tax is owing before they can be convicted of a conspiracy to evade that tax, and the Court's reasoning plainly demonstrates to me that the Government has made no such showing in this case.

I think that sight has been lost of the fact that this is a prosecution for conspiracy to violate a federal taxing statute, not for violation of local gambling laws. An overwhelming showing has been made that petitioners were participants in a large lottery enterprise, but that does not suffice to support conviction of the crime with which they are here charged.

KINGSLEY INTERNATIONAL PICTURES CORP. *v.* REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 394. Argued April 23, 1959.—Decided June 29, 1959.

Under provisions of the New York Education Law which were construed by the Court of Appeals of New York as requiring the denial of a license to show a motion picture when "its subject matter is adultery presented as being right and desirable for certain people under certain circumstances," that Court sustained denial of a license to show a motion picture which it found "alluringly portrays adultery as proper behavior." *Held:* As thus construed and applied, the New York statute violates the freedom to advocate ideas which is guaranteed by the First Amendment and protected by the Fourteenth Amendment from infringement by the States. Pp. 684–690.

4 N. Y. 2d 349, 115 N. E. 2d 197, 175 N. Y. S. 2d 39, reversed.

Ephraim London argued the cause for appellant. With him on the brief were *Seymour H. Chalif* and *Stephen A. Wise.*

Charles A. Brind, Jr. argued the cause and filed a brief for appellees.

MR. JUSTICE STEWART delivered the opinion of the Court.

Once again the Court is required to consider the impact of New York's motion picture licensing law upon First Amendment liberties, protected by the Fourteenth Amendment from infringement by the States. Cf. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495.

The New York statute makes it unlawful "to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel

[with certain exceptions not relevant here], unless there is at the time in full force and effect a valid license or permit therefor of the education department. . . ." [1] The law provides that a license shall issue "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime. . . ." [2] A recent statutory amendment provides that, "the term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior." [3]

As the distributor of a motion picture entitled "Lady Chatterley's Lover," the appellant Kingsley submitted that film to the Motion Picture Division of the New York Education Department for a license. Finding three isolated scenes in the film " 'immoral' within the intent of our Law," the Division refused to issue a license until the scenes in question were deleted. The distributor petitioned the Regents of the University of the State of New York for a review of that ruling.[4] The Regents upheld the denial of a license, but on the broader ground that "the whole theme of this motion picture is immoral under said law, for that theme is the presentation of adultery as a desirable, acceptable and proper pattern of behavior."

---

[1] McKinney's N. Y. Laws, 1953, Education Law, § 129.

[2] McKinney's N. Y. Laws, 1953, Education Law, § 122.

[3] McKinney's N. Y. Laws, 1953 (Cum. Supp. 1958), Education Law, § 122–a.

[4] "An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents." McKinney's N. Y. Laws, 1953, Education Law, § 124.

Kingsley sought judicial review of the Regents' determination.[5] The Appellate Division unanimously annulled the action of the Regents and directed that a license be issued. 4 App. Div. 2d 348, 165 N. Y. S. 2d 681. A sharply divided Court of Appeals, however, reversed the Appellate Division and upheld the Regents' refusal to license the film for exhibition. 4 N. Y. 2d 349, 151 N. E. 2d 197, 175 N. Y. S. 2d 39.[6]

The Court of Appeals unanimously and explicitly rejected any notion that the film is obscene.[7] See *Roth*

---

[5] The proceeding was brought under Art. 78 of the New York Civil Practice Act, Gilbert-Bliss' N. Y. Civ. Prac., Vol. 6B, 1944, 1949 Supp., § 1283 *et seq.* See also, McKinney's N. Y. Laws, 1953, Education Law, § 124.

[6] Although four of the seven judges of the Court of Appeals voted to reverse the order of the Appellate Division, only three of them were of the clear opinion that denial of a license was permissible under the Constitution. Chief Judge Conway wrote an opinion in which Judges Froessel and Burke concurred, concluding that denial of the license was constitutionally permissible. Judge Desmond wrote a separate concurring opinion in which he stated: "I confess doubt as to the validity of such a statute but I do not know how that doubt can be resolved unless we reverse here and let the Supreme Court have the final say." 4 N. Y. 2d, at 369, 151 N. E. 2d, at 208, 175 N. Y. S. 2d, at 55. Judge Dye, Judge Fuld, and Judge Van Voorhis wrote separate dissenting opinions.

[7] The opinion written by Chief Judge Conway stated: "[I]t is curious indeed to say in one breath, as some do, that obscene motion pictures may be censored, and then in another breath that motion pictures which alluringly portray adultery as proper and desirable may not be censored. As stated above, 'The law is concerned with effect, not merely with but one means of producing it.' It must be firmly borne in mind that to give obscenity, as defined, the stature of the only constitutional limitation is to extend an invitation to corrupt the public morals by methods of presentation which craft will insure do not fall squarely within the definition of that term. Precedent, just as sound principle, will not support a statement that motion pictures must be 'out and out' obscene before they may be

v. *United States,* 354 U. S. 476. Rather, the court found that the picture as a whole "alluringly portrays adultery as proper behavior." As Chief Judge Conway's prevailing opinion emphasized, therefore, the only portion of the statute involved in this case is that part of §§ 122 and 122–a of the Education Law requiring the denial of a license to motion pictures "which are immoral in that they *portray* 'acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior.'" [8] 4 N. Y. 2d, at 351, 151 N. E. 2d, at 197, 175 N. Y. S. 2d, at 40. A majority of the Court of Appeals ascribed to that language a precise purpose of the New York Legislature to require the denial of a license to a motion picture "because its subject matter is adultery presented as being right and desirable for certain people under

---

censored." 4 N. Y. 2d, at 364, 151 N. E. 2d, at 205, 175 N. Y. S. 2d, at 51.

Judge Desmond's concurring opinion stated: "[It is not] necessarily determinative that this film is not obscene in the dictionary sense. . . ." 4 N. Y. 2d, at 369, 151 N. E. 2d, at 208, 175 N. Y. S. 2d, at 55. Judge Dye's dissenting opinion stated: "No one contends that the film in question is obscene within the narrow legal limits of obscenity as recently defined by the Supreme Court. . . ." 4 N. Y. 2d, at 371, 151 N. E. 2d, at 210, 175 N. Y. S. 2d, at 57. Judge Van Voorhis' dissenting opinion stated: "[I]t is impossible to write off this entire drama as 'mere pornography' . . . ." Judge Van Voorhis, however, would have remitted the case to the Board of Regents to consider whether certain "passages" in the film "might have been eliminated as 'obscene' without doing violence to constitutional liberties." 4 N. Y. 2d, at 375, 151 N. E. 2d, at 212, 175 N. Y. S. 2d, at 60.

[8] This is also emphasized in the brief of counsel for the Regents, which states, "The full definition is not before this Court—only these parts of the definition as cited—and any debate as to whether other parts of the definition are a proper standard has no bearing in this case."

certain circumstances." [9] 4 N. Y. 2d, at 369, 151 N. E. 2d, at 208, 175 N. Y. S. 2d, at 55 (concurring opinion).

We accept the premise that the motion picture here in question can be so characterized. We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it. *Albertson* v. *Millard,* 345 U. S. 242; *United States* v. *Burnison,* 339 U. S. 87; *Aero Mayflower Transit Co.* v. *Board of R. R. Comm'rs,* 332 U. S. 495. That construction, we emphasize, gives to the term "sexual immorality" a concept entirely different from the concept embraced in words like "obscenity" or "pornography." [10] Moreover, it is not suggested that the film would itself operate as an incitement to illegal action. Rather, the New York Court of Appeals tells us that the relevant portion of the New York Education Law requires the denial of a license to any motion picture which approvingly portrays an adulterous relationship, quite without reference to the manner of its portrayal.

What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.

It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This

---

[9] In concurring, Judge Desmond agreed that this was the meaning of the statutory language in question, and that "the theme and content of this film fairly deserve that characterization. . . ." 4 N. Y. 2d, at 366, 151 N. E. 2d, at 206, 175 N. Y. S. 2d, at 52.

[10] See by way of contrast, *Swearingen* v. *United States,* 161 U. S. 446; *United States* v. *Limehouse,* 285 U. S. 424.

argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, "a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." *Whitney* v. *California,* 274 U. S. 357, at 376 (concurring opinion). "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech. . . ." *Id.,* at 378.[11]

The inflexible command which the New York Court of Appeals has attributed to the State Legislature thus cuts so close to the core of constitutional freedom as to make it quite needless in this case to examine the periphery. Specifically, there is no occasion to consider the appellant's contention that the State is entirely without power to require films of any kind to be licensed prior to their exhibition. Nor need we here determine whether, despite problems peculiar to motion pictures, the controls which a State may impose upon this medium of expression

---

[11] Thomas Jefferson wrote more than a hundred and fifty years ago, "But we have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors. And especially when the law stands ready to punish the first criminal *act* produced by the false reasoning. These are safer correctives than the conscience of a judge." Letter of Thomas Jefferson to Elijah Boardman, July 3, 1801, Jefferson Papers, Library of Congress, Vol. 115, folio 19761.

are precisely coextensive with those allowable for newspapers,[12] books,[13] or individual speech.[14] It is enough for the present case to reaffirm that motion pictures are within the First and Fourteenth Amendments' basic protection. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495.

Reversed.

MR. JUSTICE BLACK, concurring.

I concur in the Court's opinion and judgment but add a few words because of concurring opinions by several Justices who rely on their appraisal of the movie Lady Chatterley's Lover for holding that New York cannot constitutionally bar it. Unlike them, I have not seen the picture. My view is that stated by MR. JUSTICE DOUGLAS, that prior censorship of moving pictures like prior censorship of newspapers and books violates the First and Fourteenth Amendments. If despite the Constitution, however, this Nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found. So far as I know, judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the Nation. In addition, the Justices of this Court seem especially unsuited to make the kind of value judgments—as to what movies are good or bad for local communities—which the concurring opinions appear to require. We are told that the only way we can decide whether a State or municipality can constitutionally bar movies is for this Court to view and appraise each movie on a case-by-case basis. Under these circumstances, every member of the

---

[12] Cf. *Near* v. *Minnesota,* 283 U. S. 697.

[13] Cf. *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436; *Alberts* v. *California,* 354 U. S. 476.

[14] Cf. *Thomas* v. *Collins,* 323 U. S. 516; *Thornhill* v. *Alabama,* 310 U. S. 88.

Court must exercise his own judgment as to how bad a picture is, a judgment which is ultimately based at least in large part on his own standard of what is immoral. The end result of such decisions seems to me to be a purely personal determination by individual Justices as to whether a particular picture viewed is too bad to allow it to be seen by the public. Such an individualized determination cannot be guided by reasonably fixed and certain standards. Accordingly, neither States nor moving picture makers can possibly know in advance, with any fair degree of certainty, what can or cannot be done in the field of movie making and exhibiting. This uncertainty cannot easily be reconciled with the rule of law which our Constitution envisages.

The different standards which different people may use to decide about the badness of pictures are well illustrated by the contrasting standards mentioned in the opinion of the New York Court of Appeals and the concurring opinion of MR. JUSTICE FRANKFURTER here. As I read the New York court's opinion this movie was held immoral and banned because it makes adultery too alluring. MR. JUSTICE FRANKFURTER quotes Mr. Lawrence, author of the book from which the movie was made, as believing censorship should be applied only to publications that make sex look ugly, that is, as I understand it, less alluring.

In my judgment, this Court should not permit itself to get into the very center of such policy controversies, which have so little in common with lawsuits.

MR. JUSTICE FRANKFURTER, concurring in the result.

As one whose taste in art and literature hardly qualifies him for the *avant-garde,* I am more than surprised, after viewing the picture, that the New York authorities should have banned "Lady Chatterley's Lover." To assume that this motion picture would have offended Victorian

moral sensibilities is to rely only on the stuffiest of Victorian conventions. Whatever one's personal preferences may be about such matters, the refusal to license the exhibition of this picture, on the basis of the 1954 amendment to the New York State Education Law, can only mean that that enactment forbids the public showing of any film that deals with adultery except by way of sermonizing condemnation or depicts any physical manifestation of an illicit amorous relation. Since the denial of a license by the Board of Regents was confirmed by the highest court of the State, I have no choice but to agree with this Court's judgment in holding that the State exceeded the bounds of free expression protected by the "liberty" of the Fourteenth Amendment. But I also believe that the Court's opinion takes ground that exceeds the appropriate limits for decision. By way of reinforcing my brother HARLAN'S objections to the scope of the Court's opinion, I add the following.

Even the author of "Lady Chatterley's Lover" did not altogether rule out censorship, nor was his passionate zeal on behalf of society's profound interest in the endeavors of true artists so doctrinaire as to be unmindful of the facts of life regarding the sordid exploitation of man's nature and impulses. He knew there was such a thing as pornography, dirt for dirt's sake, or, to be more accurate, dirt for money's sake. This is what D. H. Lawrence wrote:

> "But even I would censor genuine pornography, rigorously. It would not be very difficult. In the first place, genuine pornography is almost always underworld, it doesn't come into the open. In the second, you can recognize it by the insult it offers invariably, to sex, and to the human spirit.
>
> "Pornography is the attempt to insult sex, to do dirt on it. This is unpardonable. Take the very lowest instance, the picture post-card sold underhand,

> by the underworld, in most cities. What I have seen of them have been of an ugliness to make you cry. The insult to the human body, the insult to a vital human relationship! Ugly and cheap they make the human nudity, ugly and degraded they make the sexual act, trivial and cheap and nasty." (D. H. Lawrence, Pornography and Obscenity, pp. 12–13.)

This traffic has not lessened since Lawrence wrote. Apparently it is on the increase. In the course of the recent debate in both Houses of Parliament on the Obscene Publications Bill, now on its way to passage, designed to free British authors from the hazards of too rigorous application in our day of Lord Cockburn's ruling, in 1868, in *Regina* v. *Hicklin*, L. R. 3 Q. B. 360, weighty experience was adduced regarding the extensive dissemination of pornographic materials.[1] See 597 Parliamentary Debates, H. C., No. 36 (Tuesday, December 16, 1958), cols. 992 *et seq.*, and 216 Parliamentary Debates H. L., No. 77 (Tuesday, June 2, 1959), cols. 489 *et seq.* Nor is there any reason to believe that on this side of the ocean there has been a diminution in the pornographic business which years ago sought a flourishing market in some of the leading secondary schools for boys, who presumably had more means than boys in the public high schools.

It is not surprising, therefore, that the pertinacious, eloquent and free-spirited promoters of the liberalizing legislation in Great Britain did not conceive the needs of a civilized society, in assuring the utmost freedom to those who make literature and art possible—authors, artists, publishers, producers, book sellers—easily attainable by sounding abstract and unqualified dogmas about freedom.

---

[1] "In the course of our enquiries, we have been impressed with the existence of a considerable and lucrative trade in pornography . . . ." Report of the Select Committee on Obscene Publications to the House of Commons, March 20, 1958, p. IV.

They had a keen awareness that freedom of expression is no more an absolute than any other freedom, an awareness that is reflected in the opinions of Mr. Justice Holmes and Mr. Justice Brandeis, to whom we predominantly owe the present constitutional safeguards on behalf of freedom of expression. And see *Near* v. *Minnesota,* 283 U. S. 697, 715–716, for limitations on constitutionally protected freedom of speech.[2]

In short, there is an evil against which a State may constitutionally protect itself, whatever we may think about the questions of policy involved. The real problem is the formulation of constitutionally allowable safeguards which society may take against evil without impinging upon the necessary dependence of a free society upon the fullest scope of free expression. One cannot read the debates in the House of Commons and the House of Lords and not realize the difficulty of reconciling these conflicting interests, in the framing of legislation on the ends of which there was agreement, even for those who most generously espouse that freedom of expression without which all freedom gradually withers.

It is not our province to meet these recalcitrant problems of legislative drafting. Ours is the vital but very limited task of scrutinizing the work of the draftsmen in order to determine whether they have kept within the narrow limits of the kind of censorship which even D. H. Lawrence deemed necessary. The legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion for sweeping within its condemnation what is permissible expression as

---

[2] "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases . . . ." 283 U. S., at 715–716.

well as what society may permissibly prohibit. Always remembering that the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit, we have struck down legislation phrased in language intrinsically vague, unless it be responsive to the common understanding of men even though not susceptible of explicit definition. The ultimate reason for invalidating such laws is that they lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society.

The New York legislation of 1954 was the product of careful lawyers who sought to meet decisions of this Court which had left no doubt that a motion-picture licensing law is not inherently outside the scope of the regulatory powers of a State under the Fourteenth Amendment. The Court does not strike the law down because of vagueness, as we struck down prior New York legislation. Nor does it reverse the judgment of the New York Court of Appeals, as I would, because in applying the New York law to "Lady Chatterley's Lover" it applied it to a picture to which it cannot be applied without invading the area of constitutionally free expression. The difficulty which the Court finds seems to derive from some expressions culled here and there from the opinion of the Chief Judge of the New York Court of Appeals. This leads the Court to give the phrase "acts of sexual immorality . . as desirable, acceptable or proper patterns of behavior" an innocent content, meaning, in effect, an allowable subject matter for discussion. But, surely, to attribute that result to the decision of the Court of Appeals, on the basis of a few detached phrases of Chief Judge Conway, is to break a faggot into pieces, is to forget that the meaning of language is to be felt and its phrases not to be treated disjointedly. "Sexual immorality" is not a new phrase in this branch of law and its implications dominate the

509615 O–59–47

context. I hardly conceive it possible that the Court would strike down as unconstitutional the federal statute against mailing lewd, obscene and lascivious matter, which has been the law of the land for nearly a hundred years, see the Act of March 3, 1865, 13 Stat. 507, and March 3, 1873, 17 Stat. 599, whatever specific instances may be found not within its allowable prohibition. In sustaining this legislation this Court gave the words "lewd, obscene and lascivious" concreteness by saying that they concern "sexual immorality." And only very recently the Court sustained the constitutionality of the statute. *Roth* v. *United States,* 354 U. S. 476.

Unless I misread the opinion of the Court, it strikes down the New York legislation in order to escape the task of deciding whether a particular picture is entitled to the protection of expression under the Fourteenth Amendment. Such an exercise of the judicial function, however onerous or ungrateful, inheres in the very nature of the judicial enforcement of the Due Process Clause. We cannot escape such instance-by-instance, case-by-case application of that clause in all the varieties of situations that come before this Court. It would be comfortable if, by a comprehensive formula, we could decide when a confession is coerced so as to vitiate a state conviction. There is no such talismanic formula. Every Term we have to examine the particular circumstances of a particular case in order to apply generalities which no one disputes. It would be equally comfortable if a general formula could determine the unfairness of a state trial for want of counsel. But, except in capital cases, we have to thread our way, Term after Term, through the particular circumstances of a particular case in relation to a particular defendant in order to ascertain whether due process was denied in the unique situation before us. We are constantly called upon to consider the alleged misconduct of a prosecutor as vitiating the fairness of a partic-

ular trial or the inflamed state of public opinion in a particular case as undermining the constitutional right to due process. Again, in the series of cases coming here from the state courts, in which due process was invoked to enforce separation of church and state, decision certainly turned on the particularities of the specific situations before the Court. It is needless to multiply instances. It is the nature of the concept of due process, and, I venture to believe, its high serviceability in our constitutional system, that the judicial enforcement of the Due Process Clause is the very antithesis of a Procrustean rule. This was recognized in the first full-dress discussion of the Due Process Clause of the Fourteenth Amendment, when the Court defined the nature of the problem as a "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasons on which such decision may be founded." *Davidson* v. *New Orleans,* 96 U. S. 97, 104. The task is onerous and exacting, demanding as it does the utmost discipline in objectivity, the severest control of personal predilections. But it cannot be escaped, not even by disavowing that such is the nature of our task.

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

While I join in the opinion of the Court, I adhere to the views I expressed in *Superior Films* v. *Department of Education,* 346 U. S. 587, 588–589, that censorship of movies is unconstitutional, since it is a form of "previous restraint" that is as much at war with the First Amendment, made applicable to the States through the Fourteenth, as the censorship struck down in *Near* v. *Minnesota,* 283 U. S. 697. If a particular movie violates a valid law, the exhibitor can be prosecuted in the usual way. I can find in the First Amendment no room for any censor

whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie.

Reference is made to British law and British practice. But they have little relevance to our problem, since we live under a written Constitution. What is entrusted to the keeping of the legislature in England is protected from legislative interference or regulation here. As we stated in *Bridges* v. *California,* 314 U. S. 252, 265, "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." If we had a provision in our Constitution for "reasonable" regulation of the press such as India has included in hers,[1] there would be room for argument that censorship in the interests of morality would be permissible. Judges sometimes try to read the word "reasonable" into the First Amendment or make the rights it grants subject to reasonable regulation (see *Beauharnais* v. *Illinois,* 343 U. S. 250, 262; *Dennis* v. *United States,* 341 U. S. 494, 523–525), or apply to the States a watered-down version of the First Amendment. See *Roth* v. *United States,* 354 U. S. 476, 505–506. But its language, in terms that are absolute, is utterly at war with censorship. Different questions may arise as to censorship of some news when the Nation is actually at war. But any possible exceptions are extremely limited. That is why the tradition represented by *Near* v. *Minnesota, supra,* represents our constitutional ideal.

---

[1] Section 19 (2) of the Indian Constitution permits "reasonable restrictions" on the exercise of the right of freedom of speech and expression in the interests, *inter alia,* of "decency or morality . . . defamation or incitement to an offence." This limitation is strictly construed; any restriction amounting to an "imposition" which will "operate harshly" on speech or the press will be held invalid. See *Seshadri* v. *District Magistrate, Tangore,* 41 A. I. R. (Sup. Ct.) 747, 749.

Happily government censorship has put down few roots in this country. The American tradition is represented by *Near* v. *Minnesota, supra.* See Lockhart and McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 324–325; Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 53 *et seq.* We have in the United States no counterpart of the Lord Chamberlain who is censor over England's stage. As late as 1941 only six States had systems of censorship for movies. Chafee, Free Speech in the United States (1941), p. 540. That number has now been reduced to four [2]—Kansas, Maryland, New York, and Virginia—plus a few cities. Even in these areas, censorship of movies shown on television gives way by reason of the Federal Communications Act. See *Allen B. Dumont Laboratories* v. *Carroll,* 184 F. 2d 153. And from what information is available, movie censors do not seem to be very active.[3] Deletion of the residual part of censorship that remains would constitute the elimination of an institution that intrudes on First Amendment rights.

MR. JUSTICE CLARK, concurring in the result.

I can take the words of the majority of the New York Court of Appeals only in their clear, unsophisticated and common meaning. They say that §§ 122 and 122–a of New York's Education Law "require the denial of a license to motion pictures which are immoral in that they portray 'acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior.' " That court states the issue in the case in this language:

> "Moving pictures are our only concern and, what is more to the point, only those motion pictures which

---

[2] See Note, 71 Harv. L. Rev. 326, 328, n. 14.

[3] *Id.*, p. 332.

alluringly present acts of sexual immorality as proper behavior." 4 N. Y. 2d 349, 361, 151 N. E. 2d 197, 203, 175 N. Y. S. 2d 39, 48.

Moreover, it is significant to note that in its 14-page opinion that court says again and again, in fact 15 times, that the picture "Lady Chatterley's Lover" is proscribed because of its "espousal" of sexual immorality as "desirable" or as "proper conduct for the people of our State."*

The minority of my brothers here, however, twist this holding into one that New York's Act requires "obscenity or incitement, not just abstract expressions of opinion." But I cannot so obliterate the repeated declarations above-mentioned that were made not only 15 times by the Court of Appeals but which were the basis of the Board of Regents' decision as well. Such a construction would raise many problems, not the least of which would be our failure to accept New York's interpretation of the scope of its own Act. I feel, as does the majority here, bound by their holding.

In this context, the Act comes within the ban of *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495 (1952). We held there that "expression by means of motion pic-

*The phrase is not always identical but varies from the words of the statute, "acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior," to such terms "as proper conduct for the people of our State"; "exaltation of illicit sexual love in derogation of the restraints of marriage"; as "a proper pattern of behavior"; "the espousal of sexually immoral acts"; "which debase fundamental sexual morality by portraying its converse to the people as alluring and desirable"; "which alluringly portrays sexually immoral acts as proper behavior"; "by presenting . . . [adultery] in a clearly approbatory manner"; "which alluringly portrays adultery as proper behavior"; "which alluringly portray acts of sexual immorality (here adultery) and recommend them as a proper way of life"; "which alluringly portray adultery as proper and desirable"; and "which alluringly portray acts of sexual immorality by adultery as proper behavior."

tures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Id.*, at 502. Referring to *Near* v. *Minnesota,* 283 U. S. 697 (1931), we said that while "a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication" such protection was not unlimited but did place on the State "a heavy burden to demonstrate that the limitation challenged" was exceptional. *Id.*, at 503–504. The standard applied there was the word "sacrilegious" and we found it set the censor "adrift upon a boundless sea amid a myriad of conflicting currents of religious views . . . ." *Id.*, at 504. We struck it down.

Here the standard is the portrayal of "acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior." Motion picture plays invariably have a hero, a villain, supporting characters, a location, a plot, a diversion from the main theme and usually a moral. As we said in *Burstyn:* "They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." 343 U. S., at 501. What may be to one viewer the glorification of an idea as being "desirable, acceptable or proper" may to the notions of another be entirely devoid of such a teaching. The only limits on the censor's discretion is his understanding of what is included within the term "desirable, acceptable or proper." This is nothing less than a roving commission in which individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law. Even here three of my brothers "cannot regard this film as depicting anything more than a somewhat unusual, and rather pathetic, 'love triangle.' " At least three—perhaps four—of the members of New York's highest court thought otherwise. I

need only say that the obscurity of the standard presents such a choice of difficulties that even the most experienced find themselves at dagger's point.

It may be, as Chief Judge Conway said, "that our public morality, possibly more than ever before, needs every protection government can give." 4 N. Y. 2d, at 363, 151 N. E. 2d, at 204–205, 175 N. Y. S. 2d, at 50. And, as my Brother HARLAN points out, "each time such a statute is struck down, the State is left in more confusion." This is true where broad grounds are employed leaving no indication as to what may be necessary to meet the requirements of due process. I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray *acts* of sexual immorality, perversion or lewdness." If New York's statute had been so construed by its highest court I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters. For this reason, I would reverse on the authority of *Burstyn*.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, concurring in the result.

I think the Court has moved too swiftly in striking down a statute which is the product of a deliberate and conscientious effort on the part of New York to meet constitutional objections raised by this Court's decisions respecting predecessor statutes in this field. But although I disagree with the Court that the parts of §§ 122 and 122–a of the New York Education Law, 16 N. Y. Laws Ann. § 122 (McKinney 1953), 16 N. Y. Laws Ann. § 122–a (McKinney Supp. 1958), here particularly involved are unconstitutional on their face, I believe that in their application to this film constitutional bounds were exceeded.

I.

Section 122–a of the State Education Law was passed in 1954 to meet this Court's decision in *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587, which overturned the New York Court of Appeals' holding in *In re Commercial Pictures Corp.* v. *Board of Regents,* 305 N. Y. 336, 113 N. E. 2d 502, that the film *La Ronde* could be banned as "immoral" and as "tend[ing] to corrupt morals" under § 122.[1] The Court's decision in *Commercial Pictures* was but a one line *per curiam* with a citation to *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, which in turn had held for naught not the word "immoral" but the term "sacrilegious" in the statute.

New York, nevertheless, set about repairing its statute. This it did by enacting § 122–a which in the respects emphasized in the present opinion of Chief Judge Conway as pertinent here defines an "immoral" motion picture film as one which portrays " 'acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior.' " 4 N. Y. 2d 349, 351, 151 N. E. 2d 197, 175 N. Y. S. 2d 39.[2] The Court now holds this part of New York's effort

---

[1] Section 122 provides: "The director of the [motion picture] division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto."

[2] Section 122–a provides:

"1. For the purpose of section one hundred twenty-two of this chapter, the term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion

unconstitutional on its face under the Fourteenth Amendment. I cannot agree.

The Court does not suggest that these provisions are bad for vagueness.[3] Any such suggestion appears

---

picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"2. For the purpose of section one hundred twenty-two of this chapter, the term 'incite to crime' shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs."

[3] The bill that became § 122–a was introduced at the request of the State Education Department, which noted in a memorandum that "the issue of censorship, as such, is not involved in this bill. This bill merely attempts to follow out the criticism of the United States Supreme Court by defining the words 'immoral' and 'incite to crime.'" N. Y. S. Legis. Ann., 1954, 36. In a memorandum accompanying his approval of the measure, the then Governor of New York, himself a lawyer, wrote:

"Since 1921, the Education Law of this State has required the licensing of motion pictures and authorized refusal of a license for a motion picture which is 'obscene, indecent, immoral' or which would 'tend to corrupt morals or incite to crime.'

"Recent Supreme Court decisions have indicated that the term 'immoral' may not be sufficiently definite for constitutional purposes. The primary purpose of this bill is to define 'immoral' and 'tend to corrupt morals' in conformance with the apparent requirements of these cases. It does so by defining them in terms of 'sexual immorality.' The words selected for this definition are based on judicial opinions which have given exhaustive and reasoned treatment to the subject.

"The bill does not create any new licensing system, expand the scope of motion picture censorship, or enlarge the area of permissible prior restraint. Its sole purpose is to give to the section more precision to make it conform to the tenor of recent court decisions and proscribe the exploitation of 'filth for the sake of filth.' It does so

to me untenable in view of the long-standing usage in this Court of the concept "sexual immorality" to explain in part the meaning of "obscenity." See, *e. g.*, *Swearingen* v. *United States*, 161 U. S. 446, 451.[4] Instead, the Court finds a constitutional vice in these provisions in that they require, so it is said, neither "obscenity" nor incitement to "sexual immorality," but strike of their own force at the mere advocacy of "an idea—that adultery under certain circumstances may be proper behavior"; expressions of "opinion that adultery may sometimes be proper . . . ." I think this characterization of these provisions misconceives the construction put upon them by the prevailing opinions in the Court of Appeals. Granting that the abstract public discussion or advocacy of adultery, unaccompanied by obscene portrayal or actual incitement to such behavior, may not constitutionally be proscribed by the State, I do not read those opinions to hold that the statute on its face undertakes

---

as accurately as language permits in 'words well understood through long use.' [*People* v. *Winters*, 333 U. S. 507, 518 (1948)].

. . . . . .

"The language of the Supreme Court of the United States, in a recent opinion of this precise problem, should be noted:

" 'To hold that liberty and expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.' [*Burstyn* v. *Wilson*, 343 U. S. 495, at 502].

"So long as the State has the responsibility for interdicting motion pictures which transgress the bounds of decency, we have the responsibility for furnishing guide lines to the agency charged with enforcing the law." *Id.*, at 408.

[4] Certainly it cannot be claimed that adultery is not a form of "sexual immorality"; indeed adultery is made a crime in New York. N. Y. Penal Law §§ 100–103, 39 N. Y. Laws Ann. §§ 100–103 (McKinney 1944).

any such proscription. Chief Judge Conway's opinion, which was joined by two others of the seven judges of the Court of Appeals, and in the thrust of which one more concurred, to be sure with some doubt, states (4 N. Y. 2d, at 356, 151 N. E. 2d, at 200, 175 N. Y. S. 2d, at 44):

> "It should first be emphasized that the scope of section 122–a is not mere expression of opinion in the form, for example, of a filmed lecture whose subject matter is the espousal of adultery. We reiterate that this case involves the espousal of sexually immoral acts (here adultery) *plus* actual scenes of a suggestive and obscene nature." (Emphasis in original.)

The opinion elsewhere, as indeed is also the case with §§ 122 and 122–a themselves when independently read in their entirety, is instinct with the notion that mere abstract expressions of opinion regarding the desirability of sexual immorality, unaccompanied by obscenity [5] or incitement, are not proscribed. See 4 N. Y. 2d 349, especially at 351–352, 354, 356–358, 361, 363–364; 151 N. E. 2d 197, at 197, 199, 200–201, 203, 204–205; 175 N. Y. S. 2d 39, at 40, 42, 44–46, 48, 50–51; and Notes 1 and 2, *supra*. It is the corruption of public morals, occasioned by the inciting effect of a particular portrayal or by what New York has deemed the necessary effect of obscenity, at which the statute is aimed. In the words of Chief Judge Conway, "There is no differ-

[5] Nothing in Judge Dye's dissenting opinion, to which the Court refers in Note 7 of its opinion, can be taken as militating against this view of the prevailing opinions in the Court of Appeals. Judge Dye simply disagreed with the majority of the Court of Appeals as to the adequacy of the § 122–a definition of "immoral" to overcome prior constitutional objections to that term. See 4 N. Y. 2d, at 371, 151 N. E. 2d, at 209–210, 175 N. Y. S. 2d, at 57; see also the dissenting opinion of Judge Van Voorhis, 4 N. Y. 2d, at 374, 151 N. E. 2d, at 212, 175 N. Y. S. 2d, at 60.

ence in substance between motion pictures which are corruptive of the public morals, and sexually suggestive, because of a predominance of suggestive scenes, and those which achieve precisely the same effect by presenting only several such scenes in a clearly approbatory manner throughout the course of the film. *The law is concerned with effect, not merely with but one means of producing it . . . the objection lies in the corrosive effect upon the public sense of sexual morality.*" 4 N. Y. 2d, at 358, 151 N. E. 2d, at 201, 175 N. Y. S. 2d, at 46. (Emphasis in original.)

I do not understand that the Court would question the constitutionality of the particular portions of the statute with which we are here concerned if the Court read, as I do, the majority opinions in the Court of Appeals as construing these provisions to require obscenity or incitement, not just mere abstract expressions of opinion. It is difficult to understand why the Court should strain to read those opinions as it has. Our usual course in constitutional adjudication is precisely the opposite.

II.

The application of the statute to this film is quite a different matter. I have heretofore ventured the view that in this field the States have wider constitutional latitude than the Federal Government. See the writer's separate opinion in *Roth* v. *United States* and *Alberts* v. *California*, 354 U. S. 476, 496. With that approach, I have viewed this film.

Giving descriptive expression to what in matters of this kind are in the last analysis bound to be but individual subjective impressions, objectively as one may try to discharge his duty as a judge, is not apt to be repaying. I shall therefore content myself with saying that, according full respect to, and with, I hope, sympathetic consideration for, the views and characterizations expressed by

others, I cannot regard this film as depicting anything more than a somewhat unusual, and rather pathetic, "love triangle," lacking in anything that could properly be termed obscene or corruptive of the public morals by inciting the commission of adultery. I therefore think that in banning this film New York has exceeded constitutional limits.

I conclude with one further observation. It is sometimes said that this Court should shun considering the particularities of individual cases in this difficult field lest the Court become a final "board of censorship." But I cannot understand why it should be thought that the process of constitutional judgment in this realm somehow stands apart from that involved in other fields, particularly those presenting questions of due process. Nor can I see, short of holding that all state "censorship" laws are constitutionally impermissible, a course from which the Court is carefully abstaining, how the Court can hope ultimately to spare itself the necessity for individualized adjudication. In the very nature of things the problems in this area are ones of individual cases, see *Roth* v. *United States* and *Alberts* v. *California, supra,* at 496–498, for a "censorship" statute can hardly be contrived that would in effect be self-executing. And, lastly, each time such a statute is struck down, the State is left in more confusion, as witness New York's experience with its statute.

Because I believe the New York statute was unconstitutionally applied in this instance I concur in the judgment of the Court.

Per Curiam.

TAYLOR *v.* McELROY ET AL.

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

No. 504. Argued March 31–April 1, 1959.—Decided June 29, 1959.

Petitioner, a lathe operator and tool and die maker at a plant which manufactured aircraft for the Government, lost his job because of revocation of his security clearance in proceedings similar to those involved in *Greene* v. *McElroy, ante,* p. 474. After this Court had granted certiorari to review a judgment sustaining that action, his security clearance was restored and the Solicitor General assured this Court that petitioner now stands in precisely the same position as all others who have been granted clearance, that the evidence in petitioner's file will not be used against him in the future, and that the findings against petitioner have been expunged. *Held:* The cause is moot; and the judgment of the District Court is vacated and the cause is remanded to that Court with instructions to dismiss the complaint as moot. Pp. 709–711.

Judgment vacated and cause remanded.

Joseph L. Rauh, Jr. argued the cause for petitioner. With him on the brief were *John Silard, Eugene Gressman, Harold A. Cranefield, Daniel H. Pollitt* and *Richard Lipsitz.*

Solicitor General Rankin argued the cause for respondents. With him on the brief were *Assistant Attorney General Doub, Samuel D. Slade* and *Bernard Cedarbaum.*

J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

PER CURIAM.

This is a companion case to *Greene* v. *McElroy, ante,* p. 474, decided today, and concerns an industrial worker who was denied clearance to classified defense information

and consequently discharged from his employment as a lathe operator and tool and die maker at a plant which manufactured aircraft for the Government.

Prior to 1956, petitioner had a Confidential clearance. In that year, he was denied Secret clearance and his Confidential clearance was suspended. He demanded and was accorded a hearing similar to the one afforded petitioner in *Greene* v. *McElroy, supra.* The Hearing Board concluded that petitioner's access to classified defense information was "not clearly consistent with the interests of national security." Later, he was afforded another hearing with similar results. Petitioner then filed an action asking for a declaration that he was entitled to a hearing at which he could confront the informants whose statements were used against him, a declaration that the denial of clearance violated his rights under the Fifth Amendment, and an injunction restraining respondents from enforcing the decision denying clearance. Respondents prevailed on a motion for summary judgment and, on December 15, 1958, we granted certiorari to the Court of Appeals before argument was had in that court because of the pendency here of *Greene* v. *McElroy, supra.* 358 U. S. 918.

On December 31, 1958, the Department of Defense notified all interested parties, including petitioner, his counsel, and his ex-employer, that the Secretary of Defense had determined "that the granting of clearance to Mr. Charles Allen Taylor for access to Secret defense information is in the national interest." On January 9, 1959, respondents filed a suggestion of mootness. We postponed consideration of that question to the hearing of the case on the merits. 359 U. S. 901.

At the oral argument in this case, the Solicitor General made the following representations:

1. The Secretary of Defense in determining that petitioner was eligible for clearance to obtain access to

information classified "Secret" did not intend by his reference to "the national interest" to differentiate between petitioner's status and that of other employees whose eligibility for clearance has been found to be "clearly consistent with the interests of national security."*

2. The findings of the various Hearing Boards which passed on petitioner's fitness for clearance have been expunged from all records and no longer have any vitality or effect.

3. Petitioner was afforded clearance on December 31, 1958, after having been denied clearance for over two years, because of a change in applicable Department of Defense regulations.

4. Pursuant to existing Department of Defense procedures, the evidence in petitioner's file will not be used again as a basis for revoking petitioner's clearance.

5. Petitioner is eligible under applicable regulations for compensation for wages lost during the time he was unemployed due to the clearance revocation and denial.

In view of the fact that petitioner has received clearance, the ultimate relief which he demanded, and in view of the representations of the Solicitor General to the effect that petitioner stands in precisely the same position as all others who have been granted clearance, that the evidence in petitioner's file will not be used against him in the future, and that the findings against petitioner have been expunged, this case is moot.

The judgment of the District Court is vacated and the case is remanded to that court with instructions to dismiss the complaint as moot.

It is so ordered.

---

*The respondents have filed a letter in this Court from the General Counsel of the Department of Defense which makes an identical representation.

509615 O–59–48

ILLINOIS *v.* MICHIGAN ET AL.

ON MOTION FOR LEAVE TO FILE COMPLAINT.*

No. 15, Original. Argued May 21–22, 1959.—Decided June 29, 1959.

Application for reopening of decree of April 21, 1930, in Nos. 2, 3 and 4, Original, granted; motion for leave to file Bill of Complaint in No. 15, Original, granted; Special Master appointed in each of these cases.

William C. Wines, Assistant Attorney General, and *Charles A. Bane* argued the cause for the State of Illinois, complainant in No. 15, Original. With them on the brief were *Latham Castle,* Attorney General, *George E. Billett* and *Calvin D. Trowbridge,* Special Assistant Attorneys General.

For the defendants in No. 15, Original, the cause was argued by *Paul L. Adams,* Attorney General, for the State of Michigan; *John W. Reynolds,* Attorney General, for the State of Wisconsin; *Richard H. Shepp,* Assistant Attorney General, for the State of New York and *Lois G. Forer,* Deputy Attorney General, for the Commonwealth of Pennsylvania. On the briefs for defendants were *Paul L. Adams,* Attorney General, *Samuel J. Torina,* Solicitor General, and *Nicholas V. Olds,* Assistant Attorney General, for the State of Michigan; *Mark McElroy,* Attorney General, and *J. Harold Read,* Assistant Attorney General, for the State of Ohio; *Anne X. Alpern,* Attorney General, and *Lois G. Forer,* Deputy Attorney General, for the Commonwealth of Pennsylvania; *Miles Lord,* Attorney General, and *Raymond G. Haik,* Special Assistant Attorney General, for the State

*Together with 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.,* on application for reopening of the decree of April 21, 1930—not argued.

of Minnesota; *Louis J. Lefkowitz,* Attorney General, *Paxton Blair,* Solicitor General, and *Richard H. Shepp,* Assistant Attorney General, for the State of New York; *John W. Reynolds,* Attorney General, and *Roy G. Tulane,* Assistant Attorney General, for the State of Wisconsin; and *Herbert H. Naujoks,* Special Assistant to the Attorneys General.

Solicitor General Rankin argued the cause and filed a brief for the United States, as *amicus curiae* in No. 15, Original, by invitation of the Court (359 U. S. 963). With him on the brief were *Oscar H. Davis, John F. Davis* and *George S. Swarth.*

Stewart G. Honeck and *John Reynolds,* Attorneys General, and *Roy G. Tulane,* Assistant Attorney General, for the State of Wisconsin; *Miles Lord,* Attorney General, *Melvin J. Peterson,* Deputy Attorney General, and *Raymond A. Haik,* Special Assistant Attorney General, for the State of Minnesota; *William Saxbe* and *Mark McElroy,* Attorneys General, *Robert E. Boyd* and *J. Harold Read,* Assistant Attorneys General, for the State of Ohio; and *Thomas D. McBride* and *Anne X. Alpern,* Attorneys General, and *Lois G. Forer,* Deputy Attorney General, for the State of Pennsylvania, complainants in No. 2, Original. *Herbert H. Naujoks,* Special Assistant to the Attorneys General, was also on the brief.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, and *Nicholas V. Olds,* Assistant Attorney General, for the State of Michigan, complainant in No. 3, Original.

Louis J. Lefkowitz, Attorney General, *Richard H. Shepp* and *Dunton F. Tynan,* Assistant Attorneys General, for the State of New York, complainant in No. 4, Original. *John R. Davison,* for the Power Authority of New York, was also on the brief.

Latham Castle, Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, *George A. Lane, Lawrence J. Fenlon, Joseph B. Fleming, Joseph H. Pleck* and *Thomas M. Thomas* for defendants.

Solicitor General Rankin, John F. Davis and *George S. Swarth* for the United States, as *amicus curiae* in Nos. 2, 3 and 4, Original.

Sydney G. Craig and *David M. Gooder* for the Chicago Association of Commerce and Industry, as *amicus curiae* in Nos. 2, 3 and 4, Original.

PER CURIAM.

The motion of Chicago Association of Commerce and Industry for leave to file brief in Nos. 2, Original, 3, Original and 4, Original, as *amicus curiae,* is granted. The amended application of complainants for a reopening of the decree of April 21, 1930, in Nos. 2, Original, 3, Original, and 4, Original [281 U. S. 696], is granted.

The motion for leave to file a bill of complaint in No. 15, Original, is granted.

IT IS ORDERED that Honorable Albert B. Maris, United States Senior Circuit Judge, be, and he is hereby, appointed special master in each of these causes, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to hold hearings with all convenient speed, and to submit such reports as he may deem necessary.

The master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses, shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

UNITED STATES ET AL. *v.* HINE PONTIAC ET AL.

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

No. 561. Decided June 29, 1959.

Certiorari granted and judgments reversed.

Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten and *Carolyn R. Just* for petitioners.

Paul J. Sedgwick and *L. W. Anderson* for Hine Pontiac, *M. M. Wade* for Modern Olds, Inc., and *Michael J. Salmon* and *Vincent F. Kilborn* for Kilborn et al., respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgments of the United States Court of Appeals for the Fifth Circuit are reversed. *Commissioner of Internal Revenue* v. *Hansen, ante,* p. 446; *Commissioner of Internal Revenue* v. *Glover, ante,* p. 446; *Baird* v. *Commissioner of Internal Revenue, ante,* p. 446.

UNITED STATES *v.* COLONIAL CHEVROLET CORP. ET AL.

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

No. 761. Decided June 29, 1959.

Certiorari granted and judgments reversed.

Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten and *Carolyn R. Just* for the United States.

Everett A. Corten for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgments of the United States Court of Appeals for the Fourth Circuit are reversed. *Commissioner of Internal Revenue* v. *Hansen, ante,* p. 446; *Commissioner of Internal Revenue* v. *Glover, ante,* p. 446; *Baird* v. *Commissioner of Internal Revenue, ante,* p. 446.

KELLEY *v.* CITY OF RICHMOND.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 858, Misc. Decided June 29, 1959.

PER CURIAM.

The appeal is dismissed.

HERSHEY MFG. CO. *v.* ADAMOWSKI ET AL.

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

No. 944. Decided June 29, 1959.

Judgment affirmed.

Maurice J. Walsh, John J. Yowell and *G. Kent Yowell* for appellant.

Benjamin S. Adamowski for appellees.

PER CURIAM.

The judgment is affirmed. Although the District Court had jurisdiction, *Doud* v. *Hodge*, 350 U. S. 485, we accept its finding that there was no showing of irreparable injury.

DEGREGORY *v.* WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 7, Misc. Decided June 29, 1959.

Appeal dismissed for want of a substantial federal question.

Appellant *pro se*.

Louis C. Wyman, Attorney General of New Hampshire, for appellee.

PER CURIAM.

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

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would note probable jurisdiction.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 717 and 901 were purposely omitted, in order to make it possible to publish the orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

ORDERS OF JUNE 8 THROUGH JUNE 29, 1959.

JUNE 8, 1959.

Miscellaneous Orders.

No. 842, Misc. McCRAW *v.* NEW MEXICO;
No. 849, Misc. LOWERY *v.* MURPHY, WARDEN;
No. 854, Misc. POLITO *v.* WARDEN, NEVADA STATE PENITENTIARY;
No. 860, Misc. WAGONER *v.* NORTH CAROLINA;
No. 861, Misc. CUMMINGS *v.* TINSLEY, WARDEN;
No. 862, Misc. HARTER *v.* ILLINOIS; and
No. 889, Misc. WILSON *v.* HEINZE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 841, Misc. JUSTUS *v.* WOODRUFF, 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.

No. 848, Misc. LUNDBERG *v.* BANNAN, WARDEN. Motion for leave to file petition for writ of habeas corpus and for other relief denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Probable Jurisdiction Noted. (*See No. 699, ante, p. 246.*)

Certiorari Granted. (*See No. 753, ante, p. 240.*)

Certiorari Denied. (*See also Misc. Nos. 841 and 848, supra.*)

No. 777, Misc. JACKSON *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 852. LEE C. MOORE CORP. *v.* PRYOR ET AL. C. A. 10th Cir. Certiorari denied. *Earl F. Reed* for petitioner. *M. A. Ned Looney* for respondents. Reported below: 262 F. 2d 673.

No. 866. BRENNAN *v.* W. A. WILLS, LTD., ET AL. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Charles E. Grover* for respondents. Reported below: 263 F. 2d 1.

No. 867. EVEREST & JENNINGS, INC., *v.* E. & J. MANUFACTURING CO. C. A. 9th Cir. Certiorari denied. *Fred H. Miller* for petitioner. Reported below: 263 F. 2d 254.

No. 871. AMERICAN EXPORT LINES, INC., *v.* GULF ITALIA CO. C. A. 2d Cir. Certiorari denied. *Kenneth Gardner* and *M. E. DeOrchis* for petitioner. *Eugene Underwood* for respondent. Reported below: 263 F. 2d 135.

No. 874. WHITFIELD ET AL. *v.* UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2708, ET AL. C. A. 5th Cir. Certiorari denied. *Roberson L. King* for petitioners. *Chris Dixie* for Local 2708 et al., and *George Rice* and *James Dennis Smullen* for Armco Steel Corp. et al., respondents. Reported below: 263 F. 2d 546.

No. 906. ENGELSHER *v.* JACOBS. Court of Appeals of New York. Certiorari denied. *Menahem Stim* and *Allen S. Stim* for petitioner. *Seymour B. Quel* for respondent. *Raymond Rubin* filed a brief for the Association of Private Hospitals, Inc., as *amicus curiae*, in support of petitioner. Reported below: 5 N. Y. 2d 370, 157 N. E. 2d 626.

No. 872. North Central Airlines, Inc., *v.* Civil Aeronautics Board et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *A. L. Wheeler* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Franklin M. Stone, O. D. Ozment* and *Robert L. Toomey* for the Civil Aeronautics Board, *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for Lake Central Airlines, Inc., and *Albert F. Grisard* for Lake Central Airlines Employee Stockholder Group, respondents. Reported below: 105 U. S. App. D. C. 207, 265 F. 2d 581.

No. 876. Helms Bakeries *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *George T. Altman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 263 F. 2d 642.

No. 877. Woolfson *v.* Doyle, Trustee in Reorganization, et al. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Edward D. Burns, John A. Kiser* and *Daniel J. Driscoll* for Doyle, and *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* for the Securities and Exchange Commission, respondents.

No. 886. Dancyger *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. *Rose Rothenberg* for petitioner. *Brendan T. Byrne,* Deputy Attorney General of New Jersey, and *C. William Caruso* for respondent. Reported below: 29 N. J. 76, 148 A. 2d 155.

No. 806, Misc. Allen *v.* Smyth, Superintendent, Virginia State Penitentiary. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 930. Bricklayers, Masons, Plasterers, Marble Masons, Tile Layers, Terrazzo Workers, and Cement Finishers' Union No. 3, Florida, *v.* Cone Brothers Contracting Co. C. A. 5th Cir. Certiorari denied. *Frank McClung* for petitioner. *William H. Agnor* for respondent. Reported below: 263 F. 2d 297.

No. 656, Misc. Miles *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 750, Misc. Gundlach *v.* United States. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 262 F. 2d 72.

No. 761, Misc. Smith *v.* Industrial Accident Commission of California et al. District Court of Appeal of California, First Appellate District. Certiorari denied. Petitioner *pro se*. *Everett A. Corten* for the Industrial Accident Commission of California, respondent.

No. 789, Misc. Andrews *v.* United States. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 796, Misc. Smith *v.* Alvis, Warden. Court of Appeals of Ohio, Franklin County. Certiorari denied.

No. 805, Misc. Domico *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 783, Misc. NEWMAN *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 Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 105 U. S. App. D. C. 176, 265 F. 2d 368.

No. 810, Misc. HOLLOWAY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 812, Misc. CONVERSE *v.* MENTAL HYGIENE DEPARTMENT OF CALIFORNIA ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 823, Misc. BARBOUR *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Horace J. Donnelly, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 105 U. S. App. D. C. 89, 264 F. 2d 375.

No. 827, Misc. HOWELL *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se*. *Norman A. Erbe,* Attorney General of Iowa, for respondent.

No. 836, Misc. YOUNGER *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 Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 105 U. S. App. D. C. 51, 263 F. 2d 735.

No. 826, Misc. POLLINO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 832, Misc. HEARD *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. 834, Misc. PORTER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James R. Scullen* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 103 U. S. App. D. C. 385, 258 F. 2d 685.

No. 839, Misc. LUCAS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 844, Misc. EGITTO *v.* JACKSON, WARDEN. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent. Reported below: 7 App. Div. 2d 808, 180 N. Y. S. 2d 890.

No. 874, Misc. GEORGE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 876, Misc. ALLEN *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 795, Misc. SCHLETTE *v.* KEATING, JUDGE. C. A. 9th Cir. The petition for writ of certiorari and for other relief is denied.

No. 890, Misc. BROWN *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 733, Misc. CORBETT *v.* COMMON PLEAS COURT OF STARK COUNTY, OHIO. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. Petitioner *pro se*. *Harry N. Kandel* for respondent.

Rehearing Denied.

No. 1. BARTKUS *v.* ILLINOIS, 359 U. S. 121. Petition for rehearing denied.

No. 169. GROCERY DRIVERS UNION LOCAL 848 ET AL. *v.* SEVEN UP BOTTLING CO. OF LOS ANGELES, INC., 359 U. S. 434. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 774. ALLEN ET AL. *v.* COLUMBIA GAS SYSTEM, INC., ET AL., 359 U. S. 979. Petition for rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 547. BOHN *v.* UNITED STATES, 358 U. S. 931. Motion for leave to file a petition for rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

JUNE 9, 1959.

Dismissal Under Rule 60.

No. 797, Misc. FURTAK *v.* GLADDEN, WARDEN. On petition for writ of certiorari to the Supreme Court of Oregon. Petition dismissed pursuant to Rule 60 (2) of the Rules of this Court. Petitioner *pro se*.

509615 O–59–49

JUNE 15, 1959.

Miscellaneous Order.

No. 813, Misc. IN RE DISBARMENT OF ALKER. IT IS ORDERED that Harry J. Alker, Jr., of Norristown, Pennsylvania, be suspended from the practice of the law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of the law in this Court.

Certiorari Granted. (*See also No. 378, ante, p. 287.*)

No. 784. PETITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. *Edward Bennett Williams* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 262 F. 2d 788.

No. 895. FEDERAL TRADE COMMISSION *v.* HENRY BROCH & Co. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Earl W. Kintner* and *James E. Corkey* for petitioner. *Frederick M. Rowe* for respondent. Reported below: 261 F. 2d 725.

No. 721, Misc. WYATT *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 263 F. 2d 304.

Certiorari Denied.

No. 882. 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: 262 F. 2d 592.

No. 772. National Association for the Advancement of Colored People, Inc., *v.* Arkansas ex rel. Bennett, Attorney General. Supreme Court of Arkansas. Certiorari denied. *Robert L. Carter* and *Frank D. Reeves* for petitioner. *Bruce Bennett,* Attorney General of Arkansas, and *Ben J. Harrison,* Chief Assistant Attorney General, for respondent. Reported below: 229 Ark. 840, 319 S. W. 2d 33.

No. 856. Local Union 976 et al. *v.* Dairy Distributors, Inc. Supreme Court of Utah. Certiorari denied. *Herbert S. Thatcher* and *Clarence M. Beck* for petitioners. *Rex J. Hanson* and *Walter L. Budge* for respondent. Reported below: 8 Utah 2d 124, 329 P. 2d 414.

No. 860. Seneca Nation of Indians *v.* Brucker, Secretary of the Army, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward E. O'Neill* and *C. Walter Harris* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for respondents. Reported below: 104 U. S. App. D. C. 315, 262 F. 2d 27.

No. 868. Bullock et al. *v.* United States. C. A. 6th Cir. Certiorari denied. *G. W. Williams, W. E. Michael* and *Ross R. Barnett* for petitioners. *Solicitor General Rankin, Assistant Attorney General White, Joseph M. F. Ryan, Jr.* and *Harold H. Greene* for the United States. Reported below: 265 F. 2d 683.

No. 879. Fromen *v.* United States. C. A. 2d Cir. Certiorari denied. *Frank G. Raichle* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 265 F. 2d 702.

509615 O–59–50

No. 875. SCHNAUTZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *John D. Cofer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 263 F. 2d 525.

No. 880. ZEDDIES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *John J. Yowell* and *G. Kent Yowell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for respondent. Reported below: 264 F. 2d 120.

No. 881. WILLIAM T. ALVARADO SALES CO. ET AL. *v.* RUBALOFF ET AL. C. A. 9th Cir. Certiorari denied. *Fred H. Miller* and *Munson H. Lane* for petitioners. *George A. Brace* for Rubaloff et al., and *Bernard Kriegel* for Du-More Fixture Co., Inc., respondents. Reported below: 263 F. 2d 926.

No. 883. EMBRY BROTHERS, INC., ET AL. *v.* DAVIS ET AL. C. A. 6th Cir. Certiorari denied. *Ralph H. Logan* for Embry Brothers, Inc., petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States, and *Charles I. Dawson* for Citizens Fidelity Bank & Trust Co., respondents. Reported below: 260 F. 2d 356.

No. 903. SMITH *v.* UNITED STATES. Motion to use the record in No. 954, October Term, 1957, granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Joseph A. St. Ana* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 265 F. 2d 14.

No. 885. OWENSBORO ON THE AIR, INC., ET AL. *v.* UNITED STATES ET AL.; and

No. 889. MCDONALD, TRUSTEE, *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Russell Rowell* for petitioners in No. 885. *Vincent B. Welch, Harold E. Mott, Edward P. Morgan* and *James P. Kem* for petitioner in No. 889. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon* and *John L. Fitzgerald* for the United States and the Federal Communications Commission, respondents. *James A. McKenna, Jr.* and *Vernon L. Wilkinson* for American Broadcasting-Paramount Theatres, Inc., respondent in No. 885. Reported below: 104 U. S. App. D. C. 391, 262 F. 2d 702.

No. 891. CONTINENTAL GIN CO. *v.* MURRAY COMPANY OF TEXAS. C. A. 5th Cir. Certiorari denied. *E. L. All* for petitioner. *Hector M. Holmes* and *William W. Rymer, Jr.* for respondent. Reported below: 264 F. 2d 65.

No. 896. WILLIAMS *v.* MOORE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 262 F. 2d 335.

No. 772, Misc. BROWN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert M. Scott* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 105 U. S. App. D. C. 77, 264 F. 2d 363.

No. 897. WALKER *v.* WASHINGTON ET AL. Motion to dispense with printing of the petition granted. Petition for writ of certiorari to the Supreme Court of Washington denied.

No. 887. WEBSTER ROSEWOOD CORP. *v.* SCHINE CHAIN THEATRES, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Francis Thomas Anderson* for petitioner. *James O. Moore, Jr.* for respondents. Reported below: 263 F. 2d 533.

No. 890. DIVISION OF NATIONAL MISSIONS OF THE BOARD OF MISSIONS OF THE METHODIST CHURCH ET AL. *v.* KOERNER, ADMINISTRATOR. Supreme Court of Kansas. Certiorari denied. *Ralph Bush Foster* for petitioners. Reported below: 183 Kan. 808, 816, 332 P. 2d 554, 560.

No. 892. FOSTER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John K. Pickens* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Meyer Rothwacks* for the United States. Reported below: 265 F. 2d 183.

No. 923. DE NIRO *v.* OHIO EX REL. BEIL, PROSECUTING ATTORNEY. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Paul W. Brown* for petitioner. *Thomas A. Beil* for respondent. Reported below: 168 Ohio. St. 315, 154 N. E. 2d 634.

No. 362, Misc. HIGHTOWER *v.* BIBB, DIRECTOR OF THE DEPARTMENT OF PUBLIC SAFETY, ET AL. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondents.

No. 647, Misc. DORNBLUT *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: 261 F. 2d 949.

No. 691, Misc. SELLS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Harry K. Nier, Jr.* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Yeagley* and *Philip R. Monahan* for the United States. Reported below: 262 F. 2d 815.

No. 781, Misc. MITCHELL *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied.

No. 798, Misc. KEPHART *v.* RANDOLPH, WARDEN. Circuit Court of Rock Island, Illinois. Certiorari denied.

No. 811, Misc. NELSON *v.* ALVIS, WARDEN. Court of Appeals of Ohio, Franklin County. Certiorari denied.

No. 817, Misc. MONTALBANO *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 819, Misc. CARROLL *v.* HEINZE, WARDEN. Superior Court of California, Sacramento County. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, for respondent.

No. 846, Misc. JORDAN *v.* MICHIGAN. Recorder's Court for the City of Detroit, Michigan. Certiorari denied.

No. 897, Misc. WOLFE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 900, Misc. LEVENTIS *v.* JACKSON, WARDEN. 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.

Rehearing Denied.

No. 278. FRANK *v.* MARYLAND, 359 U. S. 360;

No. 429. PATTERSON, GENERAL ADMINISTRATOR, ET AL. *v.* UNITED STATES, 359 U. S. 495;

No. 781. MERCER *v.* THERIOT, 359 U. S. 983;

No. 794. TITLE *v.* UNITED STATES, 359 U. S. 989;

No. 816. GULF OIL CORP. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 715, AFL–CIO, 359 U. S. 992;

No. 683, Misc. GILMORE *v.* UNITED STATES, 359 U. S. 994; and

No. 763, Misc. SIMUNICH *v.* SUPREME COURT OF ILLINOIS ET AL., 359 U. S. 987. Petitions for rehearing denied.

JUNE 22, 1959.

Miscellaneous Orders.

No. 944. HERSHEY MFG. CO. *v.* ADAMOWSKI ET AL. Appeal from the United States District Court for the Northern District of Illinois. The motion for injunction is denied. *Maurice J. Walsh, John J. Yowell* and *G. Kent Yowell* for appellant. *Benjamin S. Adamowski* for appellees.

No. 856, Misc. KILPATRICK *v.* MCCARREY, DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition and mandamus denied. *Harold J. Butcher* and *Charles S. Rhyne* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Carl H. Imlay* for the United States in opposition. *John L. Rader,* Attorney General of Alaska, *David J. Pree,* First Assistant Attorney General, *Jack O'Hair Asher, Douglas L. Gregg* and *Gary Thurlow,* Assistant Attorneys General, and *James M. Fitzgerald* were on a brief for the State of Alaska, as *amicus curiae,* in opposition.

No. 820. FLORIDA LIME & AVOCADO GROWERS, INC., ET AL. *v.* JACOBSEN, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL. Appeal from the United States District Court for the Northern District of California; and

No. 857. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *v.* NESTOR. Appeal from the United States District Court for the District of Columbia. Further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. *Isaac E. Ferguson* for appellants in No. 820. *Solicitor General Rankin, Acting Assistant Attorney General Yeagley* and *Philip R. Monahan* for appellant in No. 857. *Stanley Mosk,* Attorney General of California, and *John Fourt,* Deputy Attorney General, for appellees in No. 820. *David Rein* and *Joseph Forer* for appellee in No. 857. Reported below: No. 857, 169 F. Supp. 922.

No. 940, Misc. CORCORAN *v.* FAY, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted. (*See also Nos. 175 and 463, ante, p. 423; and No. 677, Misc., ante, p. 472.*)

No. 911. FEDERAL POWER COMMISSION *v.* TUSCARORA INDIAN NATION; and

No. 921. POWER AUTHORITY OF THE STATE OF NEW YORK *v.* TUSCARORA INDIAN NATION. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Lionel Kestenbaum, Willard W. Gatchell, John C. Mason* and *Joseph B. Hobbs* for petitioner in No. 911. *Thomas F. Moore, Jr., Samuel I. Rosenman, Frederic P. Lee, John R. Davison* and *Scott Lilly* for petitioner in No. 921. *Arthur Lazarus, Jr.* and *Eugene Gressman* for respondent. Reported below: 105 U. S. App. D. C. 146, 265 F. 2d 338.

No. 780. Local Lodge No. 1424, International Association of Machinists, AFL–CIO, et al. *v.* National Labor Relations Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Plato E. Papps, Louis P. Poulton* and *Bernard Dunau* for Local Lodge No. 1424, and *Frank L. Gallucci* for Bryan Manufacturing Co., petitioners. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 105 U. S. App. D. C. 102, 264 F. 2d 575.

No. 884. Thompson *v.* City of Louisville et al. Police Court of Louisville, Kentucky. Certiorari granted. *Louis Lusky, Harold Leventhal* and *Eugene Gressman* for petitioner. *Jo M. Ferguson,* Attorney General of Kentucky, *Wm. E. Allender,* Assistant Attorney General, *William E. Berry* and *Herman E. Frick* for respondents.

Certiorari Denied. (*See also No. 806, ante, p. 473.*)

No. 878. Berman *v.* West et al. C. A. 2d Cir. Certiorari denied. *I. Arnold Ross* for petitioner. *John A. Wilson* and *Hugh W. Darling* for respondents. Reported below: 263 F. 2d 422.

No. 899. Kearney *v.* United States. Court of Claims. Certiorari denied. *Rees B. Gillespie* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 140 Ct. Cl. 523, 156 F. Supp. 928.

No. 900. McCormick & Co., Inc., *v.* United States. Court of Claims. Certiorari denied. *Sumner Ford* and *Paul L. Peyton* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *S. Dee Hanson* for the United States. Reported below: —— Ct. Cl. ——, 170 F. Supp. 427.

No. 901. CAGE *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Ivan Irwin* and *M. R. Irion* for petitioner. Reported below: 166 Tex. Cr. R. —, 320 S. W. 2d 364.

No. 902. GINSBURG *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. C. A. 2d Cir. Certiorari denied. *Paul Ginsburg* for petitioner. *Haughton Bell* and *Carl F. Hollander* for respondent. Reported below: 263 F. 2d 608.

No. 905. MCINTYRE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Myer H. Gladstone* for petitioner. Reported below: 15 Ill. 2d 350, 155 N. E. 2d 45.

No. 907. SCHAEFFER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Carolyn R. Just* for respondent. Reported below: 258 F. 2d 861.

No. 908. DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. *v.* SIEGRIST. C. A. 2d Cir. Certiorari denied. *John E. Dickinson* for petitioner. *William J. Flynn, Jr.* for respondent. Reported below: 263 F. 2d 616.

No. 910. PHOENIX INSURANCE CO. ET AL. *v.* HANEY ET AL. Supreme Court of Mississippi. Certiorari denied. *Thomas Henry Watkins* for petitioners. Reported below: — Miss. —, 108 So. 2d 227.

No. 918. BREWERY & BEVERAGE DRIVERS, WAREHOUSEMEN & HELPERS UNION, LOCAL NO. 993, ET AL. *v.* MCLEAN DISTRIBUTING CO., INC. Supreme Court of Minnesota. Certiorari denied. *Solly Robins* for petitioners. *Ronald S. Hazel* for respondent. Reported below: 254 Minn. 204, 94 N. W. 2d 514.

No. 909. General Retail Corporation *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. *William Waller* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *L. W. Post* for respondent. Reported below: 262 F. 2d 591.

No. 912. Eisenberg et al. *v.* Smith, Collector of Internal Revenue. C. A. 3d Cir. Certiorari denied. *Joseph S. Lord III* and *Seymour I. Toll* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *Louise Foster* for respondent. Reported below: 263 F. 2d 827.

No. 913. Sclafani *v.* United States. C. A. 2d Cir. Certiorari denied. *Albert M. Schmalholz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph F. Goetten* for the United States. Reported below: 265 F. 2d 408.

No. 915. Dorn *v.* Balfour, Guthrie & Co., Ltd. C. A. 9th Cir. Certiorari denied. *Chas. R. Garry, Benjamin Dreyfus* and *George Olshausen* for petitioner. *Morris M. Doyle* and *Russell A. Mackey* for respondent. Reported below: 262 F. 2d 48.

No. 916. Field *v.* United States. C. A. 5th Cir. Certiorari denied. *Fred Botts* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Joseph Kovner* for the United States. Reported below: 263 F. 2d 758.

No. 919. Atlas Transportation Co. *v.* United States. C. A. 3d Cir. Certiorari denied. *Clifford J. Hynning* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for the United States. Reported below: 263 F. 2d 573.

No. 920. FOGARTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *C. Anthony Friloux, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 263 F. 2d 201.

No. 929. BRYSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George Gladstein, George R. Andersen* and *Norman Leonard* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 265 F. 2d 9.

No. 873. GIBSON ET AL. *v.* FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE. Supreme Court of Florida. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Robert L. Carter* for petitioners. Reported below: 108 So. 2d 729.

No. 749, Misc. CHRISTY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 261 F. 2d 357.

No. 803, Misc. PITTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Edgar Paul Boyko* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 263 F. 2d 808.

No. 807, Misc. CANTY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph Calderon* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 263 F. 2d 627.

No. 904. ELRICK RIM CO. *v.* READING TIRE MACHINERY CO., INC., ET AL. Motion by respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Jack E. Hursh* for petitioner. *Albert M. Herzig* for respondents. Reported below: 264 F. 2d 481.

No. 808, Misc. PLACE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph Calderon* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 263 F. 2d 627.

No. 822, Misc. YATES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 829, Misc. SPELLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bernard A. Golding* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 263 F. 2d 609.

No. 857, Misc. BLACK *v.* CITY NATIONAL BANK & TRUST COMPANY OF KANSAS CITY, EXECUTOR. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se. Kenneth E. Arnold* for respondent. Reported below: 321 S. W. 2d 477.

No. 863, Misc. LEE *v.* LANGLOIS, ACTING WARDEN. Supreme Court of Rhode Island. Certiorari denied.

No. 865, Misc. COUNTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 263 F. 2d 603.

No. 866, Misc. SCOTT *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 867, Misc. UNITED STATES EX REL. FAULKNER *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 869, Misc. SCHMIDT *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 870, Misc. MORPHEW *v.* INDIANA. Supreme Court of Indiana. Certiorari denied.

No. 877, Misc. CUNNINGHAM *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 880, Misc. DAVIES *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 899, Misc. STIEHLER *v.* MURPHY, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondent. Reported below: 7 App. Div. 2d 961, 183 N. Y. S. 2d 550.

No. 901, Misc. CANTRELL *v.* CALIFORNIA ADULT AUTHORITY ET AL. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 989, Misc. STARKWEATHER *v.* GREENHOLTZ, ACTING WARDEN. C. A. 8th Cir. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioner. *Clarence S. Beck,* Attorney General of Nebraska, for respondent. Reported below: 267 F. 2d 858.

No. 908, Misc. HARRIS *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. 909, Misc. BOBBITT *v.* ELLIS, GENERAL MANAGER, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 922, Misc. PENNEY *v.* CALIFORNIA ADULT AUTHORITY ET AL. Supreme Court of California. Certiorari denied.

No. 6, Misc. JONES *v.* ALVIS, WARDEN. Petition for writ of certiorari to the Court of Appeals of Ohio, Franklin County, and for other relief denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 433, Misc. DOWNS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

Rehearing Granted.

No. 492, October Term, 1957. FLORA *v.* UNITED STATES, 357 U. S. 63. The petition for rehearing is granted and the case is restored to the docket for reargument. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

Rehearing Denied.

No. 357. AMERICAN LIFE & ACCIDENT INSURANCE CO. ET AL. *v.* FEDERAL TRADE COMMISSION, 358 U. S. 875. Motion for leave to file petition for rehearing denied.

No. 551. DeVries et al. *v.* Baumgartner's Electric Construction Co., 359 U. S. 498;

No. 812. Gorska *v.* Pennsylvania Railroad Co., 359 U. S. 990;

No. 824. Vant et al. *v.* Mutual Benefit Life Insurance Co., 359 U. S. 1002; and

No. 747, Misc. Williams *v.* Alabama, 359 U. S. 1004. Petitions for rehearing denied.

No. 384. Tuscarora Nation of Indians, also known as Tuscarora Indian Nation, *v.* Power Authority of New York et al., 358 U. S. 841. Motion to substitute John Burch McMorran in the place of John W. Johnson as a party respondent granted. Motion for leave to file petition for rehearing denied. Mr. Justice Stewart took no part in the consideration or decision of this motion and application.

June 26, 1959.

Miscellaneous Order.

No. ——. County School Board of Prince Edward County, Virginia, et al. *v.* Allen et al. The application for a stay of further proceedings in the United States District Court for the Eastern District of Virginia is denied. *Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.* for petitioners. *Albertis S. Harrison, Jr.*, Attorney General, and *Henry T. Wickham,* Special Assistant Attorney General, for the Commonwealth of Virginia.

June 29, 1959.

Miscellaneous Orders.

Pursuant to the provisions of Title 28, U. S. C. § 42, It is ordered that Mr. Justice Brennan be, and he is hereby, temporarily assigned to the Second Circuit as Circuit Justice.

No. 488. SCALES *v.* UNITED STATES. Certiorari, 358 U. S. 917, to the United States Court of Appeals for the Fourth Circuit. Argued April 29, 1959. Reported below: 260 F. 2d 21.

Telford Taylor argued the cause for petitioner. With him on the brief was *McNeill Smith.*

John F. Davis argued the cause for the United States. On the brief were *Solicitor General Rankin, Acting Assistant Attorney General Yeagley, Kevin T. Maroney* and *Philip R. Monahan.*

IT IS ORDERED that this case be set for reargument at the 1959 Term to be heard on Thursday, November 19, 1959. Counsel are requested to address themselves to the following questions among others:

"(1) Is the Membership Clause of the Smith Act, 18 U. S. C. § 2385, valid under the Constitution of the United States if it be interpreted to permit a conviction based only on proof that the accused was a member of a society, group or assembly of persons described in the Act knowing the purposes thereof?

"(2) If not, is the Membership Clause constitutionally valid if interpreted as also requiring proof that the membership was accompanied by a specific intent of the accused to accomplish those purposes as speedily as circumstances would permit? Does the Smith Act permissibly bear such an interpretation?

"(3) If the Membership Clause would not be constitutionally valid as interpreted under (1) or (2), would the clause be constitutionally valid if interpreted as requiring as an element of the crime proof that the accused was an 'active' member? Does the Smith Act permissibly bear such an interpretation? If not, and if the clause be valid without such element, does a constitutional application of the Membership Clause depend upon any such requirement, and if so was such a requirement properly applied by the courts in this case?

"(4) Whether the 'clear and present danger' doctrine, as interpreted by counsel, has application to the Membership Clause, either with respect to the accused or with respect to the 'society, group, or assembly of persons' described in the statute. If applicable, whether such doctrine was or can now be, properly applied in this case.

"(5) Is § 4 (f) of the Internal Security Act, 50 USCA 780, a bar to the present prosecution? Counsel are requested to discuss the relevance of the registration provisions of that Act to this question."

Two hours are allotted to each side for oral argument.

MR. JUSTICE CLARK.

There are some 13 indictments now pending in the courts awaiting our disposition of this case, and one being held here on petition for certiorari.[1] Involved is the validity of the clause in the Smith Act having to do with membership in the Communist Party.

The case first came here over three years ago. Certiorari was originally granted on March 26, 1956, 350 U. S. 992. After oral argument, the case was restored to the docket and ordered to be reargued, 353 U. S. 979. Prior to reargument, the Solicitor General filed a memorandum suggesting remand for a new trial under our intervening ruling in *Jencks* v. *United States,* 353 U. S. 657. This was done, 355 U. S. 1. After affirmance of a second conviction, we again granted certiorari, 358 U. S. 917, and on April 29, 1959, heard oral argument for the second time.

The Court poses some questions ostensibly for the guidance of counsel at the third argument. None involves the *"Jencks* question," so there must be no doubt in the Court's mind on that issue. In fact, all of the questions posed have been fairly covered by the two arguments already made by capable counsel. All the reargument

[1] *Noto* v. *United States,* No. 564 Misc., this Term.

does is cause inordinate delay. The case is as ready for disposition now as it will ever be, and we should not adjourn until it is handed down.

Much has been said of late of the law's delay, and criticism has been heaped on the courts for it. This case affords a likely Exhibit A. It looks as if Scales' case, like *Jarndyce* v. *Jarndyce*,[2] will go on forever, only for the petitioner to reach his remedy, as did Richard Carstone there, through disposition by the Lord.

No. 914. UNITED STATES *v.* RAINES ET AL. Appeal from the United States District Court for the Middle District of Georgia. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Attorney General Rogers, Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for the United States. Reported below: 172 F. Supp. 552.

No. 989, Misc. STARKWEATHER *v.* GREENHOLTZ, ACTING WARDEN. Motion for leave to withdraw petition for rehearing because of mootness granted. *James J. Laughlin* for petitioner.

No. 919, Misc. CONWAY *v.* DICKSON, WARDEN;

No. 924, Misc. BRINSON *v.* WILKINSON, WARDEN;

No. 934, Misc. ODELL *v.* BURKE, WARDEN;

No. 938, Misc. UNITED STATES EX REL. CUOMO *v.* FAY, WARDEN;

No. 947, Misc. GILSON *v.* KEENAN, WARDEN, ET AL.; and

No. 948, Misc. TRIANTAFILLOS *v.* CLEMMER ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

---

[2] *Bleak House*, Charles Dickens.

No. 888. ARNOLD *v.* BEN KANOWSKY, INC. Motion of respondent to dispense with printing of record and briefs granted. *G. H. Kelsoe, Jr.* for respondent.

No. 688, Misc. HUNT *v.* TINSLEY, WARDEN; and

No. 885, Misc. BROADUS *v.* CLEMMER, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, DISTRICT OF COLUMBIA, 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. Petitioners *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John W. Patterson,* Assistant Attorney General, for respondent in No. 688, Misc.

No. 875, Misc. LANDES *v.* ANDERSON, SECRETARY OF THE TREASURY. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Rankin* for respondent.

No. 895, Misc. GERSHENSON *v.* HALL, U. S. DISTRICT JUDGE. Motion of Charles Resnik for leave to intervene as co-petitioner, and for other relief, denied. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Walter Ernest Hurst* for Resnik.

Probable Jurisdiction Noted.

No. 898. MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *v.* UNITED STATES; and

No. 942. UNITED STATES *v.* MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC. Appeals from the United States District Court for the District of Columbia. Probable jurisdiction noted. *William J. Hughes, Jr., Herbert A. Bergson, Daniel J. Freed* and *Daniel H. Margolis* for the Maryland and Virginia Milk Producers

Association, Inc. *Howard Adler, Jr.* was with them in No. 898. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Charles H. Weston* and *Edna Lingreen* for the United States. Reported below: 167 F. Supp. 45, 167 F. Supp. 799, 168 F. Supp. 880.

Certiorari Granted. (*See also No. 561, ante, p. 715, and No. 761, ante, p. 716.*)

No. 948. Superior Court of the State of Washington for King County et al. *v.* Washington ex rel. Yellow Cab Service, Inc. Supreme Court of Washington. Certiorari granted. *Samuel B. Bassett* for petitioners. *Herbert S. Little* and *Warren R. Slemmons* for respondent. Reported below: 53 Wash. 2d 644, 333 P. 2d 924.

No. 828, Misc. Talley *v.* California. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Appellate Department of the Superior Court of California, Los Angeles County, granted. *A. L. Wirin* and *Fred Okrand* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for respondent. Reported below: 172 Cal. App. 2d Supp. ——, 332 P. 2d 447.

No. 608, Misc. Nelson et al. *v.* County of Los Angeles et al. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the District Court of Appeal of California, Second Appellate District, granted. The Chief Justice took no part in the consideration or decision of this application. *A. L. Wirin, Fred Okrand* and *Nanette Dembitz* for petitioners. *Harold W. Kennedy* for County of Los Angeles, respondent. Reported below: 163 Cal. App. 2d 607, 329 P. 2d 978.

No. 731, Misc. McGANN *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

Certiorari Denied. (*See also Misc. Nos. 688 and 885, ante, p. 927.*)

No. 799. ANDERSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Wilton D. Chapman, Thomas W. Chapman* and *Arthur Litz* for Anderson, and *Jerome F. Duggan* for Hagen, petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 262 F. 2d 764.

No. 932. GIBSON-STEWART CO., INC., *v.* WM. BROS. BOILER & MANUFACTURING CO. (NOW BROS INCORPORATED). C. A. 6th Cir. Certiorari denied. *Warley L. Parrott* for petitioner. *Andrew E. Carlsen* for respondent. Reported below: 264 F. 2d 776.

No. 933. ALLIED NEWSPAPER CARRIERS OF NEW JERSEY ET AL. *v.* THE EVENING NEWS PUBLISHING CO. C. A. 3d Cir. Certiorari denied. *Jerome C. Eisenberg* for petitioners. *Edward J. Gilhooly* and *Charles Danzig* for respondent. Reported below: 263 F. 2d 715.

No. 936. JOHNSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Raymond Kyle Hayes* and *T. R. Bryan* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 265 F. 2d 496.

No. 893. MIRANDA *v.* COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK;

No. 935. RICCOBONO *v.* COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK; and

No. 940. CASTELLANO *v.* COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK. Court of Appeals of New York. Certiorari denied. *Harris B. Steinberg* for petitioner in No. 893. *Joseph E. Brill* and *Nicholas P. Iannuzzi* for petitioner in No. 935. *Osmond K. Fraenkel* for petitioner in No. 940. *Eliot H. Lumbard, Nathan Skolnik* and *Arnold M. Weiss* for respondent. Reported below: 5 N. Y. 2d 1026, 158 N. E. 2d 250.

No. 922. MARCHESE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 264 F. 2d 892.

No. 924. REDDICK *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Joseph C. Turco* and *Norman S. Bowles, Jr.* for petitioner. *C. Ferdinand Sybert,* Attorney General of Maryland, and *Joseph S. Kaufman,* Assistant Attorney General, for respondent. Reported below: 219 Md. 95, 148 A. 2d 384.

No. 937. POWELL *v.* THE WASHINGTON POST CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Diana K. Powell,* petitioner, *pro se. George Blow* for The Washington Post Company, and *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Stuart Rothman* for the Secretary of Labor, respondents. Reported below: 105 U. S. App. D. C. 374, 267 F. 2d 651.

No. 925. 3963 BOTTLES, MORE OR LESS, ETC., OWEN LABORATORIES, INC., *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 265 F. 2d 332.

No. 941. PERRY, U. S. DISTRICT JUDGE, *v.* MADDEN, REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Mozart G. Ratner* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 264 F. 2d 169.

No. 947. UNITED STATES EX REL. DRISCOLL *v.* JUDGES OF THE MISSOURI SUPREME COURT. Supreme Court of Missouri. Certiorari denied. *J. Ward Driscoll* for relator. *Gustavus A. Buder, Jr.* for respondent. Reported below: 322 S. W. 2d 824.

No. 950. JOHN W. MCGRATH CORP. ET AL. *v.* HUGHES, DEPUTY COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. *John M. Cunneen* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the Deputy Commissioner, respondent. Reported below: 264 F. 2d 314.

No. 953. BEDNO ET AL., DOING BUSINESS AS KING OPTICAL CO., *v.* FAST ET AL. Supreme Court of Wisconsin. Certiorari denied. *David Previant* for petitioners. *John W. Reynolds,* Attorney General of Wisconsin, for the Wisconsin Board of Examiners in Optometry, and *William J. McCauley* for McCauley, respondents. Reported below: 6 Wis. 2d 471, 95 N. W. 2d 396.

No. 946. YSZARA *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Mary Ellen Caldwell* for petitioner. *F. Carter Johnson, Jr.* for respondent. Reported below: 263 F. 2d 937.

No. 955. MIDWESTERN INSTRUMENTS, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *R. J. Woolsey* and *A. Langley Coffey* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott* and *Dominick L. Manoli* for respondent. Reported below: 264 F. 2d 829.

No. 959. BERGESON *v.* LIFE INSURANCE CORPORATION OF AMERICA ET AL. C. A. 10th Cir. Certiorari denied. *George M. McMillan* and *Clarence M. Beck* for petitioner. *Dennis McCarthy* for Bullard et al., *Calvin L. Rampton* and *David K. Watkiss* for Pugsley, and *Ray R. Christensen* for Birrell et al., respondents. Reported below: 265 F. 2d 227.

No. 960. UNITED STATES DREDGING CORP. *v.* KROHMER, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. *Christopher E. Heckman* for petitioner. *Edward J. Behrens* for respondent. Reported below: 264 F. 2d 339.

No. 962. LAW *v.* UNITED FRUIT CO. C. A. 2d Cir. Certiorari denied. *Lee S. Kreindler* for petitioner. *Eugene Underwood* for respondent. Reported below: 264 F. 2d 498.

No. 966. KASPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *J. Benjamin Simmons* and *Herbert S. Ward* for petitioner. *Solicitor General Rankin, Assistant Attorney General White* and *Harold H. Greene* for the United States. Reported below: 265 F. 2d 683.

No. 956. GREENE ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Walker Lowry* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Joseph Kovner* for the United States. Reported below: —— Ct. Cl. ——, 171 F. Supp. 459.

No. 970. KAHN ENGINEERING CO., INC., *v.* AMERICAN SECURITY & TRUST CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Carl W. Berueffy* for petitioner. *Bernard J. Gallagher* and *J. Roy Thompson, Jr.* for respondent. Reported below: 105 U. S. App. D. C. 39, 263 F. 2d 485.

No. 619. HARRIS ET AL. *v.* UNITED STATES. Motion for leave to file second supplemental memorandum in support of petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *A. L. Wirin* and *Fred Okrand* for petitioners. *Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 261 F. 2d 792.

No. 927. PAE *v.* STEVENS ET AL. Motion to dispense with printing of petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Wai Yuen Char* for petitioner. *Jack H. Mizuha,* Attorney General of the Territory of Hawaii, for Kam Tai Lee, Treasurer of the Territory of Hawaii, respondent. Reported below: 267 F. 2d 449.

No. 1009. HIGHAM ET AL. *v.* GAW ET AL. C. A. 6th Cir. Certiorari denied. *Arthur T. Wincek* and *Warren M. Briggs* for petitioners. *John H. Ranz* for respondents. Reported below: 267 F. 2d 355.

No. 957. UNITED STATES STEEL CORP. *v.* GIGUERE. C. A. 7th Cir. Certiorari denied. *Harlan L. Hackbert* for petitioner. *Harry Adelman, Allen A. Freeman* and *John H. Watson, Jr.* for respondent. Reported below: 262 F. 2d 189.

No. 967. SHERRY CORINE CORP. *v.* MITCHELL, SECRETARY OF LABOR. C. A. 4th Cir. Certiorari denied. *Robert R. MacMillan* for petitioner. *Solicitor General Rankin, Stuart Rothman* and *Bessie Margolin* for respondent. Reported below: 264 F. 2d 831.

No. 972. CITIES SERVICE OIL CO. ET AL. *v.* CITY OF NEW YORK ET AL. Court of Appeals of New York. Certiorari denied. *George H. Colin* for petitioners. *Charles H. Tenney* and *Seymour B. Quel* for the City of New York, respondent. Reported below: 5 N. Y. 2d 110, 154 N. E. 2d 814.

No. 835, Misc. ALPAR *v.* PERPETUAL BUILDING ASSOCIATION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Samuel Scrivener, Jr.* and *David S. Scrivener* for respondents. Reported below: 104 U. S. App. D. C. 341, 262 F. 2d 230.

No. 872, Misc. HORNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Chester E. Wallace* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 264 F. 2d 40.

No. 706, Misc. BAKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 996. ELLIS, DIRECTOR, TEXAS BOARD OF CORRECTIONS, *v.* MACKENNA. C. A. 5th Cir. Certiorari denied. *Will Wilson,* Attorney General of Texas, *Linward Shivers, John Flowers* and *Jack N. Price,* Assistant Attorneys General, for petitioner. *Bernard A. Golding* for respondent. Reported below: 263 F. 2d 35.

No. 407, Misc. JOHNSTON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 260 F. 2d 345.

No. 745, Misc. GALLEGOS ET AL. *v.* HOY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Fred Okrand* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 262 F. 2d 665.

No. 760, Misc. FUTCH *v.* ATLANTIC COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. *James H. Fort* for petitioner. *B. J. Mayer, Norman C. Shepard* and *Frank G. Kurka* for respondent. Reported below: 263 F. 2d 701.

No. 791, Misc. PITTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 263 F. 2d 353.

No. 833, Misc. STREETER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 837, Misc. WILSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 838, Misc. VASSAR *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 843, Misc. LEWIS *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 845, Misc. CLEARY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Norman S. Beier* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 265 F. 2d 459.

No. 850, Misc. CARPENTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 264 F. 2d 565.

No. 851, Misc. UNITED STATES EX REL. JONES *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 852, Misc. MAHURIN *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 855, Misc. WAGNER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 264 F. 2d 524.

No. 859, Misc. VEGA-MURRILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 264 F. 2d 240.

No. 864, Misc. McMorris *v.* Cavell, Warden. Court of Common Pleas of Pennsylvania, Westmoreland County. Certiorari denied.

No. 873, Misc. Rose, doing business as General Developing Co., *v.* Quigley, Postmaster. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 264 F. 2d 608.

No. 878, Misc. Johnson *v.* Bennett, Warden. District Court of Lee County, Iowa. Certiorari denied. Petitioner *pro se*. *Norman A. Erbe,* Attorney General of Iowa, and *Freeman H. Forrest,* Assistant Attorney General, for respondent.

No. 879, Misc. Tribote *v.* New York. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 881, Misc. Jackson *v.* Heinze, Warden. Supreme Court of California. Certiorari denied.

No. 884, Misc. Valek *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied.

No. 887, Misc. Becton *v.* Ragen, Warden. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 888, Misc. United States ex rel. Hyde *v.* Lavallee, Warden, et al. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *George K. Bernstein,* Assistant Attorney General, for respondent. Reported below: 263 F. 2d 940.

No. 891, Misc. CANTRELL *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 892, Misc. MERRILL *v.* JACKSON, WARDEN. 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.

No. 896, Misc. KEENER *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 898, Misc. DEL BONO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 902, Misc. IN RE LA MANNA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied.

No. 903, Misc. STINCHCOMB *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 906, Misc. BALDWIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 260 F. 2d 117.

No. 912, Misc. BARNES *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 915, Misc. JACKSON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 910, Misc. BROADUS-BEY *v.* DIAMOND. C. A. 6th Cir. Certiorari denied.

No. 916, Misc. ROSS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward J. Skeens* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 105 U. S. App. D. C. 341, 267 F. 2d 618.

No. 917, Misc. WILLIAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward J. Skeens* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 105 U. S. App. D. C. 348, 267 F. 2d 625.

No. 923, Misc. TURVILLE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. *Stanley Mosk,* Attorney General of California, and *William E. James,* Assistant Attorney General, for respondent. Reported below: 51 Cal. 2d 620, 335 P. 2d 678.

No. 735, Misc. MCWHORTER *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 Wilkey* and *Beatrice Rosenberg* for the United States.

No. 954, Misc. ARMSTRONG ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Grover N. McCormick* for petitioners. *Solicitor General Rankin* for the United States.

No. 928, Misc. LOPER *v.* ELLIS, GENERAL MANAGER, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 263 F. 2d 211.

No. 937, Misc. BANKS *v.* JOHNSTON, WARDEN, ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 825, Misc. GRACE ET AL. *v.* CALIFORNIA. Petition for writ of certiorari to the Supreme Court of California denied without prejudice to an application for writ of habeas corpus in an appropriate United States District Court. Petitioners *pro se*.

No. 893, Misc. HICKS *v.* FAY, WARDEN, ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit and for other relief denied.

Rehearing Denied.

No. 398. LOUISIANA POWER & LIGHT CO. *v.* CITY OF THIBODAUX, *ante*, p. 25;

No. 787. STATE ATHLETIC COMMISSION *v.* DORSEY, 359 U. S. 533;

No. 800. BURGER *v.* UNITED STATES, 359 U. S. 990;

No. 803. IN RE SARNER, 359 U. S. 533;

No. 861. DAVIDITIS ET AL. *v.* NATIONAL BANK OF MATTOON ET AL., 359 U. S. 1012;

No. 537, Misc. CLARK *v.* ILLINOIS, 359 U. S. 992;

No. 613, Misc. MULLEN ET AL. *v.* DISTRICT OF COLUMBIA, 359 U. S. 971;

No. 711, Misc. JONES *v.* COMMISSIONERS OF THE DISTRICT OF COLUMBIA, 359 U. S. 995; and

No. 740, Misc. WILKINS *v.* UNITED STATES, 359 U. S. 1002. Petitions for rehearing denied.

No. 761, Misc. SMITH *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL., *ante,* p. 904;

No. 776, Misc. CURRY *v.* UNITED STATES, 359 U. S. 1014; and

No. 921, Misc. GRIFFITH *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, 359 U. S. 1015. Petitions for rehearing denied.

No. 745. DE LUCIA *v.* UNITED STATES, 359 U. S. 1000. Petition for rehearing denied. MR. JUSTICE CLARK took no part in the consideration of decision of this application.

No. 589, Misc. WORLEY, ADMINISTRATRIX, ET AL. *v.* DUNN, TRUSTEE IN BANKRUPTCY, ET AL., 359 U. S. 955. Motion for leave to file second petition for rehearing denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1956, 1957, AND 1958

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1956	1957	1958	1956	1957	1958	1956	1957	1958	1956	1957	1958
Number of cases on dockets	14	13	15	1,160	1,104	1,041	878	891	1,006	2,052	2,008	2,062
Number disposed of during terms	3	1	3	900	967	886	798	815	892	1,701	1,783	1,781
Number remaining on dockets	11	12	12	260	137	155	80	76	114	351	225	281

	TERMS				TERMS		
	1956	1957	1958		1956	1957	1958
Distribution of cases disposed of during terms:				Distribution of cases remaining on dockets:			
Original cases	3	1	3	Original cases	11	12	12
Appellate cases on merits	236	297	245	Appellate cases on merits	136	68	84
Petitions for certiorari	664	670	641	Petitions for certiorari	124	69	71
Miscellaneous docket applications	798	815	892	Miscellaneous docket applications	80	76	114

JULY 2, 1959.

INDEX

ABSTENTION. See **Procedure**, 5–8.

ACCOUNTING. See **Taxation**; **Trial**, 2.

ADMINISTRATIVE PROCEDURE. See also **Antitrust Acts**; **Constitutional Law**, II, 3; **Labor**, 1–4; **Natural Gas Act**; **Procedure**, 3; **Public Land.**

1. *Defense contracts—Military secrets—Revocation of security clearance.*—In absence of explicit authorization by the President or Congress, Secretaries of Armed Forces not authorized to revoke security clearance of employee of private contractor developing and producing goods involving military secrets, thereby depriving him of employment, in proceeding in which employee was not afforded safeguards of confrontation and cross-examination. Greene v. McElroy, p. 474.

2. *Defense contracts—Revocation and restoration of security clearance—Mootness.*—When security clearance of employee of defense plant was revoked but later restored, his suit to set aside revocation became moot. Taylor v. McElroy, p. 709.

ADMIRALTY. See **Procedure**, 3.

ADULTERY. See **Constitutional Law**, II, 2.

ALABAMA. See **Procedure**, 1.

ANTITRUST ACTS. See also **Constitutional Law**, IV, 1; **Trial**, 3.

Robinson-Patman Act—Price discrimination—Competition—Cost justification.—Discrimination in favor of larger customers by furnishing them services and facilities not accorded to smaller customers on equal terms violated § 2 (e) of Clayton Act, as amended by Robinson-Patman Act; record justified finding that the two classes of customers were competitors; neither absence of competitive injury nor presence of cost justification available as defense. F. T. C. v. Simplicity Pattern Co., p. 55.

APPEAL. See **Jurisdiction**, 1–2.

ARMED FORCES. See **Administrative Procedure**, 1–2.

ATTORNEYS.

Suspension from practice—Public speech about pending case—Sufficiency of evidence.—Speech of attorney relating to pending Smith Act trial in which she was one of defense counsel held not sufficient

ATTORNEYS—Continued.

to sustain charge that she had impugned impartiality and fairness of presiding judge; judgment of suspension from practice reversed. In re Sawyer, p. 622.

CARRIERS. See **Labor,** 3–4; **Procedure,** 3.

CENSORSHIP. See **Constitutional Law,** II, 2; **Federal Communications Act.**

CERTIORARI. See **Jurisdiction,** 1–2.

CLAYTON ACT. See **Antitrust Acts.**

COMMUNISM. See **Attorneys; Constitutional Law,** I; II, 1; III, 1–2, 5.

COMPETITION. See **Antitrust Acts.**

CONDEMNATION. See **Public Land.**

CONFESSIONS. See **Constitutional Law,** III, 7.

CONFRONTATION. See **Administrative Procedure,** 1.

CONGRESSIONAL INVESTIGATIONS. See **Constitutional Law,** II, 1; III, 2.

CONSPIRACY. See **Criminal Law,** 2.

CONSTITUTIONAL LAW. See also **Jurisdiction,** 2; **Procedure,** 1, 6–8.

I. Federal-State Relations.

Federal-state relations—State sedition laws—Enforceability.—New Hampshire Subversive Activities Act not superseded by Smith Act, forbidding advocacy of overthrow of U. S. Government by force and violence. Uphaus v. Wyman, p. 72.

II. Freedom of Speech and Press.

1. *Congressional investigations—Contempt conviction for refusal to answer—Membership in Communist Party.*—Conviction under 2 U. S. C. § 192 for refusal to answer questions regarding past or present membership in Communist Party did not violate witness' rights under First Amendment. Barenblatt v. United States, p. 109.

2. *Censorship of motion pictures—Advocacy of ideas.*—As construed and applied to deny license for showing of motion picture because it portrayed adultery as proper behavior in some circumstances, New York statute held violative of First and Fourteenth Amendments. Kingsley Pictures Corp. v. Regents of N. Y. Univ., p. 684.

CONSTITUTIONAL LAW—Continued.

3. *Order of Labor Board restraining employer.*—Order of Labor Board which did not forbid employers and employees from discussing matters of mutual interest but merely precluded employer from dominating, supporting and interfering with employee committees did not abridge freedom of speech in violation of First Amendment. Labor Board v. Cabot Carbon Co., p. 203.

III. Due Process.

1. *State legislative investigations—Contempt.*—Due Process Clause of Fourteenth Amendment did not preclude State from requiring production of names of guests at summer camp in legislative investigation of subversive activities; conviction of contempt for refusal to do so sustained. Uphaus v. Wyman, p. 72.

2. *Congressional investigations—Contempt conviction for refusal to testify.*—Conviction under 2 U. S. C. § 192 for refusal to answer questions before Committee on Un-American Activities sustained; Committee's authority not unconstitutionally vague. Barenblatt v. United States, p. 109.

3. *State criminal trial—Knowing use of false testimony.*—In a state trial for murder, failure of the prosecutor to correct testimony of witness he knew to be false denied defendant due process of law in violation of Fourteenth Amendment. Napue v. Illinois, p. 264.

4. *State judicial investigation—Refusal to testify in absence of counsel—Contempt.*—Conviction of contempt for refusal to testify in absence of counsel in fact-finding investigation by state judge, analogous to grand jury proceeding, did not violate Due Process Clause of Fourteenth Amendment. Anonymous v. Baker, p. 287.

5. *State legislative committee — Self-incrimination — Immunity — Entrapment.*—Convictions in state court for refusing to answer questions about Communistic or subversive activities violated Due Process Clause of Fourteenth Amendment when legislative committee let witnesses rely on privilege against self-incrimination but convictions were sustained by State Supreme Court on ground that state immunity statute had deprived them of its protection. Raley v. Ohio, p. 423.

6. *State Unfair Sales Act—Injunction.*—State-court injunction against selling below cost in violation of State Unfair Sales Act did not violate Due Process Clause of Fourteenth Amendment, though defendant's competitors were selling at illegal prices and court refused to enjoin them from giving trading stamps with goods sold at or near cost. Safeway Stores v. Oklahoma Retail Grocers, p. 334.

CONSTITUTIONAL LAW—Continued.

7. *State trial for murder—Confession not voluntary.*—Confession obtained after eight hours of continuous questioning by state officials, who repeatedly denied accused opportunity to consult counsel, was involuntary, and its admission in evidence violated Due Process Clause of Fourteenth Amendment. Spano v. New York, p. 315.

IV. Equal Protection of Laws.

1. *State Unfair Sales Act—Injunction.*—State-court injunction against selling below cost in violation of State Unfair Sales Act did not violate Equal Protection Clause of Fourteenth Amendment, though defendant's competitors were selling at illegal prices and court refused to enjoin them from giving trading stamps with goods sold at or near cost. Safeway Stores v. Oklahoma Retail Grocers, p. 334.

2. *State criminal appeals—Indigents.*—When a non-indigent person could have State Supreme Court consider his application for leave to appeal from felony conviction, denial of same right to indigent solely because he was unable to pay filing fee violated Fourteenth Amendment. Burns v. Ohio, p. 252.

V. Self-Incrimination.

1. *State grand jury proceedings—Federal offense.*—State-court conviction for contempt for refusal, after being offered immunity from state prosecution, to answer before state grand jury questions which witnesses claimed would expose them to prosecution for federal offense did not violate Fifth Amendment. Mills v. Louisiana, p. 230.

2. *State legislative committee—Immunity—Entrapment.*—Convictions in state court for refusing to answer questions about Communistic or subversive activities violated Due Process Clause of Fourteenth Amendment when legislative committee let defendants rely on privilege against self-incrimination, but convictions were sustained by State Supreme Court on ground that state immunity statute had deprived them of its protection. Raley v. Ohio, p. 423.

VI. Elections.

Qualifications of voters—Literacy test.—North Carolina statute requiring all prospective voters to pass literacy test, irrespective of race or color, does not on its face violate 14th, 15th or 17th Amendments. Lassiter v. Northampton County Board of Elections, p. 45.

CONTEMPT. See **Constitutional Law**, II, 1; III, 1–2, 4–5; V, 1; **Procedure**, 1.

COUNSEL. See **Constitutional Law**, III, 4, 7.

CRIMINAL LAW. See also **Constitutional Law,** II, 1; III, 2–5, 7; IV, 2; V, 1; **Jurisdiction; Trial,** 1–4.

1. *Federal Kidnapping Act—Prosecution for violation—Indictment.*—Under Rule 7(a), Federal Rules of Criminal Procedure, prosecution for violation of Federal Kidnapping Act, which may be punishable by death in certain circumstances, must be by indictment, not information. Smith v. United States, p. 1.

2. *Conspiracy—Evasion of wagering tax—Sufficiency of evidence.*—In trial for conspiracy to evade payment of federal wagering tax, evidence held sufficient to support conviction of principals who were liable for tax but not of mere employees who were not liable for tax. Ingram v. United States, p. 672.

CROSS-EXAMINATION. See **Administrative Procedure,** 1; **Trial,** 1–2.

DECLARATORY JUDGMENTS ACT. See **Procedure,** 7.

DECREES. See **Procedure,** 9.

DEFAMATION. See **Federal Communications Act; Libel.**

DEFENSE CONTRACTS. See **Administrative Procedure,** 1–2.

DISBARMENT. See **Attorneys.**

DISCRIMINATION. See **Antitrust Acts; Constitutional Law,** IV.

DIVERSITY OF CITIZENSHIP. See **Procedure,** 4–6.

DOCUMENTS. See **Trial,** 1–3.

DUE PROCESS OF LAW. See **Administrative Procedure,** 1; **Constitutional Law,** III.

EDUCATION. See **Constitutional Law,** II, 1; III, 2.

ELECTION OF REMEDIES. See **Public Land.**

ELECTIONS. See **Constitutional Law,** VI.

ELKINS ACT. See **Procedure,** 9.

EMINENT DOMAIN. See **Procedure,** 5–6, 8; **Public Land.**

EMPLOYEE COMMITTEES. See **Labor,** 1.

ENTRAPMENT. See **Constitutional Law,** III, 5.

EQUAL PROTECTION OF LAWS. See **Constitutional Law,** IV.

EVIDENCE. See **Attorneys; Constitutional Law,** III, 3; **Criminal Law,** 2; **Labor,** 2; **Natural Gas Act.**

EXCULPATORY CLAUSES. See **Procedure**, 3.

FALSE TESTIMONY. See **Constitutional Law**, III, 3.

FEDERAL BUREAU OF INVESTIGATION. See **Trial**, 2.

FEDERAL COMMUNICATIONS ACT.

Radio—Equal time for candidates—Censorship—Liability for defamation.—Under § 315 (a) of Federal Communications Act, requiring "equal opportunities" for candidates for public office, radio station may not censor a candidate's speech and is not liable for any defamatory statement he may make in radio speech. Farmers Educational Union v. WDAY, p. 525.

FEDERAL KIDNAPPING ACT. See **Criminal Law**, 1.

FEDERAL POWER COMMISSION. See **Natural Gas Act.**

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Criminal Law**, 1; **Trial**, 3.

FEDERAL-STATE RELATIONS. See **Constitutional Law**, I; III, 1, 3–7; IV, 1–2; V, 1–2; VI; **Procedure**, 1, 4–8.

FEDERAL TRADE COMMISSION. See **Antitrust Acts.**

FIFTEENTH AMENDMENT. See **Constitutional Law**, VI.

FIFTH AMENDMENT. See **Constitutional Law**, III, 2; V.

FINAL JUDGMENT. See **Jurisdiction**, 1.

FINANCE COMPANIES. See **Taxation.**

FIRST AMENDMENT. See **Constitutional Law**, II, 1–3.

FOURTEENTH AMENDMENT. See **Constitutional Law**, II, 2; III, 1, 3–7; VI.

FREEDOM OF SPEECH AND PRESS. See **Constitutional Law**, II.

GAS. See **Natural Gas Act.**

GOVERNMENT EMPLOYEES. See **Libel.**

GRAND JURIES. See **Constitutional Law**, III, 4; V, 1; **Trial**, 3.

HARMLESS ERROR. See **Trial**, 2.

HAWAII. See **Attorneys.**

HIGHWAYS. See **Procedure**, 8.

IMMUNITY. See **Constitutional Law**, III, 5; V, 1; **Libel.**

INCOME TAX. See **Taxation.**

INDICTMENT. See **Criminal Law**, 1.

INDIGENTS. See **Constitutional Law,** IV, 2; **Jurisdiction,** 1.

INJUNCTIONS. See **Constitutional Law,** III, 6; **Procedure,** 7.

INSPECTION. See **Trial,** 1–3.

INSTALLMENT SALES. See **Taxation.**

INTERSTATE COMMERCE ACT. See **Procedure,** 3, 9.

INVESTIGATIONS. See **Constitutional Law,** I; II, 1; III, 1–2, 4–5.

JENCKS ACT. See **Trial,** 1–3.

JUDGMENTS. See **Jurisdiction,** 1–2; **Procedure,** 1, 9.

JURIES. See **Procedure,** 4; **Trial,** 4.

JURISDICTION. See also **Labor,** 3–4; **Natural Gas Act; Procedure.**

1. *Supreme Court—Certiorari—"Final judgment" of highest state court.*—Letter of Clerk returning pauper's application for leave to appeal, in accordance with well-publicized and uniform practice sanctioned by highest state court, was "final judgment" of that court within meaning of 28 U. S. C. § 1257. Burns v. Ohio, p. 252.

2. *Supreme Court—Appeal or certiorari—State decision not passing on validity of state statute under Federal Constitution.*—When validity of state statute under Federal Constitution was not challenged or passed on in state courts, this Court lacked jurisdiction of appeal under 28 U. S. C. § 1257 (2); but granted certiorari. Anonymous v. Baker, p. 287; Raley v. Ohio, p. 423.

KIDNAPPING. See **Criminal Law,** 1.

LABOR. See also **Administrative Procedure,** 1–2; **Constitutional Law,** II, 3; **Procedure,** 4.

1. *National Labor Relations Act—"Labor organizations"—Employee committees organized and dealt with by employers.*—Employee committees organized by employers and dealt with concerning grievances and conditions of work were "labor organizations" within meaning of § 2 (5) of Act and employer domination and support of them violated § 8 (a) (2). Labor Board v. Cabot Carbon Co., p. 203.

2. *National Labor Relations Act—Refusal to bargain—Procedure.*—When union charged employer with refusal to bargain but Regional Director refused to issue complaint because of insufficiency of evidence, Board was not precluded from issuing complaint and finding employer guilty because of subsequent conduct. Labor Board v. Fant Milling Co., p. 301.

LABOR—Continued.

3. *Railway Labor Act—Board's exclusive jurisdiction—Retired employee.*—Even though employee had retired, National Railroad Adjustment Board had exclusive primary jurisdiction over dispute arising under collective bargaining agreement, and district court properly dismissed his suit for extra pay. Pennsylvania R. Co. v. Day, p. 548.

4. *Railway Labor Act—Board's decision—Common-law action for same grievance.*—When employee's union submitted his grievance to National Railroad Adjustment Board, which decided that his dismissal was justified, he was precluded from seeking damages for dismissal in common-law action. Union Pacific R. Co. v. Price, p. 601.

LEGISLATIVE INVESTIGATIONS. See **Constitutional Law,** I; II, 1; III, 1–2, 5.

LIBEL. See also **Federal Communications Act.**

Defense to suit—Absolute privilege—Government officials.—In suits by government employees against superior officers for libel, alleging malice, defendants' pleas of absolute privilege sustained when statements were made in connection with performance of their official duties. Barr v. Matteo, p. 564; Howard v. Lyons, p. 593.

LIMITED ACCESS HIGHWAYS. See **Procedure,** 8.

LITERACY TESTS. See **Constitutional Law,** VI.

LOTTERIES. See **Criminal Law,** 2.

LOUISIANA. See **Constitutional Law,** V, 1; **Procedure,** 5.

MILITARY SECRETS. See **Administrative Procedure,** 1–2.

MOOT CASE. See **Administrative Procedure,** 2.

MOTION PICTURES. See **Constitutional Law,** II, 2.

MURDER. See **Constitutional Law,** III, 3, 7.

NATIONAL LABOR RELATIONS ACT. See **Labor,** 1–2.

NATIONAL RAILROAD ADJUSTMENT BOARD. See **Labor,** 3–4.

NATURAL GAS ACT.

Applications by producers under § 7 (e)—Sales for resale—Rates—Protection of public.—Before issuing permanent certificates of convenience and necessity to producers under § 7 (e), Federal Power Commission must be satisfied that proposed rate is in public interest or must prescribe such conditions as may be needed to protect public interest; jurisdiction of Commission; sufficiency of evidence. Atlantic Refining Co. v. Public Service Comm'n, p. 378.

NAVY. See **Libel.**

NEGROES. See **Constitutional Law,** VI; **Procedure,** 1, 7.

NEW HAMPSHIRE. See **Constitutional Law,** I; III, 1.

NEWSPAPERS. See **Trial,** 4.

NEW YORK. See **Constitutional Law,** II, 2; III, 4.

NORTH CAROLINA. See **Constitutional Law,** VI.

OFFICE OF RENT STABILIZATION. See **Libel.**

OHIO. See **Constitutional Law,** III, 5; IV, 2; **Procedure,** 2.

OIL. See **Procedure,** 9.

OKLAHOMA. See **Constitutional Law,** III, 6.

PAUPERS. See **Constitutional Law,** IV, 2; **Jurisdiction,** 1.

PENNSYLVANIA. See **Procedure,** 4, 6, 8.

PERJURY. See **Constitutional Law,** III, 3.

PIPELINES. See **Natural Gas Act; Procedure,** 9.

PREJUDICIAL ERROR. See **Criminal Law,** 1; **Trial,** 4.

PRICE CUTTING. See **Constitutional Law,** III, 6.

PRICE DISCRIMINATION. See **Antitrust Acts.**

PRIVILEGE. See **Libel.**

PROCEDURE. See also **Administrative Procedure,** 1–2; **Constitutional Law,** III, 3; IV, 2; **Criminal Law,** 1; **Labor,** 2; **Trial,** 1–4.

1. *Supreme Court—Reversal of state-court judgment—Effect.*—Supreme Court of United States having reversed judgment of State Supreme Court after being led by both parties and state of the record to treat as sole issue before it the question whether State could compel petitioner to produce its membership lists in court, State Supreme Court was precluded from again affirming contempt conviction for failure to produce other documents. N. A. A. C. P. v. Alabama, p. 240.

2. *Supreme Court—Appeal—Noting probable jurisdiction.*—By vote of 4 to 4, Court noted probable jurisdiction of appeal in case believed by four Members voting against such action to turn on same question as that decided recently by 5-to-4 vote in another case. Ohio ex rel. Eaton v. Price, p. 246.

PROCEDURE—Continued.

3. *Courts of Appeals—Failure to pass on all issues—Referral of one issue to I. C. C.*—Court of Appeals correctly ruled that exculpatory clause in tariff filed with I. C. C. by water carrier should not be struck down without opportunity for consideration by I. C. C.; but it should not have ordered that question referred to I. C. C. without first passing on other issues which might have disposed of case. Southwestern Sugar & Molasses Co. v. River Terminals Corp., p. 411.

4. *District Courts — Diversity jurisdiction — Factual issues for jury.*—In a Federal District Court having jurisdiction because of diversity of citizenship, all disputed issues of fact necessary for determining whether decedent was defendant's employee within meaning of State Workmen's Compensation Act were for jury determination, regardless of practice in state courts, unless their assignment by State to judge was "integral part of special relationship created by the statute." Magenau v. Aetna Freight Lines, p. 273.

5. *District Courts—Diversity jurisdiction—Eminent domain—State law—Reference to state courts.*—When authority of city under state law to expropriate private property was challenged in Federal District Court having diversity jurisdiction and such authority was doubtful and had never been passed on by state courts, District Court properly stayed proceedings until State Supreme Court had opportunity to pass on question. Louisiana Power & Light Co. v. City of Thibodaux, p. 25.

6. *District Courts—Diversity jurisdiction—Eminent domain—State-law questions—Abstention.*—Federal District Court should not have abstained from exercising properly invoked diversity jurisdiction in state eminent domain case when no constitutional question, no danger to federal-state relationships and no difficult issue of unsettled state law involved. Allegheny County v. Frank Mashuda Co., p. 185.

7. *District Courts—Constitutionality of state statutes never construed by state courts—Reference to state courts.*—Suit to declare unconstitutional and enjoin enforcement of state statutes which had never been construed by state courts should have been held by Federal District Court until state courts had reasonable opportunity to construe them. *Harrison* v. *N. A. A. C. P.*, p. 167.

8. *District Courts—Suit to enjoin state officials from designating limited access highway—Abstention.*—Federal District Court should have declined to adjudicate controversy involving constitutionality of state statute authorizing designation of limited access highways and providing no compensation for "consequential damages where no property is taken." Martin v. Creasy, p. 219.

PROCEDURE—Continued.

9. *Elkins Act—Decree—Interpretation.*—When oil and pipeline companies had for 16 years adhered to an interpretation of consent decree against them under Elkins and Interstate Commerce Acts, which was consistent with language of decree, Government had acquiesced, and trial court concluded it was interpretation intended by parties, this Court will not reject it simply because Government now contends that a different interpretation would be more consistent with its reasons for entering into agreement in first place. United States v. Atlantic Refining Co., p. 19.

PRODUCTION OF DOCUMENTS. See **Constitutional Law,** III, 1; **Trial,** 1–3.

PUBLIC LAND.

Revocable lease—Revocation or condemnation—Election of remedies.—When Government undertook to revoke lease of land but lessee declined to vacate, Government was not required to abandon right to revoke lease in order to exercise its right to obtain immediate possession under condemnation law. United States v. 93.970 Acres, p. 328.

RACIAL DISCRIMINATION. See **Constitutional Law,** VI; **Procedure,** 1, 7.

RADIO. See **Federal Communications Act.**

RAILROAD ADJUSTMENT BOARD. See **Labor,** 3–4.

RAILWAY LABOR ACT. See **Labor,** 3–4.

REMEDIES. See **Public Land.**

RES JUDICATA. See **Procedure,** 1.

REVOCATION. See **Public Land.**

ROBINSON-PATMAN ACT. See **Antitrust Acts.**

RULES OF CRIMINAL PROCEDURE. See **Criminal Law,** 1; **Trial,** 3.

SECURITY CLEARANCE. See **Administrative Procedure,** 1–2.

SEDITION LAWS. See **Constitutional Law,** I; III, 1, 5; V, 2.

SELF-INCRIMINATION. See **Constitutional Law,** V.

SEVENTEENTH AMENDMENT. See **Constitutional Law,** VI.

SHERMAN ACT. See **Trial,** 3.

SLANDER. See **Federal Communications Act; Libel.**

SMITH ACT. See **Attorneys; Constitutional Law,** I.

STATEMENTS. See **Trial**, 1–2.

SUBVERSION. See **Constitutional Law**, I; II, 1; III, 1–2, 5; V, 2.

SUPREME COURT. See **Jurisdiction**, 1–2; **Procedure**, 1–2.

TARIFFS. See **Procedure**, 3.

TAXATION. See also **Criminal Law**, 2.

Income tax—Accrued income—Dealers' "reserve accounts" on books of finance companies.—Retail automobile dealers making tax returns on accrual basis and selling installment sales paper to finance companies must treat amounts credited to them in "reserve accounts" on books of finance companies as income accrued to them during tax years in which such amounts are so credited. Commissioner v. Hansen, p. 446.

TRADING STAMPS. See **Constitutional Law**, III, 6.

TRANSPORTATION. See **Labor**, 3–4; **Procedure**, 3.

TRIAL. See also **Attorneys**; **Constitutional Law**, III, 3; **Procedure.**

1. *Criminal cases—Cross-examination—Right to inspect government documents under Jencks Act—"Statement."*—A 600-word memorandum summarizing part of 3½-hour interrogation of witness by a government agent was not "statement" of kind required to be produced under 18 U. S. C. § 3500. Palermo v. United States, p. 343.

2. *Criminal cases—Cross-examination—Right to inspect F. B. I. files under Jencks Act.*—Certain reports of F. B. I. investigators not "statements" required to be produced under 18 U. S. C. § 3500; others need not be produced when defense already has information; failure to produce others harmless error when same information had been revealed on cross-examination and questioning by judge. Rosenberg v. United States, p. 367.

3. *Criminal cases—Production of government documents—Grand jury minutes.*—In trial for violation of Sherman Act, defendants not entitled to production of grand jury minutes without showing particularized need for them; matter committed to sound discretion of trial judge under Rule 6 (c) of Federal Rules of Criminal Procedure; *Jencks* v. *United States*, 353 U. S. 657, and 18 U. S. C. § 3500 inapplicable. Pittsburgh Plate Glass Co. v. United States, p. 395.

4. *Criminal cases—Prejudicial newspaper stories read by jurors—New trial.*—When jurors in Federal District Court saw and read newspaper stories containing information prejudicial to defendant which had been denied admission into evidence in criminal trial, resulting harm to defendant required new trial. Marshall v. United States, p. 310.

UNFAIR COMPETITION. See **Antitrust Acts; Constitutional Law,** III, 6.

VAGUENESS. See **Constitutional Law,** III, 2.

VIRGINIA. See **Procedure,** 7.

VOTERS. See **Constitutional Law,** VI.

WAGERING. See **Criminal Law,** 2.

WATER CARRIERS. See **Procedure,** 3.

WITNESSES. See **Constitutional Law,** II, 1; III, 1–5; V, 1–2.

WORDS.

1. *"Final judgment."*—28 U. S. C. § 1257. Burns v. Ohio, p. 252.

2. *"Labor organizations."*—National Labor Relations Act, § 2 (5). Labor Board v. Cabot Carbon Co., p. 203.

3. *"Offense which may be punishable by death."*—18 U. S. C. § 1201. Smith v. United States, p. 1.

4. *"Statement."*—18 U. S. C. § 3500. Palermo v. United States, p. 343; Rosenberg v. United States, p. 367.

WORKMEN'S COMPENSATION. See **Procedure,** 4.

U.S. GOVERNMENT PRINTING OFFICE : 1959 O—809615