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UNITED STATES REPORTS

VOLUME 361

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1959

OCTOBER 12, 1959, THROUGH FEBRUARY 23, 1960

WALTER WYATT
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1960

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
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.[1]
HAROLD H. BURTON, Associate Justice.[2]
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.

Notes on p. IV.

NOTES.

[1] MR. JUSTICE REED (retired) was designated and assigned to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit (see *post*, p. 801) and the United States Court of Claims (see *post*, p. 891).

[2] MR. JUSTICE BURTON (retired) was designated and assigned to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit (see *post*, p. 801).

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.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1959.

WABASH RAILROAD CO. ET AL. *v.* COMMERCIAL TRANSPORT, INC., ET AL.

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

No. 68. Decided October 12, 1959.

Judgment affirmed.

Reported below: 173 F. Supp. 524.

Eugene S. Davis, Urchie B. Ellis, J. L. Lenihan and *Amos M. Mathews* for appellants.

Solicitor General Rankin, Acting Assistant Attorney General Bicks, Charles H. Weston and *Henry Geller* for the United States, and *Mack Stephenson* for Commercial Transport, Inc., appellees.

PER CURIAM.

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

FRIEDBERG ET AL., DOING BUSINESS AS HARRISBURG WINDOW CLEANING CO., *v.* PENNSYLVANIA LABOR RELATIONS BOARD.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 140. Decided October 12, 1959.

Appeal dismissed and certiorari denied.
Reported below: 395 Pa. 294, 148 A. 2d 909.

Samuel Handler and *Arthur Berman* for appellants.

Anne X. Alpern, Attorney General of Pennsylvania, and *Harry J. Rubin,* Deputy Attorney General, for appellee.

PER CURIAM.

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

BERKSHIRE FINE SPINNING ASSOCIATES, INC., *v.* CITY OF NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 272. Decided October 12, 1959.

Appeal dismissed for want of a substantial federal question. Reported below: 5 N. Y. 2d 347, 157 N. E. 2d 614.

Truman Henson for appellant.

Stanley Buchsbaum for appellees.

PER CURIAM.

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

MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER are of the opinion that probable jurisdiction should be noted.

BEARD *v.* OHIO.

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

No. 2, Misc. Decided October 12, 1959.

Certiorari granted and judgment reversed.

Petitioner *pro se*.

Mark McElroy, Attorney General of Ohio, and *William M. Vance,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed. *Burns* v. *Ohio,* 360 U. S. 252.

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

WOMACK *v.* OHIO.

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

No. 12, Misc. Decided October 12, 1959.

Certiorari granted and judgment reversed.

Petitioner *pro se.*

Mark McElroy, Attorney General of Ohio, and *William M. Vance,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted and the judgment is reversed. *Burns* v. *Ohio,* 360 U. S. 252.

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

NICHOLS *v.* McGEE, DIRECTOR, CALIFORNIA STATE DEPARTMENT OF CORRECTIONS, ET AL.

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

No. 16, Misc. Decided October 12, 1959.

Appeal dismissed.

Reported below: 169 F. Supp. 721.

Appellant *pro se.*

Stanley Mosk, Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for appellees.

PER CURIAM.

The appeal is dismissed.

EASTERN STATES PETROLEUM CORP. *v.* ROGERS, ATTORNEY GENERAL, ET AL.

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

No. 70. Decided October 12, 1959.

Appeal dismissed.

Gerard R. Moran and *Edwin G. Martin* for appellant.

Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal and *Seymour Farber* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

CASTELLANO *v.* COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 72. Decided October 12, 1959.

Appeal dismissed as moot.

Reported below: 5 N. Y. 2d 1026, 6 N. Y. 2d 753, 878; 158 N. E. 2d 250, 159 N. E. 2d 201, 160 N. E. 2d 125.

Osmond K. Fraenkel for appellant.

Eliot H. Lumbard, Nathan Skolnik and *Arnold M. Weiss* for appellee.

PER CURIAM.

The motion for leave to file supplement to the motion to dismiss is granted. The motion to dismiss is granted and the appeal is dismissed as moot.

BROADY *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 104. Decided October 12, 1959.

Appeal dismissed and certiorari denied.
Reported below: 5 N. Y. 2d 500, 158 N. E. 2d 817.

Sol Gelb and *Harris B. Steinberg* for appellant.

PER CURIAM.

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

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

KISER ET AL. *v.* CLINCHFIELD COAL CORP.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 106. Decided October 12, 1959.

Appeal dismissed for want of a properly presented federal question.
Reported below: 200 Va. 517, 106 S. E. 2d 601.

S. H. Sutherland for appellants.

Wm. A. Stuart for appellee.

PER CURIAM.

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

FIRESTONE TIRE & RUBBER CO. *v.* BOARD OF SUPERVISORS OF LOS ANGELES COUNTY ET AL.

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

No. 110. Decided October 12, 1959.

Appeal dismissed and certiorari denied.
Reported below: 166 Cal. App. 2d 519, 333 P. 2d 378.

Oscar A. Trippet and *Thomas H. Carver* for appellant.

PER CURIAM.

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

RYALS *v.* FLORIDA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT.

No. 132. Decided October 12, 1959.

Appeal dismissed and certiorari denied.
Reported below: 109 So. 2d 626.

Lloyd D. Martin for appellant.

PER CURIAM.

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

MANCUSO *v.* COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 117. Decided October 12, 1959.

Appeal dismissed and certiorari denied.

Reported below: 5 N. Y. 2d 1026, 6 N. Y. 2d 753, 878; 158 N. E. 2d 250, 159 N. E. 2d 201, 160 N. E. 2d 125.

Anthony J. Fernicola for appellant.

Eliot H. Lumbard, Nathan Skolnik and *Arnold M. Weiss* for appellee.

PER CURIAM.

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

BIRNEL *v.* TOWN OF FIRCREST.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 182. Decided October 12, 1959.

Appeal dismissed for want of a substantial federal question.

Reported below: 53 Wash. 2d 830, 335 P. 2d 819.

Alfred J. Schweppe for appellant.

Thomas R. Garlington, Creighton C. Flynn and *Robert R. Briggs* for appellee.

PER CURIAM.

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

JONES MOTOR CO., INC., *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

No. 120. Decided October 12, 1959.

Certiorari granted and judgment reversed.
Reported below: 188 Pa. Super. 449, 148 A. 2d 491.

Roland Rice, William J. Wilcox and *Christian V. Graf* for petitioner.

William A. Goichman, Louis J. Carter and *Thomas M. Kerrigan* for the Pennsylvania Public Utility Commission, respondent.

Harold S. Shertz for Intervening Respondents.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *Service Storage & Transfer Co.* v. *Virginia,* 359 U. S. 171.

LEWEY *v.* JONES.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 210. Decided October 12, 1959.

Appeal dismissed for want of a substantial federal question.

William C. Wines and *Mark O. Roberts* for appellant.

PER CURIAM.

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

KELEHER *v.* LA SALLE COLLEGE.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 157. Decided October 12, 1959.

Appeal dismissed and certiorari denied.
Reported below: 394 Pa. 545, 147 A. 2d 835.

Isadore Winderman for appellant.

Samson B. Bernstein and *Joseph E. Gembala, Jr.* for appellee.

PER CURIAM.

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

MISSOURI PACIFIC RAILROAD CO. *v.* DEERING, REGISTER OF DEEDS, ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 253. Decided October 12, 1959.

Appeal dismissed and certiorari denied.
Reported below: 184 Kan. 283, 336 P. 2d 482.

W. F. Lilleston, Henry V. Gott and *Ralph M. Hope* for appellant.

PER CURIAM.

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

SMITH *v.* UNITED STATES.

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

No. 33, Misc. Decided October 12, 1959.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Solicitor General Rankin, Assistant Attorney General Wilkey and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case remanded to the Court of Appeals for reconsideration in light of *Johnson* v. *United States,* 352 U. S. 565; *Farley* v. *United States,* 354 U. S. 521; and *Ellis* v. *United States,* 356 U. S. 674.

SPIVAK *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 59, Misc. Decided October 12, 1959.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

McCAULEY *v.* CONSOLIDATED UNDERWRITERS.

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

No. 162, Misc. Decided October 12, 1959.

Appeal dismissed and certiorari denied.
Reported below: 320 S. W. 2d 60.

Richard E. McDaniel for appellant.

Thos. B. Ramey for appellee.

PER CURIAM.

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

JORDAN *v.* MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 201, Misc. Decided October 12, 1959.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

HARRIS *v.* PENNSYLVANIA RAILROAD CO.

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

No. 81. Decided October 19, 1959.

In this case arising under the Federal Employers' Liability Act, the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury. Therefore, certiorari is granted; the judgment of the Supreme Court of Ohio setting aside a judgment for petitioner is reversed; and the cause is remanded.

168 Ohio St. 582, 156 N. E. 2d 822, reversed.

Marshall I. Nurenberg for petitioner.

Edwin Knachel for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Supreme Court of Ohio is reversed and the case is remanded for proceedings in conformity with this opinion. We hold that the proofs justified with reason the jury's conclusion, embodied in answers to Interrogatories to Jury numbers I and II, that employer negligence played a part in producing the petitioner's injury. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500. See also *Moore* v. *Terminal Railroad Assn.*, 358 U. S. 31, and cases cited therein. We therefore find it unnecessary to consider the petitioner's challenge to the Ohio procedure governing interrogatories to the jury.

For the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, MR. JUSTICE

FRANKFURTER is of the view that the writ of certiorari is improvidently granted.

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

MR. JUSTICE DOUGLAS, concurring.

The suggestion that this and related decisions mean that we have eliminated "all meaningful judicial supervision over jury verdicts" in FELA cases prompts me to file this opinion and bring up to date the compilation which I made in *Wilkerson* v. *McCarthy,* 336 U. S. 53, 68, 71–73. The *Wilkerson* case was decided January 31, 1949. The attached Appendix presents a statistical summary [1] of our stewardship of these FELA cases from that date to October 19, 1959.

Of the 110 petitions for certiorari filed during this period of more than 10 years, 73 were filed by employees and 37 were filed by employers. Of these, 33 were granted, each at the instance of an employee who complained of the lower court's withholding the case from the jury or overturning a jury verdict in his favor. Thirty cases were reversed for usurpation of the jury function; and in each of three the lower court's decision was sustained.

Of the 77 petitions denied, 32 were by employees who sought reversal of a lower court's decision to withhold the case from the jury or to upset a jury's verdict. Eight

[1] Cases in which petitions for certiorari have been granted but which have not yet been decided on the merits have not been included nor have cases been included which did not present issues of negligence or causation under the Act. Moreover, petitions seeking review of judgments of state courts granting new trials are not included because we usually treat them as not being "final" judgments. See 28 U. S. C. § 1257; *Bruce* v. *Tobin,* 245 U. S. 18.

more employees wanted this Court to overturn jury verdicts rendered in the employers' favor.

Of the petitions filed by employers, 35 asked this Court to reverse a lower court decision upholding a jury verdict or holding that the case should have been submitted to a jury. Employers in two other petitions complained of the lower court's action in setting aside a jury verdict and granting a new trial.

It is apparent from the decisions where we refused to review cases in which lower courts withheld cases from the jury or set aside jury verdicts (or where, having granted certiorari, we sustained the lower courts in that action) that the system of judicial supervision still exists in this as in other types of cases.

It is suggested that the Court has consumed too much of its time in reviewing these FELA cases. An examination of the 33 cases in which the Court has granted certiorari during the period of over 10 years covered by the attached Appendix reveals that 16 of these cases were summarily reversed without oral argument and without full opinions. Only 17 cases were argued during this period of more than a decade and, of these, 5 were disposed of by brief *per curiam* opinions. Only 12 cases in over 10 years were argued, briefed and disposed of with full opinions by the Court. We have granted certiorari in these cases on an average of less than 3 per year and have given plenary consideration to slightly more than 1 per year. Wastage of our time is therefore a false issue.

The difference between the majority and minority of the Court in our treatment of FELA cases concerns the degree of vigilance we should exercise in safeguarding the jury trial—guaranteed by the Seventh Amendment and part and parcel of the remedy under this Federal Act when suit is brought in state courts. See *Bailey* v. *Cen-*

tral Vermont R. Co., 319 U. S. 350, 354; *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 363. Whether that right has been impaired in a particular instance often produces a contrariety of views. Yet the practice of the Court in allowing four out of nine votes to control the certiorari docket is well established and of long duration.[2] Without it, the vast discretion which Congress allowed us in granting or denying certiorari might not be tolerable. Every member of the Court has known instances where he has strongly protested the action of the minority in bringing a case or type of case here for adjudication. He may then feel that there are more important and pressing matters to which the Court should give its attention. That is, however, a price we pay for keeping our promise to Congress [3] to let the vote of four Justices bring up any case here on certiorari.

[NOTE: For dissenting opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE WHITTAKER, see *post*, p. 25.]

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[2] When the Act of February 13, 1925 (43 Stat. 936), which broadened our certiorari jurisdiction, was before the Congress, Mr. Justice Van Devanter, speaking for the Court, made explicit that the "rule of four" governs the grant of petitions for certiorari. He testified before the Subcommittee of the Senate Judiciary Committee as follows:

". . . if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition should be granted. This is the uniform way in which petitions for writs of certiorari are considered." Hearings on S. 2060, Feb. 2, 1924, 68th Cong., 1st Sess., p. 29. And see Hearings on H. R. 8206, Dec. 18, 1924, 68th Cong., 2d Sess., p. 8.

[3] The "rule of four" was given as one of the reasons why the Congress thought that the increase of our discretionary jurisdiction was warranted. The House Report stated:

"Lest it should be thought that the increase of discretionary jurisdiction might impair the administration of justice and lead to partial

Footnote 3—Continued.

hearings and not secure a decision by the whole court, it is proper to call attention to the very thorough and complete system by which discretionary jurisdiction is exercised. In granting or refusing a prayer for a certiorari the petitioner gets the judgment of the whole court. The application is not disposed of by a single justice. The luminous and informing statement of Mr. Justice Van Devanter tells the whole story:

"'While the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, this does not mean that the court is authorized merely to exercise a will in the matter but rather that the petition is to be granted or denied according to a sound judicial discretion. What actually is done may well be stated here with some particularity. The party aggrieved by the decision of the circuit court of appeals and seeking a further review in the Supreme Court is required to present to it a petition and accompanying brief, setting forth the nature of the case, what questions are involved, how they were decided in the circuit court of appeals, and why the case should not rest on the decision of that court. The petition and brief are required to be served on the other party, and time is given for the presentation of an opposing brief. When this has been done copies of the printed record as it came from the circuit court of appeals and of the petition and briefs are distributed among the members of the Supreme Court, and each judge examines them and prepares a memorandum or note indicating his view of what should be done.

"'In conference these cases are called, each in its turn, and each judge states his views in extenso or briefly as he thinks proper; and when all have spoken any difference in opinion is discussed and then a vote is taken. I explain this at some length because it seems to be thought outside that the cases are referred to particular judges, as, for instance, that those coming from a particular circuit are referred to the justice assigned to that circuit, and that he reports on them, and the others accept his report. That impression is wholly at variance with what actually occurs.

"'We do not grant or deny these petitions merely according to a majority vote. We always grant the petition when as many as four think that it should be granted and sometimes when as many as three think that way. We proceed upon the theory that, if that number out of the nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted.'" H. R. Rep. No. 1075, 68th Cong., 2d Sess., p. 3.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS, CONCURRING.

I. CASES IN WHICH CERTIORARI WAS GRANTED.

A. Where lower court which withheld the case from the jury or set aside a jury verdict for the employee and ordered a new trial or rendered judgment for the employer was reversed:

Hill v. *Atlantic Coast Line R. Co.*, 336 U. S. 911.

Urie v. *Thompson*, 337 U. S. 163.

Brown v. *Western R. of Alabama*, 338 U. S. 294.

Carter v. *Atlantic & St. Andrews Bay R. Co.*, 338 U. S. 430.

Stone v. *New York, Chicago & St. Louis R. Co.*, 344 U. S. 407.

Harsh v. *Illinois Terminal R. Co.*, 348 U. S. 940.

Smalls et al. v. *Atlantic Coast Line R. Co.*, 348 U. S. 946.

O'Neill v. *Baltimore & Ohio R. Co.*, 348 U. S. 956.

Neese v. *Southern R. Co.*, 350 U. S. 77.

Anderson v. *Atlantic Coast Line R. Co.*, 350 U. S. 807.

Strickland v. *Seaboard Air Line R. Co.*, 350 U. S. 893.

Cahill v. *New York, N. H. & H. R. Co.*, 350 U. S. 898, 351 U. S. 183.

Rogers v. *Missouri Pacific R. Co.*, 352 U. S. 500.

Webb v. *Illinois Central R. Co.*, 352 U. S. 512.

Arnold v. *Panhandle & Santa Fe R. Co.*, 353 U. S. 360.

Futrelle v. *Atlantic Coast Line R. Co.*, 353 U. S. 920.

Shaw v. *Atlantic Coast Line R. Co. et al.*, 353 U. S. 920.

Deen v. *Gulf, Colorado & Santa Fe R. Co.*, 353 U. S. 925.

Thomson v. *Texas & Pacific R. Co.*, 353 U. S. 926.
McBride v. *Toledo Terminal R. Co.*, 354 U. S. 517.
Ringhiser v. *Chesapeake & Ohio R. Co.*, 354 U. S. 901.
Gibson v. *Thompson*, 355 U. S. 18.
Stinson v. *Atlantic Coast Line R. Co.*, 355 U. S. 62.
Honeycutt v. *Wabash R. Co.*, 355 U. S. 424.
Ferguson v. *St. Louis-San Francisco R. Co.*, 356 U. S. 41.
Sinkler v. *Missouri Pacific R. Co.*, 356 U. S. 326.
Moore v. *Terminal R. Assn.*, 358 U. S. 31.
Baker et al. v. *Texas & Pacific R. Co.*, 359 U. S. 227.
Conner v. *Butler*, *post*, p. 29.
Harris v. *Pennsylvania R. Co.*, *ante*, p. 15.

B. Where lower court which withheld the case from the jury or set aside a jury verdict for the employee and ordered a new trial or rendered judgment for the employer was sustained:

Reynolds v. *Atlantic Coast Line R. Co.*, 336 U. S. 207.
Moore v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573.
Herdman v. *Pennsylvania R. Co.*, 352 U. S. 518.

II. CASES IN WHICH CERTIORARI WAS DENIED.

A. Where lower court withheld case from the jury or overturned a jury verdict for employee and rendered judgment for the employer:

Scocozza et al. v. *Erie R. Co.*, 337 U. S. 907.
Killian v. *Pennsylvania R. Co. et al.*, 338 U. S. 819.
Lavender v. *Illinois Central R. Co.*, 338 U. S. 822.
Roberts v. *Alabama Great Southern R. Co.*, 340 U. S. 829.
Emmick v. *Baltimore & Ohio R. Co.*, 340 U. S. 831.
Roberts v. *Missouri-Kansas-Texas R. Co.*, 340 U. S. 832.

Gentry v. *Seaboard Air Line R. Co.*, 340 U. S. 853.
Moleton v. *Union Pacific R. Co.*, 340 U. S. 932.
Healy v. *Pennsylvania R. Co.*, 340 U. S. 935.
Ottley v. *St. Louis-San Francisco R. Co.*, 340 U. S. 948.
Craven v. *Atlantic Coast Line R. Co.*, 340 U. S. 952.
Jaroszewski v. *Central R. Co.*, 344 U. S. 839.
Creamer v. *Ogden Union R. & Depot Co.*, 344 U. S. 912.
Frizzell v. *Wabash R. Co.*, 344 U. S. 934.
Gill v. *Pennsylvania R. Co.*, 346 U. S. 816.
Smith v. *Baltimore & Ohio R. Co.*, 346 U. S. 838.
Wetherbee v. *Elgin, Joliet & Eastern R. Co.*, 346 U. S. 867.
Shellhammer v. *Lehigh Valley R. Co.*, 347 U. S. 990.
Keiper v. *Northwestern Pacific R. Co.*, 350 U. S. 948.
Click v. *Jacksonville Terminal Co.*, 350 U. S. 994.
Barnett v. *Terminal R. Assn. of St. Louis*, 351 U. S. 953.
Lupo v. *Norfolk & Western R. Co.*, 352 U. S. 891.
Collins v. *Atlantic Coast Line R. Co.*, 352 U. S. 942.
Bennett v. *Southern R. Co.*, 353 U. S. 958.
Kelly v. *Pennsylvania R. Co.*, 355 U. S. 892.
Dessi v. *Pennsylvania R. Co.*, 356 U. S. 967.
Baum v. *Baltimore & Ohio R. Co.*, 358 U. S. 881.

B. Where lower court sustained a jury verdict for the employer:

Jones v. *Illinois Terminal R. Co.*, 347 U. S. 956.
Conser v. *Atchison, Topeka & Santa Fe R. Co.*, 348 U. S. 828.
Metrakos v. *Cleveland Union Terminals Co.*, 348 U. S. 872.

Kane v. *Chicago, Burlington & Quincy R. Corp.*, 348 U. S. 943.

Daulton v. *Southern Pacific Co.*, 352 U. S. 1005.

Burch v. *Reading Co.*, 353 U. S. 965.

Brinkley v. *Pennsylvania R. Co.*, 358 U. S. 865.

Masterson v. *New York Central R. Co.*, *post*, p. 832.

C. Where lower court reversed a jury verdict for the employee and directed a new trial:

Banning v. *Detroit, Toledo & Ironton R. Co.*, 338 U. S. 815.

Dixon v. *Atlantic Coast Line R. Co.*, 342 U. S. 830.

Thomas v. *Chesapeake & Ohio R. Co.*, 344 U. S. 921.

Milom v. *New York Central R. Co.*, 355 U. S. 953.

Anderson v. *Atlantic Coast Line R. Co.*, *post*, p. 841.

D. Where lower court sustained a jury verdict for the employee or held that the employee's case should have gone to the jury:

Atlantic Coast Line R. Co. v. *Haselden*, 338 U. S. 825.

Atlantic Coast Line R. Co. v. *Hill*, 340 U. S. 814.

New York, New Haven & Hartford R. Co. v. *Korte*, 342 U. S. 868.

Atchison, Topeka & Santa Fe R. Co. v. *White*, 343 U. S. 915.

Pennsylvania R. Co. v. *Donnelly*, 344 U. S. 855.

Denver & Rio Grande Western R. Co. v. *McGowan*, 344 U. S. 918.

Terminal Railroad Assn. of St. Louis v. *Barnett*, 345 U. S. 956.

Southern Pacific Co. v. *Miller*, 346 U. S. 909.

Chicago, Milwaukee, St. Paul & Pacific R. Co. v. *Woodrow*, 347 U. S. 935.

Fort Worth & Denver R. Co. v. *Prine,* 348 U. S. 826.

Chicago, Burlington & Quincy R. Co. v. *Bonnier,* 348 U. S. 830.

Chicago & North Western R. Co. v. *Margevich,* 348 U. S. 861.

Louisiana & Arkansas R. Co. v. *Johnson,* 348 U. S. 875.

Chattanooga Station Co. v. *Massey,* 348 U. S. 896.

Chicago, Rock Island & Pacific R. Co. v. *Kifer,* 348 U. S. 917.

Elgin, Joliet & Eastern R. Co. v. *Crowley et al.,* 348 U. S. 927.

Chicago, Rock Island & Pacific R. Co. v. *Wright,* 349 U. S. 905.

Atlantic Coast Line R. Co. v. *Chancey,* 349 U. S. 916.

Great Northern R. Co. v. *Hallada,* 350 U. S. 874.

New York Central R. Co. v. *Ruddy,* 350 U. S. 884.

New York, New Haven & Hartford R. Co. v. *Cereste,* 351 U. S. 951.

Louisiana & Arkansas R. Co. v. *Moore,* 351 U. S. 952.

Texas & Pacific R. Co. v. *Buckles et al.,* 351 U. S. 984.

Kansas City Southern R. Co. v. *Justis,* 352 U. S. 833.

Chicago Great Western R. Co. v. *Scovel,* 352 U. S. 835.

New York, Chicago & St. Louis R. Co. v. *Masiglowa,* 352 U. S. 1003.

Illinois Central R. Co. v. *Bowman,* 355 U. S. 837.

Elgin, Joliet & Eastern R. Co. v. *Gibson,* 355 U. S. 897.

Martin v. *Tindell,* 355 U. S. 959.

Kansas City Southern R. Co. v. *Thomas,* 356 U. S. 959.

Missouri-Kansas-Texas R. Co. v. *Bush,* 358 U. S. 827.

Wabash R. Co. v. *Wehrli,* 358 U. S. 932.

Butler et al. v. *Watts,* 359 U. S. 926.

Pennsylvania R. Co. v. *Byrne,* 359 U. S. 960.

Illinois Central R. Co. v. *Andre, post,* p. 820.

E. Where lower court set aside a jury verdict for the employer because of erroneous instructions and granted a new trial:

Wabash R. Co. v. *Byler,* 344 U. S. 826.

Delaware, Lackawanna & Western R. Co. v. *Siegrist,* 360 U. S. 917.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITTAKER joins, dissenting.

The opening of a new Term that confronts the Court with the usual volume of important and exacting business impels me to reiterate the view that cases involving only factual issues and which are of no general importance have no legitimate demands upon our energies, already taxed to the utmost. See *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 524, 559 (dissenting opinions). The extreme character of the adjudication which has been made in this case also deserves something more than merely noting my dissent on the merits, for I do not think that the reversal of this judgment is to be justified even under the philosophy of *Rogers.*

Petitioner was injured while engaged, as a member of a "wreck train crew," in retracking two derailed boxcars on the line of another railroad during the early morning of a "sleety, wet and sloppy" day. The operation involved the use on each car of a derrick and four outriggers. Each outrigger was supported from beneath by wooden blocks. The first derailed car was successfully retracked. The equipment then had to be moved for a similar operation

on the second car. In this process petitioner wrenched his back while attempting to remove one of the wooden blocks which had become embedded in mud. Being unable to brace his right foot on the narrow surface of the ground between the block and one of the railroad crossties, petitioner placed that foot on the tie itself. In answer to interrogatories the jury found that respondent had been negligent in that "the tie of the track [petitioner] was required to walk was elevated a substantial distance above the ground level and was covered with grease or oil, thereby affording unstable footing." A verdict in the sum of $25,000 was returned, which on review was set aside by the Ohio Supreme Court.

The Court does not reach the question as to the applicability of the Ohio rule that this specification of negligence excluded appellate consideration of any others asserted by petitioner. I can hardly believe that the Court quarrels with the state court's ruling that as a matter of law the "position of the crosstie, slightly elevated above the roadbed" could not support the jury's finding of negligence because such state of affairs was a common and notorious one. Hence justification for the overturning of this judgment must rest upon what the record shows as to the presence of grease on the crosstie and as to the respondent's culpability for that alleged condition.

Unless liability in FELA cases may be predicated upon mere conjecture, this record for me is manifestly deficient. The only evidence that there was grease on the crosstie was petitioner's statement on cross-examination that he found some grease on the sole of the shoe of his right foot, and the testimony of a section foreman of the other railroad that grease was used on that railroad's switches, which were customarily lubricated at least twice a week. Petitioner had not mentioned on direct examination, in

his pre-trial deposition, or in a written account of the accident made shortly after it occurred, that he had encountered grease at any stage of the operation, and even on cross-examination did not claim that he had seen grease anywhere in the vicinity, still less on the particular crosstie where his foot had rested. With respect to the foreman's testimony, there is no evidence at all in the record before us as to the position of any of the switches in relation to the crosstie in question—whether any of them were adjacent to it or far removed.

But even if this evidence be considered as justifying the jury's conclusion that there was grease on this particular crosstie, there was, in the words of the Ohio court, no evidence whatever that respondent "placed it there, knew about it, or, in the exercise of ordinary care, should have known about it." Evidence as to how long the alleged greasy condition of this crosstie had existed was wholly lacking. The tie on the day in question was covered with mud. And the section foreman of the other railroad testified that there was nothing untoward about the condition of the area when he inspected it the next morning. How in these circumstances it could "with reason" be said that the respondent failed in some duty of inspection is beyond me.

I cannot understand how on this record even the "scintilla" rule of *Rogers* and its progeny, see dissenting opinion in *Sinkler* v. *Missouri Pacific R. Co.,* 356 U. S. 326, 332, can be thought to justify the overturning of this judgment. I fear that this decision confirms my growing suspicion that the real but unarticulated meaning of *Rogers* is that in FELA cases anything that a jury says goes, with the consequence that all meaningful judicial supervision over jury verdicts in such cases has been put at an end. See separate memorandum in *Gibson* v. *Thompson,* 355 U. S. 18, 19. If so, I think the time has

come when the Court should frankly say so. If not, then the Court should at least give expression to the standards by which the lower courts are to be guided in these cases. Continuance of the present unsatisfactory state of affairs can only lead to much waste motion on the part of lower courts and defense lawyers.

I would affirm.

CONNER *v.* BUTLER ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 328. Decided October 19, 1959.

In this case arising under the Federal Employers' Liability Act, the proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing petitioner's injury. Therefore, certiorari is granted; the judgment is reversed; and the case is remanded for further proceedings.

Reported below: 109 So. 2d 183.

William S. Frates for petitioner.

George F. Gilleland for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the District Court of Appeal of Florida, Third District, is reversed and the case is remanded for further proceedings in conformity with this opinion. We hold that the proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing the petitioner's injury. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.

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

KIRSHBAUM ET AL. *v.* CITY OF LOS ANGELES ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 155. Decided October 19, 1959.*

Appeals dismissed and certiorari denied.

Reported below: 51 Cal. 2d 423, 333 P. 2d 745; 51 Cal. 2d 857, 337 P. 2d 825.

Roger Arnebergh and *Bourke Jones* for the City of Los Angeles et al., *James J. Arditto* for the Housing Authority of Los Angeles, and *Pierce Works, Warren M. Christopher* and *Joe Crider, Jr.* for Los Angeles Dodgers, Inc., appellees.

PER CURIAM.

The motion of Louis Kirshbaum for leave to intervene as appellant in No. 291 is denied. The motions to dismiss are granted and the appeals are dismissed. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

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*Together with No. 279, *Kirshbaum* v. *City of Los Angeles et al.*, and No. 291, *Ruben* v. *City of Los Angeles et al.*, also on appeals from the same Court.

MEMORIAL GARDENS ASSOCIATION, INC., ET AL. *v.* SMITH, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 288. Decided October 19, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 16 Ill. 2d 116, 156 N. E. 2d 587.

C. Severin Buschmann and *Roy P. Hull* for appellants.

Grenville Beardsley, Attorney General of Illinois, and *William C. Wines, Raymond S. Sarnow* and *A. Zola Groves,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

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MAGNET COVE BARIUM CORP. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 296. Decided October 19, 1959.

175 F. Supp. 473, affirmed.

Frank A. Leffingwell for appellant.

Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Robert W. Ginnane and *Francis A. Silver* for the United States and the Interstate Commerce Commission, and *Eldon Martin* for the Chicago, Burlington & Quincy Railroad Co. et al., appellees.

PER CURIAM.

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

WAGNER *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICIANS, LOCAL NO. 1305, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 300. Decided October 19, 1959.

Appeal dismissed and certiorari denied.

Reported below: 395 Pa. 380, 150 A. 2d 530.

Paul Ginsberg for appellant.

Carl E. Glock for the Pittsburgh & Lake Erie Railroad Co., and *Loyal H. Gregg* and *Richard R. Lyman* for the International Brotherhood of Electricians, Local No. 1305, appellees.

PER CURIAM.

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

EX PARTE POWELL.

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

No. 58, Misc. Decided October 19, 1959.

Certiorari granted; judgment vacated and case remanded to the District Court for a full hearing.

Petitioner *pro se.*

MacDonald Gallion, Attorney General of Alabama, and *James W. Webb,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court for a full hearing. *Ellis* v. *United States,* 356 U. S. 674.

SEISMOGRAPH SERVICE CORP. *v.* MONAGHAN, CHAIRMAN, STATE TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 265. Decided October 26, 1959.

Appeal dismissed and certiorari denied.
Reported below: 236 Miss. 278, 108 So. 2d 721.

Donald C. Beelar for appellant.

John E. Stone for appellee.

PER CURIAM.

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

QUICKIE TRANSPORT CO. *v.* UNITED STATES ET AL.

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

No. 338. Decided October 26, 1959.

169 F. Supp. 826, affirmed.

Gordon Rosenmeier for appellant.

Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Robert W. Ginnane and *Francis A. Silver* for the United States and the Interstate Commerce Commission, *Adolph J. Bieberstein* for Indianhead Truck Line, Inc., and *Perry R. Moore* for Schirmer Transportation Co., appellees.

PER CURIAM.

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

WESTON *v.* SIGLER, WARDEN.

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

No. 8, Misc. Decided October 26, 1959.

Certiorari granted; judgment vacated; and case remanded to District Court with instructions to hear on merits petitioner's application for habeas corpus.

Lemuel C. Parker for petitioner.

Jack P. F. Gremillion, Attorney General of Louisiana, *George M. Ponder,* First Assistant Attorney General, and *J. St. Clair Favrot* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with instructions to hear on the merits the petitioner's application for a writ of habeas corpus.

The stay of execution heretofore entered by the District Court is continued in effect pending such hearing and any appeal taken therefrom.

SMITH *v.* UNITED STATES.

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

No. 27, Misc. Decided October 26, 1959.

Certiorari granted and judgment reversed.

Petitioner *pro se.*

Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg and *J. F. Bishop* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed. *Ellis* v. *United States,* 356 U. S. 674.

WORBETZ *v.* GOODMAN, WARDEN.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 174, Misc. Decided October 26, 1959.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

Syllabus.

UNITED STEELWORKERS OF AMERICA *v.* UNITED STATES ET AL.

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

No. 504. Argued November 3, 1959.—Decided November 7, 1959.

Under § 208 of the Labor Management Relations Act, 1947, the United States sued in a Federal District Court to enjoin the continuation of an industry-wide strike in the steel industry. After considering affidavits filed by the parties and finding that the strike had closed down a substantial part of the Nation's steel-production capacity and that its continuation would "imperil the national health and safety," the District Court enjoined continuation of the strike. The Court of Appeals affirmed. *Held:* The judgment is sustained. Pp. 40–44.

1. Once it determined that the statutory conditions of breadth of involvement and peril to the national health or safety existed, the District Court properly enjoined continuation of the strike. Congress did not intend that the issuance of an injunction should depend upon a judicial inquiry into broad issues of national labor policy, the availability of other remedies to the Executive, the effect of an injunction on the collective bargaining process, the conduct of the parties to the labor dispute in their negotiations, or conjecture as to the course of those negotiations in the future. Pp. 40–41.

2. On the record in this case, the judgment below was amply supported on the ground that the strike imperiled the national safety. Pp. 41–42.

3. Section 208 was designed to provide a public remedy in times of emergency, and it cannot be construed to require that the Government either formulate a reorganization of the affected industry to satisfy its defense needs without the complete reopening of closed facilities or demonstrate in court that such a reorganization is not feasible. P. 43.

4. As here applied, § 208 entrusts to the courts only the determination of a "case or controversy." It does not violate the Constitution by entrusting to them any matter capable of only legislative or executive determination. Pp. 43–44.

271 F. 2d 676, affirmed.

Arthur J. Goldberg argued the cause for petitioner. With him on the brief were *David E. Feller* and *Bernard Dunau.*

Solicitor General Rankin argued the cause for the United States. With him on the brief were *Attorney General Rogers, Assistant Attorney General Doub, Wayne G. Barnett, Samuel D. Slade, Seymour Farber* and *Herbert E. Morris.*

PER CURIAM.

The Attorney General sought and obtained in the District Court for the Western District of Pennsylvania an injunction against the continuation of an industry-wide strike of workers in the basic steel industry pursuant to § 208 of the Labor Management Relations Act, 1947, 61 Stat. 155, 29 U. S. C. § 178. We granted certiorari, *post,* p. 878, to review the judgment of the Court of Appeals for the Third Circuit, 271 F. 2d 676, affirming the District Court. In pertinent part, § 208 provides that if the District Court—

> "finds that . . . [a] threatened or actual strike or lock-out—
>
> "(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and
>
> "(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate."

The arguments of the parties here and in the lower courts have addressed themselves in considerable part to the propriety of the District Court's exercising its equi-

table jurisdiction to enjoin the strike in question once the findings set forth above had been made. These arguments have ranged widely into broad issues of national labor policy, the availability of other remedies to the Executive, the effect of a labor injunction on the collective bargaining process, consideration of the conduct of the parties to the labor dispute in their negotiations, and conjecture as to the course of those negotiations in the future. We do not believe that Congress in passing the statute intended that the issuance of injunctions should depend upon judicial inquiries of this nature. Congress was not concerned with the merits of the parties' positions or the conduct of their negotiations. Its basic purpose seems to have been to see that vital production should be resumed or continued for a time while further efforts were made to settle the dispute. To carry out its purposes, Congress carefully surrounded the injunction proceedings with detailed procedural devices and limitations. The public report of a board of inquiry, the exercise of political and executive responsibility personally by the President in directing the commencement of injunction proceedings, the statutory provisions looking toward an adjustment of the dispute during the injunction's pendency, and the limited duration of the injunction, represent a congressional determination of policy factors involved in the difficult problem of national emergency strikes. This congressional determination of the policy factors is of course binding on the courts.

The statute imposes upon the courts the duty of finding, upon the evidence adduced, whether a strike or lockout meets the statutory conditions of breadth of involvement and peril to the national health or safety. We have accordingly reviewed the concurrent findings of the two lower courts. Petitioner here contests the findings that the continuation of the strike would imperil the national health and safety. The parties dispute the meaning of

the statutory term "national health"; the Government insists that the term comprehends the country's general well-being, its economic health; petitioner urges that simply the physical health of the citizenry is meant. We need not resolve this question, for we think the judgment below is amply supported on the ground that the strike imperils the national safety.* Here we rely upon the evidence of the strike's effect on specific defense projects; we need not pass on the Government's contention that "national safety" in this context should be given a broader construction and application.

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*The evidence in this regard is reflected in the District Court's findings of fact Nos. 15 (a), (b), (c), and (d), as follows:

"(a) Certain items of steel required in top priority military missile programs of the United States are not made by any mill now operating, nor available from any inventory or from imports. Any further delay in resumption of steel production would result in an irretrievable loss of time in the supply of weapons systems essential to the national defense plans of the United States and its allies.

"(b) The planned program of space activities under the direction of the National Aeronautics and Space Administration has been delayed by the strike and will be further delayed if it is continued. Specifically, project MERCURY, the nation's manned satellite program, which has the highest national priority, has been delayed by reason of delay in construction of buildings essential to its operation. This program is important to the security of the nation. Other planned space programs will be delayed or threatened with delay by a continuation of the strike.

"(c) Nuclear Submarines and the naval shipbuilding program other than submarines, including new construction, modernization, and conversion, have been affected by reason of the inability to secure boilers, compressors, and other component parts requiring steel. Products of the steel industry are indispensable to the manufacture of such items and delay in their production will irreparably injure national defense and imperil the national safety.

"(d) Exported steel products are vital to the support of United States bases overseas and for the use of NATO allies and similar collective security groups. The steel strike, if permitted to continue, will seriously impair these programs, thus imperiling the national safety."

The petitioner suggests that a selective reopening of some of the steel mills would suffice to fulfill specific defense needs. The statute was designed to provide a public remedy in times of emergency; we cannot construe it to require that the United States either formulate a reorganization of the affected industry to satisfy its defense needs without the complete reopening of closed facilities, or demonstrate in court the unfeasibility of such a reorganization. There is no room in the statute for this requirement which the petitioner seeks to impose on the Government.

We are of opinion that the provision in question as applied here is not violative of the constitutional limitation prohibiting courts from exercising powers of a legislative or executive nature, powers not capable of being conferred upon a court exercising solely "the judicial power of the United States." *Keller* v. *Potomac Elec. Power Co.,* 261 U. S. 428; *Federal Radio Comm'n* v. *General Elec. Co.,* 281 U. S. 464. Petitioner contends that the statute is constitutionally invalid because it does not set up any standard of lawful or unlawful conduct on the part of labor or management. But the statute does recognize certain rights in the public to have unimpeded for a time production in industries vital to the national health or safety. It makes the United States the guardian of these rights in litigation. Cf. *United States* v. *American Bell Tel. Co.,* 128 U. S. 315, 370; *Sanitary District of Chicago* v. *United States,* 266 U. S. 405. The availability of relief, in the common judicial form of an injunction, depends on findings of fact, to be judicially made. Of the matters decided judicially, there is no review by other agencies of the Government. Cf. *Gordon* v. *United States,* 2 Wall. 561, 117 U. S. 697. We conclude that the statute entrusts the courts only with the determination of a "case or controversy," on which the judicial power can operate, not containing any ele-

ment capable of only legislative or executive determination. We do not find that the termination of the injunction after a specified time, or the machinery established in an attempt to obtain a peaceful settlement of the underlying dispute during the injunction's pendency, detracts from this conclusion.

The result is that the judgment of the Court of Appeals for the Third Circuit, affirming that of the District Court, is affirmed. Our mandate shall issue forthwith.

It is so ordered.

MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN: In joining the Court's opinion we note our intention to file in due course an amplification of our views upon the issues involved which could not be prepared within the time limitations imposed by the necessity of a prompt adjudication in this case.

Separate opinion of MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN, concurring in the opinion of the Court dated November 7, 1959.*

This action by the United States for an injunction under § 208 of the Labor Management Relations Act, 1947 (61 Stat. 155, 29 U. S. C. § 178) was commenced by the Attorney General at the direction of the President of the United States in the District Court for the Western District of Pennsylvania on October 20, 1959. The strike which was the concern of the action arose out of a labor dispute between petitioner, the collective bargaining agent of the workers, and the steel companies, and was nationwide in scope. The strike began on July 15, 1959, fifteen days after the contracts between the steel com-

*[REPORTER'S NOTE: This concurring opinion was filed December 7, 1959.]

panies and petitioner expired. On October 9, 1959, the President created the Board of Inquiry provided by §§ 206 and 207 of the Act to inquire into the issues involved in the dispute. The President deemed the strike to affect a "substantial part of . . . an industry," and concluded that, if allowed to continue, it would imperil the national "health and safety." On October 19 the Board submitted its report, which concluded: "[T]he parties have failed to reach an agreement and we see no prospects for an early cessation of the strike. The Board cannot point to any single issue of any consequence whatsoever upon which the parties are in agreement." The President filed the report with the Federal Mediation and Conciliation Service and made its contents public, in accordance with § 206, and ordered the Attorney General to commence this action, reiterating his former pronouncements that the continuance of the strike constituted a threat to the national health and safety.

Pursuant to stipulations of the parties, the District Court heard the case on affidavits. On October 21 it granted the injunction. Its order was stayed by the Court of Appeals for the Third Circuit, pending that court's final determination of petitioner's appeal. On October 27 it affirmed the decision of the District Court (one judge dissenting) and granted an additional stay to enable petitioner to seek relief here. On October 28 this Court denied the motion of the United States to modify the stay. On October 30 we granted certiorari, set the argument down for November 2, and extended the stay pending final disposition. In a *per curiam* opinion on November 7, this Court affirmed the decision of the Court of Appeals, MR. JUSTICE DOUGLAS dissenting. We noted our intention to set forth at a later time the grounds for our agreement with the Court's disposition and not delay announcement of the result until such a statement could be prepared.

The injunction was challenged on three grounds: (1) the lower courts were not entitled to find that the national emergency, upon which the District Court's jurisdiction is dependent under § 208, existed; (2) even if the emergency existed, the District Court failed to exercise the discretion, claimed to be open to it under § 208, whether or not to grant the relief sought by the United States; (3) even if the injunction was otherwise unassailable it should have been denied because § 208 seeks to charge the District Courts with a duty outside the scope of "judicial Power" exercisable under Art. III, § 2, of the Constitution.

Section 208 provides that the District Court "shall have jurisdiction to enjoin" a "threatened or actual strike or lock-out" if the court finds that it "(i) affects an entire industry or a substantial part thereof engaged in . . . commerce . . . or engaged in the production of goods for commerce; and (ii) if permitted to occur or to continue, will imperil the national health or safety . . . ." The District Court found, and it was not contested here, that the strike satisfied the first condition in that it affected a substantial portion of the steel industry. Petitioner urged, however, that the lower courts had no basis for concluding that it satisfied the second.

In its finding of fact No. 15, the District Court described four instances of serious impediment to national defense programs as a result of existing and prospective procurement problems due to the strike. The programs affected included the missile, nuclear submarine and naval shipbuilding, and space programs. Each of these findings had, as the Court of Appeals found, ample support in the affidavits submitted by the United States. According to the affidavit of Thomas S. Gates, Jr., Acting Secretary of Defense, delays in delivery of materials critical to the creation of the Atlas, Titan and Polaris missile systems had become so severe that each additional day of the strike

would result in an equal delay in project completion; and a "significant portion of the steel specified in the procurement contracts is of a composition not common to commercial usage nor available from existing civilian inventories by exercise of allocation or eminent domain powers of the Government. . . . [T]hese programs in many cases require special sizes and shapes, many of which can be fabricated only by firms having a long experience in their production and the necessary special facilities therefor. . . ."

The affidavit of Hugh L. Dryden, Deputy Administrator of the Aeronautics and Space Administration, stated, in some detail, that space projects, including tracking centers, rocket engine test stands, and other critical facilities, were, at the time of the hearing in the District Court, already subjected to delays of as much as seven weeks, with longer delays anticipated from the continuation of the strike. The affidavit of A. R. Luedecke, the General Manager of the Atomic Energy Commission, stated that minor delays in projects had, at the time of its making, already been experienced in critical programs of the Atomic Energy Commission, and that if the strike should continue into 1960 "there would be an appreciable effect upon the weapons program."

In view of such demonstrated unavailability of defense materials it is irrelevant that, as petitioner contended and the United States conceded, somewhat in excess of 15% of the steel industry remained unaffected by the stoppage, and that only about 1% of the gross steel product is ordinarily allocated to defense production.

However, petitioner also contested the sufficiency of the affidavits on the ground that they did not present the facts giving rise to the asserted emergencies with sufficient particularity to justify the findings made. This objection raises an issue which was essentially for the trier of fact, and the two lower courts found the affidavits sufficient.

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It is not for the judiciary to canvass the competence of officers of cabinet rank, with responsibility only below that of the President for the matters to which they speak under oath, to express the opinions set forth in these affidavits. Findings based directly upon them surely cannot be said to be "clearly erroneous." Fed. Rules Civ. Proc., 52 (a).

Moreover, under § 208 the trier of these facts was called upon to make a judgment already twice made by the President of the United States: once when he convened the Board of Inquiry; and once when he directed the Attorney General to commence this action. His reasoned judgment was presumably based upon the facts we have summarized, and it is not for us to set aside findings consistent with them. The President's judgment is not controlling; § 208 makes it the court's duty to "find" the requisite jurisdictional fact for itself. But in the discharge of its duty a District Court would disregard reason not to give due weight to determinations previously made by the President, who is, after all, the ultimate constitutional executive repository for assuring the safety of the Nation, and upon whose judgment the invocation of the emergency provisions depends.

The petitioner next asserted that the findings made were insufficient as a matter of law to support the District Court's jurisdiction under § 208. Conceding that peril to the national defense is peril to the national safety, it asserted that the peril to the national safety which is made an element of the court's jurisdiction by part (ii) of § 208 (a) must result from the substantial character of the effect upon an industry required by part (i), and that if it does not so result a District Court is without power to enjoin the stoppage or any part of it. Alternatively, it urged that the jurisdiction which is conferred by the section is limited to relief against such part of the total stoppage as is found to be the cause in fact of the peril.

Petitioner claimed that as a matter of fact the procurement embarrassments found by the courts below were the result not of the entire steel stoppage or even of a substantial part of it, but only of the closing of a "handful" of the hundreds of plants affected; and that therefore the entire industry-wide strike should not have been enjoined under either construction of § 208 which it asserted.

In the first place, the requisite fact was found against petitioner's contention. The Court of Appeals found that "[t]he steel industry is too vast and too complicated to be segmented" so as to alleviate the existing and foreseeable peril to the national defense by the mere reopening of a few plants. It expressly relied upon the affidavit of Dr. Raymond J. Saulnier, Chairman of the Council of Economic Advisers of the Federal Government, which was before both the lower courts. Dr. Saulnier stated that:

> "Steel is produced through closely interrelated processes that often cannot be separated technically or economically to allow production of items 'needed' . . . while omitting items 'not needed.' . . . '[I]n order to satisfy defense requirements alone from the standpoint of size, grade, and product, it would be necessary to reactivate 25 to 30 hot rolling mills together with supporting blast furnaces, and Bessemer, electric, open hearth and vacuum-melting furnaces. Additional facilities for pickling, coating, heat treating, cold finishing, shearing, cutting, testing, and the like would also be required. To reopen these plants for the production of steel products to meet only defense requirements would be totally impracticable. The problems of scheduling the limited tonnages involved, plus the cost and technical difficulty of start-ups and shutdowns would appear to be insurmountable.' "

The lower courts had before them, as did this Court, the conflicting affidavit of Robert Nathan, the economist for the Steelworkers. But the trier of fact was not bound to prefer the arguments, however weighty, of petitioner's economist, however estimable, as against the views of the highest officers in the land and their economic advisers regarding the means for securing necessary defense materials.

Nor was it a refutation of the finding of the Court of Appeals to suggest, as petitioner did here, that "needed" facilities might be opened for all purposes. The problem is self-evidently one of programming months in advance every specialized commodity needed for defense purposes, a project which itself would require months of effort and the delays such effort would entail. Other obvious difficulties are not less formidable. Upon what basis would the plants to be reopened be chosen, assuming the number of plants needed could be determined? According to what standard would the production of particular complexes of plants be regulated? What of problems of cost and overhead, and the cost of and time required for intra-company planning to determine the practicality of partially restricting the operation of giant complexes such as those of the major producers?

No doubt a District Court is normally charged with the duty of independently shaping the details of a decree when sitting in equity in controversies that involve simple and relatively few factors—factors, that is, far less in number, less complicated and less interrelated than in the case before us. But a court is not qualified to devise schemes for the conduct of an industry so as to assure the securing of necessary defense materials. It is not competent to sit in judgment on the existing distribution of factors in the conduct of an integrated industry to ascertain whether it can be segmented with a view to its reorganization for the supply exclusively, or even pri-

marily, of government-needed materials. Nor is it able to readjust or adequately to reweigh the forces of economic competition within the industry or to appraise the relevance of such forces in carrying out a defense program for the Government. Against all such assumptions of competence, the finding of the Court of Appeals was amply supported by the record.

Even without such a finding, however, petitioner's contention would fail. There are controlling reasons for concluding that § 208 neither imposes upon the United States, as a condition for securing an injunction, the burden of establishing that the peril shown proceeds from the unavailability of a "substantial number" of particular facilities, nor limits the scope of the court's injunctive process to such part of the total stoppage as appears to be the cause in fact of the peril.

First, on its face § 208 states two separate criteria, both of which must be satisfied before an injunction may issue against a strike, and it states no other relationship between them than that both must proceed from "such strike." No other relationship is suggested by the legislative history of these emergency provisions. There is, accordingly, no foundation for the drastic limitation on their scope which would be imposed if petitioner's contention had been adopted, that a District Court is without jurisdiction unless the abstract quantitatively substantial character of the effect of the stoppage is found to be the cause in fact of the peril.

The legislative history confirms what the provisions themselves amply reveal, that this portion of the Taft-Hartley Act contains a dual purpose, on the one hand to alleviate, at least temporarily, a threat to the national health or safety; and on the other to promote settlement of the underlying dispute of industry-wide effect. The former purpose is to be accomplished by the injunction, and by whatever additional remedies the President may

seek and the Congress grant in pursuance of the command of § 210 of the Act that the matter be returned to Congress by the President with full report in the event of a failure of settlement within the injunction period. The latter purpose is to be accomplished by the command of § 209 that the parties to the dispute "make every effort to adjust and settle their differences"; by the secret ballot of employees provided by § 209 with reference to the last offer of the companies; and finally by further action by the President and Congress pursuant to § 210. To hold, as petitioner alternatively urged, that a District Court may enjoin only that part of the total stoppage which is shown to be the cause in fact of the peril, would at best serve only the purpose of alleviating the peril, while stultifying the provisions designed to effect settlement of the underlying dispute.

Second, the evidentiary burdens upon the Government which would have resulted from the adoption of either of the constructions urged by petitioner would tend to cripple the designed effectiveness of the Act. It is extremely doubtful whether in strikes of national proportion information would be available to the United States within a reasonable time to enable it to show that particular critical orders were placed with particular facilities no longer available; or whether the United States could, within such time, effect a theoretical reorganization of its procurement program so as to demonstrate to a court that it cannot successfully be conducted without the reopening of particular facilities.

Finally, § 208 is not to be construed narrowly, as if it were merely an exception to the policies which led to the restrictions on the use of injunctions in labor disputes embodied in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. §§ 101–115. Totally different policies led to the enactment of the national emergency provisions of the 1947 Act. The legislative history of these provi-

sions is replete with evidence of the concern of both the proponents and the opponents of the bill to deal effectively with large-scale work stoppages which endanger the public health or safety. To stop or prevent public injury, both management and labor were brought within the scope of the injunctive power, and both were subjected to the command to "make every effort to adjust and settle their differences . . . ." § 209. The preamble to the Act succinctly states this purpose:

> "Industrial strife which interferes with the normal flow of commerce . . . can be avoided or substantially minimized if employers, employees, and labor organizations each . . . above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest. . . ." Labor Management Relations Act, 1947, § 1 (b), 61 Stat. 136, 29 U. S. C. § 141 (b).

The Norris-LaGuardia Act had limited the power of the federal courts to employ injunctions to affect labor disputes. The purpose of that Act was rigorously to define the conditions under which federal courts were empowered to issue injunctions in industrial controversies as between employers and employees, and to devise a safeguarding procedure for the intervention of the federal judiciary in the course of private litigation. It is not without significance that this Act was found not to deprive a federal court of jurisdiction to issue an injunction at the behest of the Government as industrial operator. *United States* v. *United Mine Workers of America,* 330 U. S. 258. Moreover, as the preamble to the Norris-LaGuardia Act indicated, the formulation of policy of that statute was made in 1932 "under prevailing economic conditions." Congress at different times and for different purposes may gauge the demands of "prevailing economic

conditions" differently or with reference to considerations outside merely "economic conditions." Here Congress has made the appraisal that the interests of both parties must be subordinated to the overriding interest of the Nation. The following observations of Mr. Justice Brandeis are apposite:

> "Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 488 (1921) (dissent).

These sections were designed to provide machinery for safeguarding the comprehensive interest of the community, and to promote the national policy of collective bargaining. They must be construed to give full effect to the protections they seek to afford.

Petitioner's final contention with regard to the statutory standard of peril to the national safety appears to have been that the United States must resort to other

modes of relief than this Act to meet the national peril created by a stoppage in a substantial part of an industry, before such peril can be said to exist or be threatened. In substance petitioner urged: (1) that the United States has powers under the Defense Production Act of 1950, 64 Stat. 798, 50 U. S. C. App. § 2061, the exercise of which would, even during the course of these proceedings, have permitted it to alleviate the critical shortages which in fact resulted or threatened to result from the strike; and (2) that the United States failed to reveal to petitioner or to the courts what plants might have been reopened so as to remove the peril to the national defense. In the light of what we have already said, it is apparent that neither of these matters is relevant to the judicial determination required by § 208. The remedy available to the United States under these provisions is independent of other powers possessed by it and is not encumbered by any burden upon it to seek to persuade or enable the defendants to effect a piecemeal alteration of their conduct to avoid the court's jurisdiction.

Because the District Court's finding of peril to the national safety resulting from impediments to the programs for national defense was itself sufficient to satisfy the requirement of § 208 (a)(ii), it is not necessary to determine whether perils to defense exhaust the scope of "safety" as used in this statute, or to consider its findings with regard to peril to the national health.

Having decided that the strike was one which created a national emergency within the terms of the statute, the next question is whether, upon that finding alone, the "eighty-day" injunction for which the Government prayed should have issued, or whether the District Court was to exercise the conventional discretionary function of equity in balancing conveniences as a preliminary to issuing an injunction. The petitioner argued that under the Act a District Court has "discretion" whether to

issue an "eighty-day" injunction, even though a national emergency be found. It argued that the district judge in this case did not consider that he had such "discretion." Alternatively, it argued that if the district judge did exercise "discretion" he abused it, for the broad injunctive relief he granted was not justifiable in this case. The contention was that the relief had the effect of hindering rather than promoting a voluntary settlement of the dispute, and of unnecessarily coercing hundreds of thousands of employees, when an injunction of only a small part of the strike, or other non-injunctive remedies, assertedly less drastic, were available, and would have equally well averted the threat to public safety. We do not think it necessary to embark upon the speculative consideration whether the district judge in fact made a discretionary determination, and, if he did, whether that determination was justifiable. We conclude that under the national emergency provisions of the Labor Management Relations Act it is not for judges to exercise conventional "discretion" to withhold an "eighty-day" injunction upon a balancing of conveniences.

"Discretionary" jurisdiction is exercised when a given injunctive remedy is not commanded as a matter of policy by Congress, but is, as a presupposition of judge-made law, left to judicial discretion. Such is not the case under this statute. The purpose of Congress expressed by the scheme of this statute precludes ordinary equitable discretion. In this respect we think the role of the District Courts under this statute is like the role of the Courts of Appeals under provisions for review by them of the orders of various administrative agencies, such as the National Labor Relations Board. 29 U. S. C. § 160 (e). This Court has held that if the Board's findings are sustained, the remedy it thought appropriate must be enforced. *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318.

In the national emergency provisions of the Labor Management Relations Act, Congress has with particularity described the duration of the injunction to be granted and the nature of specific collateral administrative procedures which are to be set in motion upon its issuance. We think the conclusion compelling that Congress has thereby manifested that a District Court is not to indulge its own judgment regarding the wisdom of the relief Congress has designed. Congress expressed its own judgment and did not leave it to a District Court. The statute embodies a legislative determination that the particular relief described is appropriate to the emergency, when one is found to exist. Moreover, it is a primary purpose of the Act to stop the national emergency at least for eighty days, which would be defeated if a court were left with discretion to withhold an injunction and thereby permit continuation of an emergency it has found to exist. The hope is that within the period of the injunction voluntary settlement of the labor dispute will be reached, and to that end the statute compels bargaining between the parties during that time. If no voluntary settlement is concluded within the period of the injunction, the President is to report to Congress so that that body may further draw upon its constitutional legislative powers. How else can these specific directions be viewed but that the procedures provided are, in the view of Congress, the way to meet the emergencies which come within the statute? It is not for a court to negative the direction of Congress because of its own confident prophecy that the "eighty-day" injunction and the administrative procedures which follow upon it will not induce voluntary settlement of the dispute, or are too drastic a way of dealing with it.

We are also persuaded by the fact that, before the statute is invoked, there must be a Presidential determination that the "eighty-day" injunction is the promis-

ing method for dealing with the emergency arising from the labor dispute. Section 206 provides that whenever the President is of the "opinion" that a strike or lockout will create a national emergency, he may appoint a board of inquiry, which shall submit to him a report containing the facts relating to the dispute and the positions of the parties to it. Upon receiving this report the President "may" direct the Attorney General to petition to enjoin the strike or lockout. It is undoubtedly one of the factors in the President's decision to direct the Attorney General to act that he considers such an injunction the best available course to relieve the emergency. Such a decision by the President to invoke the courts' jurisdiction to enjoin, involving, as it does, elements not susceptible of ordinary judicial proof nor within the general range of judicial experience, is not within the competent scope of the exercise of equitable "discretion." It may be that the assumptions on the basis of which Congress legislated were ill-founded or have been invalidated by experience. It may be that the considerations on the basis of which the President exercised his judgment in invoking the legislation will be found wanting by hindsight. These are not matters within the Court's concern. They are not relevant to the construction of § 208 nor to its judicial enforcement. They certainly do not warrant the Judiciary's intrusion into the exercise by Congress and the President of their respective powers and responsibilities.

The Hecht Co. v. *Bowles,* 321 U. S. 321, heavily relied on, dealt with quite a different situation. There we held that the application of the Administrator of the Emergency Price Control Act of 1942 for an injunction of violations of that Act might be refused, in the exercise of the District Court's "discretion." But the scheme of the statute in *Hecht* v. *Bowles* was significantly different from that of the statute in this case. The Emergency Price Control Act of 1942 provided that the District

Court should grant, at the Administrator's application, "a permanent or temporary injunction, restraining order, or other order." This Court emphasized the alternative character of this provision for an "other order" as imparting to the District Court discretion to withhold an injunction. 321 U. S., at 328. Under the Labor Management Relations Act the District Court is given jurisdiction to enjoin "and to make such other orders as may be appropriate." Congress thus provided a jurisdiction additional to the power to grant an injunction, not alternative to it: an "other order" may only supplement an injunction, it may not supplant it. Beyond this difference are the considerations that, under the Emergency Price Control Act of 1942, an injunction did not, as it does here, bring into play other carefully prescribed relief designed by Congress to alleviate the cause of the evil which it was the purpose of the statute to correct, nor was the duration of the injunction specifically limited as in this case. There was not, therefore, in *Hecht* v. *Bowles* the strong showing we have here that the Congress has resolved the question of the appropriate form of relief for the condition the statute is meant to correct, and the Court there concluded that the Administrator's application for judicial relief was an appeal to the ordinary equity jurisdiction and "discretion" of the District Court. In *Hecht* v. *Bowles* itself the Court recognized that there might be "other federal statutes governing administrative agencies which . . . make it mandatory that those agencies take action when certain facts are shown to exist." 321 U. S., at 329. In essence this describes the situation under the Labor Management Relations Act.

We come finally to the petitioner's contention that the grant to the District Courts by § 208 (a) of the Labor Management Relations Act of jurisdiction to enjoin strikes such as this one is not a grant of "judicial Power" within the meaning of Art. III, § 2, of the Constitution,

and was therefore beyond the power of Congress to confer on the District Courts. What proceedings are "Cases" and "Controversies" and thus within the "judicial Power" is to be determined, at the least, by what proceedings were recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems. Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters such as were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies."

Beginning at least as early as the sixteenth century the English courts have issued injunctions to abate public nuisances. *Bond's Case,* Moore 238 (1587); *Jacob Hall's Case,* 1 Ventris 169, 1 Mod. 76 (1671); *The King* v. *Betterton,* 5 Mod. 142 (1696); *Baines* v. *Baker,* 3 Atk. 750, 1 Amb. 158 (1752); *Mayor of London* v. *Bolt,* 5 Ves. 129 (1799). See also Eden, Injunctions (3d ed. 1852), Vol. II, 259; Blackstone, Commentaries (12th ed. 1795), Vol. IV, 166. This old, settled law was summarized in 1836 by the Lord Chancellor in the statement that "the Court of Exchequer, as well as this Court, acting as a court of equity, has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbours and public roads; and, in short, generally, to prevent public nuisances." *Attorney-General* v. *Forbes,* 2 M. & C. 123, 133. And two years later this Court recognized that "it is now settled, that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney general." *Georgetown* v. *Alexandria Canal Co.,* 12 Pet. 91, 98 (1838).

See also *Payne* v. *Hook,* 7 Wall. 425, 430. Since that time this Court has impressively enforced the judicial power to abate public nuisances at the suit of the Government. *In re Debs,* 158 U. S. 564. The crux of the *Debs* decision, that the Government may invoke judicial power to abate what is in effect a nuisance detrimental to the public interest, has remained intact. The heart of the case was approvingly cited by Mr. Justice Brandeis for the Court in *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 301. The scope of the injunction in the *Debs* case no doubt gave rise to the much-criticized extensive use of the injunction in ordinary employer-employee controversies. See Frankfurter and Greene, The Labor Injunction, pp. 18 *et seq.,* 62–63, and 190, and for the terms of the decree see p. 253. Congress dealt with this proliferating and mischievous use of the labor injunction first through the Clayton Act and later through the Norris-LaGuardia Act. But even the severest critics of the *Debs* injunction have recognized that it was not a "new invention." See, *id.,* p. 20. The judicial power to enjoin public nuisance at the instance of the Government has been a commonplace of jurisdiction in American judicial history. See, *e. g., Attorney General* v. *Tudor Ice Co.,* 104 Mass. 239, 244 (1870); *Village of Pine City* v. *Munch,* 42 Minn. 342, 343, 44 N. W. 197 (1890); *Board of Health* v. *Vink,* 184 Mich. 688, 151 N. W. 672 (1915).

The jurisdiction given the District Courts by § 208 (a) of the Labor Management Relations Act to enjoin strikes creating a national emergency is a jurisdiction of a kind that has been traditionally exercised over public nuisances. The criterion for judicial action—peril to health or safety—is much like those upon which courts ordinarily have acted. Injunctive relief is traditionally given by equity upon a showing of such peril, and the court, as was traditional, acts at the request of the Executive. There can therefore be no doubt that, being thus akin to jurisdic-

tion long historically exercised, the function to be performed by the District Courts under § 208 (a) is within the "judicial Power" as contemplated by Art. III, § 2, and is one which Congress may thus confer upon the courts. It surely does not touch the criteria for determining what is "judicial Power" that the injunction to be issued is not a permanent one, and may last no longer than eighty days. Given the power in Congress to vest in the federal courts the function to enjoin absolutely, it does not change the character of the power granted or undermine the professional competence of a court for its exercise that Congress has directed the relief to be tempered.

These controlling constitutional considerations were sought to be diverted by the petitioner through abstract discussion about the necessity for Congress to define legal rights and duties. The power of Congress to deal with the public interest does not derive from, nor is it limited by, rights and duties as between parties. Congress may impose duties and enforce obligations to the Nation as a whole, as it has so obviously done in the Labor Management Relations Act. Such congressional power is not to be subordinated to a sterile juristic dialectic.

MR. JUSTICE DOUGLAS, dissenting.*

Great cases, like this one, are so charged with importance and feeling that, as Mr. Justice Holmes once remarked (*Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401, dissenting opinion), they are apt to generate bad law. We need, therefore, to stick closely to the letter of the law we enforce in order to keep this controversy from being shaped by the intense interest which

*[REPORTER'S NOTE: This dissenting opinion was filed November 7, 1959, and was revised later in the light of the concurring opinion. It is reported here as revised.]

the public rightfully has in it. The statute, which Congress had authority to pass, speaks in narrow and guarded terms. Section 206 of the Labor Management Relations Act, 1947, 61 Stat. 155, 29 U. S. C. § 176, gives the President power to invoke the aid of a board of inquiry whenever he is of the opinion that a strike or lockout will imperil "the national health or safety." The President, in appointing the board of inquiry in this case, stated:

> "The strike has closed 85 percent of the nation's steel mills, shutting off practically all new supplies of steel. Over 500,000 steel workers and about 200,000 workers in related industries, together with their families, have been deprived of their usual means of support. Present steel supplies are low and the resumption of full-scale production will require some weeks. If production is not quickly resumed, severe effects upon the economy will endanger the economic health of the nation."

It is plain that the President construed the word "health" to include the material well-being or public welfare of the Nation. When the Attorney General moved under § 208 for an injunction in the District Court based on the opinion of the President and the conclusions of the board of inquiry, the union challenged the conclusion that "the national health or safety" was imperiled, as those words are used in the Act. The District Court found otherwise, stating five ways in which the strike would, if permitted to continue, imperil "the national health and safety":

> "(a) Certain items of steel required in top priority military missile programs of the United States are not made by any mill now operating, nor available from any inventory or from imports. Any further delay in resumption of steel production would result in an irretrievable loss of time in the supply of

weapons systems essential to the national defense plans of the United States and its allies.

"(b) The planned program of space activities under the direction of the National Aeronautics and Space Administration has been delayed by the strike and will be further delayed if it is continued. Specifically, project MERCURY, the nation's manned satellite program, which has the highest national priority, has been delayed by reason of delay in construction of buildings essential to its operation. This program is important to the security of the nation. Other planned space programs will be delayed or threatened with delay by a continuation of the strike.

"(c) Nuclear Submarines and the naval shipbuilding program other than submarines, including new construction, modernization, and conversion, have been affected by reason of the inability to secure boilers, compressors, and other component parts requiring steel. Products of the steel industry are indispensable to the manufacture of such items and delay in their production will irreparably injure national defense and imperil the national safety.

"(d) Exported steel products are vital to the support of the United States bases overseas and for the use of NATO allies and similar collective security groups. The steel strike, if permitted to continue, will seriously impair these programs, thus imperiling the national safety.

"(e) A continuation of the strike will have the ultimate effect of adversely affecting millions of small business enterprises, almost all of which are directly or indirectly dependent upon steel products and most of which lack the resources to stock large inventories. In addition, it will have the effect of idling millions

> of workers and a large proportion of the facilities in industries dependent upon steel for their continued operation. Manufacturing industries directly dependent on steel mill products account for the employment of approximately 6,000,000 workers and normal annual wages and salaries totalling approximately $34,000,000,000. The products of these industries are valued at over $125,000,000,000. The national health will be imperiled if the strike is permitted to continue."

Here again it is obvious that "national health" was construed to include the economic well-being or general welfare of the country. The Court of Appeals, in sustaining the injunction, was apparently of the same view. This seems to me to be an assumption that is unwarranted. I think that Congress, when it used the words "national health," was safeguarding the heating of homes, the delivery of milk, the protection of hospitals, and the like. The coal industry, closely identified with physical health of people, was the industry paramount in the debates on this measure. The coal industry is indeed cited on the Senate side in illustration of the need for the measure. S. Rep. No. 105, 80th Cong., 1st Sess., p. 14. There were those in the Senate who wanted to go so far as to outlaw strikes "in utilities and key Nation-wide industries" in order to protect the "public welfare." 93 Cong. Rec. A1035. Reference was, indeed, made to strikes in industries "like coal or steel" among those to be barred in "the public interest." *Ibid.* But the Senate did not go that far. The Senate bill reached only situations where there was peril to the "national health or safety." [1] The House bill went further and included cases where there was peril to "the public health, safety,

[1] Legislative History of the Labor Management Relations Act, 1947 (G. P. O. 1948), Vol. I, pp. 274, 276.

or interest." [2] The Senate view prevailed, its version being adopted by the Conference.[3] Some light is thrown on the wide difference between those two standards—if words are to be taken in their usual sense—by the following colloquy on the floor of the House: [4]

> "Mr. KENNEDY. I believe that this country should certainly be in a position to combat a strike that affects the health and safety of the people. Therefore, I feel that the President must have the power to step in and stop those strikes. I am not in the position of opposing everything in this bill, but there are certain things in the bill that are wrong. I do not see how the President is going to have the power to stop strikes that will affect the health and safety of the people under the procedure listed in section 203. I think he must have that power.
>
> "I agree with you that any bill providing for an injunction should carefully consider the position of the striking union and make sure that their rights are protected. I think that in those cases Federal seizure until the dispute is settled would perhaps equalize the burden in the fairest possible manner.
>
> "Mr. OWENS. Will not the gentleman admit that we have a third word in there? It is 'interest.' Could we not better use the word 'welfare' instead of 'interest,' because the word 'welfare' occurs in the Constitution? It is just as broad as the word 'interest' and more practical.
>
> "Mr. KENNEDY. The proposal embraces two separate things, health and safety. Because the remedy is drastic these two, in my opinion, are sufficient. I believe we should apply this remedy when

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[2] Legislative History, Vol. I, *supra,* Note 1, pp. 214–215.

[3] H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 64.

[4] 93 Cong. Rec. 3513.

> the strike affects health or safety, but not the welfare and interest, which may mean anything. I would not interfere in an automobile strike because while perhaps that affects national interest, it does not affect health and safety.
>
> "Mr. OWENS. Does not the gentleman agree that 'welfare' is the stronger and in line with the President's idea?
>
> "Mr. KENNEDY. No. Both 'welfare' and 'interest' are too indefinite. They could cover anything. I would not have the law apply except in cases where the strike affected health and safety."

To read "welfare" into "health" gives that word such a vast reach that we should do it only under the most compelling necessity. We must be mindful of the history behind this legislation. *In re Debs,* 158 U. S. 564, 584, stands as ominous precedent for the easy use of the injunction in labor disputes. Free-wheeling Attorneys General used compelling public demands to obtain the help of courts in stilling the protests of labor. The revulsion against that practice was deep, and it led ultimately to the enactment of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101.[5] We deal, of course, with a later Congress and an Act that by § 208 (b) sets aside *pro*

[5] For discussion of the abusive use of blanket injunctions in labor controversies, see Allen, Injunction and Organized Labor, 28 Am. L. Rev. 828; Chafee, The Inquiring Mind, p. 198; Dunbar, Government by Injunction, 13 L. Q. Rev. 347; Frey, The Labor Injunction: An Exposition of Government by Judicial Conscience and its Menace; Lane, Civil War in West Virginia; Pepper, Injunctions in Labor Disputes, 49 A. B. A. Rep. 174; Royce, Labor, The Federal Anti-Trust Laws, and the Supreme Court, 5 N. Y. U. L. Q. Rev. 19; Stimson, The Modern Use of Injunctions, 10 Pol. Sci. Q. 189.

On the Norris-LaGuardia Act and what Congress intended to abolish by it, see Norris, Injunctions in Labor Disputes, 16 Marq. L. Rev. 157; Witte, The Federal Anti-Injunction Act, 16 Minn. L. Rev. 638.

tanto the earlier Act. What Congress has created Congress can refashion. But we should hesitate to conclude that Congress meant to restore the use of the injunction in labor disputes whenever that broad and all-inclusive concept of the public welfare is impaired. The words used—"national health or safety"—are much narrower.

Congress in the same Act knew how to speak when it spoke all-inclusively. The declaration of policy in the Labor Management Relations Act, 1947, speaks in broad terms. There is a declaration in § 1 (b) that "neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." 61 Stat. 136. The words "public . . . interest" cover five titles of a far-reaching regulatory measure. Yet, when Congress came to define the jurisdiction of courts to intervene in strikes or lockouts, it spoke in more restricted terms, confining the judiciary to injunctions where there is impending peril to "the national health or safety." That narrow reading is, indeed, the only one that can be squared with Senator Taft's explanation of the use of an injunction in a strike situation. The strike, he said, must not only affect substantially "an entire industry," it must also "imperil the national health or safety, a condition which, it is anticipated, will not often occur." [6] Yet, if "national

[6] 93 Cong. Rec. 6860.

Senator Smith said in like vein:

"Furthermore in title II of the bill we provide for the extreme cases which threaten national paralysis. To meet an industry-wide stoppage of some kind which may cause injury to the health or safety of 140,000,000 people, such as a transportation strike, or a coal strike, we have set up special machinery which will enable the Attorney General, on his own initiative, to petition the courts to prevent either a shut-down or a walk-out, until the mediation processes have had time to function." 93 Cong. Rec. 4281.

health" includes the public welfare, injunctions will issue whenever any important industry is involved—whether it be steel or automobiles or coal or any group of industries where one union makes collective agreements for each of the component unions.

It is a fact of which we can take judicial notice that steel production in its broadest reach may have a great impact on "national health." Machinery for processing food is needed; hospitals require surgical instruments; refrigeration is dependent on steel; and so on. Whether there are such shortages that imperil the "national health" is not shown by this record. But unless these particularized findings are made no case can be made out for founding the injunction on impending peril to the "national health."

Nor can this broad injunction be sustained when it is rested solely on "national safety." The heart of the District Court's finding on this phase of the case is in its statement, "Certain items of steel required in top priority military missile programs of the United States are not made by any mill now operating, nor available from any inventory or from imports." Its other findings, already quoted, are also generalized. One cannot find in the record the type or quantity of the steel needed for defense, the name of the plants at which those products are produced, or the number or the names of the plants that will have to be reopened to fill the military need. We do know that for one and a half years ending in mid-1959 the shipments of steel for defense purposes accounted for less than 1% of all the shipments from all the steel mills. If 1,000 men, or 5,000 men, or 10,000 men can produce the critical amount the defense departments need, what authority is there to send 500,000 men back to work?

There can be no doubt that the steel strike affects a "substantial" portion of the industry. Hence the first re-

quirement of § 208 (a) of the Act is satisfied.[7] But we do know that only a fraction of the production of the struck industry goes to defense needs. We do not know, however, what fraction of the industry is necessary to produce that portion.[8] Without that knowledge the District Court is incapable of fashioning a decree that will safeguard the national "safety," and still protect the rights of labor. Will a selective reopening of a few mills be adequate to meet defense needs? Which mills are these? Would it be practical to reopen them solely for defense purposes or would they have to be reopened for all civilian purposes as well? This seems to me to be the type of inquiry that is necessary before a decree can be entered that will safeguard the rights of all the parties. Section 208 (a) gives the District Court "jurisdiction to enjoin" the strike. There is no command that it *shall* enjoin 100% of the strikers when only 1% or 5% or 10% of them are engaged in acts that imperil the national "safety." We are dealing here with equity practice which has several hundred years of history behind it. We cannot lightly assume that Congress intended to make the

[7] Section 208 (a) provides:

"Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

"(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

"(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate."

[8] The record shows, as does the President's statement, *supra*, that mills accounting for at least 15% of the Nation's steel production are still in operation and are unaffected by the strike.

federal judiciary a rubber stamp for the President. His findings are entitled to great weight, and I along with my Brethren accept them insofar as national "safety" is concerned. But it is the court, not the President, that is entrusted by Article III of the Constitution to shape and fashion the decree. If a federal court is to do it, it must act in its traditional manner, not as a military commander ordering people to work willy-nilly, nor as the President's Administrative Assistant. If the federal court is to be merely an automaton stamping the papers an Attorney General presents, the judicial function rises to no higher level than an IBM machine. Those who grew up with equity and know its great history should never tolerate that mechanical conception.

An appeal to the equity jurisdiction of the Federal District Court is an appeal to its sound discretion. One historic feature of equity is the molding of decrees to fit the requirements of particular cases. See *Brown* v. *Board of Education,* 349 U. S. 294, 300. Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case.[9] We should hesitate long before we

[9] Equity has contrived its remedies and has always preserved the elements of flexibility and expansiveness so that new ones may be invented, or old ones modified, to meet the requirements of every case. *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.,* 163 U. S. 564, 601. And the extent to which the Court may grant or withhold its aid, and the manner of molding its remedies may be affected by the public interest involved. *United States* v. *Morgan,* 307 U. S. 183, 194; *Securities & Exchange Comm'n* v. *United States Realty Co.,* 310 U. S. 434, 455. There is in fact no limit to the variety of equitable remedies which can be applied to the circumstances of a particular case. 1 Pomeroy's Equity Jurisprudence (5th ed.) § 109.

An equity court may, by trial for a limited term, determine just how much relief is required to meet the situation, and thereby avoid unnecessary hardship to any of the parties. McClintock on Equity (2d ed.) § 30; Pomeroy, *supra,* §§ 115, 116. This principle has been applied by this Court several times, *e. g.,* where an injunction was

conclude that Congress intended an injunction to issue against 500,000 workers when the inactivity of only 5,000 or 10,000 of the total imperils the national "safety." That would be too sharp a break with traditional equity practice for us to accept, unless the statutory mandate were clear and unambiguous. In situations no more clouded with doubt than the present one we have refused to read a statutory authority to issue a decree as a command to do it. *Hecht Co.* v. *Bowles,* 321 U. S. 321. We there said, "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." *Id.,* at 329. And see *Porter* v. *Warner Co.,* 328 U. S. 395, 398. The concurring opinion seeks to distinguish the *Bowles* case by laying great stress on the language of the statute there in issue to the effect that remedy by injunction "or other order" shall be granted, as distinguished from the use of the words "and to make such other orders" in § 208 presently involved. In the *Bowles* case, however, we expressly declined to reach the question whether it was an abuse of discretion for the District Court to deny *any* relief, which is what it did in that case. *Id.,* at 331. Moreover, the

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sought against the pollution of a stream, the defendant was permitted to construct settling basins to alleviate the injury to the plaintiff and the injunction was modified to allow experiments toward that end. *Arizona Copper Co.* v. *Gillespie,* 230 U. S. 46. And when defendants' smelters emitted noxious fumes an injunction was withheld to permit them to devise a practical method of installing purifying devices. *Georgia* v. *Tennessee Copper Co.,* 237 U. S. 474. See also *Alexander* v. *Hillman,* 296 U. S. 222. A more recent instance where an equity decree was fashioned to meet problems far more complicated than those presented here will be found in *Nebraska* v. *Wyoming,* 325 U. S. 589, 665–672. The problem there was the division of waters among the States where enforcement of strict legal rights would have resulted in uneconomic and inequitable results. The multitude of factors weighed and appraised there makes the difficulties of the present case seem to be largely the product of imagination or prejudice, not realities of modern plant management.

language of the statute in the *Bowles* case stated that an injunction or other order "shall be granted." We have here no such command, since § 208 only provides that the District Court "shall have jurisdiction" to issue an injunction and other orders, as may be appropriate.

Plainly there is authority in the District Court to protect the national "safety" by issuance of an injunction. But there is nothing in this record to sustain the conclusion that it is necessary to send 500,000 men back to work to give the defense department all the steel it needs for the Nation's "safety." If more men are sent back to work than are necessary to fill the defense needs of the country, other objectives are being served than those specified in the statute. What are these other objectives? What right do courts have in serving them? What authority do we have to place the great weight of this injunction on the backs of labor, when the great bulk of those affected by it have nothing to do with production of goods necessary for the Nation's "safety" in the military sense of that word? Labor injunctions were long used as cudgels—so broad in scope, so indiscriminate in application as once to be dubbed "a 'scarecrow' device for curbing the economic pressure of the strike." See Frankfurter and Greene, The Labor Injunction (1930), pp. 107–108. The crop of evils that grew up during those regimes was different in some respects from those generated by this decree. The problems of vagueness, of uncertainty, of detailed judicial supervision that made police courts out of equity courts are not present here. But the same indiscriminate leveling of those within and those without the law is present. The injunction applies all the force of the Federal Government against men whose work has nothing to do with military defense as well as against those whose inactivity imperils the "national safety." It is not confined to the precise evil at which the present Act is aimed. Like the old labor injunctions that brought discredit to the federal

judiciary this is a blanket injunction broad and all-inclusive, bringing within its scope men whose work has nothing whatsoever to do with the defense needs of the Nation. Being wide of the statutory standard it has, to use the words of Mr. Justice Brandeis, all the vices of the injunction which is used "to endow property with active, militant power which would make it dominant over men." See *Truax* v. *Corrigan,* 257 U. S. 312, 354, 368 (dissenting opinion). I cannot believe that Congress intended the federal courts to issue injunctions that bludgeon all workers merely because the labor of a few of them is needed in the interest of "national safety."

Labor goes back to work under the present injunction on terms dictated by the industry, not on terms that have been found to be fair to labor and to industry. The steel industry exploits a tremendous advantage:

> "Our steel mills can produce in nine months all the metal the country can use in a year. That means a three-month strike costs the companies nothing in annual sales, and Uncle Sam picks up the tab for half of their out-of-pocket strike losses in the form of eventual tax adjustments.
>
> "The industry's final insurance against any acute financial pinch is the certainty that the President will have to step in with a national emergency injunction under the Taft-Hartley Act whenever steel stockpiles shrink to the danger level. This takes much of the bite out of the union's assault on the pocketbooks of the steel producers." [10]

This is a matter which equity should take into consideration. For a chancellor sits to do equity.

Some years ago this Court struck down as unconstitutional state statutes making arbitration of labor disputes

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[10] Raskin, To Prove Karl Marx Was Wrong, N. Y. Times Magazine, Oct. 25, 1959, pp. 12, 84.

mandatory. *Wolff Co.* v. *Industrial Court,* 262 U. S. 522; *Dorchy* v. *Kansas,* 264 U. S. 286. Those cases held that compulsory arbitration violated the Due Process Clause of the Fourteenth Amendment. One can only guess as to what institutions of adjudication we might have in this field today had that experiment been given a chance. The experiment, however, did not survive, and we have had little experience with it.[11] Collective bargaining and mediation are today the norm, except for the period of time in which an injunction is in force. By the terms of § 209, however, any injunction rendered may not continue longer than 80 days. The Act thus permits an injunction restricted in duration and narrowly confined by the requirements of the "national health or safety." When we uphold this injunction we force men back to work when their inactivity has no relation to "national health or safety." Those whose inactivity produces the peril to "national health or safety" which the Act guards against and only those should be covered in the injunction. The rest—who are the vast majority of the 500,000 on strike—should be treated as the employers are treated. They should continue under the regime of collective bargaining and mediation until they settle their differences or until Congress provides different or broader

[11] It was stated in S. Rep. No. 105, 80th Cong., 1st Sess., pp. 13–14, in reference to the new machinery for settling labor disputes:

"Under the exigencies of war the Nation did utilize what amounted to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Government, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining. It is difficult to see how such a system could be operated indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces." And see Dishman, The Public Interest in Emergency Labor Disputes, 45 Am. Pol. Sci. Rev. 1100 (1951).

remedies. When we assume that all the steelworkers are producing steel for defense when in truth only a fraction of them are, we are fulfilling the dreams of those who sponsored the House bill and failed in their efforts to have Congress legislate so broadly.

Though unlikely, it is possible that, had the District Court given the problem the consideration that it deserves, it could have found that the only way to remove the peril to national safety caused by the strike was to issue the broad, blanket injunction. It may be that it would be found impractical to send only part of the steelworkers back to work. The record in this case, however, is devoid of evidence to sustain that position.[12] Furthermore, there is no indication that the District Court ever even considered such a possibility. I am unwilling to take judicial notice that it requires 100% of the workers to produce the steel needed for national defense when 99% of the output is devoted to purposes entirely unconnected with defense projects.

The trier of fact under our federal judicial system is the District Court—not this Court nor the Court of Appeals. No finding was made by the District Court on the feasibility of a limited reopening of the steel mills and it is not, as the concurring opinion suggests, the province of the Court of Appeals to resolve conflicts in the evidence that was before the District Court.

I would reverse this decree and remand the cause to the District Court for particularized findings [13] as to how the

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[12] Such an opinion was stated in an affidavit by the Chairman of the Council of Economic Advisers; but that is conclusional only. There has been no sifting of the facts to determine whether defense needs can be satisfied by practical means short of sending all men back to work.

[13] The particularized findings necessary are illustrated by those in *United States* v. *Steelworkers,* 202 F. 2d 132, 134:

"At its Dunkirk plant the company was then engaged in commerce and in the production of goods for commerce, primarily in the 'heat

steel strike imperils the "national health" and what plants need to be reopened to produce the small quantity of steel now needed for the national "safety." [14] There would also be open for inquiry and findings any questions pertaining to "national health" in the narrow sense in which the Act uses those words.

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exchanger, pressure vessel and prefabricated pipe industry'; the threatened strike would not have affected all, or a substantial part, of that industry. A major part of the Dunkirk plant's production was to carry out contracts the company had with the Atomic Energy Commission and certain of its prime contractors to furnish specialized articles which were essential to the completion of the Commission's program for construction of facilities needed to produce atomic bombs for the national defense. These essential articles were heat exchanger shells used in the production of heavy water needed to operate nuclear reactors capable of producing fissionable materials, gas converter assemblies and other critical items all of which could have been obtained elsewhere only after other potential sources had been equipped to produce them. Resort to other sources would, consequently, have involved months of delay and set back correspondingly the construction program of the Commission and the production of fissionable materials and atomic weapons vital to the national defense. The threatened strike would have affected a substantial part of the atomic weapon industry and would have imperiled the national safety."

[14] The factor of "safety" may well involve, for example, the need for replacement of equipment on railroad trains. An affidavit of the Secretary of Commerce states:

"The continuing availability of most of these steel supplies is vital to the nation's health and safety, used as they are for the production of personal necessities, including surgical instruments, heating and refrigeration equipment, and articles used in the preparation and preservation of food. Steel is also essential to transportation, to the production and transmission of light and power, to the provision of sanitation services, and in the construction and mining industries."

But the Government in oral argument conceded that neither that aspect of "safety" nor any other aspect of "safety" apart from military defense is presented by this record, since there are no findings showing the extent to which inventories for those other purposes may be in short supply.

UNITED STATES *v.* SEABOARD AIR LINE RAILROAD CO.

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

No. 10. Argued October 19, 1959.—Decided November 9, 1959.

The provision of the Safety Appliance Act requiring power brakes on railroad "trains" applies to movements of an assembled unit consisting of an engine and a substantial number of cars between a classification or assembly yard and industrial plants one or two miles from such yard, over a track through a city which makes an interchange connection with another railroad and crosses at grade five streets, two private roads and four tracks of another railroad, when the cars are either received from a consignor or delivered to a consignee. Pp. 78–83.

258 F. 2d 262, reversed.

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

Eppa Hunton IV argued the cause for respondent. With him on the brief was *Lewis Thomas Booker.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit for statutory penalties, instituted by the United States, charging respondent with the operation of four trains in violation of the Safety Appliance Act, 27 Stat. 531, as amended, 32 Stat. 943, 45 U. S. C. §§ 1, 6, 9. That Act requires every "train" moving in interstate traffic [1] to have power brakes on not less than 50% of

[1] Section 1 provides, in relevant part:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with . . . appliances for oper-

the cars (§§ 1, 9)—a requirement which the Interstate Commerce Commission by regulation has increased to 85%. 49 CFR § 132.1. The penalties are $100 for each violation.[2] § 6.

The District Court rendered judgment for respondent and the Court of Appeals affirmed by a divided vote. 258 F. 2d 262. We granted the petition for a writ of certiorari because of the seeming conflict between that ruling and our prior decisions. 358 U. S. 926.

Respondent has a "classification or assembly yard" in Hopewell, Virginia. Trains to and from Hopewell use it for breaking up incoming trains and for assembling cars into outgoing trains. A track extends from this "classification" yard for about two miles through the city. In this stretch the tracks make an interchange connection with another railroad and cross, *at grade,* five streets, two private roads and four tracks of another railroad. Nine spur tracks branch off these tracks to industrial sidings. About two miles from the "classification" yard are plants of the Allied Chemical & Dye Company and Continental Can Company.

The complaint charged four violations: First, moving a locomotive and 26 cars as a single unit, without stops, from the track of Allied Chemical to the "classification" yard. Second, moving a locomotive and 28 cars as a single unit, without stops, from the "classification" yard to the track of Allied Chemical. Third, moving a locomotive and 29 cars as a single unit, without stops, from a track near Allied Chemical for about a mile to the interchange

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ating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

[2] The statute was amended August 14, 1957, to increase the penalty to $250 (71 Stat. 352, 45 U. S. C. (Supp. V) § 6).

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track where the locomotive was detached, coupled to 20 additional cars, and then recoupled to the 29 cars. The 49 cars were then hauled, without stops, for about a mile to the "classification" yard. Fourth, moving a locomotive and 23 cars as a single unit, without stops, from the "classification" yard to the track of Continental Can.[3]

The meaning of the word "train" as used in the Act has been before the Court four times. In *United States* v. *Erie R. Co.*, 237 U. S. 402, it was recognized that while "switching operations" were not "train" movements within the meaning of the Act, the movement of cars from one yard to another yard of the same carrier was covered. It was emphasized that this movement, like other main-line movements, took the cars over switches and other tracks where the traffic was exposed to the hazards against which the Act was designed to afford protection. The same result was reached in *United States* v. *Chicago, B. & Q. R. Co.*, 237 U. S. 410, where the movements were of transfer trains, shifting cars from one yard in Kansas City to another on the opposite side of the Missouri River. It was again emphasized that this was "not shifting cars about in a yard or on isolated tracks devoted to switching operations," but moving traffic over a line where there were great hazards in the operation. *Id.*, at 412. *Louisville & J. Bridge Co.* v. *United States*, 249 U. S. 534, involved movements of cars for about three-quarters of a mile from one company's terminal to that of another, the cars passing over city streets, at grade, and along and over other tracks. The Court, in holding that these movements

[3] Respondent since 1951 had used air brakes on the cars in these movements after inspectors of the Interstate Commerce Commission had advised that it was necessary to do so. But it discontinued the practice in 1956, justifying the discontinuance on the ground that switching movements were involved, that the use of air brakes caused a delay of about 40 minutes in each movement, and that the increased annual cost for the use of air brakes was $30,000.

were covered by the Act, emphasized that this was not "a sorting, or selecting, or classifying" of cars "involving coupling and uncoupling, and the movement of one or a few at a time for short distances," but an operation involving the typical hazards which gave rise to the need for the Act. *Id.*, at 538. *United States* v. *Northern Pacific R. Co.*, 254 U. S. 251, involved so-called transfer trains running between points, four miles apart, within one yard. The railroad contended that the Act did not apply because the movement was within a yard and because no through or local trains moved over these tracks. The tracks did cross streets and other tracks at grade; and the trains were run without stops the four miles. It was held that these movements were covered by the Act. "A moving locomotive with cars attached is without the provision of the act only when it is *not* a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains." *Id.*, at 254–255.

We think this case, judged by the principles announced in the earlier four, was erroneously decided.

The end of each trip was characteristic of the usual freight run: cars were either received from a consignor or delivered to the consignee. This was not "sorting, or selecting, or classifying" cars "involving coupling and uncoupling, and the movement of one or a few at a time for short distances" (*Louisville & J. Bridge Co.* v. *United States, supra,* at 538) nor any other type of movement that is comparable to "switching." In three of the movements there was a run of two miles without stops. In one, there was one stop to pick up additional cars; but a mile run preceded that stop and another mile of uninterrupted travel followed it. The prior decisions make clear that it is immaterial that the run was not on the main line but in a yard. The fact that switching preceded or followed these movements is likewise irrelevant to the statu-

tory test. It may properly be said there is no "train" in a true "switching" operation. But when cars—at least in substantial number—are being received from consignors or delivered to consignees in an assembled unit of engine and cars that moves a substantial distance, the operation is intrinsically no different, for purposes of the Act, than a main-line haul.

The District Court found that "The movements complained of would not have been less hazardous to employees or the public if air brakes had been coupled and used." Yet it is not for courts to determine in particular cases whether this safety measure is or is not needed. Congress determined the policy that governs us in applying the law. Traditionally, movements of assembled cars for substantial distances involved the hazards of crossing public highways and the tracks of other lines with attendant risks to the public. More important, they involved risks to those who ride the trains,[4] particularly the men who operate them. History showed that hundreds of workers had been injured or killed by the stopping of unbraked cars, by the operation of hand brakes, and by the use of hand couplers. This history, well known to Congress,[5] was the primary purpose behind

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[4] The title of the original Act described it as "An Act to promote the safety of employees and travelers upon railroads . . ." etc. 27 Stat. 531.

[5] See H. R. Rep. No. 1678, 52d Cong., 1st Sess., p. 3, where it is noted that for the years 1889 and 1890 "38 per cent of the total number of deaths and 46 per cent of the total number of injuries sustained by railway employés resulted while coupling cars or setting brakes."

On page 7 of a report of a subcommittee submitted as a part of S. Rep. No. 1930, 57th Cong., 1st Sess., the following statement of a witness appearing before the subcommittee was made:

"If only a portion of the equipped cars are operated, trainmen are exposed to great danger arising from the breakage of an air hose, or a coupling between the cars so braked, which causes an instantane-

the legislation. The Act, therefore, should be liberally construed as a safety measure. Movements which, though miniature when compared with main-line hauls, have the characteristics of the customary "train" movement and its attendant risks are to be included.

Reversed.

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ous and extremely powerful application of the power brakes, which causes the front cars in the train to quickly slacken speed and stop, and the other cars behind them, which are not braked, to rush forward against them, thus causing a severe shock, which often wrecks the train and jars the trainmen off and injures them, and in some cases they fall under the wheels and are killed. If the brakes on all of the cars were operated this would not be so, for the brakes would be applied equally all over the train, and the cars on the rear end would slacken their speed just as quickly as those on the front end, and thus prevent their running forward against the front cars and producing the shock just described. There is no way for trainmen to escape these injuries, for they are still required by the companies to ride out on the tops of trains, and when one of these shocks comes, it comes to them without warning, for the noise of the running train, together with darkness at night, prevents them from detecting any trouble ahead.

"Wrecks caused in this way do not only cause injury to the trainmen on the train which is wrecked, but also on double-tracked roads the opposite track is immediately blocked with wrecked cars, thus endangering not only the lives and limbs of trainmen, but passengers as well, who may be on trains approaching on the opposite track, which can not be stopped before striking the obstruction. I personally know of several bad wrecks of this character myself."

ST. JOHNS MOTOR EXPRESS CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 337. Decided November 9, 1959.

Judgment affirmed.

Bryce Rea, Jr. for appellants.

Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, John C. Danielson and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, *Earle V. White* for Everts' Commercial Transport, Inc., and *Albert E. Stephan* for Inland Petroleum Transportation Co., Inc., appellees.

PER CURIAM.

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

TAHITI BAR, INC., *v.* PENNSYLVANIA LIQUOR CONTROL BOARD ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 363. Decided November 9, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 395 Pa. 355, 150 A. 2d 112.

Edwin P. Rome for appellant.

Anne X. Alpern, Attorney General of Pennsylvania, *Lois G. Forer,* Deputy Attorney General, *George G. Lindsay,* Assistant Attorney General, and *Russell C. Wismer,* Special Assistant Attorney General, for appellees.

PER CURIAM.

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

LEHIGH CASINO, INC., *v.* PENNSYLVANIA LIQUOR CONTROL BOARD ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 379. Decided November 9, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 395 Pa. 355, 150 A. 2d 112.

Henry I. Jacobson for appellant.

Anne X. Alpern, Attorney General of Pennsylvania, *Lois G. Forer,* Deputy Attorney General, *George G. Lindsay,* Assistant Attorney General, and *Russell C. Wismer,* Special Assistant Attorney General, for appellees.

PER CURIAM.

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

SAFEWAY TRAILS, INC., *v.* UNITED STATES ET AL.

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

No. 375. Decided November 9, 1959.

176 F. Supp. 201, affirmed.

William A. Roberts and *Maxwell A. Howell* for appellant.

Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, John C. Danielson, Robert W. Ginnane and *Arthur J. Cerra* for the United States and the Interstate Commerce Commission, and *Frank B. Hand, Jr.* for Baltimore and Annapolis Railroad Co., appellees.

PER CURIAM.

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

GLOVER *v.* MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 265, Misc. Decided November 9, 1959.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

COMMISSIONER OF INTERNAL REVENUE *v.* ACKER.

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

No. 13. Argued October 19, 1959.—Decided November 16, 1959.

Under the Internal Revenue Code of 1939, the failure of a taxpayer, without reasonable cause, to file a declaration of estimated income tax, as required by § 58, subjects him to the addition to the tax prescribed by § 294 (d) (1) (A) for failure to file the declaration; but it does not subject him also to the addition to the tax prescribed by § 294 (d) (2) for the filing of a "substantial underestimate" of his tax. Pp. 87–94.

258 F. 2d 568, affirmed.

Ralph S. Spritzer argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson.*

Fred N. Acker, respondent, argued the cause and filed a brief *pro se.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

This case presents the question whether, under the Internal Revenue Code of 1939, the failure of a taxpayer to file a declaration of estimated income tax, as required by § 58,[1] not only subjects him to the addition to the tax

[1] Section 58, as amended, provides, in pertinent part, that:

"Every individual . . . shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if [his gross income from wages or other sources can reasonably be expected to exceed stated sums, showing] the amount which he estimates as the amount of tax under this chapter for the taxable year, without regard to any credits under Sections 32 and 35 for taxes withheld at source . . . ; the amount which he estimates as

prescribed by § 294 (d)(1)(A) for failure to file the declaration, but also subjects him to the further addition to the tax prescribed by § 294 (d)(2) for the filing of a "substantial underestimate" of his tax.

Section 294 (d)(1)(A) provides, in substance, that if a taxpayer fails to make and file "a declaration of estimated tax," within the time prescribed, there shall be added to the tax an amount equal to 5% of each installment due and unpaid, plus 1% of such unpaid installments for each month except the first, not exceeding an aggregate of 10% of such unpaid installments.[2]

Section 294 (d)(2), in pertinent part, provides:

> "(2) Substantial underestimate of estimated tax.
>
> "If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35) . . . exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to

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[such] credits . . . ; and [that] the excess of the [estimated tax] over the [estimated credits] shall be considered the estimated tax for the taxable year." 26 U. S. C. (1952 ed.) § 58.

[2] Section 294 (d)(1)(A), as amended, provides, in pertinent part, that:

"(A) Failure to file declaration.

"In the case of a failure to make and file a declaration of estimated tax within the time prescribed . . . there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35." 26 U. S. C. (1952 ed.) § 294 (d)(1)(A).

> such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. . . ." 26 U. S. C. (1952 ed.) § 294 (d)(2).

Section 29.294–1(b)(3)(A) of Treasury Regulation 111, promulgated under the Internal Revenue Code of 1939, contains the statement that:

> "In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of [§ 294 (d)(2)] is zero."

Respondent, without reasonable cause, failed to file a declaration of his estimated income tax for any of the years 1947 through 1950. The Commissioner imposed an addition to the tax for each of those years under § 294 (d)(1)(A) for failure to file the declaration, and also imposed a further addition to the tax for each of those years under § 294 (d)(2) for a "substantial underestimate" of the tax. The Tax Court sustained the Commissioner's imposition of both additions. The Court of Appeals affirmed with respect to the addition imposed for failure to file the declaration, but reversed with respect to the addition imposed for substantial underestimation of the tax, holding that § 294 (d)(2) does not authorize the treatment of a taxpayer's failure to file a declaration of estimated tax as the equivalent of a declaration estimating no tax, and that the regulation, which purports to do so, is not supported by the statute and is invalid. 258 F. 2d 568. Because of a conflict among the circuits [3] we

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[3] After the Sixth Circuit had delivered its opinion in this case but before it had decided the Commissioner's petition for rehearing, the Third Circuit, in *Abbott* v. *Commissioner,* 258 F. 2d 537, and the Fifth Circuit, in *Patchen* v. *Commissioner,* 258 F. 2d 544, held that the failure of a taxpayer to file a declaration of estimated tax subjected him not only to the "addition to the tax" imposed by

granted the Commissioner's petition for certiorari. 358 U. S. 940.

The first and primary question that we must decide is whether there is any expressed or necessarily implied provision or language in § 294 (d)(2) which authorizes the

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§ 294 (d)(1)(A) for failure to file a declaration, but also to the "addition to the tax" imposed by § 294 (d)(2) for a "substantial underestimate" of his tax. Less than two months earlier, the Ninth Circuit, too, had so held in *Hansen* v. *Commissioner,* 258 F. 2d 585.

From the beginning of litigation involving the question here presented, a large majority of the published opinions of the District Courts have held that § 294 (d)(2) does not authorize the treatment of a taxpayer's failure to file any declaration at all as the equivalent of a declaration estimating his tax to be zero, and that the regulation attempts to amend and extend the statute and is therefore invalid. See, *e. g., United States* v. *Ridley,* 120 F. Supp. 530, 538; *United States* v. *Ridley,* 127 F. Supp. 3, 11; *Owen* v. *United States,* 134 F. Supp. 31, 39, modified on another point *sub nom. Knop* v. *United States,* 234 F. 2d 760; *Powell* v. *Granquist,* 146 F. Supp. 308, 312, aff'd, 252 F. 2d 56; *Hodgkinson* v. *United States,* 57–1 U. S. T. C. ¶ 9294; *Jones* v. *Wood,* 151 F. Supp. 678; *Glass* v. *Dunn,* 56–2 U. S. T. C. ¶ 9840; *Stenzel* v. *United States,* 150 F. Supp. 364; *Todd* v. *United States,* 57–2 U. S. T. C. ¶ 9768; *Erwin* v. *Granquist,* 57–2 U. S. T. C. ¶ 9732, aff'd, 253 F. 2d 26; *Barnwell* v. *United States,* 164 F. Supp. 430. Three District Court opinions have held the other way, *Palmisano* v. *United States,* 159 F. Supp. 98; *Farrow* v. *United States,* 150 F. Supp. 581; and *Peterson* v. *United States,* 141 F. Supp. 382; and the Tax Court has consistently so held. See, *e. g., Buckley* v. *Commissioner,* 29 T. C. 455; *Garsaud* v. *Commissioner,* 28 T. C. 1086, 1090.

The 1954 Internal Revenue Code has eliminated the question here presented as respects taxable years beginning after January 1, 1955, by providing for a single addition to the tax of 6% of the amount of underpayment, whether for failure to file a declaration of estimated tax or timely to pay the quarterly installments or for a substantial underestimation of the tax. 26 U. S. C. (1952 ed., Supp. V) § 6654. But the question is still a live one because of the pendency of a substantial number of cases which arose under and are governed by the 1939 Code.

treatment of a taxpayer's failure to file a declaration of estimated tax as, or the equivalent of, a declaration estimating his tax to be zero.

We are here concerned with a taxing Act which imposes a penalty.[4] The law is settled that "penal statutes are to be construed strictly," *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284, 296, and that one "is not to be subjected to a penalty unless the words of the statute plainly impose it," *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, 362. See, *e. g.*, *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, 410; *Elliott* v. *Railroad Co.*, 99 U. S. 573, 576.

Viewing § 294 (d)(2) in the light of this rule, we fail to find any expressed or necessarily implied provision or language that purports to authorize the treatment of a taxpayer's failure to file a declaration of estimated tax as, or the equivalent of, a declaration estimating his tax to be zero. This section contains no words or language

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[4] Although the Commissioner concedes that the addition to the tax imposed by § 294 (d)(1)(A) for failure to file a declaration of estimated tax is a penalty, he contends that the addition to the tax imposed by § 294 (d)(2) for substantial underestimation of the tax may not be so regarded. He attempts to support a distinction upon the ground that the amount of the addition imposed by § 294 (d)(1)(A) of 5%, plus 1% per month of unpaid installments, not exceeding an aggregate of 10% of such unpaid installments, does not represent a normal interest rate, whereas, he argues, the addition of the maximum of 6% that may be imposed under § 294 (d)(2) is a normal interest rate and should not be regarded as a penalty but as interest to compensate the Government for delayed payment.

We think this argument is unsound, for both of the additions are imposed for the breach of statutory duty, and both are characterized by the same language. Each is stated in the respective sections to be an "addition to the tax" itself; and, being such, it cannot be interest. Moreover, being "addition[s] to the tax," both additions are themselves as subject to statutory interest as the remainder of the tax. 26 U. S. C. (1952 ed.) § 292 (a).

to that effect, and its implications look the other way. By twice mentioning, and predicating its application upon, "the estimated tax" the section seems necessarily to contemplate, and to apply only to, cases in which a declaration of "the estimated tax" has been made and filed. The fact that the section contains no basis or means for the computation of any addition to the tax in a case where no declaration has been filed would seem to settle the point beyond all controversy. If the section had in any appropriate words conveyed the thought expressed by the regulation it would thereby have clearly authorized the Commissioner to treat the taxpayer's failure to file a declaration as the equivalent of a declaration estimating his tax at zero and, hence, as constituting a "substantial underestimate" of his tax. But the section contains nothing to that effect, and, therefore, to uphold this addition to the tax would be to hold that it may be imposed by regulation, which, of course, the law does not permit. *United States* v. *Calamaro,* 354 U. S. 351, 359; *Koshland* v. *Helvering,* 298 U. S. 441, 446–447; *Manhattan Co.* v. *Commissioner,* 297 U. S. 129, 134.

The Commissioner points to the fact that both the Senate Report [5] which accompanied the bill that became the Current Tax Payment Act of 1943,[6] and the Conference Report [7] relating to that bill, contained the statement which was later embodied in the regulation. He then argues that by reading § 294 (d)(2) in connection with that statement in those reports it becomes evident

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[5] S. Rep. No. 221, 78th Cong., 1st Sess., p. 42; 1943 Cum. Bull. 1314, 1345.

[6] Section 5 (b) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, introduced into the 1939 Code what, as amended, is now § 294 (d)(2) of that Code.

[7] H. R. Conf. Rep. No. 510, 78th Cong., 1st Sess., p. 56; 1943 Cum. Bull. 1351, 1372.

that Congress intended by § 294 (d)(2) to treat the failure to file a declaration as the equivalent of a declaration estimating no tax. He urges us to give effect to the congressional intention which he thinks is thus disclosed. However, these reports pertained to the forerunner of the section with which we are now confronted, and not to that section itself. Bearing in mind that we are here concerned with an attempt to justify the imposition of a second penalty for the same omission for which Congress has specifically provided a separate and very substantial penalty, we cannot say that the legislative history of the initial enactment is so persuasive as to overcome the language of § 294 (d)(2) which seems clearly to contemplate the filing of an estimate before there can be an underestimate.

The Commissioner next argues that the fact that Congress, with knowledge of the regulation, several times amended the 1939 Code but left § 294 (d)(2) unchanged, shows that Congress approved the regulation, and that we should accordingly hold it to be valid. This argument is not persuasive, for it must be presumed that Congress also knew that the courts, except the Tax Court, had almost uniformly held that § 294 (d)(2) does not authorize an addition to the tax in a case where no declaration has been filed, and that the regulation is invalid.[8] But the point is immaterial, for Congress could not add to or expand this statute by impliedly approving the regulation.

These considerations compel us to conclude that § 294 (d)(2) does not authorize the treatment of a taxpayer's failure to file a declaration of estimated tax as the equivalent of a declaration estimating his tax to be zero. The questioned regulation must therefore be regarded "as

[8] See Note 3.

no more than an attempted addition to the statute of something which is not there." *United States* v. *Calamaro, supra,* 354 U. S., at 359.

Affirmed.

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

English courts would decide the case as it is being decided here. They would do so because English courts do not recognize the relevance of legislative explanations of the meaning of a statute made in the course of its enactment. If Parliament desires to put a gloss on the meaning of ordinary language, it must incorporate it in the text of legislation. See Plucknett, A Concise History of the Common Law (5th ed.), 330–336; Amos, The Interpretation of Statutes, 5 Camb. L. J. 163; Davies, The Interpretation of Statutes, 35 Col. L. Rev. 519; Lord Haldane in *Viscountess Rhondda's Claim,* [1922] 2 A. C. 339, 383–384. Quite otherwise has been the process of statutory construction practiced by this Court over the decades in scores and scores of cases. Congress can be the glossator of the words it legislatively uses either by writing its desired meaning, however odd, into the text of its enactment, or by a contemporaneously authoritative explanation accompanying a statute. The most authoritative form of such explanation is a congressional report defining the scope and meaning of proposed legislation. The most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body.

No doubt to find failure to file a declaration of estimated income to be a "substantial underestimate" would be to attribute to Congress a most unlikely meaning for that phrase in § 294 (d)(2) *simpliciter.* But if Congress chooses by appropriate means for expressing its

purpose to use language with an unlikely and even odd meaning, it is not for this Court to frustrate its purpose. The Court's task is to construe not English but congressional English. Our problem is not what do ordinary English words mean, but what did Congress mean them to mean. "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 48.

Here we have the most persuasive kind of evidence that Congress did not mean the language in controversy, however plain it may be to the ordinary user of English, to have the ordinary meaning. These provisions were first enacted in the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, as additions to § 294 (a) of the Internal Revenue Code of 1939. The Conference Report, H. R. Conf. Rep. No. 510, p. 56, and the Senate Report, S. Rep. No. 221, p. 42, both gave the provision dealing with substantial underestimation of taxes the following gloss:

> "In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision will be zero."

The revision of the section eight months later by the Revenue Act of 1943, c. 63, 58 Stat. 21, did not affect its substance, and this provision, therefore, continued to carry the original gloss. While the Court adverts to this congressional definition, it disregards its controlling significance.*

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*The essential reliance of the Court is on its characterization of § 294 (d)(2) as a penalty. No adequate justification for this exists. Section 294 (d)(2) on its face indicates that it is in the nature of

I agree with the construction placed upon the provision by the Third, Fifth, and Ninth Circuits. *Abbott* v. *Commissioner,* 258 F. 2d 537 (C. A. 3d Cir. 1958); *Patchen* v. *Commissioner,* 258 F. 2d 544 (C. A. 5th Cir. 1958); *Hansen* v. *Commissioner,* 258 F. 2d 585 (C. A. 9th Cir. 1958).

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an interest charge, designed to compensate the Treasury for delay in receipt of funds which a reasonably accurate estimate would have disclosed to be due and owing. Significantly, this charge is imposed regardless of fault, while § 294 (d)(1)(A), a true penalty provision, authorizes no addition to tax when the failure to file is shown "to be due to reasonable cause and not to willful neglect." Had taxpayer here had reasonable cause for failure to file, the 10% addition under § 294 (d)(1)(A) could not have been imposed. Yet taxes would have been withheld by him pending the filing of a final return for the year. Section 294 (d)(2) provides the Government a definite means for ascertaining the compensation for this loss of funds.

TRI-CITY BROADCASTING CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 406. Decided November 16, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 169 Ohio St. 126, 158 N. E. 2d 203.

Carlton S. Dargusch, Carlton S. Dargusch, Jr. and *Jack H. Bertsch* for appellant.

Mark McElroy, Attorney General of Ohio, and *Joseph D. Karam,* Assistant Attorney General, for appellee.

PER CURIAM.

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

HENRY *v.* UNITED STATES.

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

No. 17. Argued October 20–21, 1959.—Decided November 23, 1959.

Without a warrant for search or arrest, federal officers who were investigating a theft from an interstate shipment of whiskey twice observed cartons being placed in a motorcar in a residential district, followed and stopped the car, arrested petitioner and another man who were in it, searched the car, and found and seized cartons containing radios stolen from an interstate shipment. At petitioner's trial for unlawfully possessing radios stolen from an interstate shipment, his timely motion to suppress the evidence so seized was overruled and he was convicted. *Held:* On the record in this case, the officers did not have probable cause for the arrest when they stopped the car; the search was illegal; the articles seized were not admissible in evidence; and the conviction is reversed. Pp. 98–104.

259 F. 2d 725, reversed.

Edward J. Calihan, Jr. argued the cause and filed a brief for petitioner.

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

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner stands convicted of unlawfully possessing three cartons of radios valued at more than $100 which had been stolen from an interstate shipment. See 18 U. S. C. § 659. The issue in the case is whether there was probable cause for the arrest leading to the search that produced the evidence on which the conviction rests. A timely motion to suppress the evidence was made by

petitioner and overruled by the District Court; and the judgment of conviction was affirmed by the Court of Appeals on a divided vote. 259 F. 2d 725. The case is here on a petition for a writ of certiorari, 359 U. S. 904.

There was a theft from an interstate shipment of whisky at a terminal in Chicago. The next day two FBI agents were in the neighborhood investigating it. They saw petitioner and one Pierotti walk across a street from a tavern and get into an automobile. The agents had been given, by the employer of Pierotti, information of an undisclosed nature "concerning the implication of the defendant Pierotti with interstate shipments." But, so far as the record shows, he never went so far as to tell the agents he suspected Pierotti of any such thefts. The agents followed the car and saw it enter an alley and stop. Petitioner got out of the car, entered a gangway leading to residential premises and returned in a few minutes with some cartons. He placed them in the car and he and Pierotti drove off. The agents were unable to follow the car. But later they found it parked at the same place near the tavern. Shortly they saw petitioner and Pierotti leave the tavern, get into the car, and drive off. The car stopped in the same alley as before; petitioner entered the same gangway and returned with more cartons. The agents observed this transaction from a distance of some 300 feet and could not determine the size, number or contents of the cartons. As the car drove off the agents followed it and finally, when they met it, waved it to a stop. As he got out of the car, petitioner was heard to say, "Hold it; it is the G's." This was followed by, "Tell him he [you] just picked me up." The agents searched the car, placed the cartons (which bore the name "Admiral" and were addressed to an out-of-state company) in their car, took the merchandise and petitioner and Pierotti to their office and held them for about two hours when the agents learned that the cartons contained

stolen radios. They then placed the men under formal arrest.

The statutory authority of FBI officers and agents to make felony arrests without a warrant is restricted to offenses committed "in their presence" or to instances where they have "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony. 18 U. S. C. § 3052. The statute states the constitutional standard, for it is the command of the Fourth Amendment that no warrants for either searches or arrests shall issue except "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The requirement of probable cause has roots that are deep in our history. The general warrant,[1] in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed,[2] both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against that practice:

> "That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

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[1] Declared illegal by the House of Commons in 1766. 16 Hansard, Parl. Hist. Eng. 207.

[2] Quincy's Mass. Rep. 1761–1772, Appendix, p. 469.

The Maryland Declaration of Rights (1776), Art. XXIII, was equally emphatic:

> "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants—to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special—are illegal, and ought not to be granted."

And see North Carolina Declaration of Rights (1776), Art. XI; Pennsylvania Constitution (1776), Art. X; Massachusetts Constitution (1780), Pt. I, Art. XIV.

That philosophy later was reflected in the Fourth Amendment. And as the early American decisions both before [3] and immediately after [4] its adoption show, common rumor or report, suspicion, or even "strong reason to suspect" [5] was not adequate to support a warrant for arrest. And that principle has survived to this day. See *United States* v. *Di Re,* 332 U. S. 581, 593–595; *Johnson* v. *United States,* 333 U. S. 10, 13–15; *Giordenello* v. *United States,* 357 U. S. 480, 486. Its high water was *Johnson* v. *United States, supra,* where the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant. It was against this background that two scholars recently wrote, "Arrest on mere suspicion collides violently with the basic human right of liberty." [6]

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[3] *Frisbie* v. *Butler,* Kirby's Rep. (Conn.) 1785–1788, p. 213.

[4] *Conner* v. *Commonwealth,* 3 Binn (Pa.) 38; *Grumon* v. *Raymond,* 1 Conn. 40; *Commonwealth* v. *Dana,* 2 Met. (Mass.) 329.

[5] *Conner* v. *Commonwealth, supra,* note 4, at 43.

[6] Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1, 22.

Uniform Crime Reports for the United States, compiled by the Federal Bureau of Investigation (Vol. XXVIII, No. 1, Semiannual

Evidence required to establish guilt is not necessary. *Brinegar* v. *United States,* 338 U. S. 160; *Draper* v. *United States,* 358 U. S. 307. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. *Stacey* v. *Emery,* 97 U. S. 642, 645. And see *Director General* v. *Kastenbaum,* 263 U. S. 25, 28; *United States* v. *Di Re, supra,* at 592; *Giordenello* v. *United States, supra,* at 486. It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. *Carroll* v. *United States,* 267 U. S. 132, 156. And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause. *Carroll* v. *United States, supra,* at 155–156. This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen. We turn then to the question whether prudent men in the shoes of these officers (*Brinegar* v. *United States, supra,* at 175) would have seen enough to permit them to believe that petitioner was violating or had violated the law. We think not.

Bull., 1957), pp. 64, 65, shows 1956 *arrest* statistics for 1,025 cities in the United States, including 26 cities over 250,000 population and 458 cities under 10,000 population.

The report states that 111,274 were arrested on suspicion (but not in connection with any specific offense) and subsequently released without prosecution. This was at the rate of 280.4 per 100,000 inhabitants.

The grand total of persons arrested—both for a specific offense (but excluding traffic offenses) and on suspicion alone—and released without being held for prosecution was 264,601. This was at the rate of 666.7 per 100,000 inhabitants.

The prosecution conceded below, and adheres to the concession here,[7] that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses, as *Johnson* v. *United States, supra,* holds.

It is true that a federal crime had been committed at a terminal in the neighborhood, whisky having been stolen from an interstate shipment. Petitioner's friend, Pierotti, had been suspected of some implication in some interstate shipments, as we have said. But as this record stands, what those shipments were and the manner in which he was implicated remain unexplained and undefined. The rumor about him is therefore practically meaningless. On the record there was far from enough evidence against him to justify a magistrate in issuing a warrant. So far as the record shows, petitioner had not even been suspected of criminal activity prior to this time. Riding in the car, stopping in an alley, picking up packages, driving away—these were all acts that were outwardly innocent. Their movements in the car had no mark of fleeing men or men acting furtively. The case might be different if the packages had been taken from a terminal or from an interstate trucking platform. But they were not. As we have said, the alley where the packages were picked up was in a residential section.

[7] An alternative theory that the arrest took place at a subsequent time was discussed by the Government only to make clear that it would press that position on the facts of another case now pending here, No. 52, *Rios* v. *United States.*

The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure. The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband. Its shape and design might at times be adequate. The weight of it and the manner in which it is carried might at times be enough. But there was nothing to indicate that the cartons here in issue probably contained liquor. The fact that they contained other contraband appeared only some hours after the arrest. What transpired at or after the time the car was stopped by the officers is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest.

The fact that the suspects were in an automobile is not enough. *Carroll* v. *United States, supra,* liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause.

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE CLARK, whom THE CHIEF JUSTICE joins, dissenting.

The Court decides this case on the narrow ground that the arrest took place at the moment the Federal Bureau of Investigation agents stopped the car in which petitioner was riding and at that time probable cause for it did not exist. While the Government, unnecessarily it seems to me, conceded that the arrest was made at the

time the car was stopped, this Court is not bound by the Government's mistakes.*

The record shows beyond dispute that the agents had received information from co-defendant Pierotti's employer implicating Pierotti with interstate shipments. The agents began a surveillance of petitioner and Pierotti after recognizing them as they came out of a bar. Later the agents observed them loading cartons into an automobile from a gangway up an alley in Chicago. The agents had been trailing them, and after it appeared that they had delivered the first load of cartons, the suspects returned to the same platform by a circuitous route through streets and alleys. The agents then saw petitioner load another set of cartons into the car and drive off with the same. A few minutes later the agents stopped the car, alighted from their own car, and approached the petitioner. As they did so, petitioner was overheard to say: "Hold it; it is the G's," and "Tell him he [you] just picked me up." Since the agents had actually seen the two suspects together for several hours, it was apparent to them that the statement was untrue. Upon being questioned, the defendants stated that they had borrowed the car from a friend. During the questioning and after petitioner had stepped out of the car one of the agents happened to look through the door of the car which petitioner had left open and saw three cartons stacked up inside which resembled those petitioner had just loaded into the car from the gangway. The agent saw that the cartons bore Admiral shipping labels and were addressed to a company in Cincinnati, Ohio. Upon further questioning, the agent was told that the cartons

*It may be that the Government is doing some wishful thinking in regard to the relaxation of the standards incident to the "probable cause" requirement by making this a test case. We should not lend ourselves to such indulgence.

were in the car when the defendants borrowed it. Knowing this to be untrue, the agents then searched the car, arrested petitioner and his companion, and seized the cartons.

The Court seems to say that the mere stopping of the car amounted to an arrest of the petitioner. I cannot agree. The suspicious activities of the petitioner during the somewhat prolonged surveillance by the agents warranted the stopping of the car. The sighting of the cartons with their interstate labels in the car gave the agents reasonable ground to believe that a crime was in the course of its commission in their very presence. The search of the car and the subsequent arrest were therefore lawful and the motion to suppress was properly overruled.

In my view, the time at which the agents were required to have reasonable grounds to believe that petitioner was committing a felony was when they began the search of the automobile, which was after they had seen the cartons with interstate labels in the car. The earlier events certainly disclosed ample grounds to justify the following of the car, the subsequent stopping thereof, and the questioning of petitioner by the agents. This interrogation, together with the sighting of the cartons and the labels, gave the agents indisputable probable cause for the search and arrest.

When an investigation proceeds to the point where an agent has reasonable grounds to believe that an offense is being committed in his presence, he is obligated to proceed to make such searches, seizures, and arrests as the circumstances require. It is only by such alertness that crime is discovered, interrupted, prevented, and punished. We should not place additional burdens on law enforcement agencies.

I would affirm the judgments on the rationale of *Brinegar* v. *United States,* 338 U. S. 160 (1949), and *Carroll* v. *United States,* 267 U. S. 132 (1925).

SENTILLES *v.* INTER-CARIBBEAN SHIPPING CORP.

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

No. 6. Argued October 19, 1959.—Decided November 23, 1959.

In this suit by a seaman under the Jones Act and the general maritime law to recover from a shipowner damages for a serious tubercular illness alleged to have been caused by an accident at sea for which the shipowner was liable, no medical witness testified that the accident in fact caused the illness. *Held:* Nevertheless, the evidence was sufficient to support the jury's conclusion that the illness was caused by the accident, and the Court of Appeals erred in reversing a judgment for the seaman. Pp. 107–110.

(a) The lack of medical unanimity as to the respective likelihood of the potential causes of the illness, and the fact that the other potential causes were not conclusively negated by the proofs, did not bar the jury from drawing the inference which it did. P. 109.

(b) The use of a particular form of words by the medical witnesses is not determinative, and the jury was entitled to take all the circumstances, including the medical testimony, into consideration. Pp. 109–110.

256 F. 2d 156, reversed.

Milton Kelner argued the cause for petitioner. With him on the brief was *John K. Lewis.*

Robert J. Beckham argued the cause for respondent. On the brief was *George F. Gilleland.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The petitioner brought this suit against the respondent to recover damages sustained by him allegedly as a consequence of a shipboard accident while serving as a crewmember on the respondent's vessel in the Caribbean. As the vessel encountered a heavy sea, petitioner was pitched

into the air and fell back to the deck, where, upon landing, a wave washed him a considerable distance. Shortly after the accident, the petitioner became quite ill and was hospitalized and treated for a serious case of tuberculosis. The respondent's liability for the accident was predicated on fault under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, and alternatively on breach of the maritime duty to furnish a seaworthy vessel. The petitioner's theory was that the accident activated or aggravated a previously latent tubercular condition.[1] The case was submitted to a jury in the District Court, where a verdict was returned for the petitioner, and judgment entered thereon. In the Court of Appeals, the respondent did not argue that the jury could not have with reason found it liable for the accident, but contended solely that the evidence did not justify the jury's conclusion that the accident caused the serious illness that followed it. The Court of Appeals agreed with the respondent's contention and reversed, 256 F. 2d 156. We granted certiorari on a petition in which it was asserted that the Court of Appeals had applied an improper standard in reviewing the medical evidence and in examining the judgment rendered on the jury's verdict. 359 U. S. 923.

There was evidence that petitioner (whose medical history was an active one) had been examined several times by his regular physician in the year preceding the accident, as recently as two months before it, with no appearance of tuberculosis being then noted. During the petitioner's acute tuberculosis subsequent to the accident, a specialist re-examined X-ray pictures taken in the years preceding the accident, and concluded that

[1] Maintenance and cure in respect of the illness were also claimed; this was viewed as presenting a causation problem similar to that posed by the claim for indemnity damages.

they did in fact reveal a pulmonary lesion, at first involving a "small scarred inactive area." "In retrospect," the specialist felt that the lesion had been tubercular. In response to a hypothetical question as to the effect of an accident like petitioner's on the aggravation or activation of a pre-existing, dormant tubercular condition, the specialist gave an opinion that "acute dissemination of the tuberculosis" might be a consequence of the accident. Another specialist, who had treated petitioner during his hospitalization after the accident, posited the trauma and petitioner's pre-existing diabetic condition as the most likely causes of the aggravation of the tuberculosis, though he was not able to state "which of the two it is more likely was responsible in this instance." Another medical expert, who had not personally examined petitioner, when questioned hypothetically, was of opinion that the accident "probably aggravated his condition," though he would not say definitely: "We don't ever select one item and say that is the cause of any particular aggravation."

The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation.[2] They were en-

[2] For a discussion of the reluctance of medical opinion to assign trauma as the cause of disease, and of the varying medical and legal

titled to take all the circumstances, including the medical testimony, into consideration. See *Sullivan* v. *Boston Elevated R. Co.*, 185 Mass. 602, 71 N. E. 90; *Miami Coal Co.* v. *Luce*, 76 Ind. App. 245, 131 N. E. 824.[3] Though this case involves a medical issue, it is no exception to the admonition that, "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35. The proofs here justified with reason the conclusion of the jury that the accident caused the petitioner's serious subsequent illness. See *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.

Reversed.

Mr. Justice Whittaker, finding in the record direct medical testimony expressing the opinion that petitioner's latent tubercular condition actually was activated by the trauma complained of, concurs.

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concepts of causation, see Small, Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation, 31 Tex. L. Rev. 630.

[3] The medical testimony in the case last cited moved the court to say: "Indeed, if it were not for the saving grace of what we call common sense, justice would be defeated in almost every case where opinion evidence is admitted." *Id.*, at 249, 131 N. E., at 826.

MR. JUSTICE STEWART, concurring.

Cases like this, I am firmly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here. All this has been elaborated *in extenso* by others, and there is no point in repeating or paraphrasing their words. Suffice it to note that I agree with what they have said. See, *e. g., Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 524 (dissenting opinion); *Dick* v. *New York Life Ins. Co.,* 359 U. S. 437, 447 (dissenting opinion).

Yet under our rule, when four members of the Court vote to grant a petition for certiorari, the case is taken. If this rule is not to be frustrated, I can, as presently advised, see no escape from the duty of considering a case brought here on the merits, unless considerations appear which were not apprehended at the time certiorari was granted. In short, on this score I agree with the views expressed by MR. JUSTICE HARLAN in *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 559 (dissenting opinion). See Mr. Chief Justice Stone's concurring opinion in *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, at 358.

Upon an independent review of the record in this case, I concur in the result.

MR. JUSTICE HARLAN concurs in this opinion.

MR. JUSTICE FRANKFURTER, dissenting.

"We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U. S. 220, 227. Thus Mr. Justice Holmes, speaking for a unanimous Court thirty-five years ago, summarized the

practice of the Court in abstaining from exercising its certiorari jurisdiction for the purpose of reviewing facts and weighing evidence in relation to them. This practice obviously derived from the Evarts Act of 1891, by which Congress established intermediate courts of appeals to free this Court from reviewing the great mass of federal litigation in order to enable the Nation's ultimate tribunal adequately to discharge its responsibility for the wise adjudication of cases "involving principles the settlement of which is of importance to the public as distinguished from that of the parties," *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393. Since Mr. Chief Justice Taft announced this for the Court in 1923, cases of obvious public importance demanding the Court's attention have increased in number and difficulty. The practice of not taking cases turning solely on the evaluation of evidence has been consistently adhered to, barring an occasional sport like *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437, except in the special class of cases arising under the Federal Employers' Liability Act and its twin, the Jones Act. The fluctuating interest in this special class of cases by the necessary number of Justices for granting certiorari, first on behalf of employers, see Frankfurter and Landis, The Business of the Supreme Court (1928), 207–209, and more recently on behalf of employees, has disregarded the normal practice.

The oral argument overwhelmingly confirmed what the petition had already made clear, that this is the kind of case which, in the language of my Brother STEWART, does not "belong in this Court." To entertain the case merely because argument has been had does not lessen the disregard of the Court's practice, formulated in Rule 19. The Court has in scores of cases dismissed the writ of certiorari even after oral argument, when the true basis for a certiorari was lacking. Even in criminal cases

involving sentences of life imprisonment this practice has been followed. See *Triplett* v. *Iowa,* 357 U. S. 217; *Joseph* v. *Indiana,* 359 U. S. 117. Again to quote Mr. Chief Justice Taft in *Layne & Bowler Corp.* v. *Western Well Works, Inc., supra,* at 393, "it is very important that we be consistent in not granting the writ of certiorari . . . ." As a general practice the Court does not review cases involving merely individualized circumstances not unlike the type of factual situations arising in the application of the Federal Employers' Liability Act and the Jones Act. Since this case does not "belong in this Court," to have brought it here was an undue exercise of judicial discretion. Accordingly, I would dismiss the writ as improvidently granted. See my opinion in *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 524.

SCHWEGMANN BROTHERS GIANT SUPER MARKETS *v.* McCRORY, COMMISSIONER OF AGRICULTURE AND IMMIGRATION OF LOUISIANA, ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 423. Decided November 23, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 237 La. 768, 112 So. 2d 606.

Saul Stone and *Paul O. H. Pigman* for appellant.

Jack P. F. Gremillion, Attorney General of Louisiana, *George M. Ponder,* First Assistant Attorney General, and *N. Cleburn Dalton,* Special Assistant Attorney General, for McCrory, and *Frank H. Peterman,* for Blu-Ribon Dairies, Inc., et al., appellees.

PER CURIAM.

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

J. ARON & COMPANY, INC., *v.* MISSISSIPPI SHIPPING COMPANY, INC.

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

No. 450. Decided November 23, 1959.

Consent judgment having been entered by the District Court since judgment of reversal by Court of Appeals, certiorari granted, judgment of the Court of Appeals vacated and case remanded.

Reported below: 270 F. 2d 345.

Eberhard P. Deutsch, Brunswick G. Deutsch and *René H. Himel, Jr.* for petitioner.

PER CURIAM.*

It appearing from the petitioner's suggestion of mootness that, subsequent to the judgment of reversal by the Court of Appeals of the original interlocutory decree of the District Court and the filing of the petition for writ of certiorari, a consent judgment for damages and costs was entered by the District Court, the petition for writ of certiorari is granted, the judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals with directions to dismiss the appeal as moot.

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*[REPORTER'S NOTE: This decision *per curiam* is reported as amended by an order entered December 14, 1959.]

UNITED STATES *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

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

No. 24. Decided November 23, 1959.

Certiorari granted and judgment reversed.
Reported below: 260 F. 2d 884.

Solicitor General Rankin, Assistant Attorney General Anderson, Beatrice Rosenberg and *J. F. Bishop* for the United States.

Norman J. Gundlach and *John C. Roberts* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals is reversed. *United States* v. *Seaboard Air Line R. Co., ante,* p. 78.

LaPORTE ET AL. *v.* NEW YORK.

APPEAL FROM THE COURT OF CLAIMS OF NEW YORK.

No. 425. Decided November 23, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 6 N. Y. 2d 1, 159 N. E. 540.

Dante M. Scaccia for appellants.

Paxton Blair, Solicitor General of New York, for appellee.

PER CURIAM.

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

MURPHY *v.* COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 419. Decided November 23, 1959.

Appeal dismissed and certiorari denied.
Reported below: 4 N. Y. 2d 140, 149 N. E. 2d 705.

Edward M. Horey for appellant.

Charles A. Brind for appellee.

PER CURIAM.

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

BREATON *v.* UNITED STATES.

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

No. 54, Misc. Decided November 23, 1959.

Certiorari granted; judgment vacated and case remanded for consideration in light of Public Law 86–320, 73 Stat. 590.

Petitioner *pro se.*

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court for further consideration in the light of Public Law 86–320, approved September 21, 1959, 73 Stat. 590.

WEST *v.* UNITED STATES ET AL.

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

No. 11. Argued November 12, 1959.—Decided December 7, 1959.

This is a libel under the Public Vessels Act to recover damages from the United States, as shipowner, for injuries suffered by a shore-based employee of an independent contractor while working on a ship undergoing a complete overhaul at the contractor's repair docks. The ship had been completely deactivated and stored for several years, and the contractor had been employed to overhaul it completely and make it seaworthy before it was reactivated. The ship was under the complete control of the contractor, and the only representatives of the Government aboard were there solely to serve as inspectors. *Held:* The United States was not liable. Pp. 118–124.

1. There could be no express or implied warranty of seaworthiness to any person in the circumstances of this case. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, distinguished. Pp. 120–122.

2. In the circumstances of this case, the shipowner could not be charged with negligence in failing to maintain a safe place to work. Pp. 122–124.

256 F. 2d 671, affirmed.

Abraham E. Freedman argued the cause for petitioner. With him on the brief was *Joseph Weiner.*

Leavenworth Colby argued the cause for respondents. With him on a brief for the United States were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Herbert E. Morris.*

Thomson F. Edwards and *J. B. H. Carter* were on a brief for Atlantic Port Contractors, Inc., Respondent-Impleaded.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a libel filed pursuant to the Public Vessels Act, 46 U. S. C. § 781 *et seq.*, and involving the liability of a shipowner for injuries suffered by an employee of an

independent contractor while working inside the main engine of a vessel as it was undergoing a complete overhaul at the contractor's repair docks in Philadelphia. Petitioner claims the vessel was unseaworthy and that respondent was negligent, in any event, in not furnishing him a safe place to work. The District Court denied recovery, 143 F. Supp. 473, and the Court of Appeals affirmed, 256 F. 2d 671. We granted certiorari. 359 U. S. 924. We affirm the judgment.[1]

The findings of the trial judge, approved by the Court of Appeals, show that the S. S. *Mary Austin* is owned by the United States and was built during World War II as a "Liberty" ship. It had been in the "moth-ball fleet" at Norfolk, Virginia, in total deactivation for several years, with its pipes, boilers, and tanks completely drained, and an oil preservative injected through them to prevent rusting. In 1951 the vessel was ordered reactivated and a contractor, Atlantic Port Contractors, Inc., was selected to prepare her for sea duty. Under the specifications of the contract, Atlantic was to overhaul and reactivate the *Mary Austin* completely, "cleaning and repairing all water lines, replacement of all defective or missing plugs and other parts, and the testing of all lines before closing and placing them in active operating condition." The contractor was to have complete responsibility and control of the making of the repairs, with the right in the United States to inspect the work and materials to insure compliance with the contract. For this purpose, the United States placed six of its men—a captain, chief mate, second mate, chief engineer, assistant engineer, and steward—on board the vessel. However, they signed no shipping articles and had no "control of the ship in the ordinarily accepted context," their sole function being to

[1] This obviates the necessity of deciding the respondent's claim over and against the contractor.

serve as inspectors for the United States. Thereafter the respondent towed the *Mary Austin* to the repair docks of the contractor at Philadelphia and turned her over to it for the performance of the repair contract.

The petitioner, a shore-based employee of the contractor, was working inside the low pressure cylinder of the main engine of the ship when he was injured. He was kneeling on his right knee when an end plug from a one-inch pipe in the water system was propelled through the top of the open cylinder and hit his left knee. The findings indicate that the plug was loosely fitted on an overhead water pipe and that, when another employee of the contractor turned on the water without warning, the plug was forced off, hitting petitioner.

Recovery was sought on the theory that the vessel was unseaworthy in that the plug had been fitted insecurely on the pipe and was therefore incapable of withstanding the water pressure exerted upon it. In addition, petitioner claimed that the United States was liable for negligence in not maintaining a safe place for him to work, a duty asserted to be nondelegable and absolute.

I.

Petitioner contends that he comes under the doctrine of *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946), and subsequent cases, holding that the warranty of seaworthiness applies to shore-based workers while on board ship and performing work traditionally done by seamen. We do not think so. In *Sieracki,* the Court said that the warranty applied because such a shore worker "is, in short, a seaman . . . doing a seaman's work and incurring a seaman's hazards." *Id.,* 99. The findings here, however, show that, for several years, the *Mary Austin* was withdrawn from any operation whatever while in storage with the "moth-ball fleet." The water had been drained from her water system and an antirust preservative was injected

therein. Her subsequent towing to Philadelphia was for the specific purpose of delivery to Atlantic to render her seaworthy. The representation of the repair contract specifications was that she was not seaworthy for a voyage and that the major repairs called for therein would be necessary before one would be undertaken. It is evident that the sole purpose of the ship's being at Atlantic's repair dock at Philadelphia was to make her seaworthy. The totality of the reparation on the vessel included compliance with the hundreds of specifications in the contract calling for the repairing, reconditioning, and replacement, where necessary, of equipment so as to make fit all the machinery, equipment, gear, and every part of the vessel. Strangely enough, the defective water line and the metal plug specifically pointed to by petitioner as being defective were listed in the specifications for "cleaning and repairing" and the "replacement of all defective or missing plugs." In short, as the trial court said, the work to be done on the vessel was equivalent to "home port structural repairs."

On the other hand, the vessels involved in the cases depended upon by petitioner [2] were, at the times of the injuries, in the hands and under the control of the owners or charterers and, instead of undergoing general repairs, were in active maritime service in the course of loading or unloading cargo pursuant to voyages. The workmen, like the seamen, depended upon the seaworthiness of the ships, their equipment, and gear. They were obliged to work with whatever the shipowners supplied and it was only fair for the latter to be subjected to the absolute warranty that the ships were seaworthy. But no such situa-

[2] *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52 (1914); *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926); *Pope & Talbot* v. *Hawn*, 346 U. S. 406 (1953); *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396 (1954); *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 (1959).

tion is present here. The *Mary Austin,* as anyone could see, was not in maritime service. She was undergoing major repairs and complete renovation, as the petitioner knew. Furthermore, he took his orders from the contractor, not the shipowner. He knew who was in control. This undertaking was not "ship's work" but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier for the sole purpose of making her seaworthy. It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case. It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury. The job analysis which the latter would call for would lead to fortuitous results. We, therefore, do not believe that the *Sieracki* line of cases is applicable, which obviates any necessity of our discussion of situations where the vessels themselves are not in the status of the *Mary Austin.* Here there could be no express or implied warranty of seaworthiness to any person.

II.

In presenting his alternative ground of recovery, the petitioner has a dual theory. He first says that the duty to furnish a safe place to work is a nondelegable duty, the violation of which does not depend on fault. If unsuccessful in this position, he insists that respondent's failure to keep the water plug tight was negligence.[3]

Other than the doctrine of seaworthiness, whose nonrelevancy to this case we have set forth, our decisions

[3] There is no claim of negligence in the selection of Atlantic to perform the overhaul on the *Mary Austin.*

establish no basis of liability apart from fault. Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty to exercise reasonable care to furnish a safe place to work. But we do not believe that such a duty was owed under the circumstances of this case. Petitioner overlooks that here the respondent had no control over the vessel, or power either to supervise or to control the repair work in which petitioner was engaged. We believe this to be decisive against both aspects of plaintiff's dual theory. There was no hidden defect in the water system. It was one of the objects to be repaired and its plugs were to be replaced where necessary. Its testing was to be done by the contractor—not by the shipowner. It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The respondent, having hired Atlantic to perform the overhaul and reconditioning of the vessel—including the testing—was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract. The Courts of Appeals seem to have followed this rule. See *Filipek* v. *Moore-McCormack Lines,* 258 F. 2d 734. Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers. *Id.,* at 737.

Petitioner cites *Crumady* v. *The Joachim Hendrik Fisser,* 358 U. S. 423 (1959), as the chief support for his contention. There the vessel was being unloaded of cargo and its employees had set the safety cutoff device on its winch at twice the tonnage limit of the rigging. When the stevedore, unaware of this situation, brought the winch into play, the rigging snapped and the injury resulted.

We found that the safety cutoff had been adjusted by employees of the vessel in a way that made it unsafe and dangerous, and therefore the vessel was liable. But that situation is not comparable. There the vessel was in control of the owner, and he was liable under the absolute warranty of seaworthiness, as well as for the negligence of the ship's employees in setting the ship's safety cutoff device. Any culpability here could be chargeable only to the contractor, not to the shipowner. Nor was *United Pilots Assn.* v. *Halecki,* 358 U. S. 613 (1959), a similar situation. In that case the shipowner directed the use of carbon tetrachloride in the confined spaces of the engine room. The resulting fumes fatally injured the shore-based workman, necessitating a remand on the negligence question. But here the owner had no control of the ship; it had been turned over to a repair contractor for extensive overhaul, which was not performed under the direction of the shipowner. While there might be instances of hidden or inherent defects, sometimes called "latent," that would make the owner guilty of negligence, even though he had no control of the repairs, we hold that under the circumstances here the shipowner could not be so chargeable. The judgment is therefore

Affirmed.

DE SIMONE *v.* UNITED STATES.

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

No. 202. Decided December 7, 1959.

Certiorari granted; judgment and orders below vacated; and cause remanded to District Court with instructions to dismiss the proceedings as moot.

Reported below: 267 F. 2d 741.

Joseph K. Hertogs for petitioner.

Solicitor General Rankin, Assistant Attorney General Wilkey and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. It appears from the Government's suggestion of mootness and the memoranda filed in connection therewith that the petitioner is no longer in custody of the warden to whom the writ of habeas corpus ad testificandum was directed, and that the Government will take no further action under any order pursuant to which petitioner might be held in contempt. Accordingly, the judgment of the Court of Appeals; the order of the District Court, issued May 29, 1959, directing the petitioner to appear before the grand jury; the order to show cause issued by the District Court on May 19, 1959; and the order of the District Court, entered April 3, 1959, denying the petitioner's motion to quash the writ of habeas corpus ad testificandum, and directing him to appear before the grand jury on April 9, 1959, are vacated. The cause is remanded to the District Court with instructions to dismiss the proceeding as moot.

FLETCHER *v.* BRYAN, JUDGE OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA.

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

No. 75, Misc. Decided December 7, 1959.

Certiorari granted; judgment vacated; and case remanded with directions to dismiss the petition for writ of mandamus as moot.

Reported below: 266 F. 2d 72.

Petitioner *pro se*.

Solicitor General Rankin for respondent.

PER CURIAM.

In light of the suggestion of mootness due to the death of the petitioner, the motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court with directions to dismiss the petition for writ of mandamus as moot.

WEST TOWNS BUS CO. *v.* LAU.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 447. Decided December 7, 1959.

Appeal dismissed and certiorari denied.
Reported below: 16 Ill. 2d 442, 158 N. E. 2d 63.

Edward S. Macie for appellant.

James A. Dooley for appellee.

PER CURIAM.

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

MATTHEWS ET AL. *v.* HANDLEY, GOVERNOR OF INDIANA, ET AL.

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

No. 448. Decided December 7, 1959.

Judgment affirmed.

Edward V. Minczeski for appellants.

Edwin K. Steers, Attorney General of Indiana, and *Lloyd C. Hutchinson,* Assistant Attorney General, for appellees.

PER CURIAM.

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

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MacNEIL *v.* MORTON ET AL., JUSTICES OF THE SUPERIOR COURT.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 432. Decided December 7, 1959.

Appeal dismissed and certiorari denied.
Reported below: 339 Mass. —, 158 N. E. 2d 671.

Appellant *pro se.*

Edward J. McCormack, Jr., Attorney General of Massachusetts, and *Richard H. Gens* and *William F. Long, Jr.,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

VERNON *v.* BENNETT, WARDEN.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 397, Misc. Decided December 7, 1959.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Norman A. Erbe, Attorney General of Iowa, for appellee.

PER CURIAM.

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

BRAEN *v.* PFEIFER OIL TRANSPORTATION CO., INC.

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

No. 32. Argued November 16, 1959.—Decided December 14, 1959.

Petitioner, a mate on respondent's barge, was ordered to do some carpentry work on a raft used to facilitate chipping, painting and welding on respondent's vessels but which was not being used at the time to repair the barge on which petitioner was mate. While on a catwalk used to board or leave the barge and while attempting to move the raft into position for boarding preparatory to carrying out this order, petitioner was injured when the catwalk gave way. *Held:* He was injured while acting "in the course of his employment" and he was entitled to recover from respondent under the Jones Act. Pp. 129–133.

(a) At the time of his injury, petitioner had a status as a seaman and as a member of the crew of his vessel. Pp. 131–132.

(b) The fact that he was injured while not on his vessel is immaterial. Pp. 132–133.

(c) Petitioner was acting "in the course of his employment," within the meaning of the Jones Act. P. 133.

263 F. 2d 147, reversed.

Benjamin H. Siff argued the cause for petitioner. With him on the brief was *Bernard Rolnick*. *Arthur N. Seiff* was of counsel for petitioner.

Edmund F. Lamb argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner brought this suit under the Jones Act, 46 U. S. C. § 688, and recovered judgment after a jury trial. He was employed as mate on respondent's barge. On the day prior to the injury the barge came to respondent's

repair yard to have a cargo pump fixed. At this repair yard respondent maintained a covered lighter, known as the *Winisook,* which was used as a work barge. Its inshore side was connected with the dock by a plank runway. Between the *Winisook* and the dock was a raft used for chipping, painting, and welding on such barges as might need that service. The barge on which petitioner worked was not at this time being serviced by the raft. But the raft had been used in repair work on the barge at other times and now needed new decking.

The barge was moored to adjoin the open water side of the *Winisook,* the crew of the barge using a catwalk around the sides of the *Winisook* whenever they left or boarded the barge. The morning after the barge was moored, petitioner's supervisor ordered him to lay some decking on the raft, as petitioner had experience as a carpenter. Petitioner accordingly prepared to go to work on this new job assignment. As he was standing on the catwalk, preparatory to starting his work, releasing a line on the raft to permit him to maneuver it into place so he could board it, the catwalk gave way, causing the injury. The Court of Appeals reversed the judgment for petitioner. 263 F. 2d 147. We granted the petition for certiorari because that decision seemed to be out of line with the authorities. 359 U. S. 952.

In *O'Donnell* v. *Great Lakes Co.,* 318 U. S. 36, a seaman was allowed to recover under the Jones Act even though he was injured on shore. The seaman was a deckhand. The ship was discharging her cargo through a conduit that was connected at its outer end to a land pipe by means of a gasket. The seaman in question was ordered by the master to go ashore to assist in repairing the gasket. While so engaged, he was injured by reason of the negligence of a fellow employee. We held that the words "in the course of his employment" as used in the Jones Act were not restricted to injuries occurring on navigable

waters, that they were broadly used by Congress in support of "all the constitutional power it possessed," *id.*, at 39, and that it was constitutionally permissible for Congress to supplement the remedy of maintenance and cure by extending a right of recovery in trial by jury to a seaman injured "while in the service of his vessel by negligence." *Id.*, at 43.

The test, as the *O'Donnell* case holds, is not whether the injury occurred on navigable waters, for that had been applied by the lower court, *id.*, at 38, which we reversed. Rather it is whether the seaman was injured by negligence while "in the course of his employment."

The injured party must of course have "status as a member of the vessel" for it is seamen, not others who may work on the vessel (*Swanson* v. *Marra Bros.*, 328 U. S. 1, 4), to whom Congress extended the protection of the Jones Act. Nice questions often arise concerning the status of particular workmen and whether their duties give them the status of "seamen" as that word is used in the Act. *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187. And see *Gianfala* v. *Texas Co.*, 350 U. S. 879, reversing 222 F. 2d 382; *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370; *Butler* v. *Whiteman*, 356 U. S. 271. The court below apparently thought that at the moment petitioner was injured he was not a "seaman"; and that conclusion apparently turned on its view that to be such he had to be engaged at the time of the injury in work which was in furtherance of the navigation of the vessel. The court, indeed, held it error not to have given instructions to that effect.

At times the work done by an employee will be crucial in determining what his status is for purposes of recovery. *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 260; *Swanson* v. *Marra Bros., supra; Desper* v. *Starved Rock Ferry Co., supra; Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334; *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252;

Butler v. *Whiteman, supra.* Those cases, however, are not relevant to our present problem since the question whether petitioner's duties on the raft assignment were of the type to bring one not otherwise a member of a ship's crew within the scope of the Act is not presented in this case. Here we start with an employee who had the status of mate. The issue is whether petitioner, a mate and therefore a "seaman," was injured "in the course of his employment." We conclude that he was.

The fact that the injury did not occur on the vessel is not controlling, as *Senko* v. *LaCrosse Dredging Corp., supra,* 373, holds. A "seaman" may often be sent off ship to perform duties of his employment. *O'Donnell* v. *Great Lakes Co., supra.* In *Marceau* v. *Great Lakes Transit Corp.,* 146 F. 2d 416, a ship's cook was allowed to recover under the Jones Act when, pursuant to duty, he was returning to the ship and was injured on the dock while approaching a ladder used as ingress to the vessel.

We held that a seaman who was injured on the dock while departing from the ship on shore leave was in the service of the vessel and was entitled to recover for maintenance and cure in *Aguilar* v. *Standard Oil* Co., 318 U. S. 724. It was there recognized that a seaman is as much in the service of his ship when boarding it on first reporting for duty, quitting it on being discharged, or going to and from the ship while on shore leave, as he is while on board at high sea. *Id.,* at 736–737. We also held that a seaman injured in a dance hall while on shore leave was in the service of his ship in *Warren* v. *United States,* 340 U. S. 523, 529. These two cases were not brought under the Jones Act but involved maintenance and cure. Yet they make clear that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. They also supply relevant guides to the meaning of the term "course of

employment" under the Act since it is the equivalent of the "service of the ship" formula used in maintenance and cure cases. See Gilmore and Black, The Law of Admiralty, p. 284. And see *O'Donnell* v. *Great Lakes Co., supra,* at 43; *Marceau* v. *Great Lakes Transit Corp., supra.*

Petitioner in the present case was ordered by a superior to perform some carpentry work on a raft which lay between the lighter and the dock. Petitioner was injured, as we have said, while on the catwalk attempting to move the raft into position for boarding. The raft was used to facilitate chipping, painting and welding on respondent's vessels. Cf. *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469. New decking was to be installed on the raft. The fact that the raft was not presently being used to repair respondent's barge is in our view immaterial. Petitioner was acting "in the course of his employment" at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders. No more is required by the Jones Act, as the *O'Donnell* case indicates, petitioner being a seaman who was injured as a consequence of the negligence of his employer.

The judgment of the Court of Appeals is reversed and the judgment of the District Court is reinstated.

So ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, concurring in part and dissenting in part.

To assert a right of action under the Jones Act, a plaintiff must not only be a seaman, that is, a "member of a crew of any vessel," but must have been injured "in the course of his employment." 46 U. S. C. § 688; 33 U. S. C. § 903 (a)(1). Petitioner was concededly a member of the

crew of a vessel at the time the events in question took place. The controverted issue is whether a jury could have found that he was injured "in the course of his employment." I cannot agree that the nature of a seaman's duties at the time of injury is irrelevant to this latter issue.

Until today it has not been intimated in any opinion of the Court that I know of that a seaman may recover under the Jones Act for injuries arising out of activities unrelated to the maintenance or operation of his vessel, and not incidental to its affairs. In other words, the status of being a seaman does not alone bring the Jones Act into play. The character of the activities giving rise to the injury complained of is also an indispensable element to the existence of a federal right to relief under this statute. In the *O'Donnell* case, 318 U. S. 36, cited by the Court, it was stated (at 42–43): "The right of recovery in the Jones Act is given to the seaman as such, and . . . depends . . . on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." There a crew member was ordered to go ashore momentarily to assist in the repair of a fixture being used in unloading the ship. That the work was being done on the dock was held immaterial to Jones Act liability. But that work was plainly in aid of the operations of the vessel on which O'Donnell was employed. See *Swanson* v. *Marra Bros.*, 328 U. S. 1, 4.[1] It is a far different matter to say, as the Court seems to say here, that a crew member

[1] In referring to the *O'Donnell* case, it was stated in *Swanson* (at p. 4): "We there held the ship owner liable, under the Jones Act, for injuries caused to a seaman by a fellow servant while the former was on shore engaged in repairing a conduit which was *a part of the vessel and used for discharging its cargo.* But in that case we sustained the recovery because the injured person was a seaman and an employee of the vessel, engaged in the course of his employment *as such.*" (Emphasis supplied.)

may recover under the Jones Act for injuries arising out of activities not directly related to the affairs of the vessel, as in *O'Donnell,* and not incidental to his shipboard work, see *Thompson* v. *Eargle,* 182 F. 2d 717; *Marceau* v. *Great Lakes Transit Corp.,* 146 F. 2d 416. "In the service of the ship" is something quite different than "in the service of the shipowner." [2] In this case the seaman's employer also had a nonseaman-employing business, the repair yard, for which nonseaman activities were needed.

The Jones Act extended to maritime workers the negligence remedy provided for interstate railroad workers by the Federal Employers' Liability Act, 45 U. S. C. § 51. Under the FELA, and the uniform course of our decisions under it, see, *e. g., Southern Pacific Co.* v. *Gileo,* 351 U. S. 493; *Reed* v. *Pennsylvania R. Co.,* 351 U. S. 502, the remedy given by that Act applies only "to any person suffering injury while he is employed by such [interstate] carrier in such commerce." Under the Jones Act the remedy is given to "[a]ny seaman who shall suffer personal injury in the course of his employment." I think this means that a seaman's injury must have arisen out of his work as a seaman, just as a railroad worker's injury must have arisen out of his employment in interstate commerce. Otherwise it is difficult to see what purpose the "in the course of his employment" requirement of the Jones Act serves. Both the FELA and the Jones Act give a federal cause of action in negligence only in respect of particular kinds of injuries—under the FELA, those

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[2] The maintenance and cure decisions relied on by the Court are all, like the *Marceau* case, instances of injuries incurred during leave-time activities, and are inapposite here. Whether, on the facts in the case before us, the petitioner would be found to have been working "in the service of his ship" for purposes of the doctrine of maintenance and cure, we need not decide, for the Court advances no reason for assimilating the issue of Jones Act coverage to that of the availability of maintenance and cure.

suffered *in interstate commerce,* under the Jones Act, those suffered *in work as a seaman.*

Thus, I think the issue of liability in this case turns on whether petitioner, when he fell from the faulty catwalk, was already engaged in the performance of his raft assignment, or whether he was simply *en route* to that assignment. If the former, there would, in my opinion, be no liability, for the record contains no basis for an inference that petitioner's assignment was related to the business of the vessel and, lacking such relationship, petitioner's injury cannot be deemed to have occurred "in the course of his employment." In that event any remedy would be that afforded by local law. Cf. *Swanson* v. *Marra Bros., supra,* at p. 7; 2 Larson, Law of Workmen's Compensation, § 90.22.[3] If, however, petitioner was injured *en route* to his raft assignment, the Jones Act would apply, for "the course of his employment," I think, continued until he commenced that assignment. Considering that the evidence presents a jury issue on this score, I concur in the reversal of the judgment of the Court of Appeals dismissing the complaint.

However, I dissent from the reinstatement of the judgment of the District Court. The relevant portion of the charge, to which respondent excepted, was vague and lacking in guidance as to the nature of the factual issue presented in this respect.[4] Moreover, in making liabil-

[3] I think the Court of Appeals was mistaken in considering that the Longshoremen's and Harbor Workers' Compensation Act would apply, for that Act, 33 U. S. C. §§ 902 (3), 903 (a)(1), excludes from its coverage a "member of a crew of any vessel," which this petitioner admittedly was.

[4] The charge, in pertinent part, read as follows:

"While it seemed at the outset to be some question as to whether or not he was a member of the crew, it does not seem to be seriously disputed that at the time of the accident he was a member of the crew.

"Whether or not at the time of the accident he was engaged in

ity turn on the question whether crew members normally performed work of this nature, the charge was in error.[5] Such a factor might well be relevant in a case where there was doubt as to the ultimate issue whether an injury was suffered in the course of work[6] in some way related to the vessel in which the plaintiff seaman served. However, here it was not disputed that the petitioner's assignment to work on the raft was at the time wholly unrelated to any of the affairs of his vessel.

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functions which are normally performed by a member of the crew, and as he stated, some functions he gave in detail, that he did perform various functions prior to the date of the accident, are for you to determine."

Subsequently the court amended the charge in this language:

"I did state that it is not seriously disputed that the plaintiff was not a member of the crew. Apparently according to the defendant's statement, he says that is a serious issue.

"So I will leave that as an issue."

[5] The two lower courts seem to have failed to come sharply to grips with the distinction between the two separate requirements of the Jones Act, namely, that the plaintiff have the status of a "seaman," and that his injury must have been suffered "in the course of his employment" as such. Most of the Jones Act cases decided by this Court have involved only the "seaman" issue. See, *e. g.*, *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370; *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252; *Butler* v. *Whiteman*, 356 U. S. 271. Such decisions are only remotely apposite here where the petitioner's status as a seaman is not disputed. It only confuses things to equate the issue of being a "seaman" with the issue whether the injuries suffered were "in the course of his employment."

[6] Shore leave cases such as *Marceau, supra,* present a different problem.

INMAN *v.* BALTIMORE & OHIO RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 36. Argued November 12, 1959.—Decided December 14, 1959.

In this suit by petitioner under the Federal Employers' Liability Act to recover damages from his railroad employer for personal injuries sustained when he was struck by an automobile driven by a drunken driver while petitioner was serving as crossing watchman at a heavily traveled intersection of two city streets and three sets of railroad tracks, *held:* The evidence was not sufficient to support the jury's conclusion that negligence of the railroad played a part in petitioner's injury, and a judgment for petitioner was properly reversed. Pp. 138–141.

168 Ohio St. 335, 154 N. E. 2d 442, affirmed.

Raymond J. McGowan argued the cause and filed a brief for petitioner.

William A. Kelly argued the cause for respondent. On the brief were *C. G. Roetzel* and *John L. Rogers, Jr.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner brought this action under the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51, for personal injuries sustained in the course of his employment. Petitioner for some seven years had been a railroad crossing watchman for respondent at "Bettes Corners" in Akron, Ohio. He filed suit claiming damages for an injury he received when an intoxicated automobile driver ran into him one midnight while he was on duty flagging traffic for a passing train. Bettes Corners is a heavily traveled vehicular intersection where Tallmadge Avenue, running east and west, is intersected by Home Avenue, which runs northeast and southwest. Three sets of railroad tracks cut diagonally across the intersection in a northwest-southeast direction. The driver of the automobile, heading northeast on Home Avenue, was turning

left into Tallmadge Avenue when the accident occurred. Petitioner claims that the railroad "was negligent in failing to use ordinary care to provide . . . a reasonable safe place to work" at the crossing. He says that his duties—including the flagging of traffic, maintenance of a lookout for other trains, and the reporting of hotboxes on the passing ones—required him to face the train tracks and created a likelihood of his being struck by automobiles at the intersection.

The evidence of the manifold duties of petitioner is clear. The evidence of his exposure to injury by traffic includes the layout of Bettes Corners, the cut of the railroad tracks across it, and the duties petitioner was required to perform. Petitioner says that the layout of the crossing was hazardous for one performing the duties assigned to him. In support of this, he points to the answer of one witness as to the action of the car which struck him. This witness stated that, "like a lot of them I seen there, jumping the gun" at the crossing, the driver of this car, on seeing the tail light of the train approaching, drove around the line of cars on the street adjacent to the train and, as he was turning left onto the other street, hit petitioner, who was standing near the passing train and flagging the traffic. There is no claim that the intersection was dark or that the regular railroad crossing warning, lights, bells, etc., were not properly working at the time. Nor is it disputed that the petitioner was waving a lighted lantern in each hand. Likewise the intoxicated condition of the driver is not in controversy, nor is the fact that he passed through a traffic stop sign immediately before hitting petitioner and violated other local traffic safety measures designed to protect persons from injury at the crossing.

The trial court submitted the issue of negligence to the jury, which found the railroad negligent "in part" because it failed to afford "enough protection." Judgment for

petitioner was entered on the verdict for $25,000. The Court of Appeals of Ohio reversed, finding that "there was a complete failure of proof to establish the negligence." It said that it was not "reasonably foreseeable" that petitioner "would be injured by the actions of a drunken driver, violating five traffic statutes . . . ." 108 Ohio App. 124, 131, 161 N. E. 2d 60, 66. After the Supreme Court of Ohio dismissed the appeal, 168 Ohio St. 335, 154 N. E. 2d 442, we granted certiorari, 359 U. S. 958.

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957), we laid down the rule that "[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." *Id.*, at 506–507. In measuring Ohio's disposition of the case here by the *Rogers* yardstick, we must affirm. The Act does not make the employer an insurer. Here petitioner had been working at Bettes Corners for seven years, performing these same duties under like circumstances and, for some three years, on this identical midnight shift. No accidents had occurred during that long period. In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury.

The contention of petitioner is that the witness' remark, "like a lot of them I seen there, jumping the gun," was testimony of other occurrences at the crossing similar to the one here involved. The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there other testimony of similar occurrences in the record. In mak-

ing the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was "no evidence of prior occurrences of the kind here under consideration" in the record. Indeed, unless these 11 words of the witness can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous.

We therefore conclude, in light of these considerations, that the judgment must be

Affirmed.

MR. JUSTICE FRANKFURTER.

The opinion of my Brother CLARK demonstrates, insofar as demonstration is possible in law, that this case should never have been brought here. In accordance with the views that I expressed in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524 (1957), and in which I have since persisted, the appropriate disposition would be dismissal of the writ of certiorari as improvidently granted. If these views were enforced under the special circumstances of this case, affirmance by an equally divided Court would result. Thereby this case would be cast into the limbo of unexplained adjudications, and the lower courts, as well as the profession, would be deprived of knowing the circumstances of this litigation and the basis of our disposition of it. Since I have registered my conviction on what I believe to be the proper disposition of the case, it is not undue compromise with principle for me to join Brother CLARK's opinion in order to make possible a Court opinion.

MR. JUSTICE WHITTAKER, concurring.

I heartily join the Court's opinion. But I derive no pleasure from implying, contrary to the views of my Brothers in the minority, that there was such complete want of evidence of negligence by respondent that "rea-

sonable men" could not differ about it, for, at the very least, I regard my Brothers who dissent as reasonable men.

Notwithstanding this, it seems to me that the facts of this case make it crystal clear that the Court's opinion lacks not a whit in fully comporting with the standards of care of the mythical "reasonable man," for, like the Ohio Court of Appeals, I simply cannot see any substantial evidence—or even a scintilla or an iota of evidence—of negligence on the part of respondent that caused, or directly contributed in any degree to cause, petitioner's unfortunate injury.

Reduced to substance, the simple facts are that petitioner, a crossing flagman, while standing in a well-lighted intersection alongside a passing train in the nighttime and swinging a lighted red lantern in each hand, was struck, knocked down and run over by a drunken driver. What, I ask, did respondent do or omit that caused or contributed to cause that casualty? How could it have prevented the casualty? Petitioner says that respondent failed to provide him with "enough protection." About the only way, as I perceive, that respondent could protect its crossing flagmen against injury from such lawless conduct by third persons would be to provide them with military tanks and make sure they stay in them while within or moving about crossing-intersections in the performance of their duties—and I am not even sure that this method, though ironclad, would be certain protection to a flagman against lawless injury by third persons, for someone might shoot him, an act not very different, it seems to me, from the drunken driver's conduct which injured petitioner in this case, and for which injuries he insists, and four members of this Court agree, a jury should be permitted to require respondent to pay damages. How this can be thought to square with any known concept of "negligence" by respondent is beyond me.

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

Petitioner, a nighttime crossing watchman stationed at respondent's railroad intersection, was seriously injured about midnight when an automobile driven by an intoxicated person ran into him from behind while he was flagging traffic for a passing train. The jury found on a special interrogatory that respondent was negligent in not providing "enough protection."

The crossing is at Tallmadge and Home Avenues. Tallmadge runs east and west; Home, northeast and southwest. Three of respondent's tracks, running northwest and southeast, extend through the intersection of these two streets, and its trains move over the parallel tracks in opposite directions and often near the same time.

There was evidence that at the approach of a train petitioner had duties of the following character: (1) He was supposed to flag highway traffic moving in four directions to a stop, using lanterns and a whistle provided for that purpose. (2) If a second train was to pass at or about the time of another, he had to look for it before clearing the highway traffic. (3) He was to look for hotboxes on all passing trains and signal the conductor if he discovered any. (4) If a train was going east, he was to stand on the west side of the tracks the better to see trains coming from the west.

On the night in question petitioner received a signal that an eastbound train was approaching. Accordingly, he stationed himself a few feet west of the tracks, blowing the whistle and swinging the red lantern first toward Tallmadge Avenue traffic and then toward Home Avenue traffic. Then he stationed himself facing the tracks, his back to Tallmadge Avenue traffic.

Although respondent's tracks intersect Tallmadge and Home Avenues where those two streets cross, it is pos-

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sible for a car going north on Home to make a left turn into Tallmadge even while a train is passing. There is, however, a stop sign on Home; and petitioner rightfully had halted all highway traffic. Nevertheless an intoxicated driver came through the stop sign on Home and made a squealing left turn into Tallmadge, hitting petitioner and injuring him.

There was evidence that at the time of the accident (1) the caboose of the passing train was just making the crossing; (2) the railroad block signal could not be seen from where petitioner stood; (3) another train from the opposite direction on the adjoining track was due to reach the crossing at any moment and petitioner was looking for its headlight; (4) petitioner remained standing with his back to the highway traffic as he was obliged to do if he performed these manifold duties; (5) this traffic was heavy in both streets; (6) on prior occasions cars had "jumped the gun" at this same intersection.

It may be that if the duty of the petitioner had been restricted to stopping traffic on the approach of a train and waving it on when the train had passed, there would be on this record (unlike that in *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183)[1] no evidence of negligence on respondent's part. Petitioner's duties were much broader, as I have indicated. Yet the Court holds there was no jury question as to whether the place chosen for the performance of those several duties was a reasonably safe one in light of all the circumstances, including the volume of traffic at that intersection. Plainly respondent is not an insurer. It is under no duty to remove all possibilities of injury to its employees or to make, at any cost, the place of work as safe as one's living room. But whether a particular hazard is of sufficient weight and moment to induce a reasonable person to guard against it and whether that

[1] For the opinion below see 224 F. 2d 637.

danger could be removed or diminished by safety measures reasonably available are matters for the jury to determine. The jury might find that the assignment of part of petitioner's duties to someone else or the installation of mechanical devices to stop traffic would have been undertaken by a reasonable person under the circumstances. It is not clear beyond argument of reasonable men that the respondent could not have foreseen an injury to petitioner by a reckless motorist or that it took every precaution that reasonableness under the circumstances required.

The nature of this congested crossing with three sets of railroad tracks cutting diagonally across its four corners and the multiple duties required of petitioner at this hour of the night, were sufficient in my view for a jury to find that petitioner was too busy to protect himself from the vehicular traffic and that the employer did not use reasonable care in furnishing him with a safe place to work, as required by the Act. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350. The very close division in this Court on that issue reinforces my conclusion.

There is no reason why a negligent actor should be insulated from the consequences of his negligence merely because a third party's reckless or criminal act was the immediate cause of the injury. On the contrary, we have unanimously held that the fact that the danger to the employee under the Act lies in intentional or criminal conduct of third parties is not determinative. If foreseeable, there is a duty to make reasonable provisions against such events. *Lillie* v. *Thompson*, 332 U. S. 459. The instructions on this point seem to me to be adequate.[2] The

[2] "After an accident has happened it is usually easy to see how it could have been avoided but negligence is not a matter to be judged after an occurrence. It is always a question of what reasonably prudent persons under like or similar circumstances would or should have anticipated in the exercise of ordinary care. Where

Court appears to place great stress on the lack of evidence of prior accidents at this intersection and the fact that petitioner worked there for seven years before being hit by an automobile. But certainly the duty to make a reasonable effort to provide a safe place of work is not conditioned upon an employee's first being injured or killed. Moreover, the liability of the railroad under the Act attaches even though the injury was caused only "in part" by its negligence. Such is the command of § 1 of the Act, as repeatedly applied. See *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 506–507; *Cahill* v. *New York, N. H. & H. R. Co., supra.*

Though I think affirmance of the judgment is error, I am happy that we have a full Court turning its attention to an important question of law—whether trial by jury, guaranteed by the Seventh Amendment and an integral part of the remedy provided by Congress under this Act, has been honored by the courts. Moreover, as my Brother FRANKFURTER points out, affirmance of the judgment below by an equally divided Court would deprive the decision of all precedential value, so important in this as in other fields. Furthermore, the withdrawal of a Justice from a decision on the merits after certiorari has been granted impairs the integrity of the practice of allowing the vote of four Justices to bring up any case on certiorari.[3] Participation by the whole Court at least in some of these cases (cf. *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207, 209) is partial performance of our pledge to Congress.

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there is no danger reasonably to be anticipated or apprehended, there is no duty to guard against something that in the minds of reasonable men does not exist. However, if such expectation carries a realization that a given set of circumstances is suggestive of danger, then failure to take appropriate safety measures constitutes negligence."

[3] See the legislative history in *Harris* v. *Pennsylvania R. Co., ante,* p. 15, at p. 18, note 2 (concurring opinion).

SMITH *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 9. Argued October 20, 1959.—Decided December 14, 1959.

Appellant, proprietor of a bookstore, was convicted of violating a city ordinance which was construed by the state courts as making him absolutely liable criminally for the mere possession in his store of a book later judicially determined to be obscene—even if he had no knowledge as to the contents of the book. *Held:* As thus construed and applied, the ordinance violates the freedom of the press which is safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. Pp. 148–155.

(a) The free publication and dissemination of books obviously are within the constitutionally protected freedom of the press, and a retail bookseller plays a most significant role in the distribution of books. P. 150.

(b) Legal devices and doctrines, in most applications consistent with the Constitution, may not be constitutionally capable of application where such application would have the effect of inhibiting freedom of expression by making persons reluctant to exercise it. Pp. 150–152.

(c) Obscene expression is not constitutionally protected; but this ordinance imposes an unconstitutional limitation on the public's access to constitutionally protected matter. For, if the bookseller be criminally liable without knowledge of the contents, he will tend to restrict the books he sells to those he has inspected; and thus a restriction will be imposed by the States upon the distribution of constitutionally protected as well as obscene books. Pp. 152–154.

(d) The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power. Hence that there may be more difficulty in enforcing a regulation against the distribution of obscene literature if booksellers may not be held to an absolute criminal liability does not require a different result here. Pp. 154–155.

161 Cal. App. 2d Supp. 860, 327 P. 2d 636, reversed.

Stanley Fleishman and *Sam Rosenwein* argued the cause and filed a brief for appellant.

Roger Arnebergh argued the cause for appellee. With him on the brief was *Philip E. Grey*.

A. L. Wirin and *Fred Okrand* filed a brief for the American Civil Liberties Union, as *amicus curiae*, urging reversal.

Mr. Justice Brennan delivered the opinion of the Court.

Appellant, the proprietor of a bookstore, was convicted in a California Municipal Court under a Los Angeles City ordinance which makes it unlawful "for any person to have in his possession any obscene or indecent writing, [or] book . . . [i]n any place of business where . . . books . . . are sold or kept for sale." [1] The offense was defined by the Municipal Court, and by the Appellate

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[1] The ordinance is § 41.01.1 of the Municipal Code of the City of Los Angeles. It provides:

"INDECENT WRITINGS, ETC.—POSSESSION PROHIBITED:

"It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in any of the following places:

"1. In any school, school-grounds, public park or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;

"2. In any place of business where ice-cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;

"3. In any toilet or restroom open to the public;

"4. In any poolroom or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public;

"5. In any place where phonograph records, photographs, motion pictures, or transcriptions of any kind are made, used, maintained, sold or exhibited."

Department of the Superior Court,[2] which affirmed the Municipal Court judgment imposing a jail sentence on appellant, as consisting solely of the possession, in the appellant's bookstore, of a certain book found upon judicial investigation to be obscene. The definition included no element of scienter—knowledge by appellant of the contents of the book—and thus the ordinance was construed as imposing a "strict" or "absolute" criminal liability.[3] The appellant made timely objection below that if the ordinance were so construed it would be in conflict with the Constitution of the United States. This contention, together with other contentions based on the Constitution,[4] was rejected, and the case comes here on appeal. 28 U. S. C. § 1257 (2); 358 U. S. 926.

Almost 30 years ago, Chief Justice Hughes declared for this Court: "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth

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[2] In this sort of proceeding, "the highest court of a State in which a decision could be had." 28 U. S. C. § 1257. Cal. Const., Art. VI, §§ 4, 4b, 5. See *Edwards* v. *California*, 314 U. S. 160, 171.

[3] See Hall, General Principles of Criminal Law, p. 280. The Appellate Department's opinion is at 161 Cal. App. 2d Supp. 860, 327 P. 2d 636. The ordinance's elimination of scienter was, in fact, a reason assigned by that court for upholding it as permissible supplementary municipal legislation against the contention that the field was occupied by California Penal Code § 311, a state-wide obscenity statute which requires scienter.

[4] These other contentions, which are made again here, are that evidence of a nature constitutionally required to be allowed to be given for the defense as to the obscene character of a book was not permitted to be introduced; that a constitutionally impermissible standard of obscenity was applied by the trier of the facts; and that the book was not in fact obscene. In the light of our determination as to the constitutional permissibility of a strict liability law under the circumstances presented by this case, we need not pass on these questions. For the purposes of discussion, we shall assume without deciding that the book was correctly adjudged below to be obscene.

Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. . . ." *Near* v. *Minnesota,* 283 U. S. 697, 707. It is too familiar for citation that such has been the doctrine of this Court, in respect of these freedoms, ever since. And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices. See *Joseph Burstyn, Inc.,* v. *Wilson,* 343 U. S. 495; *Grosjean* v. *American Press Co.,* 297 U. S. 233. Certainly a retail bookseller plays a most significant role in the process of the distribution of books.

California here imposed a strict or absolute criminal responsibility on appellant not to have obscene books in his shop. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis* v. *United States,* 341 U. S. 494, 500.[5] Still, it is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter—though even where no freedom-of-expression question is involved, there is precedent in this Court that this power is not without limitations. See *Lambert* v. *California,* 355 U. S. 225. But the question here is as to the validity of this ordinance's elimination of the scienter requirement—an elimination which may tend to work a substantial restriction on the freedom of speech and of the press. Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitu-

[5] See also Williams, Criminal Law—The General Part, p. 238 *et seq.*

tion, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. The States generally may regulate the allocation of the burden of proof in their courts, and it is a common procedural device to impose on a taxpayer the burden of proving his entitlement to exemptions from taxation, but where we conceived that this device was being applied in a manner tending to cause even a self-imposed restriction of free expression, we struck down its application. *Speiser* v. *Randall,* 357 U. S. 513. See *Near* v. *Minnesota, supra,* at 712–713. It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill* v. *Alabama,* 310 U. S. 88, 97–98. Cf. *Staub* v. *City of Baxley,* 355 U. S. 313.[6] And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. *Winters* v. *New York,* 333 U. S. 507, 509–510, 517–518. Very much to the point here, where the question is the elimination of the mental element in an offense, is this Court's holding in *Wieman* v. *Updegraff,* 344 U. S. 183. There an oath as to past freedom from membership in subversive organizations, exacted by a State as a qualification for public employment, was held to violate the Constitution in that it made no distinction between members who had, and those who had not, known of the organization's character. The

[6] See Note, 61 Harv. L. Rev. 1208.

Court said of the elimination of scienter in this context: "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." *Id.*, at 191.

These principles guide us to our decision here. We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press. *Roth* v. *United States*, 354 U. S. 476.[7] The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if in fact there is to be found in his shop an obscene book. But our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. The appellee and the court below analogize this strict liability penal ordinance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example. We find the analogy instructive in our examination of the question before us. The usual rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors—in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used. Cf. *United States* v. *Balint*, 258 U. S. 250, 252–253, 254. His ignorance of the character of the food is irrelevant. There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the

[7] In the *Roth* opinion there was also decided *Alberts* v. *California*, which dealt with the power of the States in this area.

press stand in the way of imposing a similar requirement on the bookseller. By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose,[8] he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of scienter that: "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." [9] *The King* v. *Ewart,* 25 N. Z. L. R. 709, 729 (C. A.). And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's

[8] The effectiveness of absolute criminal liability laws in promoting caution has been subjected to criticism. See Hall, General Principles of Criminal Law, pp. 300–301. See generally Williams, Criminal Law—The General Part, pp. 267–274; Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55; Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043; *Morissette* v. *United States,* 342 U. S. 246.

[9] Common-law prosecutions for the dissemination of obscene matter strictly adhered to the requirement of scienter. See the discussion in *Attorney General* v. *Simpson,* 93 Irish L. T. 33, 37–38 (Dist. Ct.). Cf. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 2 (5); American Law Institute Model Penal Code § 207.10 (7) (Tentative Draft No. 6, May 1957), and Comments, pp. 49–51.

The general California obscenity statute, Penal Code § 311, requires scienter, see note 3, and was of course sustained by us in *Roth* v. *United States, supra.* See note 7.

limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.

It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law, 68 Harv. L. Rev. 1. Cf. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 411. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibi-

tory effect on the dissemination of material not obscene, but we consider today only one which goes to the extent of eliminating all mental elements from the crime.

We have said: "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." *Roth* v. *United States, supra,* at 488.[10] This ordinance opens that door too far. The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power. Cf. *Dean Milk Co.* v. *City of Madison,* 340 U. S. 349. It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution.

Reversed.

MR. JUSTICE BLACK, concurring.

The appellant was sentenced to prison for possessing in his bookstore an "obscene" book in violation of a Los Angeles city ordinance.[1] I concur in the judgment holding that ordinance unconstitutional, but not for the reasons given in the Court's opinion.

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[10] We emphasized in *Roth,* at p. 484, that there is a "limited area" where such other interests prevail, and we listed representative decisions in note 14 at that page.

[1] As shown by Note 1 of the Court's opinion, the ordinance makes it unlawful to possess at places defined any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind.

The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an "obscene" book, even though he is unaware of its obscenity. The grounds on which the Court draws a constitutional distinction between a law that punishes possesssion of a book with knowledge of its "obscenity" and a law that punishes without such knowledge are not persuasive to me. Those grounds are that conviction of a bookseller for possession of an "obscene" book when he is unaware of its obscenity "will tend to restrict the books he sells to those he has inspected," and therefore "may tend to work a substantial restriction on freedom of speech." The fact is, of course, that prison sentences for possession of "obscene" books will seriously burden freedom of the press whether punishment is imposed with or without knowledge of the obscenity. The Court's opinion correctly points out how little extra burden will be imposed on prosecutors by requiring proof that a bookseller was aware of a book's contents when he possessed it. And if the Constitution's requirement of knowledge is so easily met, the result of this case is that one particular bookseller gains his freedom, but the way is left open for state censorship and punishment of all other booksellers by merely adding a few new words to old censorship laws. Our constitutional safeguards for speech and press therefore gain little. Their victory, if any, is a Pyrrhic one. Cf. *Beauharnais* v. *Illinois,* 343 U. S. 250, 267, at 275 (dissenting opinion).

That it is apparently intended to leave the way open for both federal and state governments to abridge speech and press (to the extent this Court approves) is also indicated by the following statements in the Court's opinion: " 'The door barring federal and state intrusion into this area [freedom of speech and press] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' . . . This ordinance opens that door too far."

This statement raises a number of questions for me. What are the "more important" interests for the protection of which constitutional freedom of speech and press must be given second place? What is the standard by which one can determine when abridgment of speech and press goes "too far" and when it is slight enough to be constitutionally allowable? Is this momentous decision to be left to a majority of this Court on a case-by-case basis? What express provision or provisions of the Constitution put freedom of speech and press in this precarious position of subordination and insecurity?

Certainly the First Amendment's language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." I read "no law . . . abridging" to mean *no law abridging*. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly "beyond the reach" of *federal* power to abridge.[2] No

[2] Another concurring opinion has said that it would wrong James Madison and Thomas Jefferson to attribute to them the view that the First Amendment places speech wholly beyond the reach of the Federal Government. Of course, both men made many statements on the subject of freedom of speech and press during their long lives and no one can define their precise views with complete certainty. However, several statements by both Madison and Jefferson indicate that they may have held the view that the concurring opinion terms "doctrinaire absolutism."

James Madison, in exploring the sweep of the First Amendment's limitation on the Federal Government when he offered the Bill of Rights to Congress in 1789, is reported as having said, "[t]he right of freedom of speech is secured; the liberty of the press is expressly declared to be *beyond the reach of this Government* . . . ." (Emphasis supplied.) 1 Annals of Cong. 738. For reports of other discussions by Mr. Madison see pp. 424–449, 660, 704–756. Eleven years later he wrote: "Without tracing farther the evidence on this subject,

other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal agencies, including Congress and this Court, have power

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it would seem scarcely possible to doubt that no power whatever over the press was supposed to be delegated by the Constitution, as it originally stood, and that the amendment was intended as a positive and absolute reservation of it." 6 Madison, Writings (Hunt ed. 1906), 341, 391, and see generally, 385–393, 399.

Thomas Jefferson's views of the breadth of the First Amendment's prohibition against abridgment of speech and press by the Federal Government are illustrated by the following statement he made in 1798: "[The First Amendment] thereby guard[s] in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals." 8 Jefferson, Writings (Ford ed. 1904), 464–465. For another early discussion of the scope of the First Amendment as a complete bar to all federal abridgment of speech and press see St. George Tucker's comments on the adequacy of state forums and state laws to grant all the protection needed against defamation and libel. 1 Blackstone, Commentaries (Tucker ed. 1803) 299.

Of course, neither Jefferson nor Madison faced the problem before the Court in this case, because it was not until the Fourteenth Amendment was passed that any of the prohibitions of the First Amendment were held applicable to the States. At the time Jefferson and Madison lived, before the Fourteenth Amendment was passed, the First Amendment did not prohibit the States from abridging free speech by the enactment of defamation or libel laws. Cf. *Barron* v. *Baltimore*, 7 Pet. 243. But the meaning of the First Amendment, as it was understood by two such renowned constitutional architects as Jefferson and Madison, is important in this case because of our prior cases holding that the Fourteenth Amendment applies the First, with all the force it brings to bear against the Federal Government, against the States. See, *e. g.*, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639, and other cases collected in *Speiser* v. *Randall*, 357 U. S. 513, 530 (concurring opinion). But see *Beauharnais* v. *Illinois*, 343 U. S. 250, 288 (Court and dissenting opinions).

or authority to subordinate speech and press to what they think are "more important interests." The contrary notion is, in my judgment, court-made not Constitution-made.

State intrusion or abridgment of freedom of speech and press raises a different question, since the First Amendment by its terms refers only to laws passed by Congress. But I adhere to our prior decisions holding that the Fourteenth Amendment made the First applicable to the States. See cases collected in the concurring opinion in *Speiser* v. *Randall,* 357 U. S. 513, 530. It follows that I am for reversing this case because I believe that the Los Angeles ordinance sets up a censorship in violation of the First and Fourteenth Amendments.

If, as it seems, we are on the way to national censorship, I think it timely to suggest again that there are grave doubts in my mind as to the desirability or constitutionality of this Court's becoming a Supreme Board of Censors—reading books and viewing television performances to determine whether, if permitted, they might adversely affect the morals of the people throughout the many diversified local communities in this vast country.[3]

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[3] *Kingsley International Pictures Corp.* v. *Regents of the University of New York,* 360 U. S. 684, 690–691 (concurring opinion). The views of a concurring opinion here, if accepted, would make this Court a still more inappropriate "Board of Censors" for the whole country. That opinion, conceding that "[t]here is no external measuring rod of obscenity," argues that the Constitution requires the issue of obscenity to be determined on the basis of "contemporary community standards"—"the literary, psychological or moral standards of a community." If, as argued in the concurring opinion, it violates the Federal Constitution for a local court to reject the evidence of "experts" on contemporary community standards of the vague word "obscenity," it seems odd to say that this Court should have the final word on what those community standards are or should be. I do not believe the words "liberty" and "due process" in the Fourteenth Amendment give this Court that much power.

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It is true that the ordinance here is on its face only applicable to "obscene or indecent writing." It is also true that this particular kind of censorship is considered by many to be "the obnoxious thing in its mildest and least repulsive form . . . ." But "illegitimate and unconstitutional practices get their first footing in that way . . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *United States,* 116 U. S. 616, 635. While it is "obscenity and indecency" before us today, the experience of mankind—both ancient and modern—shows that this type of elastic phrase can, and most likely will, be synonymous with the political and maybe with the religious unorthodoxy of tomorrow.

Censorship is the deadly enemy of freedom and progress. The plain language of the Constitution forbids it. I protest against the Judiciary giving it a foothold here.

MR. JUSTICE FRANKFURTER, concurring.

The appellant was convicted of violating the city ordinance of Los Angeles prohibiting possession of obscene books in a bookshop. His conviction was affirmed by the highest court of California to which he could appeal and it is the judgment of that court that we are asked to reverse. Appellant claims three grounds of invalidity under the Due Process Clause of the Fourteenth Amendment. He urges the invalidity of the ordinance as an abridgment of the freedom of speech which the guarantee of "liberty" of the Fourteenth Amendment safeguards against state action, and this for the reason that California law holds a bookseller criminally liable for possessing an obscene book, wholly apart from any scienter on his part regarding the book's obscenity. The second constitutional infirmity urged by appellant is the exclusion of appropriately offered testimony through duly qualified witnesses regarding the prevailing literary standards

and the literary and moral criteria by which books relevantly comparable to the book in controversy are deemed not obscene. This exclusion deprived the appellant, such is the claim, of important relevant testimony bearing on the issue of obscenity and therefore restricted him in making his defense. The appellant's ultimate contention is that the questioned book is not obscene and that a bookseller's possession of it could not be forbidden.

The Court does not reach, and neither do I, the issue of obscenity. The Court disposes of the case exclusively by sustaining the appellant's claim that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment precludes a State from making the dissemination of obscene books an offense merely because a book in a bookshop is found to be obscene without some proof of the bookseller's knowledge touching the obscenity of its contents.

The Court accepts the settled principle of constitutional law that traffic in obscene literature may be outlawed as a crime. But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable with knowledge of the obscenity. Obviously the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop. No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut. How much or how little awareness that a book may be found to be obscene suffices to establish scienter, or what kind of evidence may satisfy the how much or the how little, the Court leaves for another day.

I am no friend of deciding a case beyond what the immediate controversy requires, particularly when the limits of constitutional power are at stake. On the other hand, a case before this Court is not just a case. Inevitably its disposition carries implications and gives direc-

tions beyond its particular facts. Were the Court holding that this kind of prosecution for obscenity requires proof of the guilty mind associated with the concept of crimes deemed infamous, that would be that and no further elucidation would be needed. But if the requirement of scienter in obscenity cases plays a role different from the normal role of *mens rea* in the definition of crime, a different problem confronts the Court. If, as I assume, the requirement of scienter in an obscenity prosecution like the one before us does not mean that the bookseller must have read the book or must substantially know its contents on the one hand, nor on the other that he can exculpate himself by studious avoidance of knowledge about its contents, then, I submit, invalidating an obscenity statute because a State dispenses altogether with the requirement of scienter does require some indication of the scope and quality of scienter that is required. It ought at least to be made clear, and not left for future litigation, that the Court's decision in its practical effect is not intended to nullify the conceded power of the State to prohibit booksellers from trafficking in obscene literature.

Of course there is an important difference in the scope of the power of a State to regulate what feeds the belly and what feeds the brain. The doctrine of *United States* v. *Balint,* 258 U. S. 250, has its appropriate limits. The rule that scienter is not required in prosecutions for so-called public welfare offenses is a limitation on the general principle that awareness of what one is doing is a prerequisite for the infliction of punishment. See *Morissette* v. *United States,* 342 U. S. 246. The balance that is struck between this vital principle and the overriding public menace inherent in the trafficking in noxious food and drugs cannot be carried over in balancing the vital role of free speech as against society's interest in dealing with pornography. On the other hand, the constitutional

protection of non-obscene speech cannot absorb the constitutional power of the States to deal with obscenity. It would certainly wrong them to attribute to Jefferson or Madison a doctrinaire absolutism that would bar legal restriction against obscenity as a denial of free speech.[1]

[1] The publication of obscene printed matter was clearly established as a common-law offense in England in 1727 by the case of *Rex* v. *Curl*, 2 Str. 788, which overruled *Reg.* v. *Read*, [1708] 11 Mod. 142, where it had been held that such offenses were exclusively within the jurisdiction of the ecclesiastical courts. See also *Rex* v. *Wilkes*, [1770] 4 Burr. 2527. The common-law liability was carried across the Atlantic before the United States was established and appears early in the States. In 1786, in New York, a copyright act specifically stated that "nothing in this Act shall . . . authorise any Person or Persons to . . . publish any Book . . . that may be profane, treasonable, defamatory, or injurious to Government, Morals or Religion." An Act to Promote Literature, Act of April 29, 1786, c. LIV, § IV, 1 Laws of New York (Jones and Varick) (1777–1789) 321. In Pennsylvania, in 1815, a prosecution was founded on common-law liability. *Commonwealth* v. *Sharpless*, 2 Serg. & Rawle, 91. And in Maryland, when a statute regulating obscene publications was enacted in 1853, it was recited that "although in the judgment of the Legislature, such advertisements and publications are contra bonos mores, and punishable by the common law, it is desirable that the common law in this regard be re-enacted and enforced; . . ." Act of May 16, 1853, Md. Laws 1853, c. 183.

Moreover, as early as the eleventh year of the reign of Queen Anne (1711–1712), well before the jurisdiction at common law emerged in England, Massachusetts enacted a statute which provided "[t]hat whosoever shall be convicted of composing, writing, printing or publishing, of any filthy obscene or prophane Song, Pamphlet . . . shall be punished . . . ." Acts of 1711–1712, c. I, Charter of the Province of the Massachusetts-Bay, p. 172 (1759). It is unclear whether the well-known prosecution in Massachusetts in 1821, *Commonwealth* v. *Holmes*, 17 Mass. *336, was founded on this statute or on common-law liability, although in 1945 the Supreme Judicial Court indicated that it regarded this early statute as having been in effect until a successor enactment of 1835, Revised Statutes of the Commonwealth of Massachusetts, c. 130, § 10 (1836). *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 547, 62 N. E. 2d 840, 843, n. 1. See also Grant and Angoff, Massachusetts and Censorship, III, 10 B. U. L. Rev. 147

We have not yet been told that all laws against defamation and against inciting crime by speech, see *Fox* v. *Washington,* 236 U. S. 273 (1915), are unconstitutional as impermissible curbs upon unrestrictable utterance. We know this was not Jefferson's view, any more than it was the view of Holmes and Brandeis, JJ., the originating architects of our prevailing constitutional law protective of freedom of speech.

Accordingly, the proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity. Out of regard for the State's interest, the Court suggests an unguiding, vague standard for establishing "awareness" by the bookseller of the contents of a challenged book in contradiction of his disclaimer of knowledge of its contents. A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book. As a practical matter therefore the exercise of the constitutional right of a State to regulate obscenity will carry with it some hazard to the dissemination by a bookseller of non-obscene literature. Such difficulties or hazards are inherent in many domains of the law for the simple reason that law cannot avail itself of factors ascertained quantitatively or even wholly impersonally.

The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity—a right implicit in the very nature of the legal concept of obscenity—to enlighten the judgment of the tribunal,

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(1930). Thereafter the offense was made statutory in other States. See, *e. g.,* Act of March 14, 1848, c. VIII, § 7 (1847–1848), Va. Laws 111; Act of May 16, 1853, c. 183 (1853), Laws of Maryland 212; Act of April 28, 1868, c. 430, 7 N. Y. Stat. at Large (1867–1870) 309.

be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability of a controverted device.

There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is "applying contemporary community standards" in determining what constitutes obscenity, *Roth* v. *United States,* 354 U. S. 476, 489, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporary community standards." Can

it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? The difference derives from a shift in community feeling regarding what is to be deemed prurient or not prurient by reason of the effects attributable to this or that particular writing. Changes in the intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, afford shifting foundations for the attribution. What may well have been consonant "with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time." *United States* v. *Kennerley,* 209 F. 119, 120. This was the view of Judge Learned Hand decades ago reflecting an atmosphere of propriety much closer to mid-Victorian days than is ours. Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of "due process" to exclude the constitutionally relevant evidence proffered in this case. The importance of this type of evidence in prosecutions for obscenity has been impressively attested by the recent debates in the House of Commons dealing with the insertion of such a provision in the enactment of the Obscene Publications Act, 1959, 7 & 8 Eliz. 2, Ch. 66 [2] (see 597 Parliamentary Debates, H. Comm., No. 36 (December

[2] Section 4 of this Act provides:

"(1) A person shall not be convicted of an offense against . . . this Act . . . if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

"(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground."

16, 1958), cols. 1009–1010, 1042–1043; 604 Parliamentary Debates, H. Comm., No. 100 (April 24, 1959), col. 803), as well as by the most considered thinking on this subject in the proposed Model Penal Code of the American Law Institute. See A. L. I. Model Penal Code, Tentative Draft No. 6 (1957), § 207.10.[3] For the reasons I have indicated, I would make the right to introduce such evidence a requirement of due process in obscenity prosecutions.

MR. JUSTICE DOUGLAS, concurring.

I need not repeat here all I said in my dissent in *Roth* v. *United States,* 354 U. S. 476, 508, to underline my conviction that neither the author nor the distributor of this book can be punished under our Bill of Rights for publishing or distributing it. The notion that obscene publications or utterances were not included in free speech developed in this country much later than the adoption of the First Amendment, as the judicial and legislative

[3] Subsection (2) of this draft section provides in part:

". . . In any prosecution for an offense under this section evidence shall be admissible to show:

"(a) the character of the audience for which the material was designed or to which it was directed;

"(b) what the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on behavior of such people;

"(c) artistic, literary, scientific, educational or other merits of the material;

"(d) the degree of public acceptance of the material in this country;

"(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

. . . . . .

"Expert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall be admissible."

developments in this country show. Our leading authorities on the subject have summarized the matter as follows:

> "In the United States before the Civil War there were few reported decisions involving obscene literature. This of course is no indication that such literature was not in circulation at that time; the persistence of pornography is entirely too strong to warrant such an inference. Nor is it an indication that the people of the time were totally indifferent to the proprieties of the literature they read. In 1851 Nathaniel Hawthorne's *The Scarlet Letter* was bitterly attacked as an immoral book that degraded literature and encouraged social licentiousness. The lack of cases merely means that the problem of obscene literature was not thought to be of sufficient importance to justify arousing the forces of the state to censorship." Lockhart and McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 324–325.

Neither we nor legislatures have power, as I see it, to weigh the values of speech or utterance against silence. The only grounds for suppressing this book are very narrow. I have read it; and while it is repulsive to me, its publication or distribution can be constitutionally punished only on a showing not attempted here. My view was stated in the *Roth* case, at 514:

> "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 498; *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477–478. As a people, we cannot afford to relax that standard. For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is

to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless."

Yet my view is in the minority; and rather fluid tests of obscenity prevail which require judges to read condemned literature and pass judgment on it. This role of censor in which we find ourselves is not an edifying one. But since by the prevailing school of thought we must perform it, I see no harm, and perhaps some good, in the rule fashioned by the Court which requires a showing of *scienter*. For it recognizes implicitly that these First Amendment rights, by reason of the strict command in that Amendment—a command that carries over to the States by reason of the Due Process Clause of the Fourteenth Amendment—are preferred rights. What the Court does today may possibly provide some small degree of safeguard to booksellers by making those who patrol bookstalls proceed less highhandedly than has been their custom.*

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

The striking down of local legislation is always serious business for this Court. In my opinion in the *Roth* case, 354 U. S., at 503–508, I expressed the view that state power in the obscenity field has a wider scope than federal power. The question whether *scienter* is a constitutionally required element in a criminal obscenity statute is

*See Chafee, Free Speech in the United States (1941), pp. 536–540; Lockhart and McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 302–316; Daniels, The Censorship of Books (1954), p. 76 *et seq.*; Blanshard, The Right to Read (1955), p. 180 *et seq.*; Fellman, The Censorship of Books (1957). And see *New American Library of World Literature* v. *Allen*, 114 F. Supp. 823.

intimately related to the constitutional scope of the power to bar material as obscene, for the impact of such a requirement on effective prosecution may be one thing where the scope of the power to proscribe is broad and quite another where the scope is narrow. Proof of *scienter* may entail no great burden in the case of obviously obscene material; it may, however, become very difficult where the character of the material is more debatable. In my view then, the *scienter* question involves considerations of a different order depending on whether a state or a federal statute is involved. We have here a state ordinance, and on the meagre data before us I would not reach the question whether the absence of a *scienter* element renders the ordinance unconstitutional. I must say, however, that the generalities in the Court's opinion striking down the ordinance leave me unconvinced.

From the point of view of the free dissemination of constitutionally protected ideas, the Court invalidates the ordinance on the ground that its effect may be to induce booksellers to restrict their offerings of nonobscene literary merchandise through fear of prosecution for unwittingly having on their shelves an obscene publication. From the point of view of the State's interest in protecting its citizens against the dissemination of obscene material, the Court in effect says that proving the state of a man's mind is little more difficult than proving the state of his digestion, but also intimates that a relaxed standard of *mens rea* would satisfy constitutional requirements. This is for me too rough a balancing of the competing interests at stake. Such a balancing is unavoidably required in this kind of constitutional adjudication, notwithstanding that it arises in the domain of liberty of speech and press. A more critical appraisal of both sides of the constitutional balance, not possible on the meagre material before us,

seems to me required before the ordinance can be struck down on this ground. For, as the concurring opinions of my Brothers BLACK and FRANKFURTER show, the conclusion that this ordinance, but not one embodying some element of *scienter,* is likely to restrict the dissemination of legitimate literature seems more dialectical than real.

I am also not persuaded that the ordinance in question was unconstitutionally applied in this instance merely because of the state court's refusal to admit expert testimony. I agree with my Brother FRANKFURTER that the trier of an obscenity case must take into account "contemporary community standards," *Roth* v. *United States,* 354 U. S. 476, 489. This means that, regardless of the elements of the offense under state law, the Fourteenth Amendment does not permit a conviction such as was obtained here [1] unless the work complained of is found substantially to exceed the limits of candor set by contemporary community standards.[2] The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process—"using that term in its primary sense of an opportunity to be heard and to defend [a] . . . substantive right," *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 678—requires a State to allow a liti-

[1] We are concerned in this instance with an objection to what a book portrays, not to what it teaches. Cf. *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684.

[2] The most notable expression of this limitation is that of Judge Learned Hand, in *United States* v. *Kennerley,* 209 F. 119, 121: "If there be no abstract definition, . . . should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" See also the exposition of this view in American Law Institute, Model Penal Code (Tentative Draft No. 6), at p. 30. It may be that the *Roth* case embodies this restriction, see 354 U. S., at 487, n. 20; but see *id.,* at 499–500 (separate opinion).

gant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards,[3] it is not privileged to rebuff *all* efforts to enlighten or persuade the trier.

However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance. Where there is a variety of means, even though it may be considered that expert testimony is the most convenient and practicable method of proof, I think it is going too far to say that such a method is constitutionally compelled, and that a State may not conclude, for reasons responsive to its traditional doctrines of evidence law, that the issue of community standards may not be the subject of expert testimony. I know of no case where this Court, on constitutional grounds, has required a State to sanction a particular mode of proof.

In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside *every* attempt by appellant to introduce evidence bearing on community standards. The exclusionary rulings were not limited to offered expert testimony. This had the effect of depriving appellant of the opportunity to offer any proof on a constitutionally relevant issue. On this ground I would reverse the judgment below, and remand the case for a new trial.

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[3] Such a view does not of course mean that the issue is to be tried according to the personal standards of the judge or jury.

MINNEAPOLIS & ST. LOUIS RAILWAY CO. *v.* UNITED STATES ET AL.

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

No. 12. Argued November 16–17, 1959.—
Decided December 14, 1959.*

Under § 5 (2) of the Interstate Commerce Act, the Commission was confronted with rival applications by several railroads for authority to acquire control of the Toledo, Peoria & Western Railroad, an independent, short-line, "bridge carrier" of through east-west traffic by-passing the congested Chicago and St. Louis gateways and connecting with 16 other railroads. After extended hearings, the Commission found that the plan for joint control of Western by the Santa Fe and Pennsylvania Railroads contemplated that Western would continue to be operated as a separate and independent carrier with responsible local management and that all existing routes via Western would be maintained and kept open without discrimination between connecting lines of railroads; but that the plan of the Minneapolis & St. Louis Railroad to acquire sole control of Western contemplated its disappearance as an independent and neutral connection for 15 other carriers, that it would be extremely harmful to other carriers and that it would result in termination of the employment of most of Western's 24 executives and 225 other employees. The Commission concluded that the acquisition and plan of operation by the Santa Fe and Pennsylvania, subject to stated conditions, was within the scope of § 5 (2) of the Act, that the proposed terms and conditions were just and reasonable, and that the transaction would be consistent with the public interest. It, therefore, approved the Santa Fe-Pennsylvania application, dismissed the Minneapolis application, and denied applications by several intervening railroads for permission to participate in the acquisition of Western's stock. The District Court sustained the Commission's order. *Held:* The judgment is affirmed. Pp. 176–194.

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*Together with No. 27, *South Dakota et al.* v. *United States et al.*, and No. 28, *Minnesota et al.* v. *United States et al.*, also on appeals from the same Court.

1. The record shows that the Commission's finding that continued operation of Western as a "separate and independent carrier" was required by the "public interest" did not deprive the Minneapolis & St. Louis Railroad of "fair comparative consideration" and that it was made after full and fair consideration; and the District Court did not err in so holding. Pp. 184–185.

2. Notwithstanding appellants' contention that acquisition of Western by Santa Fe and Pennsylvania would create a combination in restraint of commerce in violation of § 1 of the Sherman Act and would lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act, the record shows that the Commission fully estimated the scope and appraised the effects of any resulting curtailment of competition and concluded that the proposed acquisition and plan of operation would not result in any significant lessening of competition; and this determination rests upon adequate findings, supported by substantial evidence, and is well within the limits of the Commission's discretion under the Act. Pp. 185–189.

(a) Although § 5 (11) does not authorize the Commission to "ignore" the antitrust laws, it does authorize the Commission to approve acquisitions which might otherwise violate the antitrust laws, if it finds that such acquisitions are in the public interest, and, upon approval of the acquisitions by the Commission, it relieves the acquiring carriers from the operation of the antitrust laws. Pp. 185–187.

(b) As respects railroad acquisitions, the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in the public interest, and the wisdom and experience of the Commission, not of the courts, must determine whether the proposed acquisition is in the public interest. Pp. 187–188.

(c) The Commission gave extensive consideration to this contention of appellants and determined that the acquisition of Western by Santa Fe and Pennsylvania and their plan of operation of Western would not result in any significant lessening of competition; and that determination was based upon adequate findings, supported by substantial evidence, and was well within the limits of the Commission's discretion under the Act. Pp. 188–189.

3. Notwithstanding appellants' contention that Pennsylvania actually contracted to purchase 50% of Western's stock from a trust company which had four common directors with Pennsylvania and that such purchase would violate § 10 of the Clayton

Act, the Commission's action in approving Pennsylvania's acquisition of the stock, after fully considering all factors bearing thereon, did not exceed the statutory limits of the Commission's discretion. Pp. 189–191.

4. Whether or not § 5 (11) operates only *in futuro* is immaterial in this case, since the existing contractual arrangements through which Pennsylvania asked authority to acquire 50% of Western's stock looked entirely to the future. Pp. 191–192.

5. Notwithstanding appellants' contention that the Commission violated § 8 (b) of the Administrative Procedure Act by failing to make findings which, they think, were compelled by the evidence, the record discloses that the Commission made adequate subsidiary findings upon all material issues and made the ultimate findings required by § 5 (2), that they support the Commission's order and that they are, in turn, supported by substantial evidence. Pp. 192–194.

6. The District Court fairly considered and decided all of the issues raised by appellants, accorded to them a full and fair judicial review, and reached a right result. P. 194.

165 F. Supp. 893, affirmed.

Max Swiren and *Harold J. Soderberg* argued the cause for appellants. *Max Swiren, John G. Dorsey* and *Richard Musenbrock* were on the brief for the Minneapolis & St. Louis Railway Co., appellant in No. 12; *Parnell Donohue,* Attorney General of South Dakota, *Herman L. Bode,* Assistant Attorney General, and *Ernest W. Stephens* for the State of South Dakota et al., appellants in No. 27; and *Miles Lord,* Attorney General of Minnesota, and *Harold J. Soderberg,* Assistant Attorney General, for the State of Minnesota et al., appellants in No. 28.

Robert W. Ginnane and *Starr Thomas* argued the cause for appellees. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Robert W. Ginnane* and *B. Franklin Taylor, Jr.* were on the brief for the United States and the Interstate Commerce Commission; *Grenville Beardsley,* Attorney General of Illinois, and *Harry R. Begley,* Special Assistant Attorney Gen-

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eral, for the State of Illinois; *Starr Thomas, Carl E. Bagge* and *Edwin A. Lucas* for the Atchison, Topeka & Santa Fe Railway Co. et al.; and *Robert H. Walker* for certain municipalities and shippers et al., appellees.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

These appeals present questions arising out of rival applications by several rail carriers to the Interstate Commerce Commission under § 5 (2) of the Interstate Commerce Act [1] for authority to acquire control of Toledo, Peoria & Western Railroad Company.

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[1] Section 5 (2) of the Interstate Commerce Act (24 Stat. 380, as amended, 54 Stat. 905, 49 U. S. C. § 5 (2)) provides, in pertinent part, that:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

"(i) for . . . two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . .

. . . . . .

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier . . . seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify . . . [designated parties], and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . .

"(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the

"Western" is an independent, short-line "bridge carrier" [2] of through east-west traffic by-passing the congested Chicago gateway. Its line is about 234 miles long, extending from its connection with the Pennsylvania Railroad Company ("Pennsylvania") at Effner, on the Illinois-Indiana state line, westward, through Peoria, to its connection with the main line of the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") at Lomax, Illinois, and thence southwesterly a short distance to Keokuk, Iowa. Its headquarters, shops and yards are located in East Peoria where it has 24 executives and where, and elsewhere along its line, it has about 225 other employees. It has connections for the interchange of traffic with 16 railroads, the principal ones being with the Pennsylvania at Effner, with the Santa Fe at Lomax, and with the New York, Chicago & St. Louis Railroad Company ("Nickel Plate"), the Illinois Terminal Railroad Company, the

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following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

. . . . . .

"(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. . . ."

[2] The term "bridge carrier" appears to mean a short-line carrier which transports through traffic from one long-line carrier to another.

Chicago, Burlington & Quincy Railroad Company ("Burlington") and the Minneapolis & St. Louis Railway Company ("Minneapolis") at Peoria. Its interchange connections with the other 10 railroads are at 17 other towns along its line.

Western has outstanding 90,000 shares of common capital stock, 82% of which is owned by the testamentary trustees of the estate of George P. McNear—Wilmington Trust Company and Guy Gladson—and the remaining 18% is owned by members of the McNear family, a bank and the president of Western. In 1954, the trustees determined to sell their Western stock, and rival efforts were commenced by Minneapolis, on the one hand, and by the Santa Fe and Pennsylvania, on the other hand, to purchase it. (Four of Wilmington Trust Company's directors were also directors of Pennsylvania.) Those negotiations culminated in a contract between the trustees and the Santa Fe, dated May 26, 1955, providing for the sale by the former and purchase by the latter of the stock at a price of $135 per share, subject to the Commission's approval.[3] Soon afterward, like agreements

[3] During the negotiations, Minneapolis first offered $69.50, and later $80, per share for the stock. On April 15, 1955, the Santa Fe and Pennsylvania each obtained letter commitments from the trustees for the sale to each of them of 26% of the Western stock at a price of $100 per share. (Near the same time the Rock Island made a like offer to the trustees for 26% of the Western stock, but that offer was not accepted.) But a dispute arose—and apparently still exists between the trustees and Pennsylvania—with respect to the validity of those commitments. Thereupon, Minneapolis offered the trustees $133 per share for the Western stock, but that offer was not accepted, and on May 26, 1955, the Santa Fe, acting, as the Commission found, "on behalf of that carrier alone," agreed with the trustees for the sale by the latter and purchase by the former of all the Western stock held by the trustees at a price of $135 per share, and those parties on that date entered into a contract, accordingly, subject to approval of the Commission.

were made by the Santa Fe with the holders of the remaining 18% of the Western stock.

On June 28, 1955, the Santa Fe entered into a contract to sell to the Pennsylvania Company, a wholly owned subsidiary of Pennsylvania, 50% of the outstanding capital stock of Western at $135 per share,[4] subject to approval of the Commission.

On July 8, 1955, the Santa Fe and Pennsylvania Company and its parent, Pennsylvania, applied to the Commission under § 5 (2) of the Act[5] for approval of

[4] The contract of June 28, 1955, between the Santa Fe and the Pennsylvania Company provided that it was without prejudice to any claims, causes of action or rights which Pennsylvania may have against the trustees of the McNear estate with respect to the letter commitment of April 15, 1955, for the sale by the trustees to Pennsylvania of 26% of the Western stock; and that, in the event Pennsylvania should acquire from the trustees, under that letter commitment, all or any part of such shares, the obligation of the Santa Fe under the contract to sell Western shares to the Pennsylvania Company was to be reduced accordingly. It appears that litigation was then, and is yet, pending by Pennsylvania against the trustees for the enforcement of the letter commitment of April 15, 1955.

The contract also contained a covenant which, in essence, provided that (1) Western "will continue to be operated as a separate and independent carrier with responsible management located along its lines in order to preserve to shippers and communities the present direct access to its officials," (2) that Western's properties will be maintained and improved, (3) that Western "will continue to maintain its own solicitation forces and will be entirely free to solicit traffic in such manner as best to serve the interests of" Western, (4) that all "existing routes and channels of trade via [Western] will be maintained and kept open without discrimination between connecting lines of railroad," and (5) that the Board of Directors of Western shall consist of 11 members, of whom one shall be the president of the company, two shall be officers of the Santa Fe, two shall be officers of the Pennsylvania Company, or Pennsylvania, or both, and the remaining six shall be prominent citizens not connected with either of the parties but selected by them through mutual agreement.

[5] See note 1.

those stock purchase agreements and the consequent joint control of Western. The Minneapolis intervened and objected to the application, as did also the States of Minnesota and South Dakota and their respective public service regulatory commissions.

Thereafter, on October 13, 1955, the Minneapolis applied to the Commission, under the same section of the Act, for authority to acquire sole control of Western, expressing its willingness to enter into contracts with Western's stockholders to purchase their stock at the same price and on the same terms as set forth in their existing contracts with the Santa Fe. The Santa Fe, the Pennsylvania Company and Pennsylvania intervened in the latter proceeding and objected to the Minneapolis application.

On motion of Minneapolis, the Commission consolidated the two proceedings. Thereafter, seven other railroads having interchange connections with Western's line intervened. Two of them sought authority, at all events,[6] and two others of them sought authority, under stated conditions,[7] to participate, under § 5 (2)(d) of the Act,

[6] The New York, Chicago & St. Louis Railroad Company ("Nickel Plate") and the Chicago, Rock Island & Pacific Railroad Company ("Rock Island") sought authority, under § 5 (2)(d) of the Act (see note 1), to be included in the acquisition of Western's stock on an equal basis with the successful applicant or applicants.

[7] The Chicago, Burlington & Quincy Railroad Company ("Burlington") and the Wabash Railroad Company ("Wabash") did not object to approval of the Santa Fe-Pennsylvania application, provided the order required continuation of present routes and channels of trade via existing junctions and gateways and of all existing traffic and operating relations and arrangements, but they asked, in the event any railroad other than the Santa Fe and Pennsylvania be authorized to acquire an interest in Western's stock, that they, too, be authorized to participate therein to the same extent as any such other railroad.

The Illinois Central Railroad Company ("Illinois Central"), the Gulf, Mobile & Ohio Railroad Company ("Gulf") and the Chicago & North Western Railway Company ("North Western") asked that,

in the acquisition of the Western stock on an equal basis with the successful applicant. The State of Illinois, 18 cities or towns and seven chambers of commerce located on or along Western's line, two labor organizations representing Western's employees, and a large number of shippers over Western's line, intervened in support of the Santa Fe-Pennsylvania application and in opposition to the Minneapolis application.

After an extended consolidated hearing before him, the Commission's examiner issued a proposed report recommending approval of the Santa Fe-Pennsylvania application and dismissal of the Minneapolis application. Thereafter, upon exceptions, and briefs and arguments in their support, Division 4 of the Commission issued its report. It was confronted, as it said, with four alternative proposals, (1) for authorization of joint control of Western by the Santa Fe and Pennsylvania, (2) for authorization of sole control by the Minneapolis, (3) for authorization of two other railroads, at all events, and of two more railroads, under stated conditions, to participate in the acquisition of the Western stock on an equal basis with the successful applicant,[8] and (4) denial of both applications.

The Commission observed that "[t]hese proceedings represent a new and more complicated phase in the administration of section 5, since [they involve] 2 applications for authority to control the same property, and petitions by 4 other carriers for inclusion in the transaction under varying circumstances." It recognized that, under § 5 (2)

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if either application be approved, the order be conditioned to require the maintenance of all routes and channels of trade via existing gateways. The Monon Railroad Company asked that if the Santa Fe-Pennsylvania application be approved, the order contain a requirement that Pennsylvania shall grant to it certain trackage rights, and, if not done, that the Santa Fe-Pennsylvania application be denied.

[8] See notes 6 and 7.

of the Act and the National Transportation Policy,[9] it was required to "weigh whether each application is consistent with the public interest, with or without inclusion of other railroads, considering not only other intervening petitioners seeking such inclusion but also the other applicant and nonparticipating railroads as well." It thought that the burden of proof was "most heavy for an applicant in a proceeding like this, because it must not only overbalance the claims of those seeking to share in the control but also of those seeking to exclude it from the transaction." It conceived it to be its duty, under the Act and the National Transportation Policy, to "arrive at a standard of public interest and determine which of the various plans of control most nearly approximates it."

The Commission found that the Santa Fe-Pennsylvania plan contemplates that Western "will continue to be operated as a separate and independent carrier with responsible management located along its lines"; that it "will continue to maintain its own solicitation forces and will be entirely free to solicit traffic in such manner as best to serve the interests of the Western," and that all "existing routes and channels of trade via the Western will be maintained and kept open without discrimination between connecting lines of railroad." It found, on the other hand, that the Minneapolis plan "unequivocally contemplates the disappearance of the Western as an independent and neutral connection for the other 15 carriers with which it presently works"; that "[f]or all practical purposes the Western would be integrated, consolidated, and merged into the Minneapolis for ownership, management, and operation"; that features of the Minneapolis plan "would be extremely harmful to other carriers"; that Western's headquarters office at Peoria would be eliminated, leaving only a trainmaster and a roadmaster at

[9] 49 U. S. C., n. preceding § 1, 54 Stat. 899.

that point, and that the employment of most of Western's 24 executives and 225 other employees would be severed.

The Commission further found that "[o]nly the Minneapolis and its supporting interveners, the States of Minnesota and South Dakota, advocate the disappearance of the Western as a separate and independent operating carrier," and that all other parties to, and intervenors in, the proceedings "insist that the separate and independent operation of the Western under its present local management is a public necessity." It then found that the "[p]ublic interest demands that the present policies of the Western in all respects be continued." It thereupon made the ultimate finding, required by § 5 (2)(b) of the Act, that the acquisition and plan of operation by the Santa Fe and Pennsylvania, subject to stated conditions, was "within the scope of section 5 (2) of the Interstate Commerce Act, as amended; that the terms and conditions proposed [by them] are just and reasonable, and that the transaction will be consistent with the public interest." The Commission then entered its order approving the Santa Fe-Pennsylvania application, dismissing the Minneapolis application, and denying the petitions of the several intervening railroads which sought to participate in the acquisition of the Western stock. 295 I. C. C. 523.

Thereafter, Minneapolis petitioned the whole Commission for a reconsideration, and alternatively requested that, if the approval of the Santa Fe-Pennsylvania application be permitted to stand, it be authorized to participate equally with those railroads in the purchase of Western's stock on the same terms. That petition was denied.

Minneapolis then timely filed a complaint in the District Court for Minnesota against the United States and the Interstate Commerce Commission to vacate the Commission's order. The States of Minnesota and South Dakota and their respective regulatory commissions,

being interested in strengthening the Minneapolis, which operates in those States, intervened in support of the complaint. The defendants answered, asserting the full legality of the Commission's order. The Santa Fe, the Pennsylvania, the Pennsylvania Company, the State of Illinois, the 18 cities and seven chambers of commerce and the numerous shippers who were intervenors before the Commission, intervened in opposition to the complaint. The Nickel Plate intervened, complaining that the Commission had improperly denied its request to participate in the purchase of the Western stock.

A three-judge court was convened and, after hearing, rendered its opinion and judgment sustaining the Commission's order. 165 F. Supp. 893. On separate appeals by the Minneapolis, the State of Minnesota and its regulatory commission, and the State of South Dakota and its regulatory commission, the case was brought here and we noted probable jurisdiction. 359 U. S. 933. All of those who were defendants and intervenors in opposition to the complaint in the District Court, except the Nickel Plate, are appellees in this Court.

Minneapolis, supported by the States of Minnesota and South Dakota, contends, first, that the Commission improperly adopted at the outset of its report the standard of "separate and independent management" of Western as the criterion governing the comparative merits of the rival plans, which was antithetic to its application, and thereby deprived it of "fair comparative consideration," and that the District Court erred in approving the Commission's action.

The record does not support that contention. Rather, it shows that the Commission's governing standard was the "public interest," although it ultimately did find that the public interest would be best served by Western's continued operation as a "separate and independent carrier." We believe that the recited findings show that the Com-

mission carefully "weighed" and considered "each application" in its labors to determine which, if either, of them was "consistent with the public interest." Its subsidiary findings (a) that the Minneapolis plan "unequivocally contemplates the disappearance of the Western as an independent and neutral connection for the other 15 carriers with which it presently works," (b) that certain features of the Minneapolis plan "would be extremely harmful to other carriers," (c) that the Minneapolis plan contemplates the elimination of Western's office and the separation of its employees, and (d) that numerous witnesses insisted "that the separate and independent operation of the Western under its present local management is a public necessity," fully support its conclusional finding that the "[p]ublic interest demands that the present policies of the Western in all respects be continued." That finding, though antithetic to Minneapolis' application, did not deprive it of "fair comparative consideration," but, on the contrary, it seems to us, was made by the Commission after full and fair consideration, and the District Court did not err in so holding.

Appellants' principal contention appears to be that acquisition of control of Western by Santa Fe and Pennsylvania will create a combination in restraint of commerce in violation of § 1 of the Sherman Act [10] and will lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act,[11] and that the Commission's approval of their application was an abuse of power.

On their face these contentions would seem to run in the teeth of the language and purpose of § 5 (11) of the Interstate Commerce Act. That section, in substance, provides that "The authority conferred by this section shall be exclusive and plenary, and any carrier or corpora-

[10] 15 U. S. C. § 1, 26 Stat. 209.

[11] 15 U. S. C. § 18, 38 Stat. 731.

tion participating in . . . any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction . . . and any carriers . . . participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law . . . insofar as may be necessary to enable [it] to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." 24 Stat. 380, as amended, 54 Stat. 908, 49 U. S. C. § 5 (11).

Section 5 (11) is both a more recent and a more specific expression of congressional policy than § 1 of the Sherman Act and § 7 of the Clayton Act, and in terms relieves the acquiring carrier, upon approval by the Commission of the acquisition, "from the operation of the antitrust laws . . . ." Although § 5 (11) does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws." 321 U. S., at 85–86. The problem is one of accommodation of § 5 (2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy." 321 U. S., at 87.

Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest, "because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by 'encouraging the organization of stronger units' in the . . . industry. And in authorizing those [acquisitions] it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate [acquisitions] from the requirements of those laws. § 5 (11)." 321 U. S., at 85. It must be presumed that, in enacting this legislation, Congress took account of the fact that railroads are subject to strict regulation and supervision. "Against this background, no other inference is possible but that, as a factor in determining the propriety of [railroad acquisitions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy." 321 U. S., at 85–86.

As respects railroad acquisitions, the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in "the public interest." A contrary view would, in effect, permit the Commission to authorize only those acquisitions which would not offend those laws. "As has been said, this would render meaningless the exemption relieving the participants in a properly approved [acquisition] of the requirements of those laws . . . ." 321 U. S., at 86. Resolution of the conflicting considerations "is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation,

but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed [acquisition] is 'consistent with the public interest.' Cf. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344; *Purcell* v. *United States*, 315 U. S. 381." 321 U. S., at 87–88.

Here, the Commission gave extensive consideration to the anti-competitive contentions advanced by appellants, devoting more than five pages of its report to that matter. It found that "[a]ll the carriers endeavoring to participate in its control are in competition with Western"; that the "important thing is not whether there is possibility of competition, but whether there is probability of existing or potential competition being diminished or strangled by the Western under the control of the Santa Fe and the Pennsylvania." After an extended analysis of the complex facts and conflicting evidence, the Commission found that control of Western by the Santa Fe and Pennsylvania would not result in any significant lessening of competition. It pointed to the fact that although the Santa Fe's "long haul" is to Chicago and the Pennsylvania's "next to longest haul" is also to Chicago (its longest haul being to St. Louis) the Santa Fe has agreed, and is bound, "to place Lomax on a parity with Chicago from a solicitation standpoint, and . . . the Pennsylvania will recognize Effner as one of its principal interchanges along with Chicago and St. Louis"; that "there may be some diversion of traffic, but such diversion would not jeopardize the maintenance of adequate transportation service by the objecting intervening carriers."

The Commission also pointed to the fact that Western had been in a prolonged receivership until 1927 when George P. McNear acquired its stock at a receiver's sale,

Toledo, P. & W. R. Co. Acquisition, 124 I. C. C. 181. It further found that Western's modern existence began at that time and, under the guidance of McNear, was built into a fine railroad; that since McNear's death, in 1947, the present management has continued, with much success, the policies he established. Those policies, the Commission found, were, and are, "to maintain strict neutrality between all connections, and to participate in any haul of traffic no matter how slight [as a bridge] carrier through Peoria as an alternative route, bypassing the congested terminals of Chicago and St. Louis," and that those policies are to be continued under the Santa Fe-Pennsylvania plan.

We think it is clear from this summary of its analysis and findings that the Commission fully estimated the scope and appraised the effects of any curtailment of competition which might result from the acquisition of Western by the Santa Fe and Pennsylvania, and, after having done so, concluded that their acquisition and plan of operation of Western would not result in any significant lessening of competition. Congress has left the task of making that determination to the wisdom and experience of the Commission. The determination it has made rests upon adequate findings which are, in turn, supported by substantial evidence and is well within the limits of its discretion under the Act.

Appellants argue that the Pennsylvania, in actuality, contracted to purchase 50% of the Western stock from Wilmington Trust Company, a co-trustee of the McNear trust, and that, since four persons were directors of both companies, that proposed stock purchase violates § 10 of the Clayton Act; that the Commission was without power to approve it; that, in any event, its action in "condoning" it was an abuse of power; and that the District Court, for those reasons also, erred in upholding the Commission's order.

The Commission found that the Santa Fe in entering into the contract of May 26, 1955, with the trustees of the McNear trust was "acting on behalf of that carrier alone." But even if we assume, for present purposes, that it was acting as well for the Pennsylvania, the result must be the same. Section 10 of the Clayton Act prohibits a common carrier engaged in commerce from having "any dealings in securities" of more than $50,000, in the aggregate, in any one year, "with another corporation, . . . when the said common carrier shall have upon its board of directors . . . any person who is at the same time a director [of] such other corporation . . . , except such purchases [as] shall be made . . . by competitive bidding under regulations to be prescribed by [the] Commission." 38 Stat. 734, 15 U. S. C. § 20.

Section 10 of the Clayton Act is, of course, an antitrust law,[12] and much of what we have just said relative to the problem of accommodation of § 5 (2) of the Interstate Commerce Act and the antitrust laws is equally applicable to this contention. The evident purpose of § 10 of the Clayton Act was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest.[13] But, even if this purchase

[12] It is clear that § 10 of the Clayton Act is included in the "antitrust laws" referred to in § 5 (11) of the Interstate Commerce Act. Section 1 of the Clayton Act, 15 U. S. C. (1952 ed.) § 12, provides that "'Anti-trust laws,' as used in sections 12, 13, 14–21, and 22–27 of this title, includes sections 1–27 of this title." Moreover, § 5 (11) avoids any ambiguity by including "all other restraints, limitations, and prohibitions of law, Federal, State, or municipal."

[13] The legislative history of § 10 of the Clayton Act, though meager, supports the view stated in the text. In fact, the language of the several drafts of § 10, together with the types of abuses cited in

of securities might, under other circumstances, violate § 10 of the Clayton Act, Congress, by § 5 (11) of the Interstate Commerce Act, has authorized the Commission to approve it if it finds that so doing is in the public interest. And Congress has expressly said that, upon such approval, the carrier shall be relieved "from the operation of the anti-trust laws . . . ." A contrary view would, in effect, permit the Commission to authorize only those stock purchases which would not, in the absence of § 5 (11), offend the antitrust laws. "As has been said, this would render meaningless the exemption relieving the participants in a properly approved [acquisition] of the requirements of those laws . . . ." *McLean Trucking Co.* v. *United States, supra,* at 86.

Here, the Commission fully considered the contracts under which the Pennsylvania proposes to acquire a 50% interest in the Western stock and all other factors bearing on that matter and, after doing so, approved them. That action by the Commission did not exceed the statutory limits within which Congress has confined its discretion.

Minneapolis contends that § 5 (11) operates only *in futuro* and confers "no authority to purge the taint of a transaction illegal at the time it was brought to the Commission." Whether there is merit in that contention, as a legal abstraction, we need not decide, for here the existing contractual arrangements through which Pennsylvania asks authority to acquire 50% of the Western stock look entirely to the future. Neither the stock sale and purchase contract between the trustees and the Santa Fe nor the one between the Santa Fe and the Pennsyl-

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support of its enactment, suggests strongly that the words "dealings in securities" were intended to cover only a carrier's dealings with related persons in its own securities. See H. R. Rep. No. 627, 63d Cong., 2d Sess., p. 3; S. Rep. No. 698, 63d Cong., 2d Sess., pp. 47–48; S. Doc. No. 585, 63d Cong., 2d Sess., pp. 8–9; 51 Cong. Rec. 15943.

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vania Company is a consummated transaction, but each is expressly subject to, and will become effective only upon, approval by the Commission. Apart from criminal prosecutions, with which we are not here concerned, it seems plain that approval of an acquisition by the Commission operates under § 5 (11), as that section says, to relieve the acquiring carrier "from the operation of the antitrust laws . . . ."

Appellants next contend that the Commission violated § 8 (b) of the Administrative Procedure Act by failing to make findings which, they think, were compelled by the evidence.

There can be no doubt that the Administrative Procedure Act applies to proceedings before the Commission, *Riss & Co.* v. *United States,* 341 U. S. 907, and see *Chicago & Eastern Illinois R. Co.* v. *United States,* 344 U. S. 917.

The last sentence of § 8 (b) provides:

> "All [administrative] decisions . . . shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." [14]

Upon the basis of that language, appellants argue that the Commission should have found that the price which the Santa Fe agreed to pay for the Western stock of $135 per share was excessive. Though the Commission made no express finding upon that matter it did discuss it, pointing out that the certified value of Western's properties for ratemaking purposes was more than $13,500,000; that it has no outstanding preferred stock and is relatively free of debt; that it has a fine earning record; that the transaction was at arm's length; that Minneapolis had

[14] 60 Stat. 242, 5 U. S. C. § 1007 (b).

offered $133 per share for the stock within a few days of the time when the Santa Fe contracted for its purchase at $135 per share; and that the Minneapolis sought authority in this proceeding to acquire the stock at the same price. The Commission concluded that if $135 per share was a fair price for the one it was also for the other.

Upon the same basis, appellants also argue that the Commission should have found that the Minneapolis application was in the public interest in that its acquisition of Western would greatly strengthen both Minneapolis and Western by eliminating many duplicating facilities and by reducing operating expenses by more than $1,770,000 annually. The Commission did not make a specific finding upon that matter, but it did give consideration to it and found that most of that saving—more than $1,300,000 annually—would be at the expense of Western's employees—a matter which, because of the express command of clause 4 of § 5 (2)(c) of the Interstate Commerce Act (see note 1), it evidently thought was not consistent with the public interest. Appellants further argue that the Commission should have found that the Minneapolis plan afforded adequate protection to Western's employees by providing for their absorption into the Minneapolis as attrition among its own employees permitted. Again, although the Commission made no specific finding upon that contention it did consider and discuss it, and we think the law required no more.

Appellants challenge the Commission's failure to make a number of other subsidiary findings, all of which have been considered, but we find that they relate to contentions that are so collateral or immaterial that the law did not require specific findings upon them. By the express terms of § 8 (b), the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or

discretion which are "material." From a thorough examination of the record, we are persuaded that the Commission has made adequate subsidiary findings upon all material issues and has made the ultimate findings required by § 5 (2), that they support the Commission's order, and are, in turn, supported by substantial evidence.

Finally, appellants contend that the District Court, because of inadequate subsidiary findings by the Commission, was unable to, or at least did not, afford them a proper judicial review, and merely "rubber stamped" the Commission's order. Whether or not we approve all of the reasons and legal conclusions of the District Court, it is clear that it fairly considered and decided all of the issues raised by appellants, accorded to them a full and fair judicial review, and reached a right result. Accordingly the judgment is

Affirmed.

MR. JUSTICE DOUGLAS dissents.

Syllabus.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *v.* FEDERAL POWER COMMISSION ET AL.

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

No. 459. Decided December 14, 1959.*

Certiorari granted; judgment vacated; and cases remanded to the Court of Appeals with directions to remand to Federal Power Commission for reconsideration in the light of *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U. S. 378.

Reported below: 269 F. 2d 865.

Kent H. Brown and *George H. Kenny* for petitioner in No. 459.

J. David Mann, Jr. and *J. Louis Monarch* for United Gas Improvement Co., and *Vincent P. McDevitt* and *Samuel Graff Miller* for Philadelphia Electric Co., petitioners in No. 473.

Willard W. Gatchell and *Howard E. Wahrenbrock* for the Federal Power Commission; *Richard J. Connor, John T. Miller, Jr., Thomas F. Brosnan, James B. Henderson* and *William N. Bonner, Jr.* for Transcontinental Gas Pipe Line Corp.; *W. W. Heard* and *William J. Grove* for Pan American Petroleum Corp.; *Chas. B. Ellard* and *Bernard A. Foster, Jr.* for Atlantic Refining Co.; *Gentry Lee* and *Bernard A. Foster, Jr.* for Cities Service Production Co.; *Carl Illig* and *William J. Merrill* for Humble Oil & Refining Co.; *Clayton L. Orn* and *James D. Parriott* for Ohio Oil Co.; *Frank C. Bolton* and *William S. Richardson* for Socony Mobil Oil Co., Inc. (successor to

*Together with No. 473, *United Gas Improvement Co. et al.* v. *Federal Power Commission et al.*, also on petition for writ of certiorari to the same Court.

Magnolia Petroleum Co.); *John C. Snodgrass* for Pure Oil Co.; *George D. Horning* for Union Oil Co. of California; *Robert E. May* for Hunt, Trustee; *Rayburn L. Foster, Harry D. Turner, Kenneth Heady, Charles E. McGee* and *Lambert McAllister* for Phillips Petroleum Co.; *Martin A. Row, Robert E. May* and *Omar L. Crook* for Sun Oil Co., respondents.

Briefs of *amici curiae* in support of petitioners were filed by *William M. Bennett* for the State of California and the Public Utilities Commission of California; *John W. Reynolds,* Attorney General of Wisconsin, *N. S. Heffernan,* Deputy Attorney General, *Roy G. Tulane,* Assistant Attorney General, and *William E. Torkelson* for the State of Wisconsin and the Public Service Commission of Wisconsin; *David Berger* for the City of Philadelphia; *David Stahl* for the City of Pittsburgh; *Joe W. Anderson, Roger Arnebergh, Alexander G. Brown, J. Elliott Drinard, N. H. Goldstick, Dion R. Holm, Claude V. Jones, Walter J. Mattison, John C. Melaniphy, Barnett I. Shur, A. C. Van Soelen, Charles S. Rhyne* and *J. Parker Connor* for the Member Municipalities of the National Institute of Municipal Law Officers; *Charles S. Rhyne* and *J. Parker Connor* for the Alabama League of Municipalities; *Edward Munce* and *Thomas M. Kerrigan* for the Pennsylvania Public Utility Commission; and *Edward S. Kirby* for Public Service Electric & Gas Co.

Per Curiam.

The motion to substitute Humble Oil & Refining Company, a Delaware corporation, in the place of Humble Oil & Refining Company, a Texas corporation, as a party respondent, is granted. The motions of Public Service Electric and Gas Company and the Alabama League of Municipalities for leave to file briefs, as *amici curiae,* are granted.

The petitions for writs of certiorari are granted. The judgment of the Court of Appeals is vacated and the cases are remanded to that court with directions to remand the cases to the Federal Power Commission for reconsideration and redetermination in the light of *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U. S. 378.

MR. JUSTICE DOUGLAS dissents.

FAUBUS, GOVERNOR OF ARKANSAS, *v.* AARON ET AL.

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

No. 458. Decided December 14, 1959.*

173 F. Supp. 944, affirmed.

Thomas Harper and *Walter L. Pope* for appellant in No. 458.

Bruce Bennett, Attorney General of Arkansas, and *Ben J. Harrison,* Chief Assistant Attorney General, for appellants in No. 471.

Wiley A. Branton and *Thurgood Marshall* for appellees.

PER CURIAM.

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

MR. JUSTICE WHITTAKER would note probable jurisdiction.

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*Together with No. 471, *State Board of Education et al.* v. *Aaron et al.,* also on appeal from the same Court.

KING *v.* CONSOLIDATED UNDERWRITERS.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 273, Misc. Decided December 14, 1959.

Appeal dismissed and certiorari denied.
Reported below: —— Tex. ——, 325 S. W. 2d 127.

Richard E. McDaniel for appellant.

Fred Hull for appellee.

PER CURIAM.

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

BLACKBURN *v.* ALABAMA.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 50. Argued December 10, 1959.—Decided January 11, 1960.

After having been discharged from the Armed Forces because of permanent mental disability, and during an unauthorized absence from a Veterans' hospital where he had been classified as 100% "incompetent," petitioner was arrested on a charge of robbery. After eight or nine hours of sustained interrogation in a small room which was at times filled with police officers, he signed a confession written for him by a Deputy Sheriff. Shortly thereafter he exhibited symptoms of insanity and, after proceedings prescribed by state law, he was found insane and committed to a state mental hospital. Over four years later, he was declared mentally competent to stand trial and was tried in a state court on the robbery charge. His confession was admitted in evidence over his objection and he was convicted. *Held:* The record clearly establishes that the confession most probably was not the product of any meaningful act of volition; and its use in obtaining petitioner's conviction deprived him of his liberty without due process of law in violation of the Fourteenth Amendment. Pp. 200–211.

(a) Though it is *possible* that petitioner confessed during a period of complete mental competence, the evidence here establishes the strongest *probability* that he was insane and incompetent at the time he allegedly confessed. Pp. 207–208.

(b) On the record in this case, there was not such a conflict in the evidence as to require this Court to accept the trial judge's conclusion that the confession was voluntary. Pp. 208–209.

(c) Where the involuntariness of a confession is conclusively demonstrated at any stage of a trial, the defendant is deprived of due process by its use in obtaining his conviction—even though important evidence concerning the involuntariness of the confession was not introduced until after admission of the confession into evidence and the defendant's counsel did not request reconsideration of that ruling. Pp. 209–211.

40 Ala. App. ——, 109 So. 2d 736, reversed.

Truman Hobbs argued the cause and filed a brief for petitioner.

Paul T. Gish, Jr., Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *MacDonald Gallion,* Attorney General of Alabama.

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

Jesse Blackburn was tried in the Circuit Court of Colbert County, Alabama, on a charge of robbery, found guilty, and sentenced to 20 years' imprisonment. By far the most damaging piece of evidence against him was his confession, which he persistently maintained had not been made voluntarily.[1] The record seemed to provide substantial support for this contention, and we granted certiorari because of a grave doubt whether the judgment could stand if measured against the mandate of the Fourteenth Amendment to the Constitution of the United States. 359 U. S. 1010. Plenary hearing has hardened this doubt into firm conviction: Jesse Blackburn has been deprived of his liberty without due process of law.

The crime with which Blackburn was charged was the robbery of a mobile store on April 19, 1948. By that date Blackburn, a 24-year-old Negro, had suffered a lengthy siege of mental illness. He had served in the armed forces during World War II, but had been discharged in 1944 as permanently disabled by a psychosis. He was thereupon placed in an institution and given medical treatment over extended periods until February

[1] The only other adverse evidence of any significance tended to prove that Blackburn and two others had traveled to Alabama from Illinois around the date of the robbery; that they were driving a maroon Buick; and that the crime was committed by persons who drove a maroon Buick with an Illinois license plate.

14, 1948, when he was released from a Veterans Administration hospital for a ten-day leave in the care of his sister. He failed to return to the hospital and consequently was discharged on May 24, 1948. The robbery of which he stands convicted occurred during this period of unauthorized absence from a mental ward. Blackburn's medical records further disclose that from 1946 he was classified by the Veterans Administration as 100 percent "incompetent" and that at the time of his discharge from the hospital both his diagnosis of "schizophrenic reaction, paranoid type" and his characterization as "incompetent" remained unchanged.

This does not by any means end the record of Blackburn's history of mental illness. He was arrested shortly following the robbery, and some time after his confession on May 8, 1948, the Sheriff reported to the circuit judge that Blackburn had exhibited symptoms of insanity. The judge thereupon had Blackburn examined by three physicians, and after receiving their report he concluded that there was "reasonable ground to believe that the defendant was insane either at the time of the commission of [the] offense or at the present time." In accordance with the procedure prescribed by Alabama law,[2] the judge then directed the Superintendent of the Alabama State Hospitals to convene a lunacy commission. When the commission unanimously declared Blackburn insane, the judge committed him to the Alabama State Hospital for the mentally ill until he should be "restored to his right mind." [3] Blackburn escaped from the hospital once, only to be apprehended on another charge, declared insane

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[2] Ala. Code, 1940, Tit. 15, § 425.

[3] We later set forth in detail the opinions of the members of this lunacy commission, Drs. Tarwater, Rowe, and Richards. As will appear, the evidence they supplied is of critical importance in this case.

by a second Alabama circuit judge, and sent back to the hospital. Before his return he was examined by another set of doctors who diagnosed his mental condition as "Schizophrenic, reaction, paranoid type" and declared that he was "Insane, incompetent, and should be placed in [an] insane hospital." Except for this brief interlude, Blackburn remained in the hospital for over four years, from July 1948 to October 1952, at which time he was declared mentally competent to stand trial.

At his trial, Blackburn entered pleas of not guilty and not guilty by reason of insanity. He testified that he could remember nothing about the alleged crime, the circumstances surrounding it, his arrest, his confession, his commitment to the State Hospital, or the early period of his treatment there. He denied the truth of the confession, but admitted that the signature on it appeared to be his. According to a 1944 Army medical report, one aspect of Blackburn's illness was recurrent "complete amnesia concerning his behaviour."

When the prosecutor proposed to introduce Blackburn's confession into evidence, his attorney objected, and the judge held a hearing to determine its admissibility. Blackburn's counsel submitted to the judge the depositions of two of the three doctors who had served on the lunacy commission and who had observed Blackburn during his period of treatment at the State Hospital. These depositions incorporated copies of three significant documents. The first was the court order directing examination of Blackburn by a lunacy commission. This order mentioned Blackburn's previous treatment in a mental ward and two of his prior commitments to mental institutions. The second paper was the lunacy commission's report, in which three state-employed doctors had expressed their opinion that Blackburn was insane both at the time of his admission to the hospital on July 29, 1948, and at the time of the robbery on April 19, 1948.

Finally, the depositions set forth the order which permanently committed Blackburn to the State Hospital. In addition to attesting to the accuracy of these documents, the deponents set forth in detail their opinion of Blackburn's mental condition. Dr. Harry S. Rowe, the Assistant Superintendent of the Hospital, who had worked since 1923 exclusively with psychopathic patients, stated that as a member of the lunacy commission he had participated in its investigation and in the submission of its report. Dr. Rowe also said that he had interviewed Blackburn on many occasions since his commitment and that he not only still thought Blackburn had been insane on the date of the crime but also believed he "most probably [had been] insane and incompetent" on May 8, 1948, when he had confessed. These opinions of Dr. Rowe were seconded by Dr. J. S. Tarwater, a psychiatrist who was Superintendent of the Alabama State Hospitals.

To counter this evidence, the prosecutor introduced the deposition of the third member of the lunacy commission, Dr. A. M. Richards, a general practitioner who had spent the previous twelve years treating mental patients and who was a staff member of the State Hospital. The doctor's answers to petitioner's interrogatories were in harmony with the depositions of Drs. Tarwater and Rowe: Dr. Richards acknowledged that he had served on the lunacy commission, that he had signed the report, and that he had concurred in the finding that Blackburn had been insane on the date of the crime. He disclaimed having any other information of value, and noted in response to a cross-interrogatory that Blackburn had been "up on the criminal ward and he was such a nuisance until I didn't see him often." In his answers to other cross-interrogatories, however, Dr. Richards executed an astonishing about-face by opining that Blackburn had been "normal" since he first saw him, that his mental

condition was "normal" on the date of the crime and "good" on the date of the confession, and that he had never seen Blackburn suffer "psychotic episodes." Even this portion of the deposition is not without incongruity, however, for Dr. Richards' response to one cross-interrogatory was that he did *not* believe Blackburn had experienced lucid intervals.

Evidence concerning the circumstances surrounding the making of the confession was supplied by the Chief Deputy Sheriff. He testified that the interrogation had consumed "something like, maybe five or six hours" on May 8, 1948, and that no one had threatened Blackburn in any way. The Chief Deputy composed the statement in narrative form on the basis of Blackburn's answers to the various questions asked by the officers, and Blackburn signed the confession two days later. When asked about Blackburn's behavior, the witness responded that Blackburn had "answered like any normal person I have examined." After the judge ruled that the confession would be admitted, but before it was actually admitted, the Chief Deputy described in somewhat greater detail—this time to the jury—the manner in which the confession had been obtained. It developed that the examination had begun at approximately one o'clock in the afternoon and had continued until ten or eleven o'clock that evening, with about an hour's break for dinner. Thus it was established that the questioning went on for eight or nine hours rather than five or six. Apparently most of the interrogation took place in closely confined quarters—a room about four by six or six by eight feet—in which as many as three officers had at times been present with Blackburn. The Chief Deputy conceded that Blackburn said he had been a patient in a mental institution, but claimed that Blackburn also stated he had been released, and avowed that Blackburn "talked sensible and give [*sic*] sensible answers," was clear-eyed, and did not appear nervous.

Blackburn's counsel again objected to admission of the statement, but the objection was overruled and the confession was submitted to the jury. After the Alabama Court of Appeals affirmed the judgment and held that the Fourteenth Amendment did not require exclusion of the confession, Blackburn petitioned this Court for certiorari.[4] Thus was the constitutional issue raised, decided, and presented to this Court for review.

After according all of the deference to the trial judge's decision which is compatible with our duty to determine constitutional questions,[5] we are unable to escape the conclusion that Blackburn's confession can fairly be characterized only as involuntary. Consequently the conviction must be set aside, since this Court, in a line of decisions beginning in 1936 with *Brown* v. *Mississippi,* 297 U. S. 278, and including cases by now too well known and too numerous to bear citation, has established the principle that the Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction.

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[4] The Alabama Court of Appeals wrote two opinions in this case. After the first, 38 Ala. App. 143, 88 So. 2d 199, and after the Alabama Supreme Court had denied certiorari, 264 Ala. 694, 88 So. 2d 205, we granted certiorari, 352 U. S. 924, and later vacated the judgment and remanded the case to the Court of Appeals because we were uncertain whether that court had passed upon the federal question. 354 U. S. 393. The Court of Appeals reaffirmed the judgment of conviction, 40 Ala. App. ——, 109 So. 2d 736, and the Alabama Supreme Court again denied certiorari, 268 Ala. 699, 109 So. 2d 738. The case was then ripe for our review, and we granted certiorari once more. 359 U. S. 1010.

[5] It is well established, of course, that although this Court will accord respect to the conclusions of the state courts in cases of this nature, we cannot escape the responsibility of scrutinizing the record ourselves. *E. g., Spano* v. *New York,* 360 U. S. 315, 316; *Pierre* v. *Louisiana,* 306 U. S. 354, 358; *Chambers* v. *Florida,* 309 U. S. 227, 228–229.

Since *Chambers* v. *Florida,* 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."[6] A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror. Thus the range of inquiry in this type of case must be broad, and this Court has insisted that the judgment in each instance be based upon consideration of "[t]he totality of the circumstances." *Fikes* v. *Alabama,* 352 U. S. 191, 197.

It is also established that the Fourteenth Amendment forbids "fundamental unfairness in the use of evidence, whether true or false." *Lisenba* v. *California,* 314 U. S. 219, 236. Consequently, we have rejected the argument that introduction of an involuntary confession is immaterial where other evidence establishes guilt or corroborates the confession. *E. g., Spano* v. *New York,* 360 U. S. 315, 324; *Payne* v. *Arkansas,* 356 U. S. 560, 567–568; *Watts* v. *Indiana,* 338 U. S. 49, 50, n. 2; *Haley* v. *Ohio,* 332 U. S. 596, 599. As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his

[6] *E. g., Spano* v. *New York,* 360 U. S. 315; *Fikes* v. *Alabama,* 352 U. S. 191; *Watts* v. *Indiana,* 338 U. S. 49; *Turner* v. *Pennsylvania,* 338 U. S. 62; *Harris* v. *South Carolina,* 338 U. S. 68; *Ashcraft* v. *Tennessee,* 322 U. S. 143.

will. This insistence upon putting the government to the task of proving guilt by means other than inquisition was engendered by historical abuses which are quite familiar. See *Chambers* v. *Florida, supra,* at 235–238; *Watts* v. *Indiana, supra,* at 54–55.

But neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, "The abhorrence of society to the use of involuntary confessions . . . 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." *Spano* v. *New York, supra,* at 320–321. Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.

In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. And when the other pertinent circumstances are considered—the eight- to nine-hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's friends, relatives, or legal counsel; the composi-

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tion of the confession by the Deputy Sheriff rather than by Blackburn—the chances of the confession's having been the product of a rational intellect and a free will become even more remote and the denial of due process even more egregious.

It is, of course, quite true that we are dealing here with probabilities. It is *possible,* for example, that Blackburn confessed during a period of complete mental competence. Moreover, these probabilities are gauged in this instance primarily by the opinion evidence of medical experts. But this case is novel only in the sense that the evidence of insanity here is compelling, for this Court has in the past reversed convictions where psychiatric evidence revealed that the person who had confessed was "of low mentality, if not mentally ill," *Fikes* v. *Alabama, supra,* at 196, or had a "history of emotional instability," *Spano* v. *New York, supra,* at 322. And although facts such as youth and lack of education are more easily ascertained than the imbalance of a human mind,[7] we cannot say that this has any appreciable bearing upon the difficulty of the ultimate judgment as to the effect these various circumstances have upon independence of will, a judgment which must by its nature always be one of probabilities.

Of course, this case is no different from other involuntary confession cases in another respect—where there is a genuine conflict of evidence great reliance must be placed upon the finder of fact. It is this proposition upon which respondent's principal argument rests, for the trial judge's decision is said to be inviolable because of an alleged conflict between the depositions of Dr. Richards on the one hand and Drs. Tarwater and Rowe on the other. We need not in this case consider the relevance

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[7] Lack of education is a factor frequently present in this type of case; and in *Haley* v. *Ohio, supra,* the fact that the accused was a 15-year-old youth weighed heavily in the Court's judgment.

of the fact that the trial judge, like ourselves, had no opportunity to witness the demeanor of these doctors. It is sufficient to observe that the deposition of Dr. Richards is in such hopeless internal conflict that it raises no genuine issue of fact. It would be unreasonable in the extreme to base a determination upon those portions in which the doctor proclaimed Blackburn normal while ignoring those portions in which he judged Blackburn insane. Nor have we overlooked the testimony of the Chief Deputy that Blackburn "talked sensible," was clear-eyed, and did not appear nervous. But without any evidence in the record indicating that these observed facts bore any relation to Blackburn's disease or were symptoms of a remission of his illness, we are quite unable to conclude that such an inference can be drawn.[8] The Fourteenth Amendment would be an illusory safeguard indeed if testimony of this nature were held to raise a "conflict" which would preclude appellate review of a case where the evidence of insanity is as compelling as it is here.

We take note also of respondent's argument that our decision must be predicated solely upon the evidence introduced by defendant before admission of the confession. As we have indicated, this evidence consisted of the depositions, the copies of the documents incorporated therein, and the testimony of the Chief Deputy. The other relevant evidence, which included the detailed medical record of Blackburn's mental illness prior to his arrest, was introduced at a later stage of the trial. It is quite true that Blackburn's counsel, so far as the record shows, made no request that the judge reconsider his

[8] It is interesting to note that Blackburn's medical records disclose that in 1944 he was given a diagnosis of "Psychosis, manic depressive, manic phase," and yet was said to answer questions "relevantly and coherently." Dr. Rowe stated that it was clear Blackburn "was suffering from schizophrenia of the paranoic type. They . . . entertain delusions . . . ."

ruling on the basis of this additional data. The Alabama Court of Appeals decided that under these circumstances this further documentation of Blackburn's insanity was not, under state law, material to the Fourteenth Amendment question.

Even if respondent's argument were meritorious our decision would be the same, since the evidence introduced prior to admission of the confession was ample to establish its involuntariness. But we reject the notion that the scope of our review can be thus restricted. Where the involuntariness of a confession is conclusively demonstrated at any stage of a trial, the defendant is deprived of due process by entry of judgment of conviction without exclusion of the confession. An argument similar to respondent's was disposed of in *Brown* v. *Mississippi,* 297 U. S. 278, in the following words:

> "That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. . . . We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient. . . .
>
> "In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet

> it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process . . . ." *Id.*, at 286–287.

Just as in *Brown,* the evidence here clearly establishes that the confession most probably was not the product of any meaningful act of volition. Therefore, the use of this evidence to convict Blackburn transgressed the imperatives of fundamental justice which find their expression in the Due Process Clause of the Fourteenth Amendment, and the judgment must be

Reversed.

MR. JUSTICE CLARK concurs in the result.

STIRONE *v.* UNITED STATES.

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

No. 35. Argued November 9–10, 1959.—Decided January 11, 1960.

Petitioner was indicted and convicted in a Federal District Court for interfering with interstate commerce by extortion, in violation of the Hobbs Act, 18 U. S. C. § 1951. The only interstate commerce mentioned in the indictment was the importation into Pennsylvania of sand to be used in building a steel plant there; but the trial judge permitted the introduction of evidence to show interference also with the exportation from Pennsylvania of steel to be manufactured in the new plant, and he instructed the jury that it could base a conviction upon interference with either the importation of sand or the exportation of steel. *Held:* The conviction is reversed. Pp. 213–219.

(a) Since the indictment did not charge interference with the exportation of steel from the State, it was prejudicial error to submit to the jury the question whether the extortion interfered with the exportation of steel. Pp. 215–219.

(b) The variance between pleading and proof here involved was not insignificant and may not be dismissed as harmless error, because it deprived petitioner of his substantial right to be tried for a felony only on charges presented in an indictment returned by a grand jury. Pp. 217–218.

(c) Since the jury might have based the conviction on a finding of interference with the exportation of steel, the conviction must be reversed. P. 219.

262 F. 2d 571, reversed.

Michael von Moschzisker argued the cause for petitioner. With him on the brief was *Vincent M. Casey.*

Wayne G. Barnett argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Ralph S. Spritzer, Beatrice Rosenberg* and *Theodore George Gilinsky.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner Nicholas Stirone was indicted and convicted in a federal court for unlawfully interfering with interstate commerce in violation of the Hobbs Act.[1] The crucial question here is whether he was convicted of an offense not charged in the indictment.

So far as relevant to this question the indictment charged the following:

From 1951 until 1953, a man by the name of William G. Rider had a contract to supply ready-mixed concrete from his plant in Pennsylvania to be used for the erection of a steel-processing plant at Allenport, Pennsylvania. For the purpose of performing this contract Rider

> "caused supplies and materials [sand] to move in interstate commerce between various points in the United States and the site of his plant for the manufacture or mixing of ready mixed concrete, and more particularly, from outside the State of Pennsylvania into the State of Pennsylvania."

The indictment went on to charge that Stirone, using his influential union position,

> "did . . . unlawfully obstruct, delay [and] affect interstate commerce between the several states of

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[1] 62 Stat. 793, 18 U. S. C. § 1951.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

. . . . . .

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

> the United States and the movement of the aforesaid materials and supplies in such commerce, by extortion . . . of $31,274.13 . . . induced by fear and by the wrongful use of threats of labor disputes and threats of the loss of, and obstruction and prevention of, performance of his contract to supply ready mixed concrete."

The district judge, over petitioner's objection as to its materiality and relevancy, permitted the Government to offer evidence of an effect on interstate commerce not only in sand brought into Pennsylvania from other States but also in steel shipments from the steel plant in Pennsylvania into Michigan and Kentucky. Again over petitioner's objection the trial judge charged the jury that so far as the interstate commerce aspect of the case was concerned, Stirone's guilt could be rested either on a finding that (1) sand used to make the concrete "had been shipped from another state into Pennsylvania" or (2) "Mr. Rider's concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce . . ." from Pennsylvania into other States. On motion of petitioner for arrest of judgment, acquittal or new trial, the District Court held that "A sufficient foundation for introduction of both kinds of proof was laid in the indictment." 168 F. Supp. 490, 495. The Court of Appeals affirmed, all the judges agreeing that interference with the sand movements into Pennsylvania was barred by the Hobbs Act. 262 F. 2d 571. Judge Hastie and Chief Judge Biggs disagreed with the court's holding that Stirone could be tried and convicted for interference with the possible future shipments of steel from Pennsylvania to Michigan and Kentucky. 262 F. 2d, at 578, 580. They were of opinion that no interference with interstate steel shipments was charged in the indictment and that in any event it is an unreasonable extension of the Act to make a federal offense out of

extortion from a man merely because he is supplying concrete to build a mill which after construction will produce steel, a part of which may, if processed, move in interstate commerce.

We agree with the Court of Appeals that Rider's dependence on shipments of sand from outside Pennsylvania to carry on his ready-mixed concrete business entitled him to the Hobbs Act's protection against interruption or stoppage of his commerce in sand by extortion of the kind that the jury found the petitioner had committed here. That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference "in any way or degree." 18 U. S. C. § 1951 (a). Had Rider's business been hindered or destroyed, interstate movements of sand to him would have slackened or stopped. The trial jury was entitled to find that commerce was saved from such a blockage by Rider's compliance with Stirone's coercive and illegal demands. It was to free commerce from such destructive burdens that the Hobbs Act was passed. *United States* v. *Green,* 350 U. S. 415, 420.

Whether prospective steel shipments from the new steel mills would be enough, alone, to bring this transaction under the Act is a more difficult question. We need not decide this, however, since we agree with the dissenting judges in the Court of Appeals that it was error to submit that question to the jury and that the error cannot be dismissed as merely an insignificant variance between allegation and proof and thus harmless error as in *Berger* v. *United States,* 295 U. S. 78. The crime charged here is a felony and the Fifth Amendment requires that prosecution be begun by indictment.

Ever since *Ex parte Bain,* 121 U. S. 1, was decided in 1887 it has been the rule that after an indictment has been

returned its charges may not be broadened through amendment except by the grand jury itself. In that case, the court ordered that some specific and relevant allegations the grand jury had charged be stricken from the indictment so that Bain might be convicted without proof of those particular allegations.[2] In holding that this could not be done, Mr. Justice Miller, speaking for the Court, said:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." 121 U. S. 1, 10.

The Court went on to hold in *Bain:*

> "that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected

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[2] Bain was indicted for making a false statement "with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs of said association . . . ." After sustaining demurrers of Bain to the indictment, the trial court went on to say that "thereupon, on motion of the United States, by counsel, the court orders that the indictment be amended by striking out the words '*the Comptroller of the Currency and*' therein contained." By this amendment it was intended to permit conviction of Bain without proof that he had deceived the Comptroller as the grand jury had charged.

> by the constitutional provision, at the mercy or control of the court or prosecuting attorney . . . ." 121 U. S. 1, 13.

The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also *United States* v. *Norris,* 281 U. S. 619, 622. Cf. *Clyatt* v. *United States,* 197 U. S. 207, 219, 220. Yet the court did permit that in this case. The indictment here cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States nor does the Court of Appeals appear to have so read it. The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. Compare *Ford* v. *United States,* 273 U. S. 593, 602; *Goto* v. *Lane,* 265 U. S. 393, 402. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare *Berger* v.

United States, 295 U. S. 78. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.[3] Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

Here, as the trial court charged the jury, there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. The right

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[3] "Yet the institution [the grand jury] was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." *Ex parte Bain,* 121 U. S. 1, 11. See also *Costello* v. *United States,* 350 U. S. 359, 362, 363, n. 6.

to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, as in the *Bain* case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error. Cf. *Cole* v. *Arkansas,* 333 U. S. 196; *De Jonge* v. *Oregon,* 299 U. S. 353.

Reversed.

UNITED STATES *v.* ROBINSON ET AL.

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

No. 16. Argued December 8, 1959.—Decided January 11, 1960.

Under the Federal Rules of Criminal Procedure, the filing of a notice of appeal in a criminal case after expiration of the time prescribed in Rule 37 (a)(2) does not confer jurisdiction upon the Court of Appeals, even though the District Court, proceeding under Rule 45 (b), has found that the late filing of the notice of appeal was the result of "excusable neglect." Pp. 220–230.

(a) To recognize a late notice of appeal is actually to "enlarge" the period for taking an appeal, which is explicitly forbidden by Rule 45 (b). Pp. 224–229.

(b) The policy question whether greater flexibility should be allowed with respect to the time for taking an appeal must be resolved through the rule-making process, not by judicial decision; and it cannot be resolved by the Court of Appeals. Pp. 229–230.

104 U. S. App. D. C. 200, 260 F. 2d 718, reversed.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, J. Dwight Evans, Jr.* and *Theodore George Gilinsky.*

I. William Stempil argued the cause and filed a brief for respondents.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Respondents were indicted for murder in the District Court for the District of Columbia, and upon a trial were found guilty by a jury of the lesser included offense of manslaughter. After their motions for a new trial were considered and denied, the court entered judgment of conviction on May 7, 1958. Twenty-one days thereafter, on May 28, respondents separately filed in the District Court

their notices of appeal. On the same day they each asked, and were granted by the District Court, leave to prosecute their appeals *in forma pauperis*. On June 30, the Government moved the Court of Appeals to dismiss respondents' appeals for want of jurisdiction, because their notices of appeal were not filed within 10 days after entry of the judgment. In opposition to the motion, affidavits of respondent Travit Robinson, and of counsel for both respondents, were filed in the Court of Appeals. They tended to show that the late filing of the notices of appeal was due to a misunderstanding as to whether the notices were to be filed by respondents themselves or by their counsel.[1]

The Court of Appeals, one judge dissenting, held that the notices of appeal, although filed 11 days after expiration of the time prescribed in Rule 37 (a)(2) of the Federal Rules of Criminal Procedure,[2] were sufficient to confer jurisdiction of the appeals if the District Court actually had found, under Rule 45 (b), that the failure to file the notices of appeal within 10 days after entry of the judg-

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[1] Travit Robinson's affidavit was, in essence, as follows: On "the day of sentencing, I advised my attorney that I was going to appeal the case . . . . I had told him that from [what] other inmates at the District Jail [had told me] I knew I could appeal the judgment but [I] did not file the necessary appeal paper, thinking that my attorney would do it, while I now [understand] he thought I would do it . . . . We misunderstood each other and I now find that I gave him the wrong impression as to what I wanted done and that he misunderstood what I was going to do or wanted to do."

The affidavit of respondents' counsel substantially conformed to Travit Robinson's affidavit and further recited: "I was under the impression that he was going to [file the notice of appeal] without me, [and also] I neglected to differentiate the rules as to appealing this type of a case [from the Rules applying to the appeal] of a civil case."

[2] All references to Rules are to the Federal Rules of Criminal Procedure unless otherwise stated.

ment "was the result of excusable neglect." Being unable to determine from the record whether the District Court had so found, the Court of Appeals, on October 2, remanded to the District Court "for supplementation of the record" on that score, meanwhile holding in abeyance the Government's motion to dismiss. On October 8, the District Court "*ordered* that the record reflect that the appeals were allowed and failure to act was due to excusable neglect under Rule 45 (b) of the Federal Rules of Criminal Procedure." On November 5, the Court of Appeals *en banc,* two judges dissenting, denied the Government's petition for rehearing, 104 U. S. App. D. C. 200, 260 F. 2d 718. Because of the importance of the question to the proper and uniform administration of the Federal Rules of Criminal Procedure, we granted certiorari. 358 U. S. 940.

The single question presented is whether the filing of a notice of appeal in a criminal case after expiration of the time prescribed in Rule 37 (a)(2) confers jurisdiction of the appeal upon the Court of Appeals if the District Court, proceeding under Rule 45 (b), has found that the late filing of the notice of appeal was the result of excusable neglect.

There being no dispute about the fact that the notices of appeal were not filed within the 10-day period prescribed by Rule 37 (a)(2),[3] the answer to the question

[3] Rule 37 (a)(2) of Fed. Rules Crim. Proc. provides:

"Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. . . ."

presented depends upon the proper interpretation of Rule 45 (b). It provides:

> "*Enlargement.* When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal."

In interpreting that Rule, the Court of Appeals took the view that, although "the District Court has no authority to grant a greater period than ten days for taking an [appeal, it] may, however, if satisfied that the failure to note an appeal within ten days is excusable, permit late filing." It thought that there was "ample justification in reason for different treatment of pre-expiration and post-expiration applications"; that if a defendant "can make a timely application for an extension of time, he can readily and with less effort file the notice of appeal itself." But if, "for some cause amounting legally to 'excusable neglect' the party fails to take any action during the prescribed time, the rule seems plainly to allow the District Court discretion to permit him to file a late notice of appeal." It thought that so doing would not be to "enlarge" the period for taking an appeal, but rather would be only to "permit the act to be done" after expiration of the specified period. This conclusion has, at least, enough surface plausibility to require a detailed examination of the language, judicial

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interpretations, and history of Rule 45 (b) and the related Federal Rules of Criminal Procedure.

On its face, Rule 45 (b) appears to be quite plain and clear. It specifically says that "the court may not enlarge . . . the period for taking an appeal." We think that to recognize a late notice of appeal is actually to "enlarge" the period for taking an appeal. Giving the words of 45 (b) their plain meaning, it would seem that the conclusion of the Court of Appeals is in direct conflict with that Rule. No authority was cited by the Court of Appeals in support of its conclusion, nor is any supporting authority cited by respondents here. The Government insists, it appears correctly, that there is no case that supports the Court of Appeals' conclusion. Every other decision to which we have been cited, and that we have found, holds that the filing of a notice of appeal within the 10-day period prescribed by Rule 37 (a)(2) is mandatory and jurisdictional.[4]

It is quite significant that Rule 45 (b) not only prohibits the court from enlarging the period for taking an appeal, but, by the same language in the same sentence, also prohibits enlargement of the period for taking any action under Rules 33, 34 and 35, except as provided in

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[4] See, *e. g., Martin* v. *United States,* 263 F. 2d 516 (C. A. 10th Cir.); *Bryant* v. *United States,* 261 F. 2d 229 (C. A. 6th Cir.); *United States* v. *Isabella,* 251 F. 2d 223 (C. A. 2d Cir.); *Banks* v. *United States,* 240 F. 2d 302 (C. A. 9th Cir.); *Wagner* v. *United States,* 220 F. 2d 513 (C. A. 4th Cir.); *Kirksey* v. *United States,* 94 U. S. App. D. C. 393, 219 F. 2d 499; *Brant* v. *United States,* 210 F. 2d 470 (C. A. 5th Cir.); *McIntosh* v. *United States,* 204 F. 2d 545 (C. A. 5th Cir.); *Marion* v. *United States,* 171 F. 2d 185 (C. A. 9th Cir.); *Swihart* v. *United States,* 169 F. 2d 808 (C. A. 10th Cir.); *United States* v. *Froehlich,* 166 F. 2d 84 (C. A. 2d Cir.).

It is thus made to appear that the court below has itself recognized and enforced this Rule in *Kirksey* v. *United States, supra,* as it did also in *Richards* v. *United States,* 89 U. S. App. D. C. 354, n. 2, at 356, 192 F. 2d 602, n. 2, at 604.

those Rules. That language is: ". . . but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those Rules, or the period for taking an appeal." If, as the Court of Appeals has held, the delayed filing of a notice of appeal—found to have resulted from "excusable neglect"—is sufficient to confer jurisdiction of the appeal, it would consistently follow that a District Court may, upon a like finding, permit delayed filing of a motion for new trial under Rule 33,[5] of a motion in arrest of judgment under Rule 34,[6] and the reduction of sentence under Rule 35,[7] at any time—months or even years—after expiration of the periods specifically prescribed in those Rules.

This is not only contrary to the language of those Rules, but also contrary to the decisions of this Court. In *United States* v. *Smith,* 331 U. S. 469, it was held that the power

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[5] Rule 33 of Fed. Rules Crim. Proc., in pertinent part, provides:

". . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix *during* the 5-day period." (Emphasis added.)

[6] Rule 34 of Fed. Rules Crim. Proc. provides:

"The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix *during* the 5-day period." (Emphasis added.)

[7] Rule 35 of Fed. Rules Crim. Proc. provides:

"The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

of the District Court *sua sponte* to grant a new trial under Rule 33 is limited to the time fixed in that Rule. There, quite like here, it was argued "that because the literal language of the Rule places the five-day limit only on the making of the motion [for a new trial], it does not limit the power of the court later to grant [a new trial] . . . ." 331 U. S., at 473. This Court rejected the contention that such power "lingers on indefinitely," and pointed out that the Rules, in abolishing the limitation based on the Court Term, did not substitute indefiniteness, but prescribed precise times within which the power of the courts must be confined. 331 U. S., at 474. See also *Marion* v. *United States,* 171 F. 2d 185 (C. A. 9th Cir.); *Drown* v. *United States,* 198 F. 2d 999 (C. A. 9th Cir.). The same rule must apply with respect to the time within which a motion in arrest of judgment may be filed under Rule 34. Similarly, it has been held that a District Court may not reduce a sentence under Rule 35 after expiration of the 60-day period prescribed by that Rule regardless of excuse. *United States* v. *Hunter,* 162 F. 2d 644 (C. A. 7th Cir.). Cf. *Affronti* v. *United States,* 350 U. S. 79.

The right of appeal in criminal cases in federal courts is of relatively recent origin. *Carroll* v. *United States,* 354 U. S. 394, 400. By the Act of February 24, 1933, 47 Stat. 904 (now 18 U. S. C. § 3772) Congress first gave this Court authority to promulgate rules regulating the time and manner for taking appeals in criminal cases. One of the principal purposes was to eliminate delays in such appeals. H. R. Rep. No. 2047, 72d Cong., 2d Sess., to accompany S. 4020. The first Criminal Appeals Rules promulgated under that Act were the 13 Rules effective September 1, 1934. 292 U. S. 661–670. Rule III provided a 5-day time limit for the taking of an appeal from a judgment of conviction. It was uniformly held that Rule III was mandatory and jurisdictional, and appeals

not taken within that time appear always to have been dismissed regardless of excuse.[8]

From this review, it would seem that there is nothing in the language of Rule 45 (b), or in the judicial interpretations of that Rule or its predecessor, which supports the conclusion of the Court of Appeals. We turn, then, to the history of Rule 45 (b) to see whether any support for the court's conclusion can be found in that source.

Under the Act of June 29, 1940, 54 Stat. 688, as amended (now 18 U. S. C. § 3771), this Court was authorized to prescribe Rules of Criminal Procedure to and including verdict, which would become effective upon passive acceptance by Congress. Under that Act and the previous authority (the Act of February 24, 1933, 47 Stat. 904—now 18 U. S. C. § 3772), and with the aid of an advisory committee, this Court promulgated the Federal Rules of Criminal Procedure. Rules 32 through 39 were made effective by order of the Court, 327 U. S. 825, and the remaining Rules became effective by acceptance of Congress. What are now Rules 37 (a)(2) and 45 (b) underwent a number of draft changes before adoption. The first preliminary draft of Rule 37 (a)(2) changed from 5 days to 10 days the time limit for the taking of an appeal, but of more significance is the fact that the preliminary draft of that Rule stated, in effect, that when a court imposes sentence upon a defendant, represented by appointed counsel or not represented by any counsel,

[8] See, *e. g.*, *Nix* v. *United States*, 131 F. 2d 857 (C. A. 5th Cir.); *United States* v. *Infusino*, 131 F. 2d 617 (C. A. 7th Cir.); *Miller* v. *United States*, 104 F. 2d 343 (C. A. 5th Cir.); *United States* v. *Tousey*, 101 F. 2d 892 (C. A. 7th Cir.); *O'Gwin* v. *United States*, 90 F. 2d 494 (C. A. 9th Cir.); *Burr* v. *United States*, 86 F. 2d 502 (C. A. 7th Cir.); *Fewox* v. *United States*, 77 F. 2d 699 (C. A. 5th Cir.). And compare *United States ex rel. Coy* v. *United States*, 316 U. S. 342, and *United States* v. *Hark*, 320 U. S. 531, 533.

the court shall ask the defendant whether he wishes to appeal and, if he answers in the affirmative, "the court shall direct the clerk forthwith to prepare, file, and serve on behalf of the defendant a notice of appeal *or shall extend the time specified by rule for the filing of a notice of appeal.*" [9] (Emphasis added.) In conformity with that draft proposal, the preliminary draft of what is now Rule 45 (b) [10] stated: ". . . but it may not enlarge . . . the period for taking an appeal except as provided in Rule 35 (a)(2)." The limited provision for an extension of the time within which to appeal that was contained in the first preliminary draft of those Rules was eliminated by the second preliminary draft [11] and never reappeared. This seems almost conclusively to show a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal.

But there is more. The prototype for Rule 45 (b) was Rule 6 of the Federal Rules of Civil Procedure.[12] When the original Criminal Rules were being prepared, the limiting clause of Rule 6 (b) of the Federal Rules of Civil Procedure stated: ". . . but it may not enlarge the period for taking any action under Rule 59, except as stated in sub-

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[9] Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, 1943, Appeal Rule then No. 35 (a)(2), p. 152.

[10] What became Rule 45 (b) was then treated as Rule 41 (b). *Id.*, at p. 179. The note to this proposed Rule stated that it ". . . is an adaptation for all criminal proceedings of Fed. Rules Civ. Proc., Rule 6 (Time)." *Id.*, at p. 180.

[11] Federal Rules of Criminal Procedure, Second Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, February 1944, Appeal Rule then No. 39 (a)(2), p. 135.

[12] The Notes of Advisory Committee on Rules of Criminal Procedure (Rule 45), state, "The rule is in substance the same as Rule 6 of the Federal Rules of Civil Procedure . . . ."

division (c) thereof, or the period for taking an appeal as provided by law." It had consistently been held that Civil Rule 6 (b) was mandatory and jurisdictional and could not be extended regardless of excuse.[13] It must be presumed that the Advisory Committee and the Justices of this Court were aware of the limiting language of Civil Rule 6 (b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure. No support for the conclusion of the Court of Appeals can be found in this history of Rule 45 (b).

Rule 45 (b) says in plain words that ". . . the court may not enlarge . . . the period for taking an appeal." The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional. The history of Rule 45 (b) shows that consideration was given to the matter of vesting a limited discretion in the courts to grant an extension of time for the taking of an appeal, but, upon further consideration, the idea was deliberately abandoned. It follows that the plain words, the judicial interpretations, and the history, of Rule 45 (b) not only fail to support, but actually oppose, the conclusion of the Court of Appeals, and therefore its judgment cannot stand.

That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. *United*

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[13] *United Drug Co.* v. *Helvering,* 108 F. 2d 637 (C. A. 2d Cir.); *Alexander* v. *Special School District of Booneville,* 132 F. 2d 355 (C. A. 8th Cir.); *Tinkoff* v. *West Publishing Co.,* 138 F. 2d 607 (C. A. 7th Cir.); *Lamb* v. *Shasta Oil Co.,* 149 F. 2d 729 (C. A. 5th Cir.); *Federal Deposit Insurance Corporation* v. *Congregation Poiley Tzedeck,* 159 F. 2d 163 (C. A. 2d Cir.).

States v. *Isthmian S. S. Co.*, 359 U. S. 314. If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possibility would unnecessarily [14] produce intolerable uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent, as they share the view of Judge Bazelon, 104 U. S. App. D. C. 200, 201, 260 F. 2d 718, 719, that an extension of time, granted after the 10-day period for an appeal has passed, is not an "enlargement" of the time in the narrow sense in which Rule 45 (b) uses the word.

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[14] The allowance of an appeal months or years after expiration of the prescribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time, and to reduce a sentence within 60 days after the judgment of conviction becomes final; the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U. S. C. § 2255; and proceedings by way of writ of error *coram nobis*.

MITCHELL, SECRETARY OF LABOR, *v.* OREGON FROZEN FOODS CO. ET AL.

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

No. 33. Argued November 17, 1959.—Decided January 11, 1960.

In view of ambiguities in the record as to the issues, certiorari dismissed as improvidently granted.

Reported below: 254 F. 2d 116.

Bessie Margolin argued the cause for petitioner. With her on the brief were *Solicitor General Rankin, Wayne G. Barnett, Harold C. Nystrom* and *Sylvia S. Ellison.*

Martin P. Gallagher argued the cause for respondents. With him on the brief was *Orval Yokom.*

Edward Brown Williams filed a brief for the National Association of Frozen Food Packers, as *amicus curiae,* in support of respondents.

PER CURIAM.

In view of ambiguities in the record as to the issues sought to be tendered, made apparent in oral argument and the memoranda of counsel subsequently filed at the Court's request, the writ of certiorari is dismissed as improvidently granted.

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

STUART ET AL. *v.* WILSON, ATTORNEY GENERAL OF TEXAS, ET AL.

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

No. 495. Decided January 11, 1960.

Appeal dismissed for want of a substantial federal question.

James L. McNees, Jr. for appellants.

Will Wilson, Attorney General of Texas, and *John Wildenthal, Jr.* and *Tom I. McFarling,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

LEWIS *v.* MOORE ET AL.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 540. Decided January 11, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 250 N. C. 77, 108 S. E. 2d 26.

Herman L. Taylor and *Samuel S. Mitchell* for appellant.

PER CURIAM.

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

IN RE SARNER.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 490. Decided January 11, 1960.

Appeal dismissed.

Reported below: 30 N. J. 566, 154 A. 2d 452.

Aaron W. Nussman for appellant.

David D. Furman, Attorney General of New Jersey, and *Morton I. Greenberg,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to use the record in No. 803, October Term 1958, is granted. The motion to dismiss is granted and the appeal is dismissed as moot.

IN RE McDANIEL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 252, Misc. Decided January 11, 1960.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

KINSELLA, WARDEN, *v.* UNITED STATES EX REL. SINGLETON.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 22. Argued October 22, 1959.—Decided January 18, 1960.

Article 2 (11) of the Uniform Code of Military Justice, providing for the trial by court-martial of "all persons . . . accompanying the armed forces" of the United States in foreign countries, cannot constitutionally be applied in peacetime to the trial of a civilian dependent accompanying a member of the armed forces overseas and charged with having committed a noncapital offense there. *Reid* v. *Covert*, 354 U. S. 1. Pp. 235–249.

(a) In providing for trials by courts-martial, Congress was exercising the power granted by Art. I, § 8, cl. 14 of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," and the test for court-martial jurisdiction is one of status—*i. e.*, whether the accused is a person who can be regarded as falling within the term "land and naval Forces." *Toth* v. *Quarles*, 350 U. S. 11; *Reid* v. *Covert*, 354 U. S. 1. Pp. 236–241.

(b) Under Art. I, § 8, cl. 14, no constitutional distinction can be drawn between capital and noncapital offenses; if a civilian cannot be tried by court-martial in peacetime for a capital offense, he cannot be tried by court-martial in peacetime for a noncapital offense. Pp. 241–248.

(c) The Necessary and Proper Clause, Art. I, § 8, cl. 18, does not enable Congress to broaden the term "land and naval Forces" in Clause 14 to include civilian dependents accompanying members of the armed forces overseas, even in providing for trials for noncapital offenses. Pp. 247–248.

(d) The dependent wife of a soldier here involved was entitled to the safeguards of Article III and the Fifth and Sixth Amendments of the Constitution, and her conviction by court-martial was not constitutionally permissible. P. 249.

164 F. Supp. 707, affirmed.

Harold H. Greene argued the cause for appellant. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General White, Acting Assistant*

Attorney General Ryan, William A. Kehoe, Jr., Peter S. Wondolowski, William M. Burch II and *D. Robert Owen.*

Frederick Bernays Wiener argued the cause and filed a brief for appellee.

MR. JUSTICE CLARK delivered the opinion of the Court.

This direct appeal tests the constitutional validity of peacetime court-martial trials of civilian persons "accompanying the armed forces outside the United States" [1] and charged with noncapital offenses under the Uniform Code of Military Justice, 10 U. S. C. § 802, 70A Stat. 37. Appellee contends that the dependent wife of a soldier can be tried only in a court that affords her the safeguards of Article III and of the Fifth and Sixth Amendments of the Constitution. The trial court held Article 2 (11) of the Code unconstitutional as applied to civilian dependents accompanying the armed forces overseas and charged with noncapital offenses, 164 F. Supp. 707, and the Government appealed. We noted probable jurisdiction and permitted appellee to proceed *in forma pauperis*. 359 U. S. 903.

The appellee is the mother of Mrs. Joanna S. Dial, the wife of a soldier who was assigned to a tank battalion of the United States Army. The Dials and their three children lived in government housing quarters at Baumholder, Germany. In consequence of the death of one of their children, both of the Dials were charged with

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[1] Art. 2. "The following persons are subject to this chapter:

. . . . . .

"(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

unpremeditated murder, under Article 118 (2) of the Uniform Code of Military Justice. Upon the Dials' offer to plead guilty to involuntary manslaughter under Article 119 of the Code, both charges were withdrawn and new ones charging them separately with the lesser offense were returned. They were then tried together before a general court-martial at Baumholder. Mrs. Dial challenged the jurisdiction of the court-martial over her but, upon denial of her motion, pleaded guilty, as did her husband. Each was sentenced to the maximum penalty permitted under the Code. Their convictions were upheld by the Court of Military Appeals, and Mrs. Dial was returned to the United States and placed in the Federal Reformatory for Women at Alderson, West Virginia. Thereafter the appellee filed this petition for habeas corpus and obtained Mrs. Dial's discharge from custody. From this judgment the warden has appealed.

As has been noted, the jurisdiction of the court-martial was based upon the provisions of Article 2 (11) of the Code. The Congress enacted that article in an effort to extend, for disciplinary reasons, the coverage of the Uniform Code of Military Justice to the classes of persons therein enumerated. The jurisdiction of the Code only attached, however, when and if its applicability in a given foreign territory was sanctioned under "any treaty or agreement to which the United States is or may be a party" with the foreign sovereignty, or under "any accepted rule of international law." The existence of such an agreement here is admitted. The constitutionality of Article 2 (11), as it applies in time of peace to civilian dependents charged with noncapital offenses under the Code, is the sole issue to be decided.

The question is not one of first impression, as we had before us in 1956 the constitutionality of the article as applied to civilian dependents charged with capital offenses, in the companion cases of *Kinsella* v. *Krueger,*

351 U. S. 470, and *Reid* v. *Covert,* 351 U. S. 487. At the original submission of those cases, we decided by a bare majority that the article was a valid exercise of the power of the Congress, under Art. IV, § 3, to "make all needful Rules and Regulations" for the "Territories" of the United States. We held further that the "procedure in such tribunals need not comply with the standards prescribed by the Constitution for Article III courts," 351 U. S., at 475, and specifically upheld court-martial jurisdiction in such cases against the contention that its procedures did not provide for indictment by grand jury or trial by petit jury. In short, we said that the failure to provide such protections raised "no constitutional defect," citing *In re Ross,* 140 U. S. 453 (1891), and the *Insular Cases,* such as *Balzac* v. *Porto Rico,* 258 U. S. 298 (1922). After rehearing at the following Term, these opinions were withdrawn and judgments were entered declaring the article unconstitutional when applied to civilian dependents charged with capital offenses. *Reid* v. *Covert,* consolidated with *Kinsella* v. *Krueger,* 354 U. S. 1 (1957). The Court held [2] that the power over "Territories," as applied by the *In re Ross* doctrine, was neither applicable nor controlling. It found that trial by court-martial was the exercise of an exceptional jurisdiction springing from the power granted the Congress in Art. I, § 8, cl. 14, "To make Rules for the Government and Regulation of the land and naval Forces," as supplemented by the Necessary and Proper Clause of Art. I, § 8, cl. 18.[3] But as applied to the

[2] Four Justices joined in an opinion announcing the judgment, two concurred in the result, and two dissented. MR. JUSTICE WHITTAKER, having come to the Court subsequent to the time of argument and decision in this case, took no part.

[3] Clause 18. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

civilian dependents there involved it must be considered, the Court said, in relation to Article III and the Fifth and Sixth Amendments. The majority concluded that, in those capital cases, trial by court-martial as provided could not constitutionally be justified.

The appellee contends that this result, declaring civilian dependents charged with capital offenses not to be subject to the provisions of the Code, bears directly on its applicability to the same class charged with non-capital crimes. She says that the test of whether civilian dependents come within the power of Congress as granted in Clause 14's limitation to the "land and naval Forces" is the status of the person involved. Her conclusion is that if civilian dependents charged with capital offenses are not within that language, *a fortiori,* persons in the same class charged with noncapital offenses cannot be included, since the clause draws no distinction as to offenses. The Government fully accepts the holding in the second *Covert* case, *supra.* It contends that the case is controlling only where civilian dependents are charged with capital offenses, and that in fact the concurrences indicate that considerations of a compelling necessity for prosecution by courts-martial of civilian dependents charged with noncapital offenses might permit with reason the inclusion of that limited category within court-martial jurisdiction. It submits that such necessities are controlling in the case of civilian dependents charged with noncapital crimes. It points out that such dependents affect the military community as a whole; that they have, in fact, been permitted to enjoy their residence in such communities on the representation that they are subject to military control; and that realistically they are a part of the military establishment. It argues that, from a morale standpoint, the present need for dependents to accompany American forces maintained abroad is a press-

ing one; that their special status as integral parts of the military community requires disciplinary control over them by the military commander; that the effectiveness of this control depends upon a readily available machinery affording a prompt sanction and resulting deterrent present only in court-martial jurisdiction; and that not only is court-martial procedure inherently fair but there are no alternatives to it. The Government further contends that it has entered into international agreements with a large number of foreign governments permitting the exercise of military jurisdiction in the territory of the signatories, and pursuant to the same it has been utilizing court-martial procedures at various American installations abroad. Its legal theory is based on historical materials which it asserts indicate a well-established practice of court-martial jurisdiction over civilians accompanying the armed forces, during Colonial days as well as the formative period of our Constitution. From this it concludes that civilian dependents may be included as a necessary and proper incident to the congressional power "To make Rules for the Government and Regulation of the land and naval Forces," as granted in Clause 14.

In this field, *Toth* v. *Quarles,* 350 U. S. 11 (1955), cited with approval by a majority in the second *Covert* case, *supra,* is a landmark. Likewise, of course, we must consider the effect of the latter case on our problem.[4] We therefore turn to their teachings. The *Toth* case involved a discharged soldier who was tried by court-martial after his discharge from the Army, for an offense committed before his discharge. It was said there that the Clause 14 "provision itself does not empower Congress to deprive

[4] See also *Dynes* v. *Hoover,* 20 How. 65 (1857); *Ex parte Milligan,* 4 Wall. 2 (1866); *Duncan* v. *Kahanamoku,* 327 U. S. 304 (1946); and Winthrop, Military Law and Precedents (2d ed. 1896), 144 *et seq.* and Reprint (1920) 105–107.

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people of trials under Bill of Rights safeguards," 350 U. S., at 21–22, and that military tribunals must be restricted "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service," *id.*, at 22. We brushed aside the thought that "considerations of discipline" could provide an excuse for "*new expansion* of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury." *Id.*, at 22–23. (Italics supplied.) We were therefore "not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause." *Id.*, at 22. The holding of the case may be summed up in its own words, namely, that "the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *Id.*, at 15.

It was with this gloss on Clause 14 that the Court reached the second *Covert* case, *supra*. There, as we have noted, the person involved was the civilian dependent of a soldier, who was accompanying him outside the United States when the capital offense complained of was committed. The majority concluded that "Trial by court-martial is constitutionally permissible *only* for persons who can, *on a fair appraisal,* be regarded as falling within the authority given to Congress under Article I to regulate the 'land and naval Forces' . . . ." Concurring opinion, 354 U. S., at 42.[5] (Italics supplied.) The test

[5] The second concurring opinion expressed the view that Article I was an unlimited grant of power to Congress "to make such laws in the regulation of the land and naval forces as are necessary to the proper functioning of those forces" and indicated that the Necessary and Proper Clause "modified" Clause 14 "expanding" its power "under changing circumstances." 354 U. S., at 68.

for jurisdiction, it follows, is one of *status,* namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term "land and naval Forces." The Court concluded that civilian dependents charged with capital offenses were not included within such authority, the concurring Justices expressing the view that they did not think "that the proximity, physical and social, of these women to the 'land and naval Forces' is, with due regard to all that has been put before us, so clearly demanded by the effective 'Government and Regulation' of those forces as reasonably to demonstrate a justification for court-martial jurisdiction over capital offenses." Concurring opinion, 354 U. S., at 46–47.

In the second *Covert* case, each opinion supporting the judgment struck down the article as it was applied to civilian dependents charged with capital crimes. The separate concurrences supported the judgment on the theory that the crime being "in fact punishable by death," *id.,* at 45, the question to be decided is "analogous, ultimately, to issues of due process," *id.,* at 75. The Justices joining in the opinion announcing the judgment, however, did not join in this view, but held that the constitutional safeguards claimed applied in "*all* criminal trials" in Article III courts and applied "outside of the States," pointing out that both the Fifth and Sixth Amendments were "all inclusive with their sweeping references to 'no person' and to 'all criminal prosecutions.'" *Id.,* at 7–8. The two dissenters [6] found "no distinction in the Constitution between capital and other cases," *id.,* at 89, but said that the constitutional safeguards claimed were not required under the power granted Congress in Art. IV, § 3, and the cases heretofore mentioned. The

[6] The writer of this opinion wrote the dissent.

briefs and argument in *Covert* reveal that it was argued and submitted by the parties on the theory that no constitutional distinction could be drawn between capital and noncapital offenses for the purposes of Clause 14. Supplemental Brief for Government on Rehearing, Nos. 701 and 713, at pp. 16–20, 82–95.

We have given careful study to the contentions of the Government. They add up to a reverse of form from the broad presentation in *Covert,* where it asserted that no distinction could be drawn between capital and noncapital offenses. But the same fittings are used here with only adaptation to noncapital crimes. The Government asserts that the second *Covert* case, rather than foreclosing the issue here, indicates that military tribunals would have jurisdiction over civilian dependents charged with offenses less than capital. It says that the trial of such a person for a noncapital crime is "significantly different" from his trial for a capital one, that the maintaining of different standards or considerations in capital cases is not a new concept, and that, therefore, there must be a fresh evaluation of the necessities for court-martial jurisdiction and a new balancing of the rights involved. As we have indicated, these necessities add up to about the same as those asserted in capital cases and which the concurrence in second *Covert* held as not of sufficient "proximity, physical and social . . . to the 'land and naval Forces' . . . as reasonably to demonstrate a justification" for court-martial prosecution. Likewise in the Government's historical material—dealing with court-martial jurisdiction during peace—which was found in *Covert* "too episodic, too meager . . . for constitutional adjudication," concurring opinion, 354 U. S., at 64, it has been unable to point out one court-martial which drew any distinction, insofar as the grant of power to the Congress under Clause 14 was concerned, between

capital and noncapital crimes.[7] The Government makes no claim that historically there was ever any distinction made as to the jurisdiction of courts-martial to try civilian dependents on the basis of capital as against noncapital offenses. Without contradiction, the materials furnished show that military jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense. To say that military jurisdiction "defies definition in terms of military 'status' " is to defy unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto.[8]

Furthermore, we are not convinced that a critical impact upon discipline will result, as claimed by the Government (even if anyone deemed this a relevant consideration), if noncapital offenses are given the same treatment as capital ones by virtue of the second *Covert* case. The same necessities claimed here were found

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[7] Even at argument here government counsel admitted he had found no such distinction other than that asserted by the concurrences in second *Covert:*

MR. JUSTICE BLACK: "What is the historical difference as to the 'Members of the land and naval Forces' and the constitutional power of Congress dependent upon whether they are capital crimes or noncapital crimes? When did that distinction first come into existence?"

MR. DAVIS: "Well, I think that distinction was first articulated in the concurring opinions in the *Covert* case."

. . . . . .

MR. JUSTICE BLACK: "I really asked you about the history because I was curious to know [whether], in your reading and so forth, you found any reference to that distinction in this field before the *Covert* case."

MR. DAVIS: "No. No explicit reference MR. JUSTICE BLACK."

[8] It was for this reason that the majority in the first *Covert* case, *supra,* based its decision on Art. IV, § 3, rather than the congressional power under Clause 14.

present in the second *Covert* case (see the dissent there) and were rejected by the Court. Even if the necessity for court-martial jurisdiction be relevant in cases involving deprivation of the constitutional rights of civilian dependents, which we seriously question, we doubt that the existence of the small number of noncapital cases now admitted by the Government in its brief here,[9] when spread over the world-wide coverage of military installations, would of itself bring on such a crisis. Moreover, in the critical areas of occupation, other legal grounds may exist for court-martial jurisdiction as claimed by the Government in No. 37, *Wilson* v. *Bohlender, post,* p. 281. See *Madsen* v. *Kinsella,* 343 U. S. 341 (1952). Another serious obstacle to permitting prosecution of noncapital offenses, while rejecting capital ones, is that it would place in the hands of the military an unreviewable discretion to exercise jurisdiction over civilian dependents simply by downgrading the offense, thus stripping the accused of his constitutional rights and protections. By allowing this assumption of "the garb of mercy," [10] we would be depriving a capital offender of his

[9] Aside from traffic violations, there were only 273 cases (both capital and noncapital) involving dependents subject to foreign jurisdiction during the period between December 1, 1954, and November 30, 1958. This number includes 54 "Offenses against economic control laws" and 88 offenses denominated "other." Government's Brief on the Merits in *McElroy* v. *Guagliardo,* No. 21, at p. 75.

[10] "He was glad, he said, that the penalty under this bill was not to be greater than that to which persons were subjected who were convicted of counterfeiting the great seal; but, on the other hand, he feared that this seeming lenity was not what it appeared to be, the child of mercy; he apprehended that its object was to facilitate the conviction of the accused, by taking from him the means of defence, which he might claim as his right, if the bill left the enumerated acts within the statute of the 25th of Edward III. These acts might be considered as proofs of an adherence to the king's enemies, and consequently came within the species of treason on which corruption of blood attached; but, by classing them under

constitutional means of defense and in effect would nullify the second *Covert* case. This situation will be aggravated by the want of legislation providing for trials in capital cases in Article III courts sitting in the United States. At argument, the Government indicated that there had been no effort in the Congress to make any provision for the prosecution of such cases either in continental United States or in foreign lands. Still we heard no claim that the total failure to prosecute capital cases against civilian dependents since the second *Covert* decision in 1957 had affected in the least the discipline at armed services installations. We do know that in one case, *Wilson* v. *Girard,* 354 U. S. 524 (1957), the Government insisted and we agreed that it had the power to turn over an American soldier to Japanese civil authorities for trial for an offense committed while on duty. We have no information as to the impact of that trial on civilian dependents. Strangely, this itself might

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the head of treasons which did not operate a corruption of blood, the framers of the bill had contrived to take from the accused the means of defence, under the appearance of lenity. Of all the characters of cruelty, he considered that as the most odious which assumed the garb of mercy: such was the case here; under the pretence of mercy to the accused, in not charging him with corruption of blood, he was to be deprived of the means of making his defence. That he might not stand a chance in the contest, his shield was to be taken from him. The list of the jury, to give him the benefit of the challenge—the list of witnesses, to enable him to detect conspiracies and to prevent perjury—the copy of the charge ten days before the trial, to enable him to prepare himself for the awful day—the assistance of a learned gentleman to speak for an unlearned man—all the arms and means of protection with which the humanity of the law of England had fortified an individual, when accused by the crown, were to be taken away. Harshness and severity were to be substituted for tenderness and compassion; and then he was to be insulted by being told he was spared the corruption of blood!" 5 The Speeches of the Right Hon. Charles James Fox in the House of Commons (London 1815) 78.

prove to be quite an effective deterrent. Moreover, the immediate return to the United States permanently of such civilian dependents, or their subsequent prosecution in the United States for the more serious offenses when authorized by the Congress, might well be the answer to the disciplinary problem. Certainly such trials would not involve as much expense nor be as difficult of successful prosecution as capital offenses.

We now reach the Government's suggestion that, in the light of the noncapital nature of the offense here, as opposed to the capital one in the *Covert* case, we should make a "fresh evaluation and a new balancing." But the power to "make Rules for the Government and Regulation of the land and naval Forces" bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of the punishment therefor. If civilian dependents are included in the term "land and naval Forces" at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses. This Court cannot diminish and expand that power, either on a case-by-case basis or on a balancing of the power there granted Congress against the safeguards of Article III and the Fifth and Sixth Amendments. Due process cannot create or enlarge power. See *Toth* v. *Quarles, supra.* It has to do, as taught by the Government's own cases,[11] with the denial of that "fundamental fairness, shocking to the universal sense of justice." *Betts* v. *Brady,* 316 U. S. 455, 462 (1942). It deals neither with power nor with jurisdiction, but with their exercise. Obviously Fourteenth Amendment cases dealing with state action have no application here, but if they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here, an

[11] *Powell* v. *Alabama,* 287 U. S. 45 (1932), and *Betts* v. *Brady,* 316 U. S. 455 (1942), both Fourteenth Amendment cases which would, of course, have no application here.

infamous case by constitutional standards, would be as invalid under those cases as it would be in cases of a capital nature. Nor do we believe that due process considerations bring about an expansion of Clause 14 through the operation of the Necessary and Proper Clause. If the exercise of the power is valid it is because it is granted in Clause 14, not because of the Necessary and Proper Clause. The latter clause is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted "foregoing" powers of § 8 "and all other Powers vested by this Constitution. . . ." As James Madison explained, the Necessary and Proper Clause is "but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant." VI Writings of James Madison, edited by Gaillard Hunt, 383. There can be no question but that Clause 14 grants the Congress power to adopt the Uniform Code of Military Justice. Our initial inquiry is whether Congress can include civilian dependents within the term "land and naval Forces" as a proper incident to this power and necessary to its execution. If answered in the affirmative then civilian dependents are amenable to the Code. In the second *Covert* case, *supra,* it was held they were not so amenable as to capital offenses. Our final inquiry, therefore, is narrowed to whether Clause 14, which under the second *Covert* case has been held not to include civilian dependents charged with capital offenses, may now be expanded to include civilian dependents who are charged with noncapital offenses. We again refer to James Madison:

> "When the Constitution was under the discussions which preceded its ratification, it is well known that great apprehensions were expressed by many, lest the omission of some positive exception, from the powers

> delegated, of certain rights, . . . might expose them to the danger of being drawn, by construction, within some of the powers vested in Congress, more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; . . . ." Writings, *supra,* at 390.

We are therefore constrained to say that since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses.

Neither our history nor our decisions furnish a foothold for the application of such due process concept as the Government projects. Its application today in the light of the irreversibility of the death penalty would free from military prosecution a civilian accompanying or employed by the armed services who committed a capital offense, while the same civilian could be prosecuted by the military for a noncapital crime. It is illogical to say that "the power respecting the land and naval forces encompasses . . . all that Congress may appropriately deem 'necessary' for their good order" and still deny to Congress the means to exercise such power through the infliction of the death penalty. But that is proposed here. In our view this would militate against our whole concept of power and jurisdiction. It would likewise be contrary to the entire history of the Articles of War. Even prior to the Constitutional Convention, the Articles of War included 17 capital offenses applicable to all persons whose status brought them within the term "land

and naval Forces." There were not then and never have been any exceptions as to persons in the applicability of these capital offenses. In 1806 when the Articles of War were first revised, Congress retained therein 16 offenses that carried the death penalty, although there was complaint that "almost every article in the bill was stained with blood." 15 Annals of Cong. 326.

Nor do we believe that the exclusion of noncapital offenses along with capital ones will cause any additional disturbance in our "delicate arrangements with many foreign countries." The Government has pointed to no disruption in such relations by reason of the second *Covert* decision. Certainly this case involves no more "important national concerns into which we should be reluctant to enter" than did *Covert*. In truth the problems are identical and are so intertwined that equal treatment of capital and noncapital cases would be a palliative to a troubled world.

We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial are not constitutionally permissible. The judgment must therefore

Affirmed.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins, dissenting in Nos. 22, 21, and 37, and concurring in No. 58.*

Within the compass of "any treaty or agreement to which the United States is or may be a party" and "any accepted rule of international law," Article 2 (11) of the Uniform Code of Military Justice makes subject to the

*[REPORTER'S NOTE: No. 22 is *Kinsella* v. *Singleton, ante,* p. 234; No. 21 is *McElroy* v. *Guagliardo, post,* p. 281; No. 37 is *Wilson* v. *Bohlender, post,* p. 281; and No. 58 is *Grisham* v. *Hagan, post,* p. 278.]

Code, and therefore prosecutable by courts-martial for offenses committed abroad, all "persons serving with, employed by, or accompanying the armed forces" outside the United States and certain other areas.[1]

These four cases, involving persons and crimes concededly covered by the Military Code, bring before us the constitutionality of Article 2 (11) as applied to (1) civilian service dependents charged with noncapital offenses (No. 22); (2) civilian service employees, also charged with noncapital offenses (Nos. 21 and 37);[2] and (3) civilian service employees charged with capital offenses (No. 58). In each instance the Court holds the Act unconstitutional. While I agree with the judgment in No. 58, which involves a capital offense, I cannot agree with the judgments in Nos. 22, 21 and 37, in each of which the conviction was for a noncapital offense.

The effect of these decisions is to deny to Congress the power to give the military services, when the United States is not actually at war, criminal jurisdiction over noncapital offenses committed by nonmilitary personnel while accompanying or serving with our armed forces abroad. I consider this a much too narrow conception of the constitutional power of Congress and the result particularly unfortunate in the setting of the present-day international scene. To put what the Court has decided in proper context, some review of the past fate of Article 2 (11) in this Court is desirable.

At the 1955 Term there came before the Court in *Kinsella* v. *Krueger,* 351 U. S. 470, and *Reid* v. *Covert,*

[1] To wit: "that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

[2] In No. 37 the Government, alternatively, relies on the "War Power," the offense having been committed in the American Occupied Zone of West Berlin. Cf. *Madsen* v. *Kinsella,* 343 U. S. 341. Apart from whether or not the contention is available in light of the course of the proceedings below, I do not reach that issue.

351 U. S. 487, the question whether two army wives could be constitutionally convicted, under Article 2 (11), of the capital offense of first degree murder, committed while stationed with their husbands at military bases abroad. Initially a divided Court, in two opinions which I joined, upheld the convictions.[3] In so holding the Court relied not upon the constitutional power of Congress "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, but upon *In re Ross,* 140 U. S. 453, the so-called *Insular Cases, e. g., Balzac* v. *Porto Rico,* 258 U. S. 298, and Art. IV, § 3, of the Constitution, respecting congressional power over Territories. These factors, in combination, led the Court to conclude that the constitutional guarantees of Article III and the Fifth and Sixth Amendments did not apply to criminal trials of Americans abroad before legislatively established tribunals; that it was permissible for Congress to conclude that persons circumstanced as those women were should be tried before a court-martial, rather than a civil tribunal; and that such trials did not offend the fundamentals of due process.

The decisions in these cases were reached under the pressures of the closing days of the Term. See 351 U. S., at 483–486. Having become convinced over the summer that the grounds on which they rested were untenable, I moved at the opening of the 1956 Term that the cases be reheard, being joined by the four Justices who had been in the minority. See 352 U. S. 901, 354 U. S. 1, 65–67.[4]

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[3] In addition to myself, the majority opinions, written by MR. JUSTICE CLARK, were joined by JUSTICES REED, BURTON and MINTON. 351 U. S. 470 and 487. THE CHIEF JUSTICE and JUSTICES BLACK and DOUGLAS dissented. *Id.,* at 485. MR. JUSTICE FRANKFURTER filed a Reservation. *Id.,* at 481.

[4] The three remaining members of the original majority were in dissent, 352 U. S., at 902, MR. JUSTICE MINTON having meanwhile retired. MR. JUSTICE BRENNAN, his successor, did not participate on the motion.

Upon a consolidated rehearing of the cases, the Court's original opinions and the judgments of conviction were set aside, a majority of the Court then holding that whether the convictions should stand or fall depended solely on the Art. I, § 8, cl. 14 power, and that such power could not be constitutionally applied in those cases. *Reid* v. *Covert,* 354 U. S. 1. There was, however, no opinion for the Court. Four Justices joined in an opinion broadly holding that "civilians" can never be criminally tried by military courts in times of peace, *id.,* at 3–41.[5] Two Justices concurred specially in the result, on the narrow ground that Article 2 (11) could not be so applied to civilian service dependents charged with capital offenses, explicitly reserving judgment, however, as to whether nonmilitary personnel charged with other than capital offenses could be subjected to such trials.[6] *Id.,* at 41–64, 65–78. Two Justices dissented, adhering to the grounds expressed in the earlier majority opinions.[7] *Id.,* at 78. And one Justice did not participate in the cases.[8]

Thus the only issue that second *Covert* actually *decided* was that Article 2 (11) could not be constitutionally applied to civilian service dependents charged with capital offenses. Nevertheless, despite the wide differences of views by which this particular result was reached—none of which commanded the assent of a majority of the Court—*Covert* is now regarded as establishing that nonmilitary personnel are never within the reach of the Article I power in times of peace. On this faulty view of the case, it is considered that *Covert* controls the issues presently before us. Apart from that view I think it fair

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[5] THE CHIEF JUSTICE, MR. JUSTICE BLACK (the writer of the opinion), and JUSTICES DOUGLAS and BRENNAN.

[6] MR. JUSTICE FRANKFURTER and myself.

[7] JUSTICES CLARK and BURTON.

[8] MR. JUSTICE WHITTAKER, succeeding MR. JUSTICE REED who had meanwhile retired.

to say different results might well have been reached in the three noncapital cases now under consideration. Without needlessly traversing ground already covered in my separate opinion in *Covert, id.*, at 67–78, I shall give my reasons for believing that while the result reached by the Court in the capital case is right, its decisions in the noncapital cases are wrong.

First. The Court's view of the effect of *Covert* in these noncapital cases stems from the basic premise that only persons occupying a military "status" are within the scope of the Art. I, § 8, cl. 14 power. The judgment in *Covert* having decided that civilian service dependents were not within the reach of that power in capital cases, it is said to follow that such dependents, and presumably all other "civilians," may also not be tried by courts-martial in noncapital cases; this because neither the statute nor Article I makes exercise of the power turn upon the nature of the offense involved.

I think the "status" premise on which the Court has proceeded is unsound. Article I, § 8, cl. 14, speaks not in narrow terms of soldiers and sailors, but broadly gives Congress power to prescribe "Rules for the Government and Regulation of the land and naval Forces."[9] This power must be read in connection with Clause 18 of the same Article, authorizing Congress

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thus read, the power respecting the land and naval forces encompasses, in my opinion, all that Congress may appropriately deem "necessary" for their good order. It

[9] The Fifth Amendment excepts from its protection "cases arising," not persons, "in the land or naval forces."

does not automatically exclude the regulation of non-military personnel.

I think it impermissible to conclude, as some of my brethren have indicated on an earlier occasion (see second *Covert, supra,* at 20–22), and as the Court now holds, *ante,* p. 248, that the Necessary and Proper Clause may not be resorted to in judging constitutionality in cases of this type. The clause, itself a part of Art. I, § 8, in which the power to regulate the armed forces is also found, applies no less to that power than it does to the other § 8 congressional powers, and indeed is to be read "as an integral part of each" such power. Second *Covert, supra,* at 43 (concurring opinion of FRANKFURTER, J.). As Mr. Justice Brandeis put it in *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, at 300–301:

> "Whether it be for purposes of national defense, or for the purpose of establishing post offices and post roads or for the purpose of regulating commerce among the several States Congress has the power 'to make all laws which shall be necessary and proper for carrying into execution' the duty so reposed in the Federal Government. While this is a Government of enumerated powers it has full attributes of sovereignty within the limits of those powers. *In re Debs,* 158 U. S. 564. Some confusion of thought might perhaps have been avoided, if, instead of distinguishing between powers by the terms express and implied, the terms specific and general had been used. For the power conferred by clause 18 of § 8 'to make all laws which shall be necessary and proper for carrying into execution' powers specifically enumerated is also an express power. . . ."

See also *United States* v. *Classic,* 313 U. S. 299, 320.

Of course, the Necessary and Proper Clause cannot be used to "expand" powers which are otherwise constitu-

tionally limited, but that is only to say that when an asserted power is not appropriate to the exercise of an express power, to which all "necessary and proper" powers must relate, the asserted power is not a "proper" one. But to say, as the Court does now, that the Necessary and Proper Clause "is not itself a grant of power" is to disregard Clause 18 as one of the enumerated powers of § 8 of Art. I.

Viewing Congress' power to provide for the governing of the armed forces in connection with the Necessary and Proper Clause, it becomes apparent, I believe, that a person's "status" with reference to the military establishment is but one, and not alone the determinative, factor in judging the constitutionality of a particular exercise of that power. By the same token, the major premise on which the Court ascribes to *Covert* a controlling effect in these noncapital cases disappears.

Second. It is further suggested that the difference between capital and noncapital offenses is not constitutionally significant, and that if Article 2 (11) of the Military Code, as applied to nonmilitary persons, is unconstitutional in one case, it equally is so in the other. I think this passes over too lightly the awesome finality of a capital case, a factor which in other instances has been reflected both in the constitutional adjudications of this Court and in the special procedural safeguards which have been thrown around those charged with such crimes.

Thus, this Court has held that the Fourteenth Amendment requires a State to appoint counsel for an indigent defendant in a capital case, *Powell* v. *Alabama,* 287 U. S. 45, whereas in noncapital cases a defendant has no such absolute right to counsel, *Betts* v. *Brady,* 316 U. S. 455. Again, the Congress in first degree murder cases has in effect put infliction of the death penalty in the hands of the jury, rather than the judge, 18 U. S. C. § 1111 (b); see also 60 Stat. 766, as amended, 42 U. S. C. § 2274 (a),

and various States have similar statutes.[10] Further illustrations of the same concern about capital cases are the prohibition on acceptance of pleas of guilty in such cases,[11] and, in the appellate field, provisions for mandatory or automatic appeals from such convictions.[12]

In my *Covert* opinion I pointed out that the Government itself had in effect acknowledged that because of the gravity of the offense, a treason case against a nonsoldier in time of peace could not constitutionally be held to be within the otherwise unlimited scope of Article 2 (11); and I expressed the view that the same constitutional limitation should obtain whenever the death penalty is involved. 354 U. S., at 77. I see no reason for retreating from that conclusion. The view that we must hold that nonmilitary personnel abroad are subject to peacetime court-martial jurisdiction either for all offenses, or for none at all, represents an inexorable approach to constitutional adjudication to which I cannot subscribe.

It is one thing to hold that nonmilitary personnel situated at our foreign bases may be tried abroad by courts-martial in times of peace for noncapital offenses, but quite another to say that they may be so tried where life is at stake. In the latter situation I do not believe that the Necessary and Proper Clause, which alone in cases like this brings the exceptional Article I jurisdiction into play, can properly be taken as justifying the trial of nonmilitary personnel without the full protections of an Article III court. See 354 U. S., at 77. Before the constitutional existence of such a power can be found, for me a much more persuasive showing would be required that Congress had good reason for concluding that such a course is necessary to the proper maintenance of our military estab-

[10] *E. g.*, Mass. Gen. Laws Ann., c. 265, § 2; Miss. Code Ann., § 2536; N. H. Rev. Stat. Ann., c. 585, § 4.

[11] *E. g.*, N. Y. Code Crim. Proc., § 332.

[12] *E. g.*, Cal. Penal Code, § 1239 (b); Ore. Rev. Stat., § 138.810.

lishment abroad than has been made in any of the cases of this kind which have thus far come before the Court.

Third. I revert to the Court's "status" approach to the power of Congress to make rules for governing the armed forces. How little of substance that view holds appears when it is pointed out that had those involved in these cases been inducted into the army, though otherwise maintaining their same capacities, it would presumably have been held that they were all fully subject to Article 2 (11). Yet except for this formality their real "status" would have remained the same.

Although it was recognized in the second *Covert* case that a person might be subject to Article 2 (11) "even though he had not formally been inducted into the military or did not wear a uniform," 354 U. S., at 23, I think that drawing a line of demarcation between those who are constitutionally subject to the Art. I, § 8, cl. 14 power, and those who are not, defies definition in terms of military "status." I believe that the true issue on this aspect of all such cases concerns the closeness or remoteness of the relationship between the person affected and the military establishment. Is that relationship close enough so that Congress may, in light of all the factors involved, appropriately deem it "necessary" that the military be given jurisdiction to deal with offenses committed by such persons?

I think that such relationship here was close enough, and in this respect can draw no constitutional distinction between the army wife in No. 22 and the civilian service employees in the other cases. Though their presence at these army overseas bases was for different reasons and purposes, the relationship of both to the military community was such as to render them constitutionally amenable to the Article 2 (11) jurisdiction. By the same token, being of the view that the constitutional existence of such jurisdiction has not been shown as to civilian

service dependents charged with capital offenses, I am equally of the opinion that it cannot be found with respect to civilian service employees similarly charged. For these reasons I concur in the judgment of the Court in No. 58.

Fourth. The other factors which must be weighed in judging the constitutionality of Article 2 (11) as applied to noncapital cases have, in my opinion, been adequately satisfied. I need not add to what was said in my concurring opinion in *Covert,* 354 U. S., at 70–73, 76–77, with reference to the matters which originally were adumbrated by my Brother CLARK in his dissent in the same case. *Id.,* at 83–88. Nothing in the supplemental historical data respecting courts-martial which have been presented in these cases persuades me that we would be justified in holding that Congress' exercise of its constitutional powers in this area was without a rational and appropriate basis, so far as noncapital cases are concerned. Although it is now suggested that the problem with which Congress sought to deal in Article 2 (11) may be met in other ways, I submit that once it is shown that Congress' choice was not excluded by a rational judgment concerned with the problem it is beyond our competence to find constitutional command for other procedures.

I think it unfortunate that this Court should have found the Constitution lacking in enabling Congress to cope effectively with matters which are so intertwined with broader problems that have been engendered by present disturbed world conditions. Those problems are fraught with many factors that this Court is ill-equipped to assess, and involve important national concerns into which we should be reluctant to enter except under the clearest sort of constitutional compulsion. That such compulsion is lacking here has been amply demonstrated by the chequered history of the past cases

of this kind in the Court. Today's decisions are the more regrettable because they are bound to disturb delicate arrangements with many foreign countries, and may result in our having to relinquish to other nations where United States forces are stationed a substantial part of the jurisdiction now retained over American personnel under the Status of Forces Agreements.

I would reverse in Nos. 22, 21, and 58, and affirm in No. 37.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.*

In No. 22, one Joanna Dial (whose cause is prosecuted here by respondent Singleton), an American civilian wife accompanying her husband, an American soldier serving in Germany, was there tried and convicted in 1957 by a general court-martial for manslaughter in violation of Article 119 of the Uniform Code of Military Justice,[1] 10 U. S. C. § 919, and was sentenced to imprisonment for a term of three years. In No. 21, respondent Guagliardo, an American civilian employed as an electrical lineman by the United States Air Force at Nouasseur Air Depot in Morocco, was there tried and convicted in 1957 by a general court-martial for conspiring to commit larceny from the stores of the Air Force in violation of Article 81 of the Code, 10 U. S. C. § 881, and was sentenced to imprisonment for a term of three years. In No. 37, petitioner Wilson, an American civilian employed as an auditor by the United States Army in Berlin, Germany, was there tried and convicted in 1956 by a general court-

*[REPORTER'S NOTE: This opinion applies also to No. 58, *Grisham* v. *Hagan*, *post*, p. 278; No. 21, *McElroy* v. *Guagliardo*, *post*, p. 281; and No. 37, *Wilson* v. *Bohlender*, *post*, p. 281.]

[1] The Uniform Code of Military Justice, 70A Stat. 36 *et seq.*, will hereafter, for brevity, be called the "Code."

martial for three acts of sodomy committed upon military personnel in violation of Article 134 of the Code, 50 U. S. C. § 728, and was sentenced to imprisonment for a term of five years. In No. 58, petitioner Grisham, an American civilian employed as a cost accountant by the United States Army Corps of Engineers in Orleans, France, was there tried by a general court-martial for the capital offense of premeditated murder and convicted of the lesser included offense of unpremeditated murder in violation of Article 118 of the Code, 50 U. S. C. § 712, and was sentenced, as reduced by clemency action of the Secretary of the Army, in 1957, to imprisonment for a term of 35 years.

Each of the accused persons objected to trial by court-martial upon the ground that it had no jurisdiction to try him. After their convictions, sentences, and return to the United States, each sought release by habeas corpus in a Federal District Court. Two were successful—Singleton (164 F. Supp. 707, D. C. S. D. W. Va.) and Guagliardo (104 U. S. App. D. C. 112, 259 F. 2d 927)—but the other two were not—Wilson (167 F. Supp. 791, D. C. Colo.) and Grisham (261 F. 2d 204, C. A. 3d Cir.)—and the four cases were brought here for review.

These cases fall into three categories. No. 22, the *Singleton* case, involves a civilian dependent tried for a noncapital offense; Nos. 21 and 37, the *Guagliardo* and *Wilson* cases, involve civilian employees of the military tried for noncapital offenses, and No. 58, the *Grisham* case, involves a civilian employee of the military tried for a capital offense. Each claims that, being a civilian, he was not constitutionally subject to trial by court-martial but, instead, could constitutionally be tried by the United States only in an Article III court, upon an indictment of a grand jury under the Fifth Amendment, and by an impartial petit jury under the Sixth Amendment to the Constitution.

The cases present grave questions and, for me at least, ones of great difficulty. Our recent decision in *Reid* v. *Covert,* 354 U. S. 1, makes clear that the United States Constitution extends beyond our territorial boundaries and reaches to and applies within all foreign areas where jurisdiction is or may be exercised by the United States over its citizens—that when the United States proceeds against its citizens abroad "[i]t can only act in accordance with all the limitations imposed by the Constitution." 354 U. S., at 6.

The broad question presented, then, is whether our Constitution authorizes trials and punishments by courts-martial in foreign lands in time of peace of civilian dependents "accompanying" members of the armed forces and of civilians "employed by" the armed forces, for conduct made an offense by the Uniform Code of Military Justice, whether capital or noncapital in character.

The source of the power, if it exists, is Art. I, § 8, cl. 14, of the Constitution.[2] It provides:

> "The Congress shall have power . . .
>
> "To make Rules for the Government and Regulation of the land and naval Forces."

Pursuant to that grant of power, Congress by the Act of August 10, 1956, c. 1041, 70A Stat. 36 *et seq.*—revising the pre-existing Articles of War—enacted the Uniform

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[2] This does not overlook the "Necessary and Proper" Clause, Art. I, § 8, cl. 18, of the Constitution, but, in my view, that Clause, though applicable, adds nothing to Clause 14, because the latter Clause, empowering Congress "To make Rules for the Government and Regulation of the land and naval Forces," plainly means *all necessary and proper rules* for those purposes.

MR. JUSTICE STEWART is of the view that Clause 14 must be read in connection with the "Necessary and Proper" Clause, and agrees with the views expressed in MR. JUSTICE HARLAN'S separate opinion as to the applicability and effect of that clause.

Code of Military Justice. Article 2 (11) of that Code provides, in pertinent part:

> "The following persons are subject to this chapter:
>
> . . . . .
>
> "(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States . . . ."

It is not disputed that existing treaties with each of the foreign sovereignties, within whose territory the alleged offenses occurred, permitted the armed forces of the United States to punish offenses against the laws of the United States committed by persons embraced by Article 2 (11) of the Code. Arguments challenging the reasonableness of Article 2 (11) are presently put aside, for if Clause 14 does not grant to Congress the power to provide for the court-martial trial and punishment of the persons embraced in Article 2 (11) of the Code it may not do so, however reasonable. *Reid* v. *Covert, supra,* 354 U. S., at 74 (concurring opinion).

Did Clause 14 empower Congress to enact Article 2 (11) of the Code? Certain aspects of that broad question have recently been determined in *Reid* v. *Covert, supra,* and, though not a Court opinion, I consider that decision to be binding upon me.[3] In that case four members of the Court held that Article 2 (11) of the Code cannot constitutionally be applied to *civilian dependents* "accompanying" members of the armed forces outside the United States in time of peace, because, in their view, to do so would violate Art. III, § 2, and the Fifth and Sixth

[3] Although a member of the Court when the opinions in the *Covert* case were handed down, I was ineligible to and did not participate in the decision of that case because it had been argued, submitted and decided prior to my coming to the Court.

Amendments of the Constitution; and two members of the Court, in separate concurring opinions, agreed with that result, but only with respect to *capital offenses.*

Like my Brother CLARK who writes for the Court today, I am unable to find any basis in the Constitution to support the view that Congress may not constitutionally provide for the court-martial trial and punishment of civilian dependents for capital offenses but may do so for non-capital ones. Certainly there is nothing in Clause 14 that creates any such distinction or limitation. Legalistically and logically, it would seem that the question is one of *status* of the accused person, and that courts-martial either do or do not have jurisdiction and, hence, power to try the accused for all offenses against the military law or for none at all. Sympathetic as one may be to curtailment of the awesome power of courts-martial to impose maximum sentences in capital cases, the question, for me at least, is the perhaps cold but purely legal one of *constitutional power.* There would seem to be no doubt that Congress may constitutionally prescribe gradations of offenses and punishments in military cases. The question is solely whether Clause 14 has granted to Congress any power to provide for the court-martial trial and punishment of civilian dependents "accompanying," and civilians "employed by," the armed forces at military posts in foreign lands in time of peace. If it has, then Congress has acted within its powers in enacting Article 2 (11) of the Code—otherwise not. Inasmuch as six members of the Court have held in *Covert* that Congress may not constitutionally provide for the court-martial trial and punishment of *civilian dependents* "accompanying the armed forces" overseas in peacetime in *capital* cases, and because I can see no constitutional distinction between Congress' power to provide for the court-martial punishment of capital offenses, on the one hand, and non-capital offenses, on the other hand, I conclude that the

holding in *Covert* means that *civilian dependents* accompanying the armed forces in peacetime are not subject to military power, and that it requires affirmance of No. 22, the *Singleton* case.

But each of the three opinions supporting the conclusion reached in *Covert* was at pains to limit the decision to *civilian dependents*. "[T]he wives, children and other dependents of servicemen cannot be placed in that category [of being 'in' the armed services for purposes of Clause 14], even though they may be accompanying a serviceman abroad at Government expense and receiving other benefits from the Government." 354 U. S., at 23. "The mere fact that these women had gone overseas with their husbands should not reduce the protection the Constitution gives them." 354 U. S., at 33. See also 354 U. S., at 45 (concurring opinion of FRANKFURTER, J.), and 354 U. S., at 75–76 (concurring opinion of HARLAN, J.). The main opinion carefully pointed out that "Mrs. Covert and Mrs. Smith . . . had never been *employed by the army,* had never served in the army in any capacity." 354 U. S., at 32. (Emphasis added.)

There is a marked and clear difference between civilian dependents "accompanying the armed forces" and civilian persons "serving with [or] employed by" the armed forces at military posts in foreign lands. The latter, numbering more than 25,000 employed at United States military bases located in 63 countries throughout the world—mainly highly trained specialists and technicians possessing skills not readily available to the armed forces—are engaged in purely military work—as in the case of Guagliardo, employed as an electrical lineman by the Air Force to construct and maintain lines of communication and airfield lighting apparatus and equipment, as also in the case of Wilson, an auditor employed to audit the accounts of the United States Army in Berlin, and as in

the case of Grisham, employed as a cost accountant by the United States Army Corps of Engineers to assist in setting up a cost accounting system for the building of a line of communications from Pardeau, France, to Kossalater in the American-occupied section of Germany. These civilian employees thus perform essential services for the military and, in doing so, are subject to the orders, direction and control of the same military command as the "members" of those forces; and, not infrequently, members of those forces who are assigned to work with and assist those employees are subject to their direction and control. They have the same contact with, and information concerning, the military operations as members of those forces and present the same security risks and disciplinary problems. They are paid from the same payroll, and have the same commissary, housing, medical, dental, mailing, transportation, banking, tax-exemption, customs, border-crossing and other privileges as members of the armed forces. They are so intertwined with those forces and military communities as to be in every practical sense an integral part of them. On the other hand, civilian dependents "accompanying the armed forces" perform no services for those forces, present dissimilar security and disciplinary problems, have only a few of the military privileges, and generally stand in a very different relationship to those forces than the civilian employees. Nor should there be any confusion about the fact that the materials found in *Covert* to be "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication" (354 U. S., at 64, concurring opinion), related, as did the whole case, to "civilian dependents in particular," *ibid.*, not to persons employed at foreign military bases to do essential military work. And I readily agree with the Court today that under the

severability clause in the Code, 70A Stat. 640, ". . . legal effect can be given to each category standing alone." *McElroy* v. *Guagliardo, post,* p. 281.

Determination of the scope of the powers intended by the Framers of the Constitution to be given to Congress by Clause 14 requires an examination into the customs, practices and general political climate known to the Framers and existing at that time. The first Articles of War in this country were those adopted by the Provisional Congress of Massachusetts Bay on April 5, 1775.[4] Those Articles, initially governing the "civilian" army of farmers and tradesmen—the minutemen—who were first involved in the War of the Revolution, were made applicable to "all Officers, Soldiers, and others concerned." Winthrop (Reprint 1920) 947. Article 31 provided:

> "All sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though not enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army." *Id.,* at 950.

The American Revolutionary Army initially was governed by "Articles of War" adopted by the Continental Congress on June 30, 1775.[5] Nine of the original 69 Articles provided for the trial by court-martial of persons serving with the army but who were not soldiers. Those Articles were revised by the Continental Congress on September 20, 1776,[6] and, save for minor revisions not here pertinent, governed the Revolutionary Army during the remainder of the war.[7] Thirteen of those Articles

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[4] Winthrop, Military Law and Precedents (Reprint 1920), 947.

[5] Journals of the Continental Congress, Vol. II, p. 111. Those Articles, with additional Articles enacted November 7, 1775, are reprinted in Winthrop 953 *et seq.*

[6] Those Articles are reprinted in Winthrop 961–971.

[7] The Articles were prepared principally by John Adams. See John Adams, Works, Vol. 3, pp. 83–84; Winthrop 22.

provided for the trial by court-martial of civilians serving with the army, such as "commissaries," [8] "suttlers," [9] "store-keepers," [10] persons "belonging to the forces employed in the service of the United States," [11] and persons "belonging to the forces of the United States, employed in foreign parts." [12] In 1778, a relevant addition was made. It provided, in pertinent part: "That every person employed either as Commissary, Quarter Master, forage Master, *or in any other Civil Department of the Army* shall be subject to trial by Court Martial for neglect of duty, or other offence committed in the execution of their office . . . ." Journals of the Continental Congress, Vol. X, p. 72. (Emphasis added.) Wagon drivers "receiving pay or hire" in the service of the artillery were made subject to court-martial jurisdiction under the American Articles of 1775 [13] and 1776.[14] Throughout the Revolutionary period, "drivers" and "artillery gunners" were civilian experts. "Horses or oxen, with hired civilian drivers, formed the transport" for the cannon. Manucy, Artillery Through The Ages (G. P. O. 1949), p. 10. Their civilian status in Washington's army is concretely shown by his writings.[15]

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[8] Articles of War, Sept. 20, 1776, § IV, Art. 6.

[9] *Id.*, § VIII, Art. 1.

[10] *Id.*, § XII, Art. 1.

[11] *Id.*, § XIII, Art. 9.

[12] *Id.*, § XIII, Art. 17.

[13] Articles of War, June 30, 1775, Art. XLVIII; Winthrop 957.

[14] Articles of War, Sept. 20, 1776, § XVI, Art. I; Winthrop 970.

[15] See the report which Washington made to the Committee of Congress With The Army, on January 29, 1778: *"As it does not require military men,* to discharge the duties of Commissaries, Forage Masters and Waggon Masters, who are also looked upon as the money making part of the army, no rank should be allowed to any of them, *nor indeed to any in the departments merely of a civil nature.* Neither is it, in my opinion proper, though it may seem a trivial and incon-

There was a protracted controversy in the Constitutional Convention over whether there should be a standing army or whether the militia of the various States should be the source of military power.[16] There was, on the one hand, fear that a standing army might be detrimental to liberty; on the other was the necessity of an army for the preservation of peace and defense of the country.[17] The problem of providing for essential forces and also of assuring enforcement of the unanimous determination to keep them in subjection to the civil power was resolved by inserting the provision that no appropriation for the support of the army could be made for a longer period than two years (Art. I, § 8, cl. 12), and by the continuance of the militia "according to the discipline prescribed by Congress." (Art. I, § 8, cls. 15 and 16, and Amend. II.) [18]

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sequential circumstance, that they should wear the established uniforms of the army, which ought to be considered as a badge of military distinction." Writings of Washington, Vol. 10, at 379. (Emphasis added.)

Numerous instances of the exercise of military jurisdiction over civilians serving with the army are detailed in Washington's Writings. A "Wagon Master" was so tried and acquitted on January 22, 1778. (Vol. 10, p. 359.) A "waggoner" was so tried and sentenced on May 25, 1778 (Vol. 11, p. 487), and another on September 2, 1780. At the same time, an "express rider" was so tried and convicted. (Vol. 20, pp. 24–25.) On September 21, 1779, a "Commissary of Issues" and a "Commissary of Hides" were tried by court-martial. (Vol. 16, pp. 385–386.) On September 23, 1780, another "waggoner" was so tried and acquitted. (Vol. 20, pp. 96–97.) On December 6 and 16, 1780, another "commissary" and also a "barrack master" were so tried. (Vol. 21, p. 10, and pp. 22–23.) Numerous other court-martial trials of civilians serving with the army are recited in Vol. 10, p. 507; Vol. 12, p. 242; Vol. 13, pp. 54, 314; Vol. 21, p. 190.

[16] Prescott, Drafting the Federal Constitution (1941), pp. 515–525; 5 Elliot's Debates 443–445.

[17] Glenn and Schiller, The Army and the Law, pp. 14, 18–20.

[18] The basis of this conclusion was summarized by James Madison in Beloff, The Federalist, No. XLI, p. 207:

"Next to the effectual establishment of the union, the best possible

It was in the light of this background and upon these considerations that the Framers gave to the representatives of the people—the Congress—the power "To make Rules for the Government and Regulation of the land and naval Forces." Clause 14. That language was taken straight from the Articles of Confederation.[19] In respect thereto, Hamilton said in Beloff, The Federalist, No. XXIII, p. 111:

> "These powers ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. . . ." [20]

Soon after the formation of the Government under the Constitution, Congress, by the Act of September 29, 1789, c. 25, § 4, 1 Stat. 96, adopted the Articles of War which were essentially the Articles of 1776. By that Act, Congress—it is almost necessary to assume—approved the consistent practice of exercising military jurisdiction over civilians serving with the armed forces, although not actually soldiers. The first complete enactment of the Articles of War subsequent to the adoption of the Constitution was the Act of April 10, 1806. Article 60 of that Act (2 Stat. 366) re-enacted the provisions for jurisdic-

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precaution against danger from standing armies, is a limitation of the term for which revenue may be appropriated to their support. This precaution the constitution has prudently added. . . ."

[19] Prescott, Drafting the Federal Constitution (1941), p. 526; 5 Elliot's Debates 443.

[20] Hamilton, aide-de-camp to Washington and a distinguished army officer, undoubtedly knew that civilians serving with the army were commonly subjected to court-martial jurisdiction. The same must be presumed to have been known by most, if not all, of the members of the Constitutional Convention, for so many of them had been a part of the Revolutionary Army wherein that practice was commonplace.

tion over sutlers, retainers, and "all persons whomsoever, serving with the armies of the United States in the field, though not enlisted soldiers." Provisions similar to Article 60 have been made in all subsequent re-enactments of the Military Code: In the revision of 1874, Rev. Stat. (2d ed. 1878), p. 236 (Article 63); in 1916, 39 Stat. 651; in 1920, 41 Stat. 787; and in the adoption of the Uniform Code of Military Justice, 64 Stat. 109, codified in 70A Stat. 37, 10 U. S. C. § 802 (11).

In the 1916 general revision of the Articles of War, Congress used language which is substantially equivalent to that of Article 2 (11),[21] and it appears it did not consider that any new concept was being adopted.[22] After full consideration by an eminent committee of experts, Congress, in 1956—recognizing that, although we are not at war, turbulent world conditions require large military commitments throughout the world—re-enacted, in Article 2 (11), the provision that civilians "serving with" the armies of the United States "outside the United

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[21] Article 2 (d) of the 1916 Articles provided that the following persons should be subject to the Articles of War:

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles." This section was re-enacted in 1920, 41 Stat. 787.

[22] General Enoch H. Crowder, then Judge Advocate General of the Army, stated before the House Committee on Military Affairs: "There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised. When any person joins an army in the field and subjects himself by that act to the discipline of the camp he acquires the capacity to imperil the safety of the command to the same degree as a man under the obligation of an enlistment contract or of a commission." Hearings on H. R. 23628, 62d Cong., 2d Sess., p. 61.

States" are subject to military jurisdiction, and it redefined that concept by adding the "employed by" classification.

Clause 14 does not limit Congress to the making of rules for the government and regulation of "members" of the armed forces. Rather, it empowers Congress to make rules for the government and regulation of "the land and naval Forces." The term "land and naval Forces" does not appear to be, nor ever to have been treated as, synonymous with "members" of the armed services.[23]

Viewed in the light of its birth and history, is it not reasonably clear that the grant of Clause 14, to make rules for the government and regulation of the land and naval forces, empowers Congress to govern and regulate all persons so closely related to and intertwined with those forces as to make their government essential to the government of those forces? Do not civilians employed by the armed forces at bases in foreign lands to do essential work for the military establishment, such as was being done by respondent Guagliardo and petitioners Wilson and Grisham, occupy that status and stand in that relationship to the armed forces for which they worked?

This Court has consistently held, in various contexts, that Clause 14 does not limit the power of Congress to the government and regulation of only those persons who are "members" of the armed services. In *Ex parte Milligan,* 4 Wall. 2, 123, it was said, relative to the discipline necessary to the efficient operation of the army and navy, that "Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts." In *Duncan* v. *Kahanamoku,* 327 U. S. 304, 313, this Court recognized the "well-established power of the military to

[23] See Cong. Globe, 37th Cong., 3d Sess., 995 *et seq.*

exercise jurisdiction over members of the armed forces [and] *those directly connected with such forces . . . .*" (Emphasis added.) In *Toth* v. *Quarles,* 350 U. S. 11, 15, this Court said that Clause 14 "would seem to restrict court-martial jurisdiction to persons who are actually members *or part of* the armed forces." (Emphasis added.) Of even greater relevance, the main opinion in *Covert,* although expressing the view that Clause 14 authorized military trials only of persons "in" the armed forces, recognized "that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." 354 U. S., at 23. To repeat the query of this Court, made under very similar circumstances, in *Ex parte Reed,* 100 U. S. 13, 22, "If these [civilian employees] are not *in* the [armed] service, it may well be asked who are." (Emphasis added.) That case held that a civilian, employed to serve aboard ship as the clerk of a paymaster of the United States Navy and who was dismissable at the will of the commander of the ship, occupied such "an important [place] in the machinery of the navy . . . [that] [t]he good order and efficiency of the service depend[ed] largely upon the faithful performance of [his] duties" and brought him "in the naval service," so that he was subject to trial and punishment by court-martial for an offense committed in a Brazilian port. 100 U. S., at 21–22. *Johnson* v. *Sayre,* 158 U. S. 109, reaffirmed the principle on practically identical facts.

The provisions of Art. III, § 2, and the Fifth and Sixth Amendments of the Constitution requiring the trial of capital or otherwise infamous crimes in an Article III court, upon an indictment of a grand jury, by an impartial petit jury, are not applicable to "cases arising in the land or naval forces." The Fifth Amendment expressly excepts those cases. It cannot be said that the "words,

in the Fifth Amendment, relating to the mode of accusation, restrict the jurisdiction of courts martial in the regular land and naval forces." *Johnson* v. *Sayre, supra,* 158 U. S., at 115. The exception in the Fifth Amendment "was undoubtedly designed to correlate with the power granted Congress to provide for the 'Government and Regulation' of the armed services . . . ." (*Reid* v. *Covert, supra,* at 22), and so was the jury-trial provision of the Sixth Amendment, for "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan, supra,* 4 Wall., at 123. See also *Ex parte Quirin,* 317 U. S. 1, 40. The power conferred upon Congress by Clause 14 to provide for court-martial trials of offenses arising in the land and naval forces is independent of and not restricted by Article III or the Fifth and Sixth Amendments to the Constitution.

Counsel for the convicted employees argue, with the citation and force of much history, that even if civilians "serving with [or] employed by" the armed forces are subject to the military power of courts-martial, such could be so only in respect of offenses committed while those forces are "in the field." Some of the early Articles of War limited military jurisdiction over certain civilian employees to the period when the army was "in the field." [24] What is really meant by the term "in the

[24] Article XXXII of American Articles of War of 1775, 2 J. Cont. Cong. 111, provided that "All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field . . ." were subject to court-martial jurisdiction.

Article 60 of the American Articles of War of 1806, 2 Stat. 359, 366, provided that "All suttlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field . . ." were subject to court-martial jurisdiction.

Article 63 of American Articles of War of 1874, R. S. § 1342,

field"? Seemingly, it does not mean "in actual war" or even "in time of war." "The essential element was thought to be, not so much that there be war, in the technical sense, but rather that the forces and their retainers be 'in the field.'" *Reid* v. *Covert, supra,* 354 U. S., at 71, n. 8 (concurring opinion). Historically, the term has been thought to include armed forces located at points where the civil power of the Government did not extend or where its civil courts did not exist. Prior to the Civil War, a number of civilians employed by the armed forces were tried and punished by courts-martial in time of peace.[25] In 1814, the Attorney General expressed the opinion that civilian employees of the navy were subject to punishment by court-martial for offenses committed on board vessels beyond the territorial jurisdiction of our civil courts. 1 Op. Atty. Gen. 177. The term "in the field" was thought to apply to organized camps stationed in remote places where civil courts did not exist or were not functioning. In 1866, the Judge Advocate General of the Army so declared.[26] But thereafter, Winthrop ex-

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provided that "All retainers to the camp, and all persons serving with the armies of the United States in the field . . ." were within the jurisdiction of courts-martial.

[25] At Ft. Monroe, Va., in 1825; Ft. Washington, Md., in 1825; Ft. Gibson, in what is now Oklahoma, in 1833; Ft. Brooke, Fla., in 1838; Camp Scott, Utah Territory, in 1858; Ft. Bridger, Utah Territory, in 1858.

[26] On November 15, 1866, the Judge Advocate General of the Army formulated the following opinion and direction:

"It is held by this Bureau and has been the general usage of the service in times of peace, that a detachment of troops is an army 'in the field' when on the march, or at a post remote from civil jurisdiction.

"It has been the custom and is held to be advisable, that civil employees, sutlers and camp followers when guilty of crimes known to the civil law, to turn the parties over to the courts of the vicinity in which the crimes were committed. For minor offences against good orders and discipline, it has been customary to expel the parties from

pressed the view that the term "in the field" is to be "confined both to the period and pendency of war and to acts committed on the theatre of the war." [27] This would seem to ignore the fact that the constitutional authority involved is Clause 14, not the war power, and that the Clause 14 powers apply to times of both peace and war. Moreover, even at the time when Winthrop wrote, there was no consensus of interpretation supporting his view. In 1872, the Attorney General issued an opinion which concluded that civilians serving with troops in Kansas, Colorado, New Mexico, and the Indian Territory (where civil courts did not exist or were not functioning) in the building of defensive earthworks to protect against threatening Indians were "in the field." 14 Op. Atty. Gen. 22.[28] As earlier observed, this Court held, in 1879, in *Ex parte Reed, supra,* and again in 1895, in *Johnson* v. *Sayre, supra,* that the civilian clerk of a paymaster of the navy might be tried and punished by a court-martial for a military offense committed in peacetime aboardship in a foreign port.

Doubtless, with the passing of the frontier and the extension of civil courts throughout the territorial bound-

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the Army: If, however, it is sought to punish civil employees in New Mexico, for crimes committed at a post where there are no civil courts before which they can be tried, it is held that they can be brought to trial before a General Court Martial, as they must be considered as serving with 'an army in the field' and, therefore, within the provision of the 60th Article of War." Op. J. A. G. of the Army, Nov. 15, 1866, 23 Letters sent, 331 (National Archives).

[27] Winthrop, Military Law and Precedents, 101.

[28] The opinion rested primarily on the ground that the term "in the field" implies military operations with a view to an enemy, and that an army was "in the field" when "engaged in offensive or defensive operations." It also noted, p. 24, that:

"Possibly the fact that troops are found in a region of country chiefly inhabited by Indians, and remote from the exercise of civil authority, may enter into the description of 'an army in the field.' "

aries of the United States, detachments of troops stationed within our borders may not in time of peace be regarded as "in the field." But, it seems to me that armed forces of the United States stationed at bases in foreign lands—where jurisdiction of our civil courts does not extend—must, under turbulent world conditions, be otherwise regarded. Because of long-existing world tensions and with the fervent hope of preventing worse, the United States Government has stationed armed forces at military bases in 63 foreign lands throughout the world. We are told that they must be kept constantly alert and ready to prevent or, if and when they arise, to put down "brush fires" which if allowed to spread might ignite a world-wide holocaust of atomic war. Because of physical necessities, such a war, like the frequently recurring "brush fires," could be suppressed, if at all, mainly from those bases. The forces at those bases are as much "in the field" in the one case as in the other. Though there be no war in the technical sense, those forces while so engaged in foreign lands—where our civil courts do not exist—are in every practical sense "in the field." They are as clearly "in the field" as were American soldiers while building fortifications to protect against threatening Indians in New Mexico and the Indian Territory, where our civil courts did not exist, in the days of the frontier. Op. J. A. G. of the Army, Nov. 15, 1866, 23 Letters sent, 331 (National Archives) and see note 26; 14 Op. Atty. Gen. 22, and see note 28.

Clause 14 empowers Congress to "make Rules"—all necessary and proper rules—"for the Government and Regulation of the land and naval Forces"—not just for "members" of those forces, but the "Forces," and not only in time of war but in times of both peace and war. In the exercise of that granted power, Congress has promulgated rules, the Uniform Code of Military Justice, for the government of the "armed forces" and, to that end, has

deemed it necessary, as witness Article 2 (11), to include persons "employed by" those forces when "outside the United States"—where our civil courts have no jurisdiction and do not exist—in times of both peace and war. In the light of all the facts, it would seem clear enough that Congress could rationally find that those persons are "in" those forces and, though there be no shooting war, that those forces, in turn, are "in the field"; and hence Congress could and did constitutionally make those employees subject to the military power. Both the practical necessities and the lack of alternatives, so clearly demonstrated by MR. JUSTICE CLARK in the *Covert* case, 354 U. S., at 78 (dissenting opinion), strongly buttress this conclusion, if, indeed, it could otherwise be doubted.

For these reasons, I would affirm No. 22, the *Singleton* case; reverse No. 21, the *Guagliardo* case; and affirm Nos. 37 and 58, the *Wilson* and *Grisham* cases.

GRISHAM *v.* HAGAN, WARDEN.

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

No. 58. Argued October 22, 1959.—Decided January 18, 1960.

Article 2 (11) of the Uniform Code of Military Justice, providing for the trial by court-martial of "all persons serving with, employed by, or accompanying the armed forces" of the United States in foreign countries, cannot constitutionally be applied in peacetime to the trial of a civilian employee of the armed forces serving with the armed forces in a foreign country and charged with having committed a capital offense there. *Reid* v. *Covert*, 354 U. S. 1. Pp. 278–280.

261 F. 2d 204, reversed.

Charles Wolfe Kalp and *Frederick Bernays Wiener* argued the cause for petitioner. On the brief were *Mr. Kalp* and *H. Clay Espey*.

Oscar H. Davis argued the cause for respondent. On the brief were *Solicitor General Rankin, Acting Assistant Attorney General Ryan, Harold H. Greene, William A. Kehoe, Jr., Peter S. Wondolowski* and *William M. Burch II*.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case tests by habeas corpus the validity of Article 2 (11) of the Uniform Code of Military Justice, 10 U. S. C. § 802,[1] as applied to a civilian tried by court-

[1] Art. 2. "The following persons are subject to this chapter:

. . . . . .

"(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

martial for a capital offense while employed overseas by the United States Army. It is a companion case to No. 22, *Kinsella* v. *Singleton, ante,* p. 234, which involves the application of the same Article to noncapital offenses committed by dependents accompanying soldiers stationed outside the United States, and to No. 21, *McElroy* v. *Guagliardo,* and No. 37, *Wilson* v. *Bohlender, post,* p. 281, involving noncapital offenses committed by armed-services employees while stationed overseas—all of which cases are decided today.

Petitioner, a civilian employee of the United States Army attached to an Army installation in France, was tried by a general court-martial for the capital offense of premeditated murder as defined in Article 118 (1) of the Uniform Code of Military Justice. He was found guilty of the lesser and included offense of unpremeditated murder, and sentenced to confinement at hard labor for the term of his natural life. The sentence was subsequently reduced to 35 years. While serving this sentence at the United States Penitentiary at Lewisburg, Pennsylvania, he filed this petition for a writ of habeas corpus, claiming that Article 2 (11) was unconstitutional as applied to him, for the reason that Congress lacked the power to deprive him of a civil trial affording all of the protections of Article III and the Fifth and Sixth Amendments of the Constitution. The writ was dismissed, 161 F. Supp. 112, and the Court of Appeals affirmed, 261 F. 2d 204. In the light of the opinion of this Court on the rehearing in *Reid* v. *Covert,* 354 U. S. 1 (1957), as well as that of the Court of Appeals on the issue of the severability of Article 2 (11) in *Guagliardo* v. *McElroy,* 259 F. 2d 927,[2] we granted certiorari. 359 U. S. 978 (1959).

[2] In the light of our opinion in No. 21, *McElroy* v. *Guagliardo,* handed down today, *post,* p. 281, we deny the contention that the article is nonseverable.

We are of the opinion that this case is controlled by *Reid* v. *Covert, supra.* It decided that the application of the Article to civilian dependents charged with capital offenses while accompanying servicemen outside the United States was unconstitutional as violative of Article III and the Fifth and Sixth Amendments. We have carefully considered the Government's position as to the distinctions between civilian dependents and civilian employees, especially its voluminous historical materials relating to court-martial jurisdiction. However, the considerations pointed out in *Covert* have equal applicability here. Those who controlled the majority there held that the death penalty is so irreversible that a dependent charged with a capital crime must have the benefit of a jury. The awesomeness of the death penalty has no less impact when applied to civilian employees. Continued adherence to *Covert* requires civilian employees to be afforded the same right of trial by jury. Furthermore, the number of civilian employees is much smaller than the number of dependents, and the alternative procedures available for controlling discipline as to the former more effective. See *McElroy* v. *Guagliardo, post,* p. 281. For the purposes of this decision, we cannot say that there are any valid distinctions between the two classes of persons. The judgment is therefore reversed.

It is so ordered.

[For opinion of Mr. Justice Harlan, joined by Mr. Justice Frankfurter, see *ante,* p. 249.]

[For opinion of Mr. Justice Whittaker, joined by Mr. Justice Stewart, see *ante,* p. 259.]

McELROY, SECRETARY OF DEFENSE, ET AL. *v.* UNITED STATES EX REL. GUAGLIARDO.

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

No. 21. Argued October 21–22, 1959.—Decided January 18, 1960.*

1. Article 2 (11) of the Uniform Code of Military Justice, providing for the trial by court-martial of "all persons serving with, employed by, or accompanying the armed forces" of the United States in foreign countries, cannot constitutionally be applied in peacetime to the trial of a civilian employee of the armed forces serving with the armed forces in a foreign country and charged with having committed a noncapital offense there. *Kinsella* v. *Singleton*, *ante*, p. 234; *Grisham* v. *Hagan*, *ante*, p. 278. Pp. 282–287.

2. Article 2 (11) is severable, and legal effect can be given to each category standing alone. P. 283.

104 U. S. App. D. C. 112, 259 F. 2d 927, affirmed.

167 F. Supp. 791, reversed.

Oscar H. Davis argued the cause for petitioners in No. 21. On the briefs were *Solicitor General Rankin, Assistant Attorney General White, Acting Assistant Attorney General Ryan, Harold H. Greene, William A. Kehoe, Jr., Peter S. Wondolowski, William M. Burch II* and *D. Robert Owen.*

Frederick Bernays Wiener argued the cause for petitioner in No. 37. With him on the brief was *Arthur John Keeffe.*

Michael A. Schuchat argued the cause and filed a brief for respondent in No. 21.

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*Together with No. 37, *Wilson* v. *Bohlender*, on certiorari to the United States Court of Appeals for the Tenth Circuit, argued October 22, 1959.

Harold H. Greene argued the cause for respondent in No. 37. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General White, Acting Assistant Attorney General Ryan, William A. Kehoe, Jr., D. Robert Owen* and *John M. Raymond.*

MR. JUSTICE CLARK delivered the opinion of the Court.

These are companion cases to No. 22, *Kinsella* v. *Singleton, ante,* p. 234, and No. 58, *Grisham* v. *Hagan, ante,* p. 278, both decided today. All the cases involve the application of Article 2 (11)[1] of the Uniform Code of Military Justice. Here its application to noncapital offenses committed by civilian employees of the armed forces while stationed overseas is tested.

In No. 21 the respondent, a civilian employee of the Air Force performing the duties of an electrical lineman, was convicted by court-martial at the Nouasseur Air Depot near Casablanca, Morocco, of larceny and conspiracy to commit larceny from the supply house at the Depot. Before being transferred to the United States Disciplinary Barracks, New Cumberland, Pennsylvania, respondent filed a petition for a writ of habeas corpus in the District Court for the District of Columbia alleging that the military authorities had no jurisdiction to try him by court-martial. This petition was dismissed. 158 F. Supp. 171. The Court of Appeals reversed and ordered respondent discharged. It held that *Reid* v.

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[1] Article 2. "The following persons are subject to this chapter:

. . . . . .

"(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

Covert, 354 U. S. 1 (1957), was binding as to all classes of persons included within the section and that each class was nonseverable. 104 U. S. App. D. C. 112, 259 F. 2d 927. We granted certiorari, 359 U. S. 904, in view of the conflict with *Grisham* v. *Taylor,* 261 F. 2d 204.

In No. 37, petitioner, a civilian auditor employed by the United States Army and stationed in Berlin, was convicted by a general court-martial on a plea of guilty to three acts of sodomy. While serving his five-year sentence, petitioner filed a petition for a writ of habeas corpus in the United States District Court for Colorado. The petition was dismissed, 167 F. Supp. 791, and appeal was perfected to the Court of Appeals for the Tenth Circuit. Prior to argument we granted certiorari.[2] 359 U. S. 906.

We first turn to respondent Guagliardo's contention that Article 2 (11) is nonseverable. As desirable as it is to avoid constitutional issues, we cannot do so on this ground. The Act provides for severability of the remaining sections if "a part of this Act is invalid in one or more of its applications." 70A Stat. 640. The intention of Congress in providing for severability is clear, and legal effect can be given to each category standing alone. See *Dorchy* v. *Kansas,* 264 U. S. 286, 290 (1924).

We believe that these cases involving the applicability of Article 2 (11) to employees of the armed services while serving outside the United States are controlled by our

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[2] Since the offense occurred within the United States Area of Control of West Berlin, the Government now contends that petitioner Wilson is amenable to the military government jurisdiction of an occupied territory. However the charges were drawn in terms of Article 2 (11) power, and jurisdiction was sustained on that basis. Moreover the Court of Military Appeals refused to consider that issue when raised by the Government and the trial court did not rest its decision sustaining military jurisdiction over petitioner on that ground. This contention is consequently denied.

opinion in No. 22, *Kinsella* v. *Singleton, ante,* p. 234, and No. 58, *Grisham* v. *Hagan, ante,* p. 278, announced today. In *Singleton* we refused, in the light of *Reid* v. *Covert,* 354 U. S. 1 (1957), to apply the provisions of the article to noncapital offenses committed by dependents of soldiers in the armed services while overseas; in *Grisham* we held that there was no constitutional distinction for purposes of court-martial jurisdiction between dependents and employees insofar as application of the death penalty is concerned. The rationale of those cases applies here.

Although it is true that there are materials supporting trial of sutlers and other civilians by courts-martial, these materials are "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication." Concurring opinion, *Covert,* 354 U. S., at 64. Furthermore, those trials during the Revolutionary Period, on which it is claimed that court-martial jurisdiction rests, were all during a period of war, and hence are inapplicable here. Moreover, the materials are not by any means one-sided. The recognized authority on court-martial jurisdiction, after a careful consideration of all the historical background, concluded: "That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law . . . ." [3] But it is contended that *Ex parte Reed,* 100 U. S. 13 (1879), is controlling because the forces covered by Article 2 (11) are overseas and therefore "in the field." Examination of that case, as well as *Johnson* v. *Sayre,* 158 U. S. 109 (1895), however, shows them to be entirely inapposite.

[3] Winthrop, Military Law and Precedents (2d ed. 1896), 143. See also, *Ex parte Milligan,* 4 Wall. 2, 121, 123 (1866); Maltby, Courts Martial and Military Law, 37; Rawle, Constitution (2d ed. 1829), 220; 3 Op. Atty. Gen. 690; 5 *id.,* at 736; 13 *id.,* at 63.

Those cases permitted trial by courts-martial of paymasters' clerks in the navy. The Court found that such a position was "an important one in the machinery of the navy," the appointment being made only upon approval of the commander of the ship and for a permanent tenure "until discharged." Also the paymaster's clerk was required to agree in writing "to submit to the laws and regulations for the government and discipline of the navy." Moreover, from time immemorial the law of the sea has placed the power of disciplinary action in the commander of the ship when at sea or in a foreign port. None of these considerations are present here. As we shall point out subsequently, a procedure along the lines of that used by the navy as to paymasters' clerks might offer a practical alternative to the use of civilian employees by the armed services. As was stated in the second *Covert* case, *supra,* at 23, "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military . . . ."

The only other authorities cited in support of court-martial jurisdiction over civilians appear to be opinions by the Attorney General and the Judge Advocate General of the Army. However, the 1866 opinion of the Judge Advocate General (cited in support of the Government's position) was repudiated by subsequent Judge Advocate Generals.[4] To be sure, the 1872 opinion of the Attorney General, dealing with civilians serving with troops in the building of defensive earthworks to protect against threatened Indian uprisings, is entitled to some weight. However, like the other examples of frontier activities based on the legal concept of the troops' being "in the field," they are inapposite here. They were in time of

[4] See 16 Op. Atty. Gen. 13; *id.*, at 48; Dig. Op. JAG (1901), 563, ¶ 2023; *id.* (1895), at 599–600, ¶ 4; *id.* (1880), at 384, ¶ 4.

"hostilities" with Indian tribes or were in "territories" governed by entirely different considerations. See second *Covert,* at 12–13. Such opinions, however, do not have the force of judicial decisions and, where so "episodic," have little weight in the reviewing of administrative practice. Moreover, in the performance of such functions as were involved there, the military service would today use engineering corps subject to its jurisdiction. This being entirely practical, as we hereafter point out, as to all civilians serving with the armed forces today, we believe the *Toth* doctrine, that we must limit the coverage of Clause 14 to "the least possible power adequate to the end proposed," 350 U. S., at 23, to be controlling.

In the consideration of the constitutional question here we believe it should be pointed out that, in addition to the alternative types of procedure available to the Government in the prosecution of civilian dependents and mentioned in *Kinsella* v. *Singleton, supra,* additional practical alternatives have been suggested in the case of employees of the armed services. One solution might possibly be to follow a procedure along the line of that provided for paymasters' clerks as approved in *Ex parte Reed, supra.* Another would incorporate those civilian employees who are to be stationed outside the United States directly into the armed services, either by compulsory induction or by voluntary enlistment. If a doctor or dentist may be "drafted" into the armed services, 50 U. S. C. App. § 454 (i), extended, 73 Stat. 13; *Orloff* v. *Willoughby,* 345 U. S. 83 (1953), there should be no legal objection to the organization and recruitment of other civilian specialists needed by the armed services.

Moreover, the armed services presently have sufficient authority to set up a system for the voluntary enlistment of "specialists." This was done with much success during the Second World War. "The Navy's Construction Battalions, popularly known as the Seabees, were estab-

lished to meet the wartime need for uniformed men to perform construction work in combat areas." 1 Building the Navy's Bases in World War II (1947) 133. Just as electricians, clerks, draftsmen, and surveyors were enlisted as "specialists" in the Seabees, *id.*, at 136, provisions can be made for the voluntary enlistment of an electrician (Guagliardo), an auditor (Wilson), or an accountant (Grisham). It likewise appears entirely possible that the present "specialist" program conducted by the Department of the Army [5] could be utilized to replace civilian employees if disciplinary problems require military control. Although some workers might hesitate to give up their civilian status for government employment overseas, it is unlikely that the armed forces would be unable to obtain a sufficient number of volunteers to meet their requirements. The increased cost to maintain these employees in a military status is the price the Government must pay in order to comply with constitutional requirements.

The judgment in No. 21 is affirmed and the judgment in No. 37 is reversed.

No. 21, *affirmed.*
No. 37, *reversed.*

[For opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE FRANKFURTER, see *ante*, p. 249.]

[For opinion of MR. JUSTICE WHITTAKER, joined by MR. JUSTICE STEWART, see *ante*, p. 259.]

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[5] See Army Regulations 600–201, 20 June 1956, as changed 15 March 1957, and Army Regulations 624–200, 19 May 1958, as changed 1 July 1959.

525554 O–60—24

MITCHELL, SECRETARY OF LABOR, *v.* ROBERT DeMARIO JEWELRY, INC., ET AL.

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

No. 39. Argued November 16, 1959.—Decided January 18, 1960.

In an action by the Secretary of Labor under § 17 of the Fair Labor Standards Act of 1938, as amended, to restrain violations of § 15 (a)(3), a district court has jurisdiction to order an employer to reimburse employees unlawfully discharged or otherwise discriminated against for wages lost because of that discharge or discrimination. Pp. 289–296.

(a) The jurisdiction conferred by § 17 is not to be narrowly construed as including only the powers expressly conferred or necessarily implied from its language. The jurisdiction is equitable and includes the power to provide complete relief in the light of the statutory purpose. Pp. 290–292.

(b) By the proscription of retaliatory acts set forth in § 15 (a)(3) and its enforcement in equity by the Secretary under § 17, Congress sought to foster a climate in which compliance with the Act would be enhanced. P. 292.

(c) The Act should not be construed as enabling employees to resort to statutory remedies to obtain restitution of partial deficiencies in wages due for past work, only at the risk of irremediable loss of entire pay for an unpredictable future period. Pp. 292–293.

(d) The proviso added to § 17 by the 1949 amendment, which disabled courts in actions under § 17 from awarding "unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages," was not intended to apply to reimbursement of *lost* wages incident to wrongful discharge. Pp. 293–296.

260 F. 2d 929, reversed.

Bessie Margolin argued the cause for petitioner. With her on the brief were *Solicitor General Rankin, Harold C. Nystrom* and *Jacob I. Karro.*

R. Lamar Moore argued the cause and filed a brief for respondents.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Section 15 (a)(3) of the Fair Labor Standards Act of 1938, 52 Stat. 1068, 29 U. S. C. § 215 (a)(3), makes it unlawful for an employer covered by that Act—

> "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act . . . ."

By § 17 of the Act, 52 Stat. 1069, as amended, 29 U. S. C. § 217, the District Courts are given jurisdiction—

> "for cause shown, to restrain violations of section 15: [1] *Provided,* That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

The question for decision is whether, in an action brought by the Secretary of Labor to enjoin violations of § 15 (a)(3), Section 17 empowers a District Court to order reimbursement for loss of wages caused by an unlawful discharge or other discrimination.

The facts, as found by the District Court,[2] are not in dispute. Several of the employees of the respondent corporation had sought the aid of the Secretary of Labor, petitioner here, in seeking to recover wages allegedly unpaid in violation of §§ 6 (a) and 7 (a) of the Act. The Secretary instituted an action pursuant to § 16 (c) of the statute, 63 Stat. 919, 29 U. S. C. § 216 (c), on behalf of

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[1] In addition to the conduct prohibited by § 15 (a)(3), various other activities are proscribed by paragraphs (1), (2), (4), and (5) of subdivision (a) of that section.

[2] The opinion of the District Court is reported in 13 WH Cases 709.

the aggrieved employees, for the recovery of the unpaid compensation. After the commencement of such action, respondents commenced a course of discriminatory conduct against three of the complaining employees, culminating in their discharge. In a second action by the Secretary, pursuant to § 17, this discrimination was found by the District Court to have been caused by respondents' "displeasure" over the actions of the employees in authorizing suit.

Finding the evidence of unlawful discrimination "clear and convincing," the District Court granted an injunction against further discrimination and ordered reinstatement of the three discharged employees, without loss of seniority. As to reimbursement for loss of wages, the court, expressly reserving the question whether it had jurisdiction to order such reimbursement, declined in the exercise of its discretion to do so. On appeal, the Court of Appeals did not reach the question of abuse of discretion, for it held that the District Court lacked jurisdiction to order reimbursement of lost wages resulting from an unlawful discharge. 260 F. 2d 929. The decision being in conflict with that of the Court of Appeals for the Second Circuit in *Walling* v. *O'Grady,* 146 F. 2d 422, we granted certiorari. 359 U. S. 964.

We initially consider § 17 apart from the effect of its proviso, which was added in 1949. The court below took as the touchstone for decision the principle that to be upheld the jurisdiction here contested "must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment." 260 F. 2d, at 933. In this the court was mistaken. The proper criterion is that laid down in *Porter* v. *Warner Co.,* 328 U. S. 395. This Court there dealt with an action brought by the Price Administrator under the Emergency Price Control Act of 1942 to enjoin the collection of excessive rents and to require the landlord to reimburse its tenants for moneys

paid as a result of past violations. We upheld the implied power to order reimbursement, in language of the greatest relevance here:

> "Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. . . .
>
> "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown* v. *Swann,* 10 Pet. 497, 503. . . ." 328 U. S., at 397–398.

The applicability of this principle is not to be denied, either because the Court there considered a wartime statute, or because, having set forth the governing inquiry, it went on to find in the language of the statute affirmative confirmation of the power to order reimbursement. *Id.,* at 399. When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory

enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature." *Clark* v. *Smith,* 13 Pet. 195, 203. To the policy of the Fair Labor Standards Act we therefore now turn.

The central aim of the Act was to achieve, in those industries within its scope, certain minimum labor standards. See § 2 of the Act, 52 Stat. 1060, 29 U. S. C. § 202. The provisions of the statute affect weekly wage dealings between vast numbers of business establishments and employees. For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition of § 15 (a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. Cf. *Holden* v. *Hardy,* 169 U. S. 366, 397. By the proscription of retaliatory acts set forth in § 15 (a)(3), and its enforcement in equity by the Secretary pursuant to § 17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.

In this context, the significance of reimbursement of lost wages becomes apparent. To an employee considering an attempt to secure his just wage deserts under the Act, the value of such an effort may pale when set against the prospect of discharge and the total loss of wages for

the indeterminate period necessary to seek and obtain reinstatement. Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period. Faced with such alternatives, employees understandably might decide that matters had best be left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

Respondents argue that, in the absence of a contrary contractual provision, an employee cannot recover lost wages owing to a discriminatory discharge, and that the jurisdiction here invoked is therefore to be regarded as "punitive," outside the function of equity unless expressly authorized by the statute. We intimate no view as to the validity of the premise, for it in no way supports the conclusion. Whatever the rights of the parties may be under traditional notions of contract law, it is clear that under § 15 (a)(3) such a discharge is not permissible. Even assuming, without deciding, that the Act did not contemplate the private vindication of rights it bestowed,[3] the public remedy is not thereby rendered punitive, where the measure of reimbursement is compensatory only. Respondents cannot be heard to assert that wages are ordered to be paid for services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of their opportunity to render services.

It is contended, however, that even though equitable jurisdiction to restore lost wages resulting from an unlawful discharge may originally have existed under § 17, such jurisdiction was withdrawn by the 1949 proviso which dis-

[3] Cf. *Bonner* v. *Elizabeth Arden, Inc.*, 177 F. 2d 703, 705; *Powell* v. *Washington Post Co.*, 105 U. S. App. D. C. 374, 375, 267 F. 2d 651, 652.

abled courts in § 17 actions from awarding "unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages . . . ." *Ante,* p. 289. When considered against its background we think the proviso has no such effect.

Shortly before the enactment of this proviso the Court of Appeals for the Second Circuit had decided in *McComb* v. *Frank Scerbo & Sons,* 177 F. 2d 137, that in a § 17 suit brought by the Secretary to enjoin violations of the minimum wage and overtime provisions of the Act, the court had power to order reimbursement of unpaid overtime wages. The effect of this decision was to enable the Secretary in such a suit to recover on behalf of employees that which would otherwise have been recoverable only in an action brought by the employees themselves under § 16 (b) of the statute, 52 Stat. 1069, 29 U. S. C. § 216 (b). The § 17 proviso was aimed at doing away with this result. Even so, Congress did not see fit to undo the effects of *Scerbo* entirely, for at the time it enacted the § 17 proviso it also added to the Act § 16 (c), whereby the Secretary was empowered to bring a representative action on behalf of employees to recover unpaid wages in cases other than those involving "an issue of law which has not been settled finally by the courts." 63 Stat. 919, 29 U. S. C. § 216 (c).[4] Thus, presumably Congress felt that the Secretary should not lend his weight to, nor be burdened with, actions for unpaid wages except in the clearest cases.

We find no indication in the language of the § 17 proviso, or in the legislative history, that Congress intended the proviso to have a wider effect, that is, that it was intended to apply to reimbursement of *lost* wages incident

[4] A further limitation was that there would be no right to seek double damages, which are recoverable only in actions brought by employees under § 16 (b).

to a wrongful discharge, as distinguished from the recoupment of *underpayments* of the statutorily prescribed rates for those while still employed. The proviso speaks entirely in terms of unpaid *minimum* wages and overtime. In effectuating the policies of the Act the proper reach of equity power in suits by the Secretary under the wage provisions of the statute, and that in suits under the discharge provisions, are attended by quite different considerations, which, in passing the 1949 amendments, Congress evidently had in mind. We are not persuaded by respondents' argument that because the Second Circuit in *Scerbo* partially relied on its earlier decision in *Walling* v. *O'Grady, supra,* and because the House Conference Report on the 1949 amendments stated that the § 17 proviso "will have the effect of reversing such decisions as *McComb* v. *Scerbo* . . . in which the court included a restitution order in an injunction decree granted under section 17," H. R. Conf. Rep. No. 1453, 81st Cong., 1st Sess., p. 32, the proviso must be taken as having been intended to overrule the *O'Grady* case as well. *O'Grady* was a discriminatory discharge case, not a wage case as was *Scerbo*. And before the 1949 amendments expressions of other lower courts had indicated a point of view similar to that espoused in *Scerbo*. See *Fleming* v. *Alderman,* 51 F. Supp. 800; *Walling* v. *Miller,* 138 F. 2d 629; *Fleming* v. *Warshawsky & Co.,* 123 F. 2d 622.

Rather than expressing a general repudiation of equitable jurisdiction to order reimbursement to effectuate the policies of the Act, we think that the 1949 amendments evidence a purpose to make only limited modifications in the nature and extent of the Secretary's power to obtain reimbursement of unpaid compensation.[5] This

[5] The Conference Report makes this clear: "This proviso has been inserted . . . in view of the provision of the conference agreement contained in section 16 (c) of the act which authorizes the Administrator in certain cases to bring suits for damages for unpaid minimum

being so, there is no warrant for construing the § 17 proviso as reaching beyond suits to enjoin violations of the minimum wage and overtime provisions of the statute, so as wholly to eradicate any jurisdiction to restore wage losses to employees discharged in violation of § 15 (a)(3). To the contrary, in view of the related character of the issues presented in *O'Grady* and *Scerbo,* the modification in the area treated by the latter case bespeaks an intention to leave the *O'Grady* decision intact. The 1949 amendments, then, only serve to confirm the result we reach independently of them.

We hold that, in an action by the Secretary to restrain violations of § 15 (a)(3), a District Court has jurisdiction to order an employer to reimburse employees, unlawfully discharged or otherwise discriminated against, for wages lost because of that discharge or discrimination. The Court of Appeals did not reach the question whether the District Court abused its discretion in declining to order reimbursement. While, because of what we have found to be the statutory purposes there is doubtless little room for the exercise of discretion not to order reimbursement, since we do not have the entire record before us we shall remand the case to the Court of Appeals for consideration of that issue.

Reversed and remanded.

MR. JUSTICE DOUGLAS, while joining in this opinion, agrees with MR. JUSTICE WHITTAKER that other remedies are available and that any remedy obtained in this equity action is complementary to them.

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wages and overtime compensation owing to employees at the written request of such employees. Under the conference agreement the proviso does not preclude the Administrator from joining in a single complaint causes of action arising under section 16 (c) and section 17." H. R. Conf. Rep. No. 1453, 81st Cong., 1st Sess., p. 32; see 95 Cong. Rec. 14879.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE BLACK and MR. JUSTICE CLARK join, dissenting.

I cannot agree with the Court's opinion. My disagreement rests on the belief that Congress has expressly withheld jurisdiction from District Courts to make awards against employers in favor of employees for "wages" lost as a result of unlawful discharges, in injunction actions, such as this, brought by the Secretary of Labor under § 17 of the Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U. S. C. § 217.

Several employees of the corporate respondent, believing that they had not been paid the minimum wages and overtime compensation prescribed by §§ 6 (a) and 7 (a) of the Act, 29 U. S. C. §§ 206 (a), 207 (a), requested the Secretary of Labor, in writing, to institute an action against the corporate respondent under § 16 (c) of the Act, 29 U. S. C. § 216 (c), to recover the amount of their claims. The Secretary did so on November 16, 1956. Soon afterward, three of these employees were discharged. On May 17, 1957, the Secretary brought another suit against respondents in the same District Court—this time under § 17 of the Act, 29 U. S. C. § 217—complaining that respondents had discharged the three employees in violation of § 15 (a)(3) of the Act, 29 U. S. C. § 215 (a)(3), and praying for an order enjoining respondents from violating the provisions of that section, reinstating the three employees, and awarding reparations to them for wages lost because of their wrongful discharge. The District Court found that the employees had been discharged, in violation of § 15 (a)(3), for instigating the first action, issued an injunction against respondents from violating that section, and ordered respondents to offer reinstatement to those employees. But the district judge doubted that he had jurisdiction under § 17 to award reparations to the employees for their lost wages, and held that, even if he did have jurisdiction to do so, such

an award of reparations should be denied as a matter of discretion. On the Secretary's appeal, the Court of Appeals affirmed, 260 F. 2d 929, holding that the District Court had no jurisdiction, in an injunction action brought by the Secretary under § 17, to award reparations for wages lost by the employees because of their wrongful discharge. We granted certiorari, 359 U. S. 964.

The question before us, then, is whether a District Court has jurisdiction in an injunction action brought by the Secretary of Labor under § 17 of the Act to make an award of reparations against an employer in favor of an employee, found to have been wrongfully discharged and entitled to reinstatement, for the "wages" that he lost by being wrongfully excluded from his job.

The Court, heavily relying upon the long reach of unrestricted general equity powers, particulary as elucidated in *Porter* v. *Warner Co.*, 328 U. S. 395, 397–398,[1] holds

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[1] *Porter* v. *Warner, supra,* involved § 205 (a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 33, which authorized state and federal courts, upon complaint of the Administrator, to grant "a permanent or temporary injunction, restraining order, *or other order,*" to enforce compliance with the Act and its policy. (Emphasis added.) There the Administrator had sued a landlord to enjoin collection of excessive rents and to require the landlord to tender to his tenants the excess rents collected. The District Court granted the relief prayed. This Court approved that action, saying that "An order for the recovery and restitution of illegal rents may be considered a proper 'other order' . . . ." 328 U. S., at 399. It observed that the Report of the Senate Committee, submitted with the bill that became the Emergency Price Control Act, stated that under § 205 (a) of that Act ". . . Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." 328 U. S., at 400–401. In the light of the provisions of § 205 (a) and its legislative history, this Court held "that the traditional equity powers of a court remain unimpaired in a proceeding under that section so that an order of restitution may be made." 328 U. S., at 400.

that a District Court does have such jurisdiction and power.

It is not to be doubted that an equity court, proceeding under unrestricted general equity powers, may decree all the relief, including incidental legal relief, necessary to do complete justice between the parties. Here, however, the District Court was proceeding, not under unrestricted general equity powers, but under a statute—§ 17 of the Act—the proviso of which expressly denies to all courts jurisdiction and power, in an action brought by the Secretary for an injunction under that section, "to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

The Court does not dispute the fact that Congress by the proviso in § 17 deprived the courts of jurisdiction to "order the payment to employees of unpaid minimum wages or unpaid overtime compensation . . ." in an injunction action brought by the Secretary under that section, in a case where the wages have been *earned by services rendered;* but the Court seems to think that an award of reparations to an employee for wages *lost because of a wrongful discharge* is not one "order[ing] the payment to employees of unpaid minimum wages or unpaid overtime compensation . . ." and that, therefore, the court is not deprived by the proviso in § 17 of jurisdiction to make such an award in such a case. Here, I think, lies the fallacy. The only possible basis or theory under which a wrongfully discharged employee might recover his lost wages is that the attempted discharge, being unlawful, never became effective, and since he was unlawfully excluded from his job his wages continued to accrue. It would seem necessarily to follow that an award for those lost "wages" would be as much one for "unpaid minimum wages or unpaid overtime compensation" as would

an award for "wages" for services actually performed. If it may be thought that an award for lost wages should properly be called one for "damages," the result would be the same, for the sole measure of such "damages" would be the lost wages. Hence, it seems inescapable that however viewed an award for wages lost because of an unlawful discharge is one for, or that at least embraces, unpaid minimum wages or unpaid overtime compensation or both.

Before Congress added subdivision (c) to § 16 and the proviso to § 17 in 1949, the Second Circuit had held in *Walling* v. *O'Grady,* 146 F. 2d 422, that a District Court, acting under its unrestricted general equity powers, had jurisdiction, in a suit brought by the Secretary under § 17 of the Act as it then stood, to order not only an injunction against violation of the provisions of § 15 (a)(3) of the Act, and reinstatement of employees wrongfully discharged, but also an award of reparations for wages lost by employees because of their wrongful discharge. Thereafter, following, as it said, the principles it announced in the *O'Grady* case, the Second Circuit held in *McComb* v. *Frank Scerbo & Sons,* 177 F. 2d 137, that a District Court, proceeding under its unrestricted general equity powers, had jurisdiction, in an injunction action brought by the Secretary under § 17 as it then stood, to award reparations to employees for unpaid minimum wages and overtime compensation to which their past services entitled them.

Evidently dissatisfied with those decisions, Congress passed the Act of Oct. 26, 1949, 63 Stat. 919, by which it added subsection (c) to § 16 and the proviso to § 17 of the Act. By subsection (c) [2] of § 16, Congress provided,

[2] Subdivision (c), added to § 16 of the Act by Congress in 1949, in pertinent part, provides:

". . . When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary may

in effect, that when an employee files a written request with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under § 6 or § 7 of the Act, "the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim . . . ." In such an action the Secretary, of course, sues as a trustee or use plaintiff for the benefit of the employee, and the action is one at law triable by a jury under the Seventh Amendment of the United States Constitution. That is the only remedy which Congress has provided for the recovery of unpaid minimum wages and overtime compensation by suit instituted and prosecuted by the Secretary. By the proviso to § 17, Congress provided: "That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action." The Conference Report that accompanied that bill, H. R. Conf. Rep. No. 1453, 81st Cong., 1st Sess., p. 32, said, respecting the proviso, that: "The provision . . . will have the effect of reversing such decisions as *McComb* v. *Scerbo* . . . , in which the court included a restitution order in an injunction decree granted under section 17." It seems evident from that statement of the Conference Committee that Congress intended the proviso to, in effect, reverse not only *McComb* v. *Scerbo*, but also all other "such decisions."

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bring an action in any court of competent jurisdiction to recover the amount of such claim: . . . The consent of any employee to the bringing of any such action by the Secretary, unless such action is dismissed without prejudice on motion of the Secretary, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. . . ." 63 Stat. 919.

Not only is it clear from the opinions themselves that the Second Circuit applied the same legal principles in *Scerbo* that it had earlier applied in *O'Grady,* but, moreover, that court said that it did so. In the *Scerbo* case the court said: "Defendants attempt to distinguish the *O'Grady* case because the individual employee's right to sue for back pay lost by a discriminatory discharge is not explicit in the Act. We do not agree that the case is distinguishable . . . ." 177 F. 2d, at 138. And, in his separate opinion concurring only in the result, Judge Learned Hand's opening sentence was: "I agree that the decision below followed from what has been decided before . . . ." 177 F. 2d, at 140. It thus seems quite clear, not only from the terms of the proviso but also from the legislative history declaring its purpose, that Congress intended not only to deny jurisdiction to District Courts, in injunction actions brought by the Secretary under § 17, to award reparations for unpaid minimum wages or overtime compensation, but also, in effect, to reverse "such decisions as *McComb* v. *Scerbo.*" Surely *Walling* v. *O'Grady, supra,* was "such [a] decision" as *McComb* v. *Scerbo.*[3]

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[3] When, in 1949, Congress adopted the proviso to § 17 there were only two decisions, in addition to the *O'Grady* and *Scerbo* cases, holding that a District Court had jurisdiction in an injunction action brought by the Secretary under § 17 to make an award of reparations for unpaid wages, namely, *Fleming* v. *Warshawsky & Co.,* 123 F. 2d 622 (C. A. 7th Cir.), and *Fleming* v. *Alderman,* 51 F. Supp. 800 (D. C. D. Conn.). In neither of these cases did the employer contest the jurisdiction of the District Court to award reparations for unpaid wages. Instead, each employer appeared in the District Court and agreed to the entry of a consent decree awarding back pay to the employees. It was largely because of those agreements that those courts held that they had jurisdiction to enter the consent decrees. Thus, when Congress adopted the proviso to § 17, the only contested decisions on the point were the *O'Grady* and *Scerbo* cases. Hence, the reference in the House Conference Report, *supra,* to "such decisions as *McComb* v. *Scerbo*" seems necessarily to have been

This review seems plainly to show that Congress intended by § 16 (c) to allow recovery of unpaid minimum wages and overtime compensation at the instance of the Secretary only in an action at law, brought under that subsection, and triable by a jury; and that it intended by the proviso to § 17 to deny jurisdiction to District Courts, in injunction actions brought by the Secretary under that section, to award reparations for "wages," including "unpaid minimum wages [and] unpaid overtime compensation," whether earned by the rendition of services or by unlawful denial of the opportunity to earn them.

I think a wrongfully discharged employee may maintain in his own right an action at law, triable by a jury, under either § 16 (b) or the common law, or the Secretary may do so by an action at law under § 16 (c), to recover wages lost by the employee as a result of his wrongful discharge. But, for the reasons hereinbefore stated, it seems to me that the Court of Appeals was correct in holding that the District Court was without jurisdiction to make an award of reparations for lost wages in this injunction action brought by the Secretary under § 17, and I would affirm its judgment.

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intended to include the *O'Grady* decision as well as *McComb* v. *Scerbo*, for it was really the only other "such decision" in the books. The separate concurring opinion of one of the judges in *Walling* v. *Miller*, 138 F. 2d 629 (C. A. 8th Cir.), saying that a District Court had jurisdiction under § 17, as it stood prior to the adoption of the 1949 proviso, to make an award for unpaid wages did not express the views of the court.

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UNITED STATES *v.* PRICE.

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

No. 48. Argued December 9, 1959.—Decided January 18, 1960.

Under § 272 (a) (1) of the Internal Revenue Code of 1939, as amended, failure of the Commissioner of Internal Revenue to send to a taxpayer a 90-day notice of a deficiency in his income tax return does not bar an action by the United States to collect such deficiency and statutory interest thereon when the taxpayer had executed and filed, under § 272 (d), a waiver of the restrictions of § 272 (a) on the assessment and collection of deficiencies, since § 272 (d) authorizes the filing of such a waiver "at any time" and not only after the issuance of a 90-day notice of a deficiency. Pp. 304–313.

263 F. 2d 382, reversed.

Howard A. Heffron argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *George F. Lynch.*

W. Lee McLane, Jr. argued the cause and filed a brief for respondent.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The United States brought this action against the respondent taxpayer for the collection of a deficiency in taxes for the year 1946, and statutory interest thereon. The respondent defended on the ground that the action could not be maintained because the Commissioner of Internal Revenue had never issued to the taxpayer a notice of deficiency (commonly known as a "90-day letter") for the amount in question. This defense was based on § 272 (a) (1) of the Internal Revenue Code of 1939, 53

Stat. 82, as amended, providing in pertinent part as follows:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed . . . the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. . . ."

The Government relied on the admitted fact that respondent had executed a Treasury Department form waiving the restrictions on assessment and collection of the deficiency sued for,[1] and on § 272 (d) of the 1939 Code, 53 Stat. 83, said to authorize such a waiver, which provides:

> "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commis-

[1] The waiver was executed on United States Treasury Form 870, entitled "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax," and read, in relevant part, as follows:
"Pursuant to the provisions of Section 272 (d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272 (a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:"

> sioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

The District Court held that the waiver was not effective because a 90-day letter had not been issued, and that § 272 (a) therefore barred the action. The Court of Appeals affirmed, 263 F. 2d 382, and in view of contrary decisions in the First and Sixth Circuits,[2] we granted certiorari. 359 U. S. 988. For reasons hereafter stated we think the court below was in error.

We start with the language of § 272 (d). By its terms, the right of waiver is to be available "at any time," and is applicable to "the restrictions" contained in § 272 (a). Those restrictions include the prohibitions on assessment and collection of a deficiency prior to the mailing of a 90-day letter, no less than the same prohibitions relating to the period following the issuance of such a letter during which a petition for a redetermination of a deficiency may be filed or is awaiting decision of the Tax Court.

Respondent seeks to support the view that these provisions should be read as applying only to the period following the issuance of the 90-day letter by noting that § 272 (d) is limited to waivers of restrictions on the assessment and collection of "the deficiency," and asserting that "the deficiency" does not come into existence, as it were, until a 90-day letter has been mailed. This reading of the statute is said to follow from the first sentence of § 272 (a)(1):

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the

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[2] *Associated Mutuals* v. *Delaney*, 176 F. 2d 179, 182–184; *Moore* v. *Cleveland R. Co.*, 108 F. 2d 656, 658–660. See also *Roos* v. *United States*, 90 Ct. Cl. 482, 31 F. Supp. 144.

> tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail."

A deficiency, it is argued, is not "determined" until the statutory notice has been issued. We cannot accept any such fine-spun refinements. The plain sense of this provision contemplates, first, a determination, and then the sending of a notice. No persuasive reason appears for artificially engrafting upon the statutory terms excessively formal conditions.[3] Nor do we find any force in the argument that because a determination and assessment of additional deficiencies may follow upon one already made, "the deficiency" referred to in § 272 (d) must be taken as limited to one previously determined.

Section 272 (d) does not on its face therefore support the view that a waiver of the restrictions on assessment and collection of a tax is effective only if filed after the issuance of a 90-day letter. We think a similar conclusion follows from an examination of the legislative history of the relevant statutory enactments.

In creating the Tax Court (originally known as the Board of Tax Appeals), Congress provided a forum in which taxpayers could obtain an "independent review of the Commissioner of Internal Revenue's determination of additional income . . . taxes by the Board in advance of their paying the tax found by the Commissioner to be due." *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 721. Section 274 (a) of the Revenue Act of 1924, 43 Stat. 297, and the Revenue Act of 1926, § 274 (a), 44 Stat. 55 (the predecessors of § 272 (a) of the 1939 Code), disabled the Commissioner from assessing or collecting any deficiency until a notice of such deficiency had been

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[3] See *Moore* v. *Cleveland R. Co., supra,* at 659, analyzing § 271 (a) of the Code, 53 Stat. 82, defining a "deficiency."

issued, and for 60 (later amended to 90) days thereafter, or, in the event that a taxpayer took an appeal to the Board of Tax Appeals within such period, until that body had rendered a final decision. However, even though a taxpayer did not wish to contest the Commissioner's determination of a deficiency before the Board, interest on such deficiency continued to accrue from the original due date of the tax until the time for seeking Board review had run, such interest being thereafter collectible upon assessment of the tax. Revenue Act of 1924, § 274 (f), 43 Stat. 297.

To meet this situation, the 1926 Revenue Act added, in § 274 (d), 44 Stat. 56, the waiver provisions re-enacted as § 272 (d) of the 1939 Code. At the same time, Congress provided, in § 274 (j) (the predecessor of § 292 of the 1939 Code), that the filing of a waiver as provided for by subsection (d) should stop the running of interest on the deficiency upon the expiration of 30 days from such filing or upon the assessment of such deficiency, whichever the earlier.[4] The relation between the two sections of the 1926 Act, and between the comparable sections of the 1939 Code as well, is clear: (1) a waiver is provided for in § 274 (d) [1939 Code, § 272 (d)] "[i]n order to permit the taxpayer to pay the tax and stop the running of interest," S. Rep. No. 52, 69th Cong., 1st Sess., p. 27; (2) the Commissioner is thereupon permitted to assess

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[4] Section 292 of the 1939 Code, 53 Stat. 88, which is in all respects material here identical with its 1926 counterpart, provided, in pertinent part:

"Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax . . . to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier."

and collect the tax free of the restrictions contained in § 274 (a) [1939 Code, § 272 (a)]; and (3) the taxpayer is protected against the continued running of interest, due to delay in assessment, by the 30-day cutoff provided for by § 274 (j) [1939 Code, § 292].

We can find in this history and the purpose it discloses no warrant for inferring that it was intended that a taxpayer should be without power to stop the running of interest against him until a formal notice of deficiency has been issued.[5] Yet, as will appear, such is the necessary effect of respondent's position. Major reliance is placed on a passage in the Senate Committee Report on the 1926 Act:

> "In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in section 274 (d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the commissioner against assessing and collecting the tax, but without taking away the right of the taxpayer to take the case to the board." S. Rep. No. 52, 69th Cong., 1st Sess., p. 27.

Respondent claims that the last clause of this passage should be taken as indicating that § 274 (d), reenacted as § 272 (d) of the 1939 Code, does not sanction waivers prior to the issuance of a 90-day letter, because it is that event which brought the Board's, and now brings the Tax Court's, jurisdiction to review deficiencies into play. To read the passage—the obscurity of which has previously been judicially noted[6]—so as to apply the clause in question to waivers executed before the issuance of a notice of

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[5] See *Moore* v. *Cleveland R. Co., supra,* at 659–660.

[6] *Associated Mutuals* v. *Delaney, supra,* at 183. Even respondent's interpretation of the passage would not, however, give literal effect to its language, for a taxpayer would not "at any time be permitted to waive" the restrictions on assessment and collection of a deficiency, but could do so only after the issuance of a notice of deficiency.

deficiency would require a holding that, despite a waiver, the issuance by the Commissioner of a notice of deficiency remains a prerequisite to assessment and collection. But since, as the taxpayer acknowledges, it is inconceivable that a waiver would be effective to stop the running of interest, and at the same time be ineffective to permit the Government immediately to assess and collect the deficiency to which the waiver referred, the necessary result of respondent's reading of the Senate Committee Report would be to infer that a taxpayer was to be without power to stop the running of interest until a formal notice of deficiency had issued, often involving not inconsiderable periods of delay. Such an inference does not jibe either with the "right" the statute gives a taxpayer to file a waiver "at any time," or with the purposes of the waiver provisions. Moreover, had Congress desired to require the issuance of a notice of deficiency prior to assessment and collection in all circumstances, it more likely would have accomplished that result directly, as it did in the instance of jeopardy assessments. See Revenue Act of 1926, § 279 (b), 44 Stat. 59 (now § 6861 (b) of the 1954 Code).

Nor do we think that subsequent legislative developments change the view we have of the statute. Several years after the enactment of the 1926 statute, the Court of Appeals for the Ninth Circuit expressed views similar to those which formed the basis for the decision below. *Mutual Lumber Co.* v. *Poe,* 66 F. 2d 904; *McCarthy Co.* v. *Commissioner,* 80 F. 2d 618. In 1938, Congress considered various suggested revisions in the revenue statutes, and a House of Representatives Subcommittee recommended an express repudiation of those decisions. This recommendation was not adopted, and from the failure to act, respondent would have us infer an acceptance by Congress of the Ninth Circuit's position. Such nonaction by Congress affords the most dubious foundation

for drawing positive inferences. Moreover, the Subcommittee's discussion, which is set out in full in the margin,[7] does not support the meaning sought to be derived from it. While certain isolated passages can be so read, taken

[7] "In order to enable the Government to collect admitted deficiencies in an orderly and expeditious manner without the delay necessarily involved in the issuance of a formal notice of deficiency, and also to enable taxpayers to curtail the interest period on such deficiencies by permitting the Government to make an earlier assessment of the tax than otherwise would be possible, the Bureau of Internal Revenue has entered into cooperative agreements with taxpayers.

"It has been a practice of long standing in the Bureau to endeavor to secure the signed agreement of a taxpayer to additional taxes proposed by an internal-revenue agent as the result of a field investigation, and also to taxes proposed in letters from the Commissioner mailed as preliminaries to the issuance of the formal notice of deficiency authorized in section 272 (a), Revenue Act of 1936, and corresponding provisions of prior acts. It has further been the practice to regard such a signed agreement as a valid waiver under section 272 (d), Revenue Act of 1936, and corresponding provisions of prior acts, for the purpose of computing interest on the deficiencies agreed to in accordance with section 292, Revenue Act of 1936, and corresponding provisions of prior acts. That is, interest on a deficiency so agreed to would be computed to the date of assessment or to the thirtieth day after the filing of such agreement, whichever was the earlier. In the great majority of such cases the assessment is made within 30 days after the agreement is procured, thereby making collection of such deficiencies more nearly concurrent with their discovery than would be the case if formal notice were required to be given.

"As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (*Mutual Lumber Co.* v. *Poe*, 66 F. 2d 906, certiorari denied Jan. 6, 1936; *McCarthy Co.* v. *Commissioner*, 80 F. 2d 618, certiorari denied Apr. 6, 1936), a valid waiver cannot be given by a taxpayer prior to the formal determination by the Commissioner, as evidenced by a 60- or 90-day letter, that there is a deficiency in tax.

"Your subcommittee while feeling that the language of the statute is already sufficiently clear, feels compelled, in view of the action of the Supreme Court in denying certiorari, to recommend (Recommendation No. 47) that an amendment be inserted to insure the validity of waivers given before the mailing of the deficiency letter, such amendment to provide that the taxpayer shall have the right

as a whole what the Subcommittee said appears to us to espouse the position that the Commissioner's long-standing interpretation of the statute was correct, and that clarification was called for only because of the doubts caused by the Ninth Circuit's decisions, which this Court had declined to review. 290 U. S. 706, 298 U. S. 655. Whether Congress thought the proposal unwise, as respondent argues, or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act.

Finally, we are similarly unable to find support for respondent's position in the history of the 1954 Code. While the recodification settled (for taxable years covered by that Act) the question before us by expressly authorizing a waiver prior to the issuance of a 90-day letter,[8] the reports contain no clear statement as to Congress' view of then existing law. What light there is,

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at any time after a deficiency is proposed in any manner that the Commissioner may direct, whether before or after the sending of the notice of deficiency as provided in subsection (a) of that section, to waive by a signed notice in writing, any and all restrictions or conditions, however imposed, on the immediate assessment and collection of the whole or any part of the deficiency so proposed.

"It is believed that the proposed amendment will furnish a clear and unquestionable statutory basis for a long-established and satisfactorily functioning departmental procedure. It will be conducive to the early settlement of controverted issues without necessity for litigation, while at the same time retaining for the taxpayer his present privilege of paying deficiencies under appeal and thereby terminating the running of deficiency interest." Report of a Subcommittee of the House Committee on Ways and Means, on Proposed Revision of the Revenue Laws, 1938, 75th Cong., 3d Sess., pp. 53–54.

[8] Section 6213 (d) of the 1954 Code reads as follows:

"The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency."

however, tends to favor the Government's contentions. The new statute amended another subsection of the section containing the waiver provision, and the reports refer to that amendment as the "only material change from existing law."[9] Respondent argues that the change regarding waiver was probably thought not "material." Inferences from legislative history cannot rest on so slender a reed. Moreover, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. See *United States* v. *United Mine Workers,* 330 U. S. 258, 282.

The legislative history, then, does not call for a result contrary to that indicated by the language of the Act. We hold that a waiver given pursuant to § 272 (d) of the Internal Revenue Code of 1939 or its predecessor sections, although executed prior to the issuance of a notice of deficiency, is a fully effective instrument.

Reversed and remanded.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE STEWART joins, dissenting.

Mutual Lumber Co. v. *Poe,* 66 F. 2d 904, decided in 1933, states in my view the correct rule—one that was early criticized and challenged, yet one that Congress did not undertake to change. I would therefore affirm this judgment.

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[9] H. R. Rep. No. 1337, 83d Cong., 2d Sess., p. A405:

"*Section 6213. Restrictions applicable to deficiencies; petition to Tax Court.*

"The only material change from existing law is made in subsection (b)(3) of this section, which contains a new provision providing that any amount paid as a tax, or in respect of a tax, may be assessed upon the receipt of such payment notwithstanding the restrictions on assessment contained in subsection (a)." See also, to the same effect, S. Rep. No. 1622, 83d Cong., 2d Sess., p. 573.

HESS, ADMINISTRATOR, *v.* UNITED STATES.

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

No. 5. Argued October 15, 1959.—Decided January 18, 1960.

In an action against the United States under the Federal Tort Claims Act to recover for the wrongful death of an employee of an independent contractor engaged to perform repairs to the Bonneville Dam, which is owned and operated by the United States, it appeared that his death resulted from drowning in navigable waters of the Columbia River within the State of Oregon. *Held:* The right of action for wrongful death created by the Oregon Employers' Liability Law may be invoked to recover for a maritime death in that State without constitutional inhibition. *The Tungus* v. *Skovgaard*, 358 U. S. 588. Pp. 314–321.

259 F. 2d 285, judgment vacated and cause remanded.

Cleveland C. Cory argued the cause and filed a brief for petitioner.

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

MR. JUSTICE STEWART delivered the opinion of the Court.

This action was brought against the United States under the Federal Tort Claims Act [1] to recover for the death of petitioner's decedent, George W. Graham. Graham was drowned in the Columbia River while in the course of his employment as a carpenter foreman for Larson Construction Company, an independent contractor which had undertaken to perform repairs at Bonneville Dam. That structure is owned and operated by the United States.

As a preliminary to the job it had contracted to accomplish, Larson decided to send a working party by boat

[1] 28 U. S. C. §§ 1346 (b), 2674.

to the foot of the spillway dam to take soundings. Larson told the government inspector of the plan and asked that the operating personnel of the dam be requested to close two additional spillway gates near the point where the soundings were to be taken. This request was complied with. Larson then dispatched a group of employees to the area in a tug-and-barge unit. Graham was a member of this working party. Approaching the dam, the tug and barge veered and struck a pier, staving a hole in the barge. The unit then was carried northwardly in the river towards that part of the dam where the spillway gates were open. There it capsized in the turbulent water. Graham and all but one of his fellow employees were killed. Their deaths occurred on navigable waters within the territorial limits of the State of Oregon.

The theory of the petitioner's complaint was that Graham's death had been proximately caused by the failure of operating personnel of the dam to close a sufficient number of spillway gates near the area where the soundings were to be taken. Liability was asserted under the general wrongful death statute of Oregon,[2] as well as under another statute of that State, the Employers' Liability Law,[3] which also creates a right to recover for death under certain circumstances.

The wrongful death statute permits recovery for death "caused by the wrongful act or omission of another," limits liability to $20,000, and makes the decedent's contributory negligence an absolute bar to recovery.[4] In the

[2] Ore. Rev. Stat. § 30.020.

[3] Ore. Rev. Stat. § 654.305 *et seq.*

[4] "*Action by personal representative for wrongful death.* When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived,

limited area where the Employers' Liability Law applies, the road to recovery in a death action is considerably easier. Under that statute a defendant is liable for failure to "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb . . . ." [5] There is no monetary limitation of liability, and the decedent's contributory negligence goes only to mitigate damages.[6]

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against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $20,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased." Ore. Rev. Stat. § 30.020.

[5] "*Protection and safety of persons in hazardous employment generally.* Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance [*sic*] and devices." Ore. Rev. Stat. § 654.305.

[6] "*Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named." Ore. Rev. Stat. § 654.325.

"*Contributory negligence.* The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage." Ore. Rev. Stat. § 654.335.

After trial without a jury, the District Court entered judgment for the United States. Since Graham's death had occurred on navigable waters, the court ruled that the case was one for decision under maritime law, which in this case would apply the general wrongful death act of Oregon. Upon the basis of detailed findings of fact the court concluded that there was no liability under that statute because Graham's death was "not caused by the negligence of the United States or its employees." As to the Employers' Liability Law, it was the court's view that "this Act is not applicable for the reason that the Government was not responsible for the work there being performed, and for the further reason that the high standard of care required under the Act, if applied to these cases, would be unconstitutional." 1958 Am. Mar. Cas. 660.

The Court of Appeals affirmed, holding that the trial court had not erred in finding that negligence had not been proved, and agreeing that the Employers' Liability Law "could not be constitutionally applied to this case." The appellate court expressly refrained from deciding "whether the trial court was also correct in ruling that, if that act were applied, the United States would not be liable thereunder because it was not responsible for the work being performed by the decedent." 259 F. 2d 285, 292. Certiorari was granted to consider a seemingly important question of federal law. 359 U. S. 923.

As this case reaches us, the petitioner no longer challenges the finding that the United States was not guilty of such negligence as would make it liable under the wrongful death statute of Oregon. His sole claim here is that he was erroneously deprived of the opportunity to invoke the Employers' Liability Law.

The Federal Tort Claims Act grants the District Courts jurisdiction of civil actions against the United States "for injury or loss of property, or personal injury or death

caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b).

Graham's death and the wrongful act or omission which allegedly caused it occurred within the State of Oregon, and liability must therefore be determined in accordance with the law of that place. Since death occurred on navigable waters, the controversy is, as the trial court correctly held, within the reach of admiralty jurisdiction, *The Plymouth,* 3 Wall. 20; *Kermarec* v. *Compagnie Generale,* 358 U. S. 625. Oregon would be required, therefore, to look to maritime law in deciding it. *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255.[7]

Although admiralty law itself confers no right of action for wrongful death, *The Harrisburg,* 119 U. S. 199, yet

[7] The petitioner argues that "the place where the act or omission occurred" was on the dam itself, an extension of the land, and that, therefore, this case should be decided in accordance with the law that Oregon would apply to torts occurring on land. It is clear, however, that the term "place" in the Federal Torts Claims Act means the political entity, in this case Oregon, whose laws shall govern the action against the United States "in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. There can be no question but that Oregon would be required to apply maritime law if this were an action between private parties, since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law. *The Plymouth,* 3 Wall. 20, 35, 36. See Magruder and Grout, Wrongful Death Within The Admiralty Jurisdiction, 35 Yale L. J. 395, 404. This case does not involve the question that would be presented if wrongful conduct occurring within the territory of one political entity caused injury or death within a different political entity. Cf. *Eastern Air Lines* v. *Union Trust Co.,* 95 U. S. App. D. C. 189, 221 F. 2d 62.

"where death . . . results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given." *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242. See *The Hamilton,* 207 U. S. 398; *La Bourgogne,* 210 U. S. 95; *Levinson* v. *Deupree,* 345 U. S. 648; *The Tungus* v. *Skovgaard,* 358 U. S. 588; *United Pilots Assn.* v. *Halecki,* 358 U. S. 613. In such a case the maritime law enforces the state statute "as it would one originating in any foreign jurisdiction." *Levinson* v. *Deupree,* 345 U. S. 648, 652.

This means that in an action for wrongful death in state territorial waters the conduct said to give rise to liability is to be measured not under admiralty's standards of duty, but under the substantive standards of the state law. *United Pilots Assn.* v. *Halecki,* 358 U. S. 613, 615. See also *Curtis* v. *A. Garcia y Cia.,* 241 F. 2d 30 (C. A. 3d Cir.); *The H. S., Inc.,* 130 F. 2d 341 (C. A. 3d Cir.); *Klingseisen* v. *Costanzo Transp. Co.,* 101 F. 2d 902 (C. A. 3d Cir.); *Graham* v. *A. Lusi, Ltd.,* 206 F. 2d 223 (C. A. 5th Cir.); *Truelson* v. *Whitney & Bodden Shipping Co.,* 10 F. 2d 412 (C. A. 5th Cir.); *Quinette* v. *Bisso,* 136 F. 825 (C. A. 5th Cir.); *Lee* v. *Pure Oil Co.,* 218 F. 2d 711 (C. A. 6th Cir.); *Feige* v. *Hurley,* 89 F. 2d 575 (C. A. 6th Cir.); *Holley* v. *The Manfred Stansfield,* 269 F. 2d 317 (C. A. 4th Cir.).[8] "[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State." *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 245.

[8] We are not here concerned with those rights conferred by the Death on the High Seas Act, 41 Stat. 537 *et seq.,* 46 U. S. C. § 761 *et seq.;* the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688; or the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 *et seq.,* 33 U. S. C. § 901 *et seq.*

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Accepting this principle, we find no constitutional impediment to the application, by the maritime law, of Oregon's Employers' Liability Law to a death action in which the statute would otherwise by its terms apply. We are concerned with constitutional adjudication, not with reaching particular results in given cases. What was said last Term in deciding *The Tungus* v. *Skovgaard,* 358 U. S. 588, is controlling here:

> "The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose." 358 U. S., at 593.
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> "Even *Southern Pacific Co.* v. *Jensen,* which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 U. S. 205, at 216. It would be an anomaly to hold that a State may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. Cf. *Caldarola* v. *Eckert,* 332 U. S. 155." 358 U. S., at 594.

We leave open the question whether a state wrongful death act might contain provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them. The Oregon statute here in issue presents no such problem. Indeed, as the petitioner points out, the Employers' Liability Law contains many provisions more in consonance with traditional principles of admiralty than the State's general wrongful death

statute. We hold, therefore, that the right of action for wrongful death created by the Oregon Employers' Liability Law may be invoked to recover for a maritime death in that State without constitutional inhibition.

Whether the statute by its terms, and as construed by the Oregon Supreme Court, would extend to the present case, and whether, if the statute is applicable, the United States violated the standard of care which it prescribes, are questions which we do not undertake to decide, and upon which we intimate no view. The District Court made an alternative ruling that the statute was inapplicable as a matter of state law. The Court of Appeals did not reach the question. Although this issue has been argued here, we leave its disposition to a court more at home with the law of Oregon.[9]

The judgment is set aside and the case remanded to the United States Court of Appeals for the Ninth Circuit.

So ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join the opinion of the Court, but solely under compulsion of the Court's ruling in *The Tungus* v. *Skovgaard,* 358 U. S. 588. They believe that as long as the view of the law represented by that ruling prevails in the Court, it should be applied

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[9] In contending that the statute is applicable, the petitioner refers us to the following Oregon decisions, among others: *Byers* v. *Hardy,* 68 Ore. Advance Sheets 557, 337 P. 2d 806; *Drefs* v. *Holman Transfer Co.,* 130 Ore. 452, 280 P. 505; *Rorvik* v. *North Pacific Lumber Co.,* 99 Ore. 58, 190 P. 331, 195 P. 163; *C. D. Johnson Lumber Corp.* v. *Hutchens,* 194 F. 2d 574; *Coomer* v. *Supple Investment Co.,* 128 Ore. 224, 274 P. 302; *Myers* v. *Staub,* 201 Ore. 663, 272 P. 2d 203; *Tamm* v. *Sauset,* 67 Ore. 292, 135 P. 868; *Warner* v. *Synnes,* 114 Ore. 451, 230 P. 362, 235 P. 305; *Walters* v. *Dock Commission,* 126 Ore. 487, 245 P. 1117, 266 P. 634, 270 P. 778. The United States, in asserting that the statute is inapplicable, cites many of the same Oregon authorities.

evenhandedly, despite the contrary views of some of those originally joining it that state law is the measure of recovery when it helps the defendant, as in *Tungus,* and is not the measure of recovery when it militates against the defendant as it does here. However, they note their continued disagreement with the ruling in *The Tungus,* and reserve their position as to whether it should be overruled, particularly in the light of the controversy application of it has engendered among its original subscribers. See the various separate opinions in this case and in *Goett* v. *Union Carbide Corp., post,* p. 340.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins, dissenting.

Since *The Hamilton,* 207 U. S. 398, it has been settled law that an action *in personam* for wrongful death occurring on navigable waters, not available under maritime law, *The Harrisburg,* 119 U. S. 199, may be brought under a state wrongful death statute. In *The Tungus* v. *Skovgaard,* 358 U. S. 588, decided last Term, we held that such an action could be maintained only in accordance with the limitations placed upon it by state law. This case presents the further question, not involved in *The Tungus,* namely, whether such an action lies when the conduct said to give rise to liability is measured under state law by greater substantive standards of duty than those which would have governed the same conduct under maritime law had death not occurred.[1]

The Court, if I read its opinion aright, holds that when a victim of a maritime tort dies as a result of such con-

[1] The Court in *The Tungus* was concerned only with possible *limitations* imposed by New Jersey law on the assertion of causes of action for unseaworthiness and negligence, both of which the Court, accepting the views of the Court of Appeals, considered were embraced by the state wrongful death statute. The case did not present the question whether such a statute might confer *enlarged* substantive rights not afforded by maritime law.

duct the law of the State whose wrongful death statute is invoked *wholly* governs liability.[2] At the same time the Court leaves open the question whether a state wrongful death act might contain "provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them," finding that this Oregon statute "presents no such problem."

I cannot agree with the view that wrongful death actions growing out of maritime torts are so pervasively controlled by state law, or with the conclusion that this state statute in its substantive provisions is, in any event, not offensive to maritime law. Nor can I subscribe to the intimation that the question which the Court reserves is seriously open to debate. Because of the importance of the issue, a fuller statement of my views is justified than might be appropriate in a case of lesser general concern.

I.

It is surely beyond dispute that the Oregon Employers' Liability Law, Ore. Rev. Stat. § 654.305, imposes a stricter standard of duty than that imposed by maritime law. Under maritime law the basis of liability in cases like this is the failure to use reasonable care in light of the attendant circumstances, that is, negligence. See *Kermarec* v. *Compagnie Generale,* 358 U. S. 625, 630, 632. The state statute, on the other hand, imposes the duty to use—

> "every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserv-

[2] I agree with the Court that the provision of the Federal Tort Claims Act rendering the United States liable in accordance with the "law of the place where the act or omission occurred," 28 U. S. C. § 1346 (b), manifests no intention to convert a maritime tort into a land tort, and that this case must be treated as one falling within maritime jurisdiction. See p. 318, and note 7, *ante.*

> ing the efficiency of the . . . device, and without regard to the additional cost of suitable material or safety appliance [*sic*] and devices." Ore. Rev. Stat. § 654.305.

Oregon itself has recognized that this statute imposes a "much higher degree of care," *Hoffman* v. *Broadway Hazelwood,* 139 Ore. 519, 524, 10 P. 2d 349, 351, 11 P. 2d 814, than that generally required of defendants in accident cases. See *Camenzind* v. *Freeland Furniture Co.,* 89 Ore. 158, 172–173, 174 P. 139, 144. So much indeed I do not understand the Court to deny.

II.

Had this accident resulted in injuries short of death, it is clear that the United States could not have been held liable except in accordance with the standards of duty imposed by maritime law. This follows from the general constitutional doctrine of federal supremacy in maritime affairs, and more particularly from the rule first unmistakably announced in *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, which rejected the notion that the "saving clause" of § 9 of the Judiciary Act of 1789, 1 Stat. 77, permitted the application in maritime tort cases of state substantive rules in derogation of maritime law.[3] That

[3] While discussions of the current maritime supremacy doctrine usually commence with *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, the *Chelentis* case seems a more appropriate point of beginning in this instance. *Jensen* was of course a workmen's compensation case, and might be thought to have rested on the view that the "common law remedy" preserved by the "saving clause" did not embrace the compensation remedy, "of a character wholly unknown to the common law." 244 U. S., at 218. It remained for later cases to establish that *Jensen* reflected a broader principle.

It should be added that, while the results in *Jensen* and some of its progeny have been widely criticized, there is general recognition of the validity of its premise. As Gilmore and Black put it, The Law of Admiralty, § 1–17: "If there is any sense at all in making maritime

case was a maritime tort action brought in a state court by a seaman, seeking compensatory damages for injuries claimed to have been caused by the negligence of his employer. Historically, maritime law recognized no such cause of action. The duty of a shipowner to an injured crewman was only to provide for his maintenance and cure, and that irrespective of negligence; full indemnity was owing only for breach of the warranty of seaworthiness.[4] The Court held, first, that § 20 of the Merchant Marine Act of 1915, 38 Stat. 1185,[5] notwithstanding, such was still the rule. This being so, a state court was not free to apply any other rule to a maritime tort:

> "Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea." *Id.*, at 384.

This rule was soon reiterated in two subsequent cases. The first was *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, which, like *Chelentis,* was a state court action by a crew member against the shipowner. Injury was allegedly caused by mislabeling of a can of gasoline and

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law a federal subject, then there must be some limit set to the power of the states to interfere in the field of its working." See also Stevens, Erie R. R. v. Tompkins and the Uniform General Maritime Law, 64 Harv. L. Rev. 246.

[4] The classic formulation is that found in *The Osceola,* 189 U. S. 158, 175.

[5] Providing that "seamen having command shall not be held to be fellow-servants with those under their authority."

by the negligent failure to stock a life preserver on board. A judgment for plaintiff was affirmed, but on the ground that the vessel was unseaworthy in the respects named; the existence of a cause of action for negligence was denied. "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court." *Id.*, at 259. The second case was *Robins Dry Dock Co.* v. *Dahl,* 266 U. S. 449, where the action, again in a state court for negligence, was by an employee of an independent contractor against his employer for a shipboard injury. Such a right of action existed in admiralty, *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, and the question was as to the scope of the defendant's duty. Here too the same principle of federal supremacy was upheld. An instruction permitting the jury to consider the requirements of a state safety statute on the issue of negligence was held erroneous. "The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute." 266 U. S., at 457.

Largely owing to the passage of the Jones Act, 46 U. S. C. § 688,[6] which bound nonadmiralty as well as admiralty courts,[7] the issue was not again raised in litigation here for several decades. *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, however, demonstrates the pervasive scope given to the same principle of federal supremacy in the application of that Act. There a State was denied power, by characterizing the matter as "procedural," to apply its own rules to the question of burden of proof of fraud in the obtaining of a release from an injured seaman. Rather the state court was required to

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[6] See the account in Gilmore and Black, *op. cit., supra,* 376–377.

[7] See *Socony-Vacuum Co.* v. *Smith,* 305 U. S. 424; *Beadle* v. *Spencer,* 298 U. S. 124; *The Arizona* v. *Anelich,* 298 U. S. 110.

apply the rule adopted by federal maritime law. The case thus manifests the continued vitality of the supremacy principle in this area. 317 U. S., at 244, n. 10.

It remained for *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406, unmistakably to demonstrate that the principle embodied in the *Chelentis, Sandanger,* and *Robins Dry Dock* decisions had not withered with time. There a shore-based carpenter, employed by an independent contractor, sought a recovery against a shipowner based on negligence [8] and unseaworthiness. The Court held that under federal law a right of action was available on both grounds, and that under the maritime rule the effect of plaintiff's contributory negligence was to diminish, but not wholly defeat, his recovery. This being so, a State was debarred from applying another rule.

Finally, when, only last Term, the Court came to consider, in *Kermarec* v. *Compagnie Generale,* 358 U. S. 625, the scope of a shipowner's duty of care toward a social guest of a crew member, it had no hesitation about the proposition that federal law must govern an action within the jurisdiction of admiralty.

> "The District Court was in error in ruling that the governing law in this case was that of the State of New York. Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. . . . If this action had been brought in a state court, reference to admiralty law would have been

[8] The cause of action for negligence did not of course rest on the Jones Act, since Hawn was not a seaman, but on the traditional admiralty doctrine imposing on a shipowner a duty to use reasonable care to avoid injuring an invitee. See, *e. g., The Max Morris*, 137 U. S. 1.

necessary to determine the rights and liabilities of the parties. *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259. Where the plaintiff exercises the right conferred by diversity of citizenship to choose a federal forum, the result is no different, even though he exercises the further right to a jury trial. Whatever doubt may once have existed on that score was effectively laid to rest by *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406, 410–11." *Id.*, at 628.

I think it is clear, then, that the supremacy principle established by this line of cases may not be shrugged off as a discredited relic of an earlier day.[9] Indeed, the Court's total disregard of that principle in the present case is not grounded on the view that it is no longer generally viable. Rather, the Court appears to consider it inapplicable in an action for wrongful death. For reasons now to be discussed I think this is a mistaken view.

III.

What I shall address myself to at this point is the reason why maritime law permits resort to state wrongful death statutes.[10] For it is only through an understanding

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[9] Nothing in *Caldarola* v. *Eckert*, 332 U. S. 155, may properly be taken as impinging upon the continued vitality of the supremacy principle as enunciated in the *Chelentis* case and its successors. Cf. Stevens, Erie R. R. v. Tompkins and the Uniform General Maritime Law, 64 Harv. L. Rev. 246, 263. Nor has this doctrine otherwise become diluted as seems to be suggested by Hart and Wechsler, The Federal Courts and the Federal System, 482–483. Any doubts which might have existed on this score were "effectively laid to rest by *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406, 410–411." *Kermarec* v. *Compagnie Generale, supra*, at 628.

[10] Prior to the decision in *The Harrisburg, supra*, the Court had rejected claims that maritime tort actions in state courts based upon a local death statute were not within the "saving clause," *Steamboat Co.* v. *Chase*, 16 Wall. 522, or were offensive to the Commerce Clause, *Sherlock* v. *Alling*, 93 U. S. 99, 102–103. Subsequently, in *The Ham-*

of that reason that light can be shed on the pivotal issue in this case.

Unfortunately such rationalization as has been made of the problem in the wrongful death cases in this Court does not carry us very far. Mr. Justice Holmes in *The Hamilton* was content to say no more than that permitting state death statutes to be used would not produce "any lamentable lack of uniformity" in the maritime law. 207 U. S., at 406. Mr. Justice McReynolds in *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, simply observed that the use of such statutes was "the logical result of prior decisions," that "[t]he subject is maritime and local in character," and that the innovation "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Id.,* at 242.[11]

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ilton, supra, it was, with little difficulty, held that a plaintiff could assert in admiralty a right of action grounded on a state wrongful death act. See also *La Bourgogne,* 210 U. S. 95, 138. *Jensen* recognized the doctrine of these cases, 244 U. S., at 216, and in *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, the post-*Jensen* Court expressly held that the rule of *The Hamilton* had not been displaced. See also *Great Lakes Co.* v. *Kierejewski,* 261 U. S. 479; *Spencer Kellogg Co.* v. *Hicks,* 285 U. S. 502, 512–513.

The significance of such early cases as *Chase* and *Alling* in the history of the uniformity principle has now become largely academic, in view of the twentieth century developments.

[11] This analysis leaves unexplained the sense in which wrongful death actions are local. That attribute obtains irrespective of the character of the decedent's activities, although the "maritime but local" doctrine generally turned on the nuances of exactly that element. *E. g., Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469; see Robinson, Admiralty, 103; 2 Larson, Law of Workmen's Compensation, § 89.22. Put another way, an action for wrongful death is "local" although, had the victim lived, his action for damages would, by reason of the nature of his activities, not have been "local." Thus, it is some characteristic of a wrongful death action itself which permits application of state law.

Other rationalizations of the subject leave much to be desired. It has been said that the application of state wrongful death statutes is permitted to "fill a void" in maritime law. See, *e. g.*, 41 Va. L. Rev. 251, 252; 34 B. U. L. Rev. 365, 366; cf. *The Tungus, supra,* at 592. But there is a "void" only in the sense that there is an absence of a right of action in such cases; admiralty does not lack a rule on the subject. It has also been suggested that the Court permits the application of state death acts because it regards such statutes as wiser in this respect than maritime law, although it deems itself unable to alter the disfavored federal rule. See, *e. g.,* Note, 73 Harv. L. Rev. 84, 148, 149. But if the rule of *The Harrisburg* is so firmly established that legislation is the only available means of reform, cf. *The Tungus, supra,* at 590, 599, it is scarcely legitimate to turn, for that very reason, to state law.

I think the fault with such explanations lies in the emphasis given to admiralty's endeavor to find in state law a supplement to its own shortcomings, something which federal power has always been fully competent to remedy internally on its own account. Instead, the proper point of departure is, I believe, to recognize that in permitting use of wrongful death statutes admiralty is endeavoring to accommodate itself to state policies represented by such statutes. That indeed appears to have been the approach of Congress in enacting the Death on the High Seas Act, for as was said in *The Tungus* the legislative history of that Act "discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States' " and "reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law." 358 U. S., at 593. At the same time there was no suggestion that Congress contemplated that the

supremacy of admiralty law should be yielded to the States in maritime death cases. Cf. *id.*, at 607–608, separate opinion.

It only confuses things to say, as has sometimes been loosely remarked, that in maritime wrongful death cases admiralty absorbs state law, or that the States have embraced maritime law. State and maritime systems of law stand separately, even though the two may not always be mutually exclusive, and when a conflict arises the latter yields to the former only in face of a superior state interest. This, I think, is what Mr. Justice McReynolds had in mind when he stated in *Garcia* that a wrongful death statute is a subject both "maritime and local in character." The true inquiry thus becomes one involving the nature of the state interest in a wrongful death statute, the extent to which such interest intrudes upon federal concerns, and the basis of the reasoning that led Mr. Justice Holmes to state summarily in *The Hamilton* that resort to such statutes would not result in "any lamentable lack of uniformity" in maritime law.

What no lesser authority in admiralty matters than Judge Addison Brown said many years ago in *The City of Norwalk,* 55 F. 98,[12] is highly illuminating. He gave these reasons for permitting a state death statute to apply to a maritime tort:

> "(1) It is a general law of personal rights, not specially directed to commerce or navigation, but applying alike on sea or shore; (2) it is within the police power; for it is 'a statute intended to protect life,' (Huntington v. Attrill, 146 U. S. 657, 675 . . .) through one of the most effectual of all sanctions, viz. by imposing on the offender a liability to pay a pecu-

[12] The decision was affirmed as to this ground *sub nom. The Transfer No. 4,* 61 F. 364, 367–368, certificate dismissed on motion *sub nom. McCullough* v. *New York, N. H. & H. R. Co.,* 163 U. S. 693.

niary indemnity; while in the interest of the public, it also tends to avert the dependency or pauperism of the survivors by shifting the burden of their support, in part at least, from the community to the authors of the wrong; (3) it is local in its scope and interferes in no way with any needful uniformity in the general law of the seas, or with international or interstate interests." *Id.*, at 108.

Where tortious conduct causes death, the decision of a State to provide a right of action in favor of the victim's estate or beneficiaries represents a response to considerations peculiarly within traditional state competence: providing for the victim's family, and preventing pauperism by shifting what would otherwise be a public responsibility to those who committed the wrong. These are matters intimately concerned with the State's interest in regulating familial relationships. Moreover, where the injury is wrongful under maritime law, this is the predominant, if indeed not the sole, purpose of the statute. In such instances the State is not legislating in order to affect the defendant's conduct, since by hypothesis a federally imposed duty already exists. For merely because no federal action lies for wrongful death, one can hardly say that there is no duty not to kill through negligence, but there is a duty not to injure. The tortious conduct is the same in either case, and wrongful under federal law. The state statute therefore makes no meaningful inroads on federal interests. To quote further from Judge Brown:

"The state statute does not create the *cause* of action. It does, indeed, create a new *right,* and liability; but it does not create a single one of the elements that make up the fundamental cause of action, that is, the essential grounds of the demand. All these elements exist independently of the statute, and are not in the least affected by it. It no more creates

> the wrong, or the damage, than it creates the negligence or the death; nor does it, as in the pilotage and double wharfage cases, add anything to the damages sustained. It authorizes no recovery except for 'the pecuniary damages' already existing. It is apparent, therefore, that, as suggested by Mr. Justice Clifford in Steamboat Co. v. Chase, 16 Wall. 532, the statute does no more than 'take the case out of the operation of the common-law maxim that an action for death dies with the person.' " 55 F., at 109.
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> "Before the statute, the case was *damnum absque injuria;* by the statute, it became at once a tort in the full legal sense, and a *marine tort* by reason of its place, its nature, and its circumstances . . . ." *Id.,* at 110.

Thus, where the duty imposed by a state death act is no greater than that already existing under federal law, the application of the statute is solely, or nearly so, a reaction to strong, localized state interests, and there is no real encroachment on federal interests.[13]

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[13] This reasoning has found reflection in maritime cases outside the realm of wrongful death actions. *Just* v. *Chambers,* 312 U. S. 383, permitted the application to a maritime tort of a state statute providing for survival of an action against a deceased tortfeasor. Here, too, decedent had breached a federal duty for which, had he lived, he would have had to answer. The State's decision to protect plaintiffs from loss in this way reflected only local interests, and made no encroachment on maritime interests.

Red Cross Line v. *Atlantic Fruit Co.,* 264 U. S. 109, a contract action, involved the question of the validity, as applied to a maritime contract, of a state statute making agreements to arbitrate specifically enforceable. The decision proceeded from the premise that arbitration agreements were valid obligations under maritime law, and that the statute merely added the remedy of specific performance to the traditional remedy of damages. See, *id.,* at 123–125. While there the state interest in enforcing such agreements was not as peculiarly local as is true of wrongful death cases, the fact that admiralty

Far different is the case when a State purports, as here, to impose a duty which under federal law a person does not bear. Then it can hardly be said that the State is not seeking to regulate conduct within federal maritime jurisdiction. The very purpose of a statute like the one here invoked is to induce those to whom it applies to take the precautions required by it. In such a case, the mere fact that it is a death act which imposes the duty cannot be thought to render the import of the matter of "local" concern only. The state interests given expression no longer are predominantly those peculiarly within state concern. By the same token the intrusion into federally regulated interests is no longer minimal.

I can find no justification, consistent with the course of adjudication in this Court, for upholding state power here, without so much as even suggesting the need for an inquiry as to the extent of federal interest in the activity in question.[14]

IV.

Nothing in the wrongful death cases on which the Court relies calls for today's holding. None of them involved, as here, the assertion of any local rules of substantive law going beyond those applicable under federal standards.[15]

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acknowledged the validity of arbitration clauses in contracts, and recognized a duty to live up to them, rendered the intrusion into federal interests so minimal as to justify the result.

[14] It may be that the existence of an overriding federal interest is not to be inferred solely from the fact that the tort is maritime, in the sense that admiralty has jurisdiction over it. Cases may be put in which the connection with maritime activities is so remote or fortuitous that state law should readily be accepted by admiralty where it is otherwise applicable. The Court does not purport to treat this case on any such basis.

[15] See, in this Court: *The Harrisburg, supra* ("negligence" under Massachusetts and Pennsylvania death statutes); *The Hamilton, supra* ("negligence" under Delaware wrongful death statute); *West-*

The essential failing in the Court's use of these cases is its view that, because rights asserted under a state death statute are manifestly rights created by the State, no federal element is involved in their assertion. The truth is, however, that, where the tort is maritime and the action is brought under the "saving clause," state-created rights may be asserted *only by federal permission.* That is the premise on which *The Hamilton,* and its offspring, proceeded. When such a right is asserted, the plaintiff must, however, show more than that a State can give

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ern Fuel v. *Garcia, supra* ("negligence" under California wrongful death statute); *La Bourgogne,* 210 U. S. 95 ("fault" under French wrongful death law); *Levinson* v. *Deupree,* 345 U. S. 648 ("negligence or wrongful act" under Kentucky wrongful death statute); *The Tungus* v. *Skovgaard, supra* ("wrongful act, neglect or default" under New Jersey wrongful death statute); *United Pilots Assn.* v. *Halecki,* 358 U. S. 613 (same New Jersey statute as in *The Tungus*).

See, in the lower federal courts: *Curtis* v. *A. Garcia y Cia.,* 241 F. 2d 30 ("unlawful violence or negligence" under Pennsylvania wrongful death statute); *The H. S., Inc., No. 72,* 130 F. 2d 341 ("wrongful act, neglect or default" under New Jersey wrongful death statute); *Klingseisen* v. *Costanzo Transp. Co.,* 101 F. 2d 902 (same Pennsylvania wrongful death statute as in the *Curtis* case); *Graham* v. *A. Lusi, Ltd.,* 206 F. 2d 223 ("wrongful act, negligence, carelessness or default" under Florida wrongful death statute); *Truelson* v. *Whitney & Bodden Shipping Co.,* 10 F. 2d 412 ("wrongful act, neglect, carelessness, unskilfulness [*sic*], or default" under Texas wrongful death statute); *Quinette* v. *Bisso,* 136 F. 825 ("fault" under Louisiana wrongful death statute); *Lee* v. *Pure Oil Co.,* 218 F. 2d 711 ("wrongful act, omission, or killing" under Tennessee wrongful death statute); *Feige* v. *Hurley,* 89 F. 2d 575 ("negligence or wrongful act" under Kentucky wrongful death statute); *Holley* v. *The Manfred Stansfield,* 269 F. 2d 317 ("wrongful act, neglect, or default" under Virginia wrongful death statute).

Thus, in not one of the foregoing cases, either here or in the lower courts, did the standard of liability under the respective state laws exceed the standard of liability in admiralty had the injury not resulted in death.

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him a right to recover; he must also show that it has done so. Thus, if a State has chosen not to provide a right of action to one who does not sue within a stated period, *The Harrisburg, supra; Western Fuel Co.* v. *Garcia, supra; Levinson* v. *Deupree,* 345 U. S. 648, 651–652; to one who does not have a stated relationship to the decedent, *id.,* at 651; to one whose decedent's negligence contributed to the fatal injury, *United Pilots Assn.* v. *Halecki,* 358 U. S. 613, 615; or to one whose right of action is based on breach of the uniquely maritime duty to provide a seaworthy ship, *The Tungus* v. *Skovgaard, supra,* there can be no right of recovery, for neither federal nor state law affords it.[16] For this reason, when asking whether a plaintiff has made out a cause of action under a state death act, the Court approaches the statute "as it would one originating in any foreign jurisdiction," *Levinson* v. *Deupree, supra,* at 652, in an "endeavor to determine the issues in accordance with the substantive law of the State," *Garrett* v. *Moore-McCormack Co.,* 317 U. S., at 245. This, because the State having created the right, one must look to state law to "determine the circumstances under which that right exists." *The Tungus, supra,* at 594.

But none of these cases is apposite when the question is not whether a federally permitted state right of action has in fact been conferred by the State, but whether fed-

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[16] See also *The H. S., Inc., No. 72, supra,* where recovery rested on the appellate court's decision that the State whose wrongful death statute was sought to be made the basis of recovery imposed liability upon the defendant, in the circumstances there presented, for the tort of its employee. There was no suggestion that application of substantive federal martime standards would have led to a different result.

The remaining lower court cases relied on by the Court, and referred to in note 15, *supra,* involved the same issues as those presented in the *Halecki* and *Tungus* cases.

eral maritime law permits the State to create an asserted right of action. It is surely fallacious to reason that, because the principle of the supremacy of federal maritime law has been held not to bar a right of action for death caused by a defendant's failure to take reasonable precautions to avoid exposing those to whom the duty is owed to an undue risk of harm, it follows that such principle does not bar a right of action for death caused by failure to "use every device, care and precaution which it is practicable to use," Ore. Rev. Stat. § 654.305. When the Court, in *The Hamilton* and its successors, held that the federal supremacy principle did not prevent a State from giving any right of action for wrongful death caused by a maritime tort, it did not thereby eschew forever all federal limits on the content of substantive obligations appearing in statutes bearing the label "wrongful death act."

It may be that the Court does not intend to go so far. It asserts, albeit almost as an afterthought, that some state doctrines might be constitutionally inapplicable to maritime torts, notwithstanding that they are embodied in a death statute.[17] It then summarily finds the possible reservation inapplicable in this instance on the ground that other provisions of the Oregon Employers' Liability Law, not here involved, resemble some admiralty doctrines, with which also we are not now concerned, more than do comparable provisions in the State's general wrongful death statute, which presumably can be constitutionally applied to a maritime tort. With all deference, I must say that the total irrelevance of that fact seems plain. We are not reviewing the general constitutionality

[17] In such a case, of course, not only would "the admiralty . . . decline to enforce," *ante*, p. 320, the challenged provision, but federal law would inhibit a common-law court, state or federal, from applying it to a maritime tort action.

of the Employers' Liability Law; we are concerned only with the constitutionality of the standard-of-care provisions of that law, as applied to an employee of an independent contractor injured on navigable waters and seeking to impose liability upon the owner and operator of a dam. The Court does not find that the federal interest in regulating the conduct of the dam owner is so minimal—whether by reason of the fixed situs of the dam or on some other ground—that the federal supremacy principle may reasonably be found inapplicable. Neither does the Court assert, for it could scarcely do so, that the standard of care required by this statute is not significantly greater than that imposed by federal law. Thus, if the principle of the supremacy of maritime law calls for anything more than an empty nod, it calls for a result contrary to that reached today.

It is suggested that a contrary decision will lack "even-handedness," apparently for the reason that, since those invoking state death statutes must sometimes bear the burden of comparatively unfavorable provisions, it is only fair that, when more favorable provisions obtain, they be able to enjoy the benefits of such rules. But, as the Court points out, "[w]e are concerned with constitutional adjudication, not with reaching particular results in given cases." Such unevenhandedness as there may be in this area is the consequence of the rule of *The Harrisburg,* to which this Court has steadfastly adhered for nearly 75 years,[18] and which Congress, when it enacted the Death on the High Seas Act, saw fit to change only in a limited way. See *The Tungus, supra,* at 592–593. When federal law permits the application of state death acts, those on whom the state statute confers a right of action may escape the harsh consequences of that rule. Those whom the state

[18] See cases cited, note 15, *supra.*

law has declined to benefit are left as they were. Certainly we should not, in the name of "evenhandedness," permit a State to exceed constitutional limitations merely because in some instances it may have chosen not to do all it might under the Constitution.[19]

I would affirm.

Memorandum of MR. JUSTICE WHITTAKER.

Except for its implication, or conclusion if it may be intended to be such, that maritime torts committed on the navigable waters of a State which result in death are governed by the general substantive tort law of the State—not by the general federal maritime law as remedially supplemented only by the State's Wrongful Death Act—which conflicts with my views as expressed in my dissent in *Goett* v. *Union Carbide Corp.*, decided today, *post,* p. 345, I join my Brother HARLAN'S dissent.

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[19] It ought not to have been necessary to say explicitly that this opinion rests upon evenhanded application of a rule of constitutional law which permits the enforcement of state-afforded substantive rights under state wrongful death statutes *only* so long as such rights do not offend those established by the maritime law. Faithful adherence to that rule of course may lead to different results in different situations, depending upon the extent of the rights given by state law. In *The Tungus,* the rights accorded by state law were permitted to prevail because they were not offensive to those recognized by maritime law. Here the state-created right cannot prevail because it is flatly opposed to that existing under maritime law. In short, these opposite results are not attributable to any differences in the constitutional rule applicable in the two cases—a rule which remains the same in all wrongful death cases—but to differences in the character of the substantive rights afforded by the two wrongful death statutes involved.

GOETT, ADMINISTRATRIX, *v.* UNION CARBIDE CORP. ET AL.

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

No. 3. Argued November 12, 1959.—
Decided January 18, 1960.

Basing her claim alternatively on unseaworthiness and on negligence, petitioner brought this libel in admiralty to recover under the West Virginia Wrongful Death Act from the owner of a river barge for the death of an employee of an independent contractor engaged in repairing the barge, who fell off the barge and drowned in navigable waters in West Virginia. The District Court found that the vessel was unseaworthy and that the barge owner was negligent. Basing liability on negligence, it awarded petitioner the maximum amount of damages allowable under the West Virginia Wrongful Death Act. The Court of Appeals reversed the District Court's finding of negligence and held that the vessel was not unseaworthy and that the decedent was not a person to whom the warranty of seaworthiness was owed; but it did not pass on the question whether unseaworthiness would in any event be available as a ground for recovery in a West Virginia wrongful death action involving a maritime tort. *Held:* The judgment is vacated and the cause is remanded to the Court of Appeals to determine: (a) whether the West Virginia Wrongful Death Act, as to this maritime tort, employs the West Virginia or the general maritime law concept of negligence; (b) whether, in the light of that determination, the District Court's finding as to negligence is correct under the proper substantive law; and (c) whether the West Virginia Wrongful Death Act incorporates the doctrine of unseaworthiness in death actions involving maritime torts. Pp. 341–344.

256 F. 2d 449, judgment vacated and cause remanded.

Harvey Goldstein argued the cause for petitioner. With him on the brief were *Ernest Franklin Pauley* and *S. Eldridge Sampliner*.

Charles M. Love argued the cause and filed a brief for the Union Carbide Corporation, respondent. *Homer A. Holt, William T. O'Farrell* and *David D. Johnson* filed a brief for the Amherst Barge Co., respondent.

PER CURIAM.

This was a libel in admiralty brought against respondent Union Carbide Corporation by petitioner, the administratrix of Marvin Paul Goett. Goett had been an employee of respondent Amherst Barge Company, which was engaged in repairing a river barge owned by Union. The decedent was working on the barge when he fell off into the waters of the Kanawha River, and, after fruitless efforts at rescue, was drowned. The theory of the libel was that, alternatively, Union was negligent in turning over the barge to Amherst without its being equipped with rescue equipment, or that the vessel was unseaworthy without such equipment; and that the lack of rescue equipment caused the decedent's death. The accident had taken place in West Virginia waters and that State's Wrongful Death Act was relied upon. The District Court found that the vessel was in fact unseaworthy and that Union was negligent in the respect charged, causing the death of decedent, and that the decedent was not shown to have been guilty of contributory negligence or to have assumed the risk. The District Court bottomed Union's liability on negligence, and awarded petitioner $20,000 in damages, the maximum allowable under the West Virginia Act, though finding that the actual damages were substantially higher. On Union's appeal to the Court of Appeals, the judgment was reversed. 256 F. 2d 449.

The Court of Appeals held that, as a matter of law, Union owed no duty to the employees of Amherst once the vessel had been turned over to the latter. It accord-

ingly reversed the District Court's finding of negligence. It further held, contrary to the District Court, that the vessel was not unseaworthy at the time of the accident, and that in any event the decedent was not a person to whom the warranty of seaworthiness was owed. In the light of this determination, it did not pass on the question whether unseaworthiness would be in any event available as a ground for recovery in a West Virginia wrongful death action involving a maritime tort. We granted certiorari. 359 U. S. 923.

This case was decided in the lower courts before the decision of this Court in *The Tungus* v. *Skovgaard,* 358 U. S. 588, where it was held that it was a question of state law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdictions of the States in wrongful death cases. See *Hess* v. *United States, ante,* p. 314. Under this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence.[1] Here the Court of Appeals did not decide which standard the West Virginia Act adopted. It did not articulate on what basis it was applying federal law if in fact it was; there is no intimation that it believed the West Virginia Act incorporated the maritime law's negligence standard, and in fact it expressly left open the question whether that Act incorporated the maritime standard of seaworthiness. It seems more likely to us to have passed on the negligence issue as a matter of federal maritime law; it cited only cases apply-

[1] For examples of the general maritime law's concept of negligence, see *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U. S. 625; *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406, 409; *The Max Morris,* 137 U. S. 1, 14–15.

ing the general maritime law's and the Jones Act's concepts of negligence, and general treatises; no West Virginia authority was relied upon.[2] The least that can be said is that it is highly doubtful [3] which law the Court of Appeals applied; [4] and so in the absence of any expression by it of which standard the West Virginia Act adopted, we do not believe we can permit its judgment to stand after our intervening decision in *The Tungus.*

Accordingly, so that the Court of Appeals, which is closer than we to matters of local law, may pass upon the questions of West Virginia law involved in the light of this Court's holding in *The Tungus,* we vacate its judgment and remand the cause to it to determine: (a) Whether the West Virginia Wrongful Death Act, as to this maritime tort, employs the West Virginia or the general maritime law concept of negligence; and, in the light of its determination, (b) whether the district judge's finding as to negligence is correct under the proper substantive law. To facilitate our discretionary review of

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[2] The respondent here cites West Virginia precedents in an effort to sustain the Court of Appeals' determination.

[3] The views of the dissenting opinions here confirm us in our doubts. Some of the dissents take the view that the Court of Appeals should be affirmed because it undoubtedly decided the point as a matter of state law, while another is of the view that the Court of Appeals should be affirmed because it made sufficiently clear that it decided the point as a matter of federal law. Our views lie between these two.

[4] While the Court of Appeals declared that "The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted," 256 F. 2d, at 453, this discussion seems to us probably to have been in the context of the monetary limitation of the Act. Certainly there was no specific identification of this statement with the discussion of whether the negligence finding was justified. And if the statement is taken to mean that a State cannot adopt the maritime standard, it is not correct.

the Court of Appeals' findings as to unseaworthiness, it should also determine whether the West Virginia Act incorporates this standard of the general maritime law in death actions involving maritime torts. Cf. *Barr* v. *Matteo,* 355 U. S. 171.[5]

Vacated and remanded.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins, dissenting.

I dissent from the Court's disposition of this case on the following grounds:

First. For reasons elaborated in my Brother STEWART'S dissenting opinion, there is no reasonable basis for concluding that the Court of Appeals' disposition of the negligence cause of action did not rest upon state substantive law, which in maritime wrongful death actions controls, *The Tungus* v. *Skovgaard,* 358 U. S. 588, if, as I expressed in my dissenting opinion in *Hess* v. *United States, ante,* p. 322, it does not impose duties greater than those created by maritime substantive law.

In any event, there being no suggestion that the state standards of duty differ in any way from those obtaining under maritime law, the remand of the negligence cause

[5] THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join this opinion, but solely under compulsion of the Court's ruling in *The Tungus* v. *Skovgaard,* 358 U. S. 588. They believe that as long as the view of the law represented by that ruling prevails in the Court, it should be applied evenhandedly, despite the contrary views of some of those originally joining it that state law is the measure of recovery when it helps the defendant, as in *The Tungus,* and is not the measure of recovery when it militates against the defendant, as in *Hess* v. *United States, ante,* p. 314. However, they note their continued disagreement with the ruling in *The Tungus,* and reserve their position as to whether it should be overruled, particularly in the light of the controversy application of it has engendered among its original subscribers. See the various separate opinions in this case and in *Hess* v. *United States, supra.*

of action to the Court of Appeals seems to me to be a needless and therefore wasteful procedure.

Second. As to the unseaworthiness cause of action, no one suggests that West Virginia has such a doctrine of its own. The Court of Appeals deliberately decided (256 F. 2d, at 454) that it need not reach the difficult question of whether the West Virginia Wrongful Death Statute embraced a cause of action for unseaworthiness based on federal concepts, because it found that in any event, under federal law, the vessel was not unseaworthy, and that the petitioner was not one to whom the duty to provide a seaworthy ship was owing.

In resting its decision on these grounds the Court of Appeals exercised the traditional discretion of any court to choose what appears to it a narrower and clearer ground of decision in preference to a broader and more controverted one. The Court does not suggest that the limits of this discretion were exceeded in this instance. Cf. *Barr* v. *Matteo,* 355 U. S. 171. In my view we cannot properly require the Court of Appeals to decide a question which it intentionally and sensibly left open unless we first reverse that court on the issues which it did decide. This the Court does not do. Hence, I believe there is no justification for remanding the case on this score.

MR. JUSTICE WHITTAKER, dissenting.

I am persuaded that the Court of Appeals has made sufficiently clear that it thought this diversity, admiralty, death case was governed by the general maritime law, as *remedially* supplemented by the West Virginia Wrongful Death statute, and properly decided it on that basis.

The Court's opinion says that *The Tungus* v. *Skovgaard,* 358 U. S. 588, "decided that it was a question of state law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdiction of the States in wrongful death cases [and that]

[u]nder this holding, in a maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence." I do not understand the *Tungus* case to so hold, and if such a holding was intended by its author or by any of the Justices who joined it, it does not say so.

It seems to me that the substantive legal rights and liabilities involved in this admiralty case are not in any true sense governed by West Virginia law, but rather, are within the full reach of exclusive admiralty jurisdiction and are to be measured by the standards of the general maritime law, *Kermarec* v. *Compagnie Generale Transatlantique,* 358 U. S. 625, 628, as *remedially* supplemented by the West Virginia Wrongful Death statute. See *The Tungus, supra,* at 592.

Although state Wrongful Death statutes are not ones of survivorship and are generally spoken of as creating a *new* cause of action for death, it seems rather clear that the West Virginia Wrongful Death statute, like most others, creates a cause of action only in the sense of providing a *remedy* for death resulting from an act made wrongful by other laws—whether common, statutory or maritime laws—which would have redressed the wrong "if death had not ensued." W. Va. Code, 1955, § 5474 (5). And when, in a case encompassed by the terms of the State's Wrongful Death statute, admiralty "adopts" such statute, it does so only to afford a *remedy* for a substantive cause of action created by the maritime law which, "if death had not ensued," would have redressed it.

It is true that when admiralty "adopts" a State's Wrongful Death statute "it must enforce [it] as an integrated whole, with whatever conditions and limitations the creating State has attached." *The Tungus, supra,* at

592. But the West Virginia Wrongful Death statute, like most such state statutes, apart from prescribing who may prosecute the action, the time within which it must be brought, and the measure and limit of recovery, has attached only the condition that the wrongful "act, neglect or default, [be] such as would . . . have entitled the party injured to maintain an action to recover damages in respect thereof [if death had not ensued]." W. Va. Code, 1955, § 5474 (5). Surely this means that the act, neglect or default, must be such as would, *under other laws*—whether common, statutory, or maritime laws—have entitled the party injured to recover damages in respect thereof "if death had not ensued."

Adoption by admiralty of such a remedial statute cannot be permitted to, and does not, so expand the essential purposes and characteristic features of the general maritime law as to interfere with its proper nation-wide harmony and uniformity, *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242. By such adoption, admiralty takes over only the remedy afforded for death by the State's Wrongful Death statute—albeit the whole thereof. It does not thereby abandon the nonconflicting substantive admiralty law which gave rise to the right of action that it would have enforced "if death had not ensued." In such a case, the real and substantive right in suit is still the one created by, and—to the extent not conflicting with the adopted State Wrongful Death statute—is governed by, the maritime law.

This is what I understood the *Tungus* case to mean when I joined it, and re-examination of it confirms that conclusion. I submit there is not a word in it to the contrary. And this conclusion is buttressed by the separate opinion of my Brother BRENNAN in that case. Although this Court has many times and uniformly held

that the maritime law creates no cause of action for wrongful death, and that, in circumstances like these, admiralty "adopts" the State's Wrongful Death Act, the separate opinion in *Tungus* said, in effect, that admiralty would merely look to see whether the State had enacted a wrongful death statute and, if it had, would not "adopt" that act but would put it aside and fashion its own remedy for wrongful death, 358 U. S., at 608–609, which, I thought and still think, is contrary to this Court's cases holding that the maritime law does not create a cause of action for wrongful death and that, in actions for wrongful death arising on the territorial waters of a State, admiralty "adopts" the State's Wrongful Death Act *cum onere*.

I believe that the opinion of the Court of Appeals makes reasonably clear that the court regarded this case as governed by, and that it applied, the general maritime law as remedially supplemented by the West Virginia Wrongful Death statute. I also believe that the court correctly concluded that the maritime doctrine of unseaworthiness was not applicable, and that respondent was not guilty of negligence causing or contributing to cause the death of petitioner's decedent, because, as it found, the barge was both withdrawn from navigation for extensive repairs and completely out of respondent's control—points we thoroughly explored and decided only the other day. *West* v. *United States, ante,* p. 118. I would affirm.

MR. JUSTICE STEWART, dissenting.

I.

In this wrongful death action it was incumbent upon the Court of Appeals to apply the substantive law of West Virginia. The Court today finds it "highly doubtful" whether the Court of Appeals did so. I entertain no such doubt for the following reasons: (1) This Court's

"intervening decision" [1] in *The Tungus* v. *Skovgaard,* 358 U. S. 588, announced no new principle, but simply restated a doctrine well established in this Court. (2) Long before the decision in *The Tungus,* this doctrine had been specifically recognized as the law in the Fourth Circuit. (3) The express language of the Court of Appeals' opinion in the present case makes clear that the court understood that its function was to apply West Virginia law, and that it did so.

Our decision in *The Tungus* simply reaffirmed a principle articulated in many decisions of this Court. This principle, compendiously stated, is that admiralty enforces "the *obligatio*" created by a state wrongful death action "as it would one originating in any foreign jurisdiction." *Levinson* v. *Deupree,* 345 U. S. 648, 652. See *The Harrisburg,* 119 U. S. 199; *The Hamilton,* 207 U. S. 398; *La Bourgogne,* 210 U. S. 95; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233.[2] Under this weight of authority, it could be presumed that the Court of Appeals for the Fourth Circuit would recognize, as other federal courts

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[1] The judgment of the Court of Appeals in the present case was entered May 27, 1958. The decision of this Court in *The Tungus* was announced February 24, 1959.

[2] The law took a different turn with respect to state workmen's compensation laws. See *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205. Such legislation was differentiated from state wrongful death statutes because of the greater burden imposed on shipowners by "heavy penalties and onerous conditions" of the compensation statutes, and because of the "novel remedies incapable of enforcement by an admiralty court." *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 166. More than 15 years ago this Court pointed out that "[T]he *Jensen* case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws." *Standard Dredging Co.* v. *Murphy,* 319 U. S. 306, 309. Cf. *Davis* v. *Department of Labor,* 317 U. S. 249; *Hahn* v. *Ross Island Sand & Gravel Co.,* 358 U. S. 272.

have recognized whenever the specific question has arisen, that the right to recover for wrongful death occurring on the navigable waters of a State is to be determined by reference to state law.[3]

But there is no need to indulge in such a presumption, because the Court of Appeals for the Fourth Circuit, several years before the present case was decided, manifested a thorough understanding of the controlling doctrine exactly in accord with the principles confirmed by this Court last Term in *The Tungus*. In *Continental Casualty Co.* v. *The Benny Skou*, 200 F. 2d 246 (C. A. 4th Cir. 1952), a suit to recover for a death occurring on board a ship in the territorial waters of Virginia, the court held that the action was barred by the one-year limitation contained in the Virginia Wrongful Death Act. The court's reasoning was unambiguous: "The right of action which appellant has sought to enforce is one created solely by the Virginia statute. . . . 'Virginia has bestowed upon admiralty a right to grant a recovery not previously possessed by admiralty. The endowment must be taken *cum onere*.' As appellant grounds his action upon the Virginia statute, he is obliged to accept the statute in its entirety as construed by the Virginia court of last resort." 200 F. 2d, at 250.

Even if the Court of Appeals for the Fourth Circuit had not previously expressed such a clear understanding that cases like these are controlled by the substantive law of the State, I think that its opinion in the present case, standing alone, unambiguously shows a recognition of the duty to apply the substantive law of West Virginia.

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[3] See, *e. g.*, *Turner* v. *Wilson Line of Massachusetts*, 242 F. 2d 414 (C. A. 1st Cir.); *Halecki* v. *United Pilots Assn.*, 251 F. 2d 708 (C. A. 2d Cir.), judgment vacated and cause remanded, 358 U. S. 613; *Curtis* v. *A. Garcia y Cia.*, 241 F. 2d 30 (C. A. 3d Cir.); *Graham* v. *A. Lusi, Ltd.*, 206 F. 2d 223 (C. A. 5th Cir.); *Lee* v. *Pure Oil Co.*, 218 F. 2d 711 (C. A. 6th Cir.).

What the court said seems to me quite clear: "The maritime law does not allow recovery for wrongful death. . . . The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted. The endowment must be taken *cum onere.*" 256 F. 2d, at 453. This Court's suggestion that the above language was confined to the issue of the monetary limitation upon damages in the West Virginia statute is to me entirely unconvincing, because the Court of Appeals never reached the question of damages.

II.

Even if I were able to agree that it is uncertain whether the Court of Appeals decided this case under standards of state or federal law, I still could not join in the Court's judgment. For even if the Court of Appeals mistakenly applied substantive standards of federal maritime law, no purpose could be served by remanding this case unless it were shown that the state law is somehow more favorable to the petitioner. But there has been no showing—nor any suggestion—that the law of West Virginia is in any way more favorable to plaintiffs than the general maritime law.[4] Contrast *Hess* v. *United States, ante,* p. 314.

A remand of this case is equally pointless on the issue of whether, as a matter of West Virginia law, the state death statute incorporates the maritime duty of providing a seaworthy vessel. The district judge found that the barge was unseaworthy, but went on to hold that "this case is not one for the applicability of the doctrine

[4] Indeed the case was submitted to us upon the *contrary* assumption. The petitioner's argument was pitched upon his contention that we should overrule *The Harrisburg,* 119 U. S. 199, so that his rights could be determined under *federal* law. The respondent relied upon West Virginia decisions in urging affirmance.

of liability without fault." The Court of Appeals expressly refrained from deciding whether the West Virginia Wrongful Death statute has imported the maritime concept of unseaworthiness, finding that the circumstances of this case were not such as to impose liability under that concept, even if incorporated in the state statute. The court found as a fact that the barge was not unseaworthy, and held as a matter of law that in any event there could be no warranty of seaworthiness with respect to a vessel withdrawn from navigation and delivered into the sole custody and control of a dry dock company for the purpose of major repairs. Only last month we unanimously held that this view of the scope of unseaworthiness liability is correct. *West* v. *United States, ante,* p. 118. There is no point in requiring the Court of Appeals to make what would therefore be so completely irrelevant an inquiry into an elusive question of state law.

I would affirm.

STATE CORPORATION COMMISSION OF KANSAS ET AL. *v.* ARROW TRANSPORTATION CO. ET AL.

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

No. 526. Decided January 18, 1960.*

176 F. Supp. 411, affirmed.

Byron M. Gray for appellants in No. 526.

R. W. Henriott and *M. L. Cassell* for appellants in No. 527.

Robert W. Ginnane and *Isaac K. Hay* for appellant in No. 528.

MacDonald Gallion, Attorney General of Alabama, *George F. McCanless,* Attorney General of Tennessee, *Donald Macleay, George Shuff, John A. Caddell* and *Charles J. McCarthy* for appellees.

PER CURIAM.

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

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*Together with No. 527, *Alabama Great Southern Railroad Co. et al.* v. *Arrow Transportation Co. et al.,* and No. 528, *Interstate Commerce Commission* v. *Arrow Transportation Co. et al.,* also on appeals from the same Court.

DAVIS *v.* VIRGINIAN RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 53. Argued December 10, 1959.—Decided January 25, 1960.

In this action under the Federal Employers' Liability Act to recover damages for injuries resulting from petitioner's fall from a freight car while acting as a conductor in charge of shifting various railroad cars on respondent's tracks at an industrial plant, *held:*

1. The issue whether the injury was caused by respondent's direction to complete the shifting operation in 30 minutes, plus the inexperience of the brakemen assigned to help him, should have been left to the jury. Pp. 355–357.

2. The evidence was insufficient to support petitioner's claim that the physician furnished by respondent to petitioner after the accident administered improper treatment. Pp. 357–358.

Judgment reversed and cause remanded.

Henry E. Howell, Jr. argued the cause for petitioner. With him on the brief was *R. Arthur Jett.*

Thomas R. McNamara argued the cause for respondent. With him on the brief was *W. R. C. Cocke.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a negligence case under the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51. Petitioner, an employee of respondent, was injured while shifting various railroad cars on its tracks in and about the Ford Motor Company plant at Norfolk, Virginia. His first cause of action charged respondent with negligence in requiring the shifting of the cars in such an accelerated time and with such inexperienced help that petitioner was injured in attempting to carry out his instructions. In his second claim petitioner alleged that the physician furnished petitioner by respondent subsequent to his injury administered him improper treatment, thus aggravating

his injury, and that respondent was responsible for such negligence. At the close of the case, the trial judge sustained the motion of respondent to strike petitioner's evidence and discharged the jury. On petition for writ of error claiming that the issues should have been presented to the jury, the Virginia Supreme Court of Appeals rejected the petition and, in effect, affirmed the judgment, without written opinion. Believing that the question posed was of importance in the uniform administration of this federal statute, we granted certiorari. 359 U. S. 964. We conclude that the issue of negligence as to the injury should have been submitted to the jury, but that the evidence was insufficient to support the malpractice claim.

Petitioner was a yard conductor for respondent. On July 3, 1957, he was instructed to "shift" or "spot" various railway cars to a loading platform on a spur track of the Ford Motor Company at Norfolk. There were 43 cars involved. Some were empty and standing at the loading tracks at the plant. These had to be moved out to make way for the loaded cars which were outside the plant in respondent's shifting yards. The job called for them to be lined up and then moved to particular positions or spots on the tracks at the loading platform in the plant where Ford employees might remove their contents. On the morning of the accident there were designated at the Ford loading platform some 22 spots to which the loaded cars were to be switched. Two brakemen were assigned to assist petitioner in the operation. Petitioner was to complete the spotting during the lunch period at the Ford plant, which was 30 minutes. The evidence shows that neither of the brakemen assigned to petitioner was experienced in this particular operation. The senior brakeman had never spotted cars at the plant before, nor had he worked as a senior brakeman. The other brakeman had spotted cars at the plant for only a short period. Railroad employees classed the Ford "switching opera-

tion" as "a hot job" because "you do your job a little faster there than you would in the yard." In the opinion of brakemen who had spotted cars there, the minimum time for completion of an operation involving this many cars was 50 minutes, and the maximum well over an hour. Since petitioner was instructed to perform the task in 30 minutes, it was necessary for him to work faster than he normally would. In addition, the senior brakeman had informed petitioner of his inexperience, which required petitioner to take a position on top of the boxcars in order to be ready to assist the brakemen. Normally, petitioner would have taken his position on the ground where a conductor, such as he, usually carried out his assigned duties. When one of the brakemen called for assistance in the spotting operation, petitioner ran along the top of the boxcars toward the brakeman to give him help, but, upon coming to a gondola car, was obliged to descend the ladder of the boxcar next to it. Petitioner slipped on the ladder and fell to the ground, suffering the injury complained of here.

The record indicates that petitioner would have taken his position on the ground rather than on the railroad cars but for the inexperience of the brakemen. This required petitioner to take his position on top of the cars in order to assist the brakemen—a function not ordinarily performed by a yard conductor. We think it should have been left to the jury to decide whether the respondent's direction to complete the spotting operation within 30 minutes,[1] plus the inexperience of the brakemen assigned to perform this "hot job," might have precipitated petitioner's injury. "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the ques-

[1] While the evidence indicates that this fact is undisputed, if the evidence is in conflict, such an issue is of course for the jury.

tion to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co.* [318 U. S. 54]) as well as issues involving controverted evidence. *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445; *Washington & Georgetown R. Co.* v. *McDade*, 135 U. S. 554, 572. To withdraw such a question from the jury is to usurp its functions." *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353–354 (1943).[2]

As to the malpractice claim, the trial court held that the railroad would not be liable for any negligence on the part of Dr. Leigh, the physician it furnished petitioner. We need not pass on this issue, however, since we find no evidence sufficient to support a malpractice recovery. Proof of malpractice, in effect, requires two evidentiary steps: evidence as to the recognized standard of the medical community in the particular kind of case, and a showing that the physician in question negligently departed from this standard in his treatment of plaintiff. The trial judge acknowledged these to be the tests of malpractice and allowed petitioner's counsel to make an offer of proof, although ruling that the railroad was not responsible for Dr. Leigh's actions. The evidence shows that the physician was of unquestioned qualification and treated petitioner in accordance with his best medical judgment and long practice. The only evaluation concerning his treatment was that of Dr. Thiemeyer, another physician who had treated petitioner, who testified that he did not "think that [the treatment] is proper." Dr. Thiemeyer's opinion was that "a fracture should be immobilized until it is healed sufficiently to bear weight without jeopardy of its healing," and that he "would say that activity would aggravate this fracture in that period." This offer of

[2] See also *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35 (1944); *Lavender* v. *Kurn*, 327 U. S. 645, 653 (1946); *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957).

proof was fatally deficient. No foundation was laid as to the recognized medical standard for the treatment of such a fracture. No standard having been established, it follows that the offer of proof was not sufficient. The trial judge, therefore, was correct in declining to submit the malpractice claim to the jury.

In view of our holding on the first cause of action, the judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

MR. JUSTICE HARLAN, dissenting.

From the point of view of the functions of this Court, this decision provides another example of the futility of continuing to bring here for review cases of this kind. So long as jury verdicts remain subject to some degree of judicial supervision, cf. *Harris* v. *Pennsylvania R. Co.*, 361 U. S. 15, 27–28 (dissenting opinion), whether or not the evidence is sufficient to warrant removing a particular case from consideration of the jury is a question which will doubtless continue to divide equally conscientious judges in all except the clearest instances. As to the issue upon which the judgment below is now reversed,* a majority of the Court disagrees with the unanimous view of the record taken by the two state courts. My Brother WHITTAKER, in dissent, takes a different view from that of the majority. And I, also in dissent, take still a different view from either approach.

*I agree with the Court as to the other issue.

As I read the record and the briefs, petitioner's theory was that this accident would not have happened had he not been forced to work on top of the cars, instead of on the ground where he usually worked, in consequence of (1) the company's instructions to perform the car-shifting operation in unusually short order, and (2) its failure to supply him with experienced helpers. Under the *Rogers* "rule of reason," 352 U. S. 500, I suppose it could be said that there was an issue for the jury on both scores, in light of the not unequivocal testimony of the petitioner, quoted in my Brother WHITTAKER'S opinion, and the other matters referred to in the Court's opinion. Even so, this makes out no case for the jury, unless there is evidence that one or both of these factors contributed to increase the normal hazards of petitioner's employment. I think there is no such evidence.

The record is barren of anything showing why this accident occurred. There was no evidence whatever that either the car or the ladder from which the petitioner fell was faulty. Petitioner admitted to being an experienced railroad worker whose duties had at times carried him up and down ladders, and on the tops of railroad cars. At the time of his fall the cars had stopped moving, or nearly so. When asked by the trial court to explain how he happened to fall, all petitioner could say was "it might have been grease or anything on my shoe"; and this was pure conjecture, as the record shows. More especially, petitioner did not say that he fell because he was "rushed."

In these circumstances, to hold that the jury might have found that what respondent did contributed to enhance the normal hazards of petitioner's employment is, in my opinion, to say in effect that the jury should have been allowed to substitute atmosphere for evidence and speculation for reason.

On the basis of the criteria governing our certiorari jurisdiction, this case has not been profitable business for this Court.

I would affirm.

MR. JUSTICE WHITTAKER, concurring in part and dissenting in part.

I agree that there was no evidence to support petitioner's contention that respondent is liable to him upon his claim of malpractice by the treating physician. But, with all deference, I must disagree that there was any evidence of negligence by respondent that caused or directly contributed to cause petitioner's injury. I am unable to find in the record any evidence of any "direction" by respondent to petitioner "to complete the spotting operation within 30 minutes." * And the "senior

*Bearing on the matter of the time allowed to do this switching work, petitioner testified on direct examination as follows:

"Q. What instructions did the General Yardmaster for the Virginian Railway Company give to you?

"A. My instructions was to line up those cars there for Ford Motor Company while they are at lunch.

. . . . . .

"Q. Did you ascertain how long that lunch period lasted at the Ford plant?

"A. Yes, sir.

"Q. How long did it last?

"A. 30 minutes."

On cross-examination petitioner testified:

"Q. He [the yardmaster] did not tell you that you had to meet that schedule even if it meant for you to abandon safety precautions, did he?

"A. No, sir.

. . . . . .

"Q. It is always your job, no matter what you are doing, to observe safety precautions for yourself and for your men, is it not?

[*Footnote continued on p. 361.*]

brakeman," whom the Court finds to have been "inexperienced," is shown by his own undisputed testimony to have pursued that occupation for more than a year. Even the "junior brakeman" is shown by his undisputed testimony to have worked at that occupation for respondent for "about a year." Moreover, no act—either of commission or omission—of those brakemen is shown to have in any way caused or contributed to cause petitioner to slip on and fall from the ladder of the standing or very slowly moving boxcar, and that is what caused his injury. Nor is there any evidence, or even any claim, of defect in that ladder. Where, then, is the evidence of respondent's negligence and of causation that is thought to have presented an issue of fact for the jury? Petitioner has pressed upon us an assignment that respondent failed to provide him with a safe place to work, in that it failed to make smooth and level the right of way adjoining the track so that, if a trainman were to slip and fall from a car ladder to the ground, he would land on level ground and be less likely to suffer injury. It is easy to understand why the Court makes no mention of that claim, but, as I see it and

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"A. Yes, sir.

. . . . . .

"Q. . . . And if you reach a point where it is necessary to abandon safety in order to do a certain thing by a certain time, you just have to go slower, don't you?

"A. Yes, sir.

. . . . . .

"Q. You were the top man from the Virginian Railway on that job at that time?

"A. Yes, sir.

"Q. You had charge?

"A. Yes, sir.

"Q. It was up to you as to how fast or how slow the job was carried out, was it not?

"A. It was up to me to see the Ford plant was set up."

as the judges of the two state courts unanimously saw it, the claims it does mention are equally without substance.

Citing *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353, 354, the Court quotes: "To withdraw such a question from the jury is to usurp its functions." If by that quotation the Court means that the *Bailey* case involved "such a question" as we have here, I must respectfully disagree. For the facts of that case see 319 U. S., at 351–352. On this record, I am compelled to think that the trial court and the Virginia Supreme Court of Appeals were right in holding that petitioner failed to make a submissible case of negligence and causation, and I would affirm the judgment.

Syllabus.

LOCAL NO. 8-6, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL. *v.* MISSOURI.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 42. Argued November 19, 1959.—Decided January 25, 1960.

Proceeding under a Missouri statute, the Governor of Missouri found that the public interest, health and welfare were jeopardized by an existing strike against a public utility in the State and issued executive orders taking possession of the company and directing that it continue operations. Pursuant to the statute, a state court enjoined continuation of the strike. The strike was then terminated; a new labor agreement was entered into between the unions and the company; and the Governor ended the seizure. On appeal from the injunction decree, the Supreme Court of Missouri noted that the injunction had "expired by its own terms"; but it proceeded to sustain the constitutionality of those sections of the statute authorizing the seizure, forbidding continuation of a strike after seizure, and authorizing the state courts to enjoin violations of the Act. On appeal to this Court, *held:* Since the injunction has long since expired by its own terms, the cause has become moot. Pp. 364–371.

(a) Because the injunction has long since "expired by its own terms" there remains for this Court no actual matter in controversy essential to a decision of this case. *Harris* v. *Battle*, 348 U. S. 803. Pp. 367–369.

(b) Life is not given to this appeal by the fact that the statute contains provisions which impose (1) monetary penalties upon labor unions which continue a strike after seizure, and (2) loss of seniority for employees participating in such a strike; since the Supreme Court of Missouri found that those separable provisions of the Act were not involved in this case, it carefully refrained from passing on their validity, and they are not properly before this Court in this case. Pp. 369–371.

317 S. W. 2d 309, judgment vacated and cause remanded.

Mozart G. Ratner argued the cause for appellants. With him on the brief was *Morris J. Levin.*

Robert R. Welborn, Assistant Attorney General of Missouri, argued the cause for appellee. With him on the brief was *John M. Dalton,* Attorney General of Missouri.

I. J. Gromfine, Bernard Cushman, Herman Sternstein and *Justus R. Moll* filed a brief for the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO, as *amicus curiae,* in support of appellants.

Briefs of *amici curiae* in support of appellee were filed by *Richmond C. Coburn* for the Chamber of Commerce of Metropolitan St. Louis; *Myron K. Ellison* for the Missouri State Chamber of Commerce et al.; *Irvin Fane, Harry L. Browne* and *Howard F. Sachs* for the Kansas City Power & Light Co.; and *James M. Douglas* and *Edmonstone F. Thompson* for the Laclede Gas Co.

Mr. Justice Stewart delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of Missouri affirming a decree which enjoined the appellants from continuing a strike against a St. Louis public utility. The judgment upheld the constitutionality of certain provisions of a Missouri law, commonly known as the King-Thompson Act, which authorizes the Governor on behalf of the State to take possession of and operate a public utility affected by a work stoppage when in his opinion "the public interest, health and welfare are jeopardized," and "the exercise of such authority is necessary to insure the operation of such public utility." [1]

[1] The King-Thompson Act is Chapter 295 of the Revised Statutes of Missouri, 1949. The section of the statute which authorizes seizure by the Governor on behalf of the State is Mo. Rev. Stat., 1949, § 295.180.

In the state courts and in this Court the appellants have contended that the Missouri law conflicts with federal legislation enacted under the Commerce Clause of the Federal Constitution, and that it violates the Due Process Clause of the Fourteenth Amendment. Because of doubt as to whether the controversy was moot, we postponed further consideration of the question of jurisdiction to the hearing of the case on the merits. 359 U. S. 982.

The appellants are labor unions which represent employees of the Laclede Gas Company, a corporation engaged in the business of selling natural gas in the St. Louis area. In the spring of 1956 the appellants notified Laclede of their desire to negotiate changes in the terms of the collective bargaining agreement which was to expire in that year. Extended negotiations were conducted, but no new agreement was reached, and upon expiration of the existing contract on June 30, 1956, the employees went out on strike.[2]

Five days later the Governor of Missouri issued a proclamation stating that after investigation he believed that the public interest, health, and welfare were in jeopardy, and that seizure under authority of the state law was necessary to insure the company's continued operation. In an executive order issued the same day the Governor took "possession" of Laclede "for the use and operation by the State of Missouri in the public interest." A second executive order provided that all the "rules and regulations . . . governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri."

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[2] All employees represented by the appellants, approximately 2,200, participated in the strike; approximately 300 supervisors and others not in the bargaining units represented by the appellants remained at work.

After the seizure the appellants continued the strike in violation of the statute,[3] and the State of Missouri filed suit for an injunction against them in the Circuit Court of St. Louis.[4] At the end of a three-day hearing the trial court entered an order enjoining the appellants from continuing the strike, and in an amendment to the decree declared the entire King-Thompson Act constitutional and valid. On July 14, 1956, the day after the injunction issued, the strike was terminated. On August 10, 1956, the appellants and Laclede signed a new labor agreement, and on October 31, 1956, the Governor ended the seizure.

On appeal the Supreme Court of Missouri, although noting that the injunction had "expired by its own terms," nevertheless proceeded to consider the merits of certain of the appellants' contentions. The court restricted its consideration, however, to those sections of the King-Thompson Act "directly involved"—"Section 295.180, relating to the power of seizure, and subparagraphs (1) and (6) of Section 295.200 RSMo, V.A.M.S., making unlawful a strike or concerted refusal to work after seizure and giving the state courts power to enforce the provisions of the Act by injunction or other means."[5] 317 S. W. 2d, at 316. In upholding the constitutionality of these sections of the Act, the court explicitly declined to pass on other provisions which the appellants sought to attack, stating: "The

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[3] Missouri Rev. Stat., 1949, § 295.200, par. 1, provides: "It shall be unlawful for any person, employee, or representative as defined in this chapter to call, incite, support or participate in any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state under this chapter, as means of enforcing any demands against the utility or against the state."

[4] Missouri Rev. Stat., 1949, § 295.200, par. 6, provides: "The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder."

[5] See notes 1, 3 and 4, *supra*.

sections which we have considered are severable from and may stand independently of the remainder of the Act. Although the defendants argue strenuously to the contrary, no case is made in this record for determination of the constitutionality of section 295.090, pertaining to a written labor agreement of a minimum duration and section 295.200, subparagraphs 2, 3, 4 and 5, relating to monetary penalties and loss of seniority. We, therefore, refrain from expressing any opinion with reference thereto." 317 S. W. 2d, at 323. Accordingly, the court "limited and modified" the judgment of the trial court so as to remove all possible intimation that any provisions of the Act had been held constitutional, other than those necessarily upheld in sustaining the validity of the injunction.[6]

Because that injunction has long since "expired by its own terms," we cannot escape the conclusion that there remain for this Court no "actual matters in controversy essential to the decision of the particular case before it." *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116. Whatever the practice in the courts of Missouri, the duty of this Court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green,* 159 U. S. 651, 653. See *Bus Employees* v. *Wisconsin Board,* 340 U. S. 416. To express an opinion upon the merits of the appellants' contentions would be to

[6] The court did reaffirm an earlier decision (*State ex rel. State Board of Mediation* v. *Pigg,* 362 Mo. 798, 244 S. W. 2d 75) upholding the constitutionality of provisions of the King-Thompson Act relating to the State Board of Mediation and public hearing panels, "[t]o the extent that those sections are a necessary predicate for the additional sections . . . with which we are now concerned . . . ." 317 S. W. 2d, at 315.

ignore this basic limitation upon the duty and function of the Court, and to disregard principles of judicial administration long established and repeatedly followed.[7]

In *Harris* v. *Battle,* 348 U. S. 803, these principles were given concrete application in a context so parallel as explicitly to control disposition of the primary issue here. That case originated as an action to enjoin the enforcement of a Virginia statute, markedly similar to the King-Thompson Act, under which the Governor had ordered that "possession" be taken of a transit company whose employees were on strike. Although the labor dispute was subsequently settled and the seizure terminated, the trial court nevertheless proceeded to decide the merits of the case, holding that the seizure was constitutional. *Harris* v. *Battle,* 32 L. R. R. M. 83. The Virginia Supreme Court refused an appeal. *Harris* v. *Battle,* 195 Va. lxxxviii. In this Court it was urged that the controversy was not moot because of the continuing threat of state seizure in future labor disputes.[8] It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act.[9] It was contended that the situation was akin to cases like *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498, 514–516.[10]

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[7] See, *e. g., Singer Mfg. Co.* v. *Wright,* 141 U. S. 696; *California* v. *San Pablo & Tulare R. Co.,* 149 U. S. 308; *Mills* v. *Green,* 159 U. S. 651; *American Book Co.* v. *Kansas,* 193 U. S. 49; *United States* v. *Hamburg-American Co.,* 239 U. S. 466; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360; *United States* v. *Alaska S. S. Co.,* 253 U. S. 113; *Brownlow* v. *Schwartz,* 261 U. S. 216; *Alejandrino* v. *Quezon,* 271 U. S. 528; *Barker Co.* v. *Painters Union,* 281 U. S. 462.

[8] See jurisdictional statement in *Harris* v. *Battle,* No. 111, O. T. 1954, pp. 12–13.

[9] *Ibid.*

[10] *Ibid.*

In finding that the controversy was moot, the Court necessarily rejected all these contentions. 348 U. S. 803. Upon the authority of that decision the same contentions must be rejected in the present case. See also *Barker Co.* v. *Painters Union,* 281 U. S. 462; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360.

However, as the appellants point out, the decision in *Harris* v. *Battle* is not completely dispositive here because, unlike the Virginia statute, the King-Thompson Act contains provisions which impose: (1) monetary penalties upon labor unions which continue a strike after seizure; [11] and (2) loss of seniority for employees participating in such a strike.[12] The Missouri court found that these separable provisions of the Act were not involved in the present case, and it carefully refrained from passing on their validity.[13] The court noted that liability for monetary penalties had been asserted in a separate lawsuit, 317 S. W. 2d, at 314, and the parties have informed us that the action is still pending in the state courts.

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[11] Missouri Rev. Stat., 1949, § 295.200, par. 3, provides: "Any labor organization or labor union which violates paragraph 1 of this section shall forfeit and pay to the state of Missouri for the use of the public school fund of the state, the sum of ten thousand dollars for each day any work stoppage resulting from any strike which it has called, incited, or supported, continues, to be recovered by civil action in the name of the state and against the labor organization or labor union in its commonly used name."

[12] Missouri Rev. Stat., 1949, § 295.200, par. 2, provides: "It shall be unlawful for any public utility to employ any person or employee who has violated paragraph 1 of this section except that such person or employee may be employed only as a new employee."

[13] See pp. 366–367, *supra.* Since neither the statutory penalties nor possible loss of seniority turns on the validity of the injunction, this case is quite unlike *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, where the very judgment in controversy imposed financial liability. Nor did this case involve a "perpetual" injunction. See *Bus Employees* v. *Wisconsin Board,* 340 U. S. 416, n., at 417–418.

We cannot agree that the pendency of that litigation gives life to the present appeal. When that claim is litigated it will be subject to review, but it is not for us now to anticipate its outcome. " 'Constitutional questions are not to be dealt with abstractly'. . . . They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. . . . Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress." *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740, at 746.

The guiding principle is well illustrated in *American Book Co.* v. *Kansas,* 193 U. S. 49. There the Kansas Supreme Court had ousted the appellant from doing business in the State until it complied with provisions of the local law governing foreign corporations. Pending appeal the appellant satisfied the judgment by complying with the requirements of the statute. But meanwhile the State had brought another action against the appellant to void contracts it had made prior to the date of its compliance. Because of this pending litigation the appellant argued that " 'there still exists a controversy, undetermined and unsettled,' involving the right of the State to enforce the statute against a corporation engaged in interstate commerce." 193 U. S., at 51. What the Court said in rejecting that argument and dismissing the appeal as moot is entirely relevant here. "[T]hat suit is not before us. We have not now jurisdiction of it or its issues. Our power only extends over and is limited by the conditions of the case now before us." 193 U. S., at 52. See *Alejandrino* v. *Quezon,* 271 U. S. 528.

The asserted threat to the seniority rights of Laclede employees is even more speculative. Almost four years have passed since the strike, and the appellants concede that no action has been taken to deprive any employees of their seniority. Moreover, the section of the Act which

relates to seniority rights imposes no legal sanctions on the employees or their unions, but makes unlawful only the action of the utility company which rehires the employees without loss of seniority.[14] In the unlikely event that a legal proceeding should now be brought against Laclede for having done so, there is no way to know what the outcome of such a proceeding in the Missouri courts might be.[15]

The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago. Any judgment of ours at this late date "would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain." *Brownlow* v. *Schwartz,* 261 U. S. 216, 217–218.

The judgment of the Supreme Court of Missouri is vacated, and the cause is remanded for such proceedings as by that court may be deemed appropriate.

Vacated and remanded.

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

We think this controversy is not moot. As the Court's opinion points out, the appellant unions may still be held liable for monetary penalties and their members may lose seniority because of the strike the Missouri Supreme Court held illegal under state law. Its holding was made long

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[14] See note 12, *supra.*

[15] The appellee asserts and the appellants do not deny that the statute imposes no penalty for violation of the seniority provisions.

after the strike had ended. It was moot then if it is moot now. But the state court treated it as a live controversy, and so should we. Otherwise, the appellant unions and their members stand constantly under threats of penalties and continuing injunctions under the state statute the Missouri Supreme Court held validly applied in this case.

The wrongfulness in holding the case moot is emphasized by our belief that the state court was plainly without any jurisdiction over this controversy unless the Court wants to overrule *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, and adopt the views of the three dissenters in that case. We would follow that holding and reverse this case on the merits.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY ET AL. *v.* WASHINGTON EX REL. YELLOW CAB SERVICE, INC.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 76. Argued January 20, 1960.—Decided January 25, 1960.

53 Wash. 2d 644, 333 P. 2d 924, reversed.

Richard P. Donaldson argued the cause for petitioners. With him on the brief was *Samuel B. Bassett.*

Kenneth A. Cox argued the cause for respondent. With him on the brief were *Herbert S. Little* and *Warren R. Slemmons.*

Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott, Dominick L. Manoli and *Florian J. Bartosic* filed a brief for the National Labor Relations Board, as *amicus curiae,* in support of petitioners.

PER CURIAM.

The judgment is reversed. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236.

GAIR ET AL. *v.* PECK ET AL.

APPEAL FROM THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY.

No. 544. Decided January 25, 1960.

Appeal dismissed and certiorari denied.
Reported below: 6 N. Y. 2d 97, 160 N. E. 2d 43.

Howard Hilton Spellman for appellants.

Louis J. Lefkowitz, Attorney General of New York, and *James O. Moore, Jr.* for appellees.

PER CURIAM.

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

TAYLOR *v.* TAYLOR.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 552. Decided January 25, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 185 Kan. 324, 342 P. 2d 190.

F. L. Hagaman for appellant.

PER CURIAM.

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

UNITED STATES EX REL. PORET ET AL. *v.* SIGLER, WARDEN.

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

No. 307, Misc. Decided January 25, 1960.

Certiorari granted; judgment vacated; and case remanded to the District Court for disposition of question respecting racial discrimination in selection of petit jury panels.

Reported below: 267 F. 2d 307.

G. Wray Gill and *Gerard H. Schreiber* for petitioners.

Jack P. F. Gremillion, Attorney General of Louisiana, *M. E. Culligan,* Assistant Attorney General, and *John E. Jackson, Jr.,* Special Counsel to the Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case remanded to the District Court for disposition of the question whether members of petitioners' race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution.

PHILLIPS CHEMICAL CO. *v.* DUMAS INDEPENDENT SCHOOL DISTRICT.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 40. Argued November 17–18, 1959.—Decided February 23, 1960.

Under Art. 5248 of the Revised Civil Statutes of Texas, as amended in 1950, which pertains to taxation of private users of property of the United States, a Texas School District assessed against appellant a tax measured by the full value of real property owned by the United States but leased to appellant for use in its private manufacturing business, under a lease subject to termination at the option of the United States in the event of a national emergency or a sale of the property. The Texas Supreme Court construed Art. 5248 as authorizing this assessment against appellant; but it had construed Art. 7173, which governs taxation of private lessees of real property owned by the State and its political subdivisions, as not authorizing taxation of a lessee under a lease subject to termination at the lessor's option in the event of a sale. *Held:* As construed and applied in this case, Art. 5248 discriminates unconstitutionally against the United States and its lessees, and the tax levied against appellant is invalid. Pp. 377–387.

(a) Since Texas law authorizes taxation of lessees of federal property but not lessees of property of the State or one of its political subdivisions, when the leases are subject to termination at the option of the lessors, it discriminates against the United States and its lessees. Pp. 379–382.

(b) Such discrimination between lessees of federal property and lessees of state property is not justified by any significant difference between them. *United States* v. *City of Detroit*, 355 U. S. 466, distinguished. Pp. 383–387.

159 Tex. —, 316 S. W. 2d 382, reversed.

Clark M. Clifford argued the cause for appellant. With him on the brief were *Carson M. Glass, Rayburn L. Foster, Harry D. Turner, C. J. Roberts* and *Thomas M. Blume.*

Earnest L. Langley argued the cause for appellee. With him on the brief were *James W. Witherspoon, John D. Aikin* and *Wayne E. Thomas.*

John F. Davis argued the cause for the United States, as *amicus curiae,* by invitation of the Court. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Myron C. Baum.*

Jack N. Price, Assistant Attorney General of Texas, argued the cause *pro hac vice,* by special leave of Court, on behalf of the State of Texas, as *amicus curiae,* in support of appellee. With him on the brief were *Will Wilson,* Attorney General of Texas, and *W. V. Geppert,* Executive Assistant Attorney General.

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

In this case, among other issues which we need not reach, we are asked to decide whether a Texas tax statute, Article 5248 of the Revised Civil Statutes of Texas, as amended in 1950,[1] discriminates unconstitutionally against the United States and those with whom it deals. We hold that it does.

Appellant, Phillips Chemical Company, engages in the commercial manufacture of ammonia on valuable industrial property leased from the Federal Government in Moore County, Texas. The lease, executed in 1948 pursuant to the Military Leasing Act of 1947, 61 Stat. 774, is for a primary term of 15 years and calls for an annual rental of over $1,000,000. However, it reserves to the Government the right to terminate upon 30 days' notice in the event of a national emergency and upon 90 days' notice in the event of a sale of the property.

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[1] Vernon's Tex. Rev. Civ. Stat., 1948 (Supp. 1950), Art. 5248. The amendatory Act is Tex. Laws, 1st C. S. 1950, c. 37.

In 1954, appellee, Dumas Independent School District, assessed a tax against Phillips for the years 1949 through 1954. The tax, measured by the estimated full value of the leased premises, was assessed in accordance with the District's ordinary ad valorem tax procedures.

When the District assessed the tax, Phillips commenced the present action in the state courts to enjoin its collection. Phillips contested both the District's right to levy the tax and the valuation figure upon which the amount of the tax was calculated. The latter issue was severed by the trial court for later decision and is not involved in this appeal. The lower state courts denied relief for the years subsequent to the effective date of the 1950 amendment to Article 5248, and on writ of error the Supreme Court of Texas, by a divided court, affirmed. 159 Tex. —, 316 S. W. 2d 382. Phillips appealed from the decision, and we noted probable jurisdiction. 359 U. S. 987.

The District's power to levy the tax was found to lie in amended Article 5248. Before 1950, Article 5248 provided a general tax exemption for land and improvements "held, owned, used and occupied by the United States" for public purposes. In 1950, the Texas Legislature added two provisions to Article 5248, one providing for taxation of privately owned personal property located on federal lands, and the other reading as follows:

> "[P]rovided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions."

As construed by a majority of the Texas court, this provision is an affirmative grant of authority to the State and its political subdivisions to tax private users of gov-

ernment realty. While the subject of the tax is the right to the use of the property, *i. e.*, the leasehold, its measure is apparently the value of the fee.[2] The constitutionality of the provision, thus construed, depended upon the court's interpretation of our decisions in the Michigan cases two Terms ago, where we held that a State might levy a tax on the private use of government property, measured by the full value of the property. *United States* v. *City of Detroit,* 355 U. S. 466; *United States* v. *Township of Muskegon,* 355 U. S. 484; cf. *City of Detroit* v. *Murray Corp.,* 355 U. S. 489.

However, three members of the Texas court, joined by a fourth on petition for rehearing, were of the opinion that under the majority's construction the statute discriminates unconstitutionally against the United States and its lessees. Their conclusion rested on the fact that Article 7173 of the Revised Civil Statutes of Texas[3] imposes a distinctly lesser burden on similarly situated lessees of exempt property owned by the State and its political subdivisions. We agree with the dissenters' conclusion.

Article 7173 is the only Texas statute other than Article 5248 which authorizes a tax on lessees. It provides in part that:

> "Property held under a lease for a term of three years or more, or held under a contract for the pur-

[2] The Court of Civil Appeals thought that the tax should be limited to the value of Phillips' leasehold, 307 S. W. 2d 605, 609, while the Texas Supreme Court expressed the view indicated above. However, as the State points out, these statements in the opinions of the two appellate courts were apparently dicta, for the trial court decided only the bare question of taxability, reserving for later a decision on the measure and amount of the tax. The measure of the tax, however, is not presently critical, for, as will be indicated, the levy of any tax in the circumstances of this case appears to discriminate against the Government and Phillips.

[3] Vernon's Tex. Rev. Civ. Stat., 1948, Art. 7173.

> chase thereof, belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law."

As construed by the Texas courts, Article 7173 is less burdensome than Article 5248 in three respects. First, the measure of a tax under Article 7173 is not the full value of leased tax-exempt premises, as it apparently is under Article 5248, but only the price the taxable leasehold would bring at a fair voluntary sale for cash—the value of the leasehold itself.[4] Second, by its very terms, Article 7173 imposes no tax on a lessee whose lease is for a term of less than three years. Finally, and crucial here, a lease for three years or longer but subject—like Phillips'—to termination at the lessor's option in the event of a sale is not "a lease for a term of three years or more" for purposes of Article 7173. *Trammell* v. *Faught,* 74 Tex. 557, 12 S. W. 317. Therefore, because of the termination provisions in its lease, Phillips could not be taxed under Article 7173.

Although Article 7173 is, in terms, applicable to all lessees who hold tax-exempt property under a lease for a term of three years or more, it appears that only lessees of *public* property fall within this class in Texas. Tax exemptions for real property owned by private organizations—charities, churches, and similar entities—do not survive a lease to a business lessee.[5] The full value of

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[4] Vernon's Tex. Rev. Civ. Stat., 1948, Art. 7174; *State* v. *Taylor & Kelley,* 72 Tex. 297, 12 S. W. 176; cf. *Daugherty* v. *Thompson,* 71 Tex. 192, 9 S. W. 99; *Taylor* v. *Robinson,* 72 Tex. 364, 10 S. W. 245.

[5] Tex. Const., Art. VIII, § 2; *Morris* v. *Masons,* 68 Tex. 698, 5 S. W. 519; *State* v. *Settegast,* 254 S. W. 925 (Tex. Comm. App.);

the leased property becomes taxable to the owner, and the lessee's indirect burden consequently is as heavy as the burden imposed directly on federal lessees by Article 5248. Under these circumstances, there appears to be no discrimination between the Government's lessees and lessees of private property.

However, all lessees of exempt public lands would appear to belong to the class defined by Article 7173.[6] In view of the fact that lessees in this class are taxed because they use exempt property for a nonexempt purpose, they appear to be similarly situated and presumably should be taxed alike. Yet by the amendment of Article 5248, the

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cf. *Houston* v. *Scottish Rite Benev. Assn.*, 111 Tex. 191, 230 S. W. 978; *Markham Hospital* v. *Longview*, 191 S. W. 2d 695 (Tex. Civ. App.).

[6] Although public lands in general are exempt from state and local taxation in Texas, Tex. Const., Art. XI, § 9; Vernon's Tex. Rev. Civ. Stat., 1948, Art. 7150 (4), there are certain conditions and exceptions to the exemption. The exemption does not survive a lease if the "public purpose" of the property is abandoned. *Abilene* v. *State*, 113 S. W. 2d 631 (Tex. Civ. App.); *State* v. *Beaumont*, 161 S. W. 2d 344 (Tex. Civ. App.). The School District concedes that this condition is met in this case because the lease reserves to the United States the right to terminate in the event of a national emergency. Exceptions to the general exemption of land owned by the State and its political subdivisions are created by statutes expressly providing for the taxation of certain types of public property by specific taxing authorities. *E. g.*, school-owned agricultural and grazing land is subject to local taxation, Tex. Const., Art. VII, § 6a; Vernon's Tex. Rev. Civ. Stat., 1948, Art. 7150a; state farms on which convict labor is employed are subject to county and school taxation, Vernon's Tex. Rev. Civ. Stat., 1948, Art. 7150 (4); prison property is subject to school taxation, Vernon's Tex. Rev. Civ. Stat., 1948, Arts. 7150 (17) and (18); and land which forms a part of the endowment of the University of Texas is subject to county taxation, Vernon's Tex. Rev. Civ. Stat., 1948, Art. 7150c. Although these exceptions to the general nontaxability of public lands reduce the extent of the discrimination created by Article 5248, they obviously do not eliminate it.

Texas Legislature segregated federal lessees and imposed on them a heavier tax burden than is imposed on the other members of the class by Article 7173. In this case the resulting difference in tax, attendant upon the identity of Phillips' lessor, is extreme; the State and the School District concede that Phillips would not be taxed at all if its lessor were the State or one of its political subdivisions instead of the Federal Government. The discrimination against the United States and its lessee seems apparent. The question, however, is whether it can be justified.

Phillips argues that because Article 5248 applies only to private users of federal property, it is invalid for that reason, without more. For this argument, it relies on *Miller* v. *Milwaukee,* 272 U. S. 713; see also *Macallen Co.* v. *Massachusetts,* 279 U. S. 620. *Macallen* might be deemed to support the argument, but to the extent that it does, it no longer has precedential value. See *United States* v. *City of Detroit, supra,* at 472, n. 2. *Miller* was a rather different case. In *Miller* it was thought that a State had attempted indirectly to levy a tax on exempt income from government bonds. Phillips' use of the Government's property, by way of contrast, is not exempt. 10 U. S. C. § 2667 (e); [7] *United States* v. *City of Detroit, supra.* It is true that in *Miller* the ostensible incidence of the tax—shareholders' income from corporate dividends—was not itself exempt, but the measure of the tax excluded all income not attributable to federal bonds owned by the corporation; that was the defect in the tax.

[7] During the years in question, the leasehold was taxable under § 6 of the Military Leasing Act of 1947, 61 Stat. 774, the predecessor of the provision now codified as 10 U. S. C. § 2667 (e). Section 6 provided in part that "[t]he lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation."

See *Pacific Co.* v. *Johnson,* 285 U. S. 480, 493. Therefore, in practical operation, the tax was either an indirect tax on the exempt income, or a discriminatory tax on shareholders of corporations which, as bondholders, dealt with the Government. Thus, if *Miller* has any relevance here, it is only to the extent that it may support the proposition that a State may not single out those who deal with the Government, in one capacity or another, for a tax burden not imposed on others similarly situated.

A determination that Article 5248 is invalid, under this test, cannot rest merely on an examination of that article. It does not operate in a vacuum. First, it is necessary to determine how other taxpayers similarly situated are treated. Such a determination requires "an examination of the whole tax structure of the state." Cf. *Tradesmens National Bank* v. *Oklahoma Tax Comm'n,* 309 U. S. 560, 568. Although *Macallen* may have departed somewhat from this rule, nothing in *Miller,* at least as it has been interpreted in later cases, should be read as indicating that less is required. Cf. *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Pacific Co.* v. *Johnson,* 285 U. S. 480.

Therefore, we must focus on the nature of the classification erected by Articles 5248 and 7173. The imposition of a heavier tax burden on lessees of federal property than is imposed on lessees of other exempt public property must be justified by significant differences between the two classes. The School District addresses this problem, essentially, as one of equal protection, and argues that we must uphold the classification, though apparently discriminatory, "if any state of facts reasonably can be conceived that would sustain it." *Allied Stores* v. *Bowers,* 358 U. S. 522, 528. The argument, in this context, turns on three supposed differences between the two classes. First, the School District and the State say that

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the State can collect in rent what it loses in taxes from its own lessees—something it cannot do, of course, with the Federal Government's lessees. Second, they argue that the State may legitimately foster its own interests by adopting measures which facilitate the leasing of its property. Finally, they claim that because of its allegedly greater magnitude, federal leasing of exempt land has a more serious impact on the finances and operations of local government than does the State's own leasing activities.

None of these considerations provides solid support for the classification. It is undoubtedly true, as a general proposition, that the State is free to adopt measures reasonably designed to facilitate the leasing of its own land. But if the incentive which it provides is in the form of a reduction in tax which discriminates against the Government's lessees, the question remains, is it permissible?

Likewise, it is not enough to say that the State can make up in rent what it loses in taxes from its lessees. What the State's *political subdivisions* lose in taxes from the *State's* lessees cannot be made up in this fashion. Other local taxpayers—including the Government's lessees—must make up the difference.

Nor is the classification here supported by the allegedly serious impact of federal leasing, as contrasted with state leasing, on the operations of local government. It is claimed, in this respect, that neither the State nor its subdivisions lease property exactly comparable—in size, value, or number of employees involved—to the ordnance works leased by Phillips from the Government. However, the classification erected by Article 5248 is not based on such factors. Article 5248 imposes its burdens on *all* lessees of federal property. It is conceded that the State and its subdivisions lease valuable property to commercial and business enterprises, as does the Federal Govern-

ment. Warehouse facilities are an example.[8] But the identity of the exempt lessor bears no relation to the impact on local government of otherwise identical leasing activities. Still, the variant tax consequences to the lessee, under Article 7173 on the one hand and Article 5248 on the other, differ widely.

It is true that perfection is by no means required under the equal protection test of permissible classification. But we have made it clear, in the equal protection cases, that our decisions in that field are not necessarily controlling where problems of intergovernmental tax immunity are involved. In *Allied Stores* v. *Bowers, supra,* for example, we noted that the State was "dealing with [its] proper domestic concerns, and not trenching upon the prerogatives of the National Government." 358 U. S., at 526. When such is the case, the State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary. *Id.,* at 526–528. But where taxation of the private use of the Government's property is concerned, the Government's interests must be weighed in the balance. Accordingly, it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself. Compare *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495, 500.

Nevertheless, it is claimed that the classification here is supported by our decision in *United States* v. *City of Detroit, supra,* because of the assertedly similar nature of the classification created by the statute involved in that case.[9] The Michigan statute, although applicable

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[8] See, *e. g.,* Op. Tex. Atty. Gen., No. WW–531, Dec. 9, 1958.

[9] Mich. Acts 1953, No. 189, now compiled in 6 Mich. Stat. Ann., 1950 (1957 Cum. Supp.), §§ 7.7 (5) and 7.7 (6). See *United States* v. *City of Detroit, supra,* at 467, n. 1.

generally to lessees of exempt property,[10] contained an exception for property owned by state-supported educational institutions. Appellee's argument, essentially, is that the exemption of lessees of school-owned property from the Michigan statute supports the imposition here of a heavier tax on federal lessees than is imposed on lessees of other exempt public property, in general.

This argument misconceives the scope of the Michigan decisions. In those cases we did not decide—in fact, we were not asked to decide—whether the exemption of school-owned property rendered the statute discriminatory. Neither the Government nor its lessees, to whom the statute was applicable, claimed discrimination of this character.[11] Since the issue was not raised, the basis for the separate classification of property owned by schools was not examined. Therefore, the Michigan cases shed no light on the classification problem here.[12]

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[10] "Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities." *United States* v. *City of Detroit, supra,* at 473.

[11] In its brief, the Government stated that the exception was not pertinent to its argument. Its discrimination argument rested on the proposition that the Michigan statute was, in reality, "special legislation" directed at government property. The Government argued that this purpose was manifested by the fact that the statute contained an exception for cases in which payments had been made by the United States "in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed." It was argued that the purpose thus manifested was improper under *Macallen Co.* v. *Massachusetts, supra.* We pointed out, in rejecting the argument, that the exception to the tax relied on by the Government in this connection served to protect it against the possibility of a double contribution to the revenues of the State, and that the precedential value of *Macallen* had been substantially impaired by later decisions. See *United States* v. *City of Detroit, supra,* at 472, n. 2, 474, n. 6.

[12] Only issues raised by the jurisdictional statement or petition for certiorari, as the case may be, are considered by the Court. Supreme Court Rules, 15, par. 1 (c)(1), 23, par. 1 (c).

None of these arguments, urged in support of the Texas classification, seems adequate to justify what appears to be so substantial and transparent a discrimination against the Government and its lessees. Here, Phillips is taxed under Article 5248 on the full value of the real property which it leases from the Federal Government, while businesses with similar leases, using exempt property owned by the State and its political subdivisions, are not taxed on their leaseholds at all. The differences between the two classes, at least when the Government's interests are weighed in the balance, seem too impalpable to warrant such a gross differentiation. It follows that Article 5248, as applied in this case, discriminates unconstitutionally against the United States and its lessee. As we had occasion to state, quite recently, it still remains true, as it has from the time of *M'Culloch* v. *Maryland,* 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals. See *United States* v. *City of Detroit, supra,* at 473. Therefore, this tax may not be exacted.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

ARNOLD *v.* BEN KANOWSKY, INC.

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

No. 60. Argued January 11, 1960.—Decided February 23, 1960.

Petitioner sued respondent under § 16 (b) of the Fair Labor Standards Act for payment of overtime wages claimed under § 7. Respondent claimed exemption from the Act's overtime requirements as a "retail or service establishment" under § 13 (a) (2), as amended in 1949. Respondent conducts an interior decorating and custom furniture business, but also fabricates on the same premises plastic aircraft parts which it sells in interstate commerce to manufacturers which incorporate them into aircraft or parts thereof which they sell to others. Sales of such plastic parts account for more than 25% of respondent's annual sales, and respondent introduced no evidence to prove that at least 75% of its sales were recognized in the industry as retail. *Held:* Respondent failed to satisfy the requirements of § 13 and is not entitled to exemption thereunder. Pp. 389–394.

(a) That respondent's manufacture of plastic parts may be considered a "sideline" from respondent's viewpoint does not remove petitioner from coverage under the Fair Labor Standards Act unless respondent's activities fall within the specific exemptions enumerated in § 13. P. 391.

(b) Since respondent, through its fabrication of such plastic parts, is making or processing the goods that it sells, it must comply with the requirements of § 13 (a) (4), as well as § 13 (a) (2), in order to be exempt. Pp. 392–393.

(c) Respondent failed to satisfy the requirements of § 13 (a) (2), because sales of plastic parts accounted for more than 25% of its annual sales, and respondent introduced no evidence to prove that 75% of its sales were recognized in the industry as "retail." Pp. 393–394.

(d) The sale of parts to be incorporated into aircraft that were to be sold by the purchasers of such parts were sales for resale; and, since such sales exceeded 25% of respondent's total sales, respondent failed to meet the requirement of § 13 (a) (2) that 75% of its annual sales be "not for resale." P. 394.

250 F. 2d 47, 252 F. 2d 787, reversed and cause remanded.

Submitted on briefs by *Arthur J. Riggs* for petitioner and *G. H. Kelsoe, Jr.* for respondent.

Bessie Margolin argued the cause for the United States, as *amicus curiae*. *Solicitor General Rankin, Harold C. Nystrom, Bessie Margolin, Sylvia S. Ellison* and *Beate Bloch* were on a brief for the Secretary of Labor, as *amicus curiae,* urging reversal.

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

This case concerns the provisions of the Fair Labor Standards Act of 1938 exempting from wages-and-hours coverage certain retail sales and service establishments.[1] The suit was brought by petitioner individually under § 16 (b) of the Act for payment of overtime wages claimed under § 7. The Court of Appeals for the Fifth Circuit reversed a District Court judgment for petitioner [2] and we granted certiorari, 359 U. S. 983. The proceedings in this Court are *in forma pauperis*. Both sides submitted on

[1] 29 U. S. C. § 213 (a), 63 Stat. 917, § 13 (a).

"The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . . or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; . . . ."

[2] The decision of the Court of Appeals is reported at 250 F. 2d 47. Denial of rehearing is reported at 252 F. 2d 787.

their briefs, and oral argument was heard only from the representative of the Secretary of Labor appearing as *amicus curiae*.

Respondent conducts an interior decorating and custom furniture business in Dallas, Texas. On the same premises he fabricates aircraft parts from phenolic, a cloth-impregnated phenol resin. This plastic is widely used in aircraft and automotive parts and can be machined on the woodworking equipment respondent has available in his furniture shop. Petitioner was employed by respondent from October 17, 1954, through September 2, 1955, primarily in the fabrication of phenolic parts.

At the trial, a representative of Chance Vought Aircraft, Inc., testified that his company purchased over $34,000 worth of phenolic parts from respondent in 1955, and that these parts were used in aircraft and missiles sold to the United States Navy. A representative of Temco Aircraft Company testified that it purchased about $2,000 worth of phenolic parts annually from Kanowsky for use in manufacturing aircraft subassemblies for the Air Force or for prime contractors, many of whom were located outside the State. Respondent also shipped a small amount of sheet phenolic directly outside the State.

During the year beginning October 1, 1954, respondent's sales totaled $99,117.52, and its sales of phenolic and phenolic parts were $39,751.71, or almost exactly 40% of its total sales. Its secretary-treasurer admitted that phenolic aircraft parts alone accounted for at least 25% of the company's total sales. Respondent introduced no evidence concerning the amount or nature of sales of phenolic in forms other than aircraft parts. Notwithstanding the admitted percentage of its total sales attributable to phenolic parts, respondent claimed exemption from the provisions of the Fair Labor Standards Act because of the retail character of its business.

The District Court found that petitioner was engaged in the production of goods for commerce within the meaning of the Act, and upon respondent's admission that petitioner had been paid for overtime hours only at straight time rates, entered judgment for petitioner for unpaid overtime compensation plus an attorney's fee. The Court of Appeals reversed on the ground that respondent was exempt from the Act's overtime requirements under § 13 (a)(2) as a "retail or service establishment."

We believe that the Court of Appeals was in error and must be reversed. The wording of the statute, the clear legislative history, and the decisions of this Court require this conclusion.

Petitioner admittedly is engaged in the manufacture of phenolic parts for commerce. That this activity may be considered a "sideline" from respondent's viewpoint does not remove petitioner from coverage under the Fair Labor Standards Act unless the respondent's activities fall within the specific exemptions enumerated in § 13 of the Act. As originally passed in 1938, the Fair Labor Standards Act exempted from coverage "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." [3] In 1949 Congress substituted a three-part definition for this provision. Any employee employed by a retail or service establishment is to be exempt if more than 50% of the establishment's annual dollar volume of sales is made within the State, if 75% of its annual sales volume is not for resale, and if 75% of its annual sales volume is recognized within the industry as retail sales.

This Court had occasion at the last Term to point out that the 1949 revision does not represent a general broad-

[3] 52 Stat. 1060, 1067.

ening of the exemptions contained in § 13.[4] Rather, Congress "was acting in implementation of a specific and particularized purpose" to replace the unsatisfactory "business use" test, which had developed around the 1938 provision, with a formula that would be at once flexible and at the same time provide clear statutory guidance to the Administrator.[5]

We have held that these exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.[6] The three conditions of § 13 (a)(2) are explicit prerequisites to exemption, not merely suggested guidelines for judicial determination of the employer's status.[7]

While § 13 (a)(2) contains the requirements every retail establishment must satisfy to qualify for exemption, a retailer-manufacturer must satisfy the additional requirements of § 13 (a)(4) since it "makes or processes" the goods it sells.[8]

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[4] *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 294.

[5] *Id.*, at 293. See also the statement made by Senator Holland, manager of the amendment, during the debate in the Senate, 95 Cong. Rec. 12491; and the remarks of Representative Lucas, who introduced the amendment in the House, 95 Cong. Rec. 11116.

[6] *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 295.

[7] Such cases as *White Motor Co.* v. *Littleton*, 124 F. 2d 92 (C. A. 5th Cir. 1941), relied upon by the Fifth Circuit in its opinion in this case and decided at a time when there was no statutory definition of "retail or service establishment," no longer can have any vitality in view of the 1949 amendments. The extent to which the *White Motor Co.* decision rests on the absence of a statutory definition of "retail" is shown in 124 F. 2d, at 93.

[8] Prior to the 1949 amendments to the Act, the whole area of manufacturing was excluded from the retail exemption. It had been repeatedly held that establishments engaged to any extent in manufacturing or processing activities could not qualify for exemption under former § 13 (a)(2). *E. g.*, *Grant* v. *Bergdorf & Goodman Co.*, 172 F. 2d 109 (C. A. 2d Cir. 1949); *Fred Wolferman, Inc.*, v. *Gus-*

Turning to the facts of this case, it is clear that respondent, through its fabrication of phenolic parts, is "making or processing the goods that it sells." To gain exemption it therefore must comply with the criteria of § 13 (a)(2) as they are incorporated by reference in § 13 (a)(4), as well as the additional requirements of § 13 (a)(4) itself. It is clear that respondent does not meet at least two of the three standards of § 13 (a)(2) as included in § 13 (a)(4).

First, sales of phenolic parts account for more than 25% of the respondent's annual sales volume. The court below assumed that respondent's sales were recognized in the community as retail sales without any evidence to support the fact. This conclusion was not justified, since it is clear that Congress intended that "any employer who asserts that his establishment is exempt must assume the burden of proving that at least 75 percent of his sales are recognized in his industry as retail." [9]

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tafson, 169 F. 2d 759 (C. A. 8th Cir. 1948); *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475 (C. A. 7th Cir. 1945); *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C. A. 3d Cir. 1943); *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. A. 4th Cir. 1943); *Collins* v. *Kidd Dairy & Ice Co.*, 132 F. 2d 79 (C. A. 5th Cir. 1942); see *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 666–678. The Administrator's interpretation comporting with this view is to be found in Interp. Bull. No. 6, as revised and reissued June 16, 1941, 1942 WH Manual 326.

The legislative history of the amendments, as reflected by statements of the sponsors and Committee Reports, clearly evidences that § 13 (a)(2) as amended "does not apply to any manufacturing activities since any such activities, when conducted by a retail establishment, if exempt, are intended to be exempt under section 13 (a)(4)." Statement of the House Conferees, 95 Cong. Rec. 14932; see also the statements on the floor of Congress by the managers for the amendment in each House, Senator Holland and Representatives Lesinski and Lucas, 95 Cong. Rec. 12495, 14942, 11216.

[9] Remarks of Senator Holland, 95 Cong. Rec. 12502; remarks of Representative Lucas, 95 Cong. Rec. 11004, 11116; see also the

Second, the Court of Appeals assumed that the sales of phenolic and phenolic parts were not for resale, but in doing so, it was in error. The sales of parts to one company alone for incorporation in airplanes and missiles that were to be sold to the United States Navy exceeded 25% of the total. These sales indisputably were made with the expectation that the parts would be incorporated in aircraft and that the aircraft would be sold. Such transactions are clearly within the concept of resale.[10]

Since respondent has not sustained its burden of proving that 75% of its annual sales volume is not for resale and is recognized as being retail in the particular industry, we need not reach the question whether the additional standards of § 13 (a)(4) itself are met.[11]

We hold that respondent has not satisfied the requirements of § 13 and is not entitled to exemption thereunder. The judgment of the Court of Appeals is reversed; the judgment of the District Court is reinstated; and the cause is remanded to that court for consideration of the prayer of petitioner for further counsel fees in accordance with the provision of the Act.

It is so ordered.

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statement of the majority of the Senate Conferees, 95 Cong. Rec. 14877.

[10] See statement of the House Conferees, 95 Cong. Rec. 14932; statement of majority of Senate Conferees, 95 Cong. Rec. 14877; 29 CFR § 779.15 (c) (Supp. 1959); cf. *Mitchell* v. *Sherry Corine Corp.*, 264 F. 2d 831, 834 (C. A. 4th Cir. 1959). As the cited legislative materials indicate, the exemption from the general "resale" rule for residence and farm construction repair and maintenance under § 3 (n), 29 U. S. C. § 203 (n), evinces an intent to classify other sales for use in articles to be sold as "resale."

[11] The employee having shown that the nature of his employment brings him within the coverage of the Act, the nature of the "establishment" in which he is employed will be drawn into litigation only if the employer seeks an exemption under § 13, in which event the burden of proving the nature of the establishment is on the employer.

MR. JUSTICE WHITTAKER, dissenting.

Section 13 (a) of the Fair Labor Standards Act exempts from the wage-and-hour provisions of that Act employees of "any retail or service establishment," as there defined. See note 1 of the Court's opinion. Therefore, the entity to be considered is the "establishment." A single employer may conduct two (or more) "establishments," side by side or even under the same roof, one of which could be a "retail or service establishment," as defined in and exempted by § 13 (a), and the other not. Here, respondent appears to have been separately engaged in three activities: (1) the manufacture and sale of phenolic, in which enterprise several persons—the number is not stated in the record—were employed, (2) an interior decorating business, commonly employing five persons, and (3) the custom manufacture and sale of furniture, employing a small, but varying, number of employees. During petitioner's employment by respondent—from October 17, 1954, through September 2, 1955—he worked for a period in one of these enterprises and then in another, but, as the Court says, he worked primarily in the fabrication of phenolic parts.* Upon respondent's admis-

*The witness Kanowsky testified:

"Q. To your knowledge, were there a number of weeks that he didn't do any work on phenolic aircraft parts at all?

"A. There had to be, yes, sir.

"Q. To your knowledge, were there a number of weeks in which he did seventy-five percent or more of his work on furniture and things of that nature?

"A. Yes, sir."

The witness Justice, employed primarily in the interior decorating establishment, testified:

"Q. . . . How about when they were doing this [interior decorating] job down town?

"A. I believe he worked down town practically all of the time.

[*Footnote continued on p. 396.*]

sion at the trial, that petitioner had been paid for overtime hours worked *only at straight time rates,* the District Court, without any evidence showing the number of hours worked in the one as distinguished from the other of these enterprises, entered judgment for petitioner for overtime compensation for *all* overtime hours worked by petitioner, and an attorney's fee.

Although, as the Court correctly says, respondent, in its phenolic enterprise, was engaged in the production of goods for commerce and a major part of that production was sold for resale and, hence, that enterprise was not a "retail or service establishment," as defined in § 13 (a), it appears that all of respondent's interior decorating services were rendered locally, and that all of the custom furniture manufacturing was done and the furniture sold locally and not for resale. And, therefore, it would appear—at least there is room for a finding—that respondent's interior decorating and custom furniture manufacturing and selling enterprises were "retail or service establishments," as defined in § 13 (a). But, there is no finding by the District Court that these three enterprises were conducted by respondent in three "establishments" or in only one "establishment"; nor is there any finding as to what percentage of the interior decorating services were rendered locally, or what percentage of the custom furniture manufacturing and selling was done locally and not for resale.

Only if respondent's three enterprises constituted one "establishment" would there be support in the record for the judgment, and, as stated, there is no finding to that effect. The only oral argument made here was by counsel for the Department of Labor, as *amicus curiae.* Its posi-

"Q. Were there weeks at a time that you know of that seventy-five percent of his work was done on furniture and stuff like that and the balance on phenolics?

"A. Yes, sir."

tion is that, as a matter of law, respondent operated no more than two "establishments"; that the phenolic enterprise might be one "establishment," and it clearly was not a "retail or service establishment" as defined in § 13 (a) (I agree that this is so); that the interior decorating and custom furniture manufacturing and sales enterprises might be another "establishment"—why these two enterprises might not be two "establishments" was not explicated. Its counsel then argues that, because some custom manufacturing of furniture was done in the latter "establishment," it could not, as a matter of law, be a "retail or service establishment" as defined in § 13 (a). That argument would have had some force prior to the 1949 amendment to § 13 (a) (63 Stat. 917), but it is in the teeth of that amendment, as clause 4 of the section, as then amended, provides that the wage-and-hour provisions (§§ 6 and 7) of the Act do not apply with respect to a "retail or service establishment" as defined "*notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells . . . .*" (Emphasis added.) In the absence, as here, of essential evidence (showing the overtime hours worked in each of the several "establishments"—if more than one) and findings, I think the record does not support the judgment nor disclose the matters requisite to a decision of the question sought to be presented. I would, therefore, dismiss the writ as improvidently granted, or, at the very least, remand the case to the District Court for a new trial and for proper findings of fact on the determinative issues.

NATIONAL LABOR RELATIONS BOARD *v.* DEENA ARTWARE, INC., ET AL.

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

No. 46. Argued December 8, 1959.—
Decided February 23, 1960.

The National Labor Relations Board petitioned the Court of Appeals to adjudge respondents in civil contempt for refusing to pay certain amounts of back pay due to various employees as a result of their discriminatory discharge by respondent, Deena Artware, which is one of several subsidiaries wholly owned, except for qualifying shares, by a parent corporation which in turn is wholly owned, except for qualifying shares, by an individual who serves as president and treasurer. He and his wife, son, and secretary, constitute all of the officers and directors of the parent corporation and each of the subsidiaries. The Board alleged that (1) between the date of entry of a decree of the Court of Appeals enforcing the Board's original back-pay order and the Court's entry of a supplemental decree approving the Board's determination of the specific amounts of back pay due, respondents had siphoned off the assets of Deena Artware for the purpose of avoiding payment of any back pay found to be due and owing, and (2) that respondents are integral parts of a single enterprise and, as such, were and are answerable to the Court's decrees, which explicitly run against Deena Artware and its officers, agents, successors and assigns. The Board also moved for discovery, inspection and depositions. Without considering the Board's contention that the various corporate respondents were in fact "a single enterprise," the Court of Appeals dismissed the petition and denied the Board's motion for discovery, inspection and depositions, on the ground that, at the time of the alleged siphoning of assets, its decree was not sufficiently definite and mandatory to serve as a basis for contempt proceedings. *Held:* The Board is entitled to a hearing on its theory that the respondent corporations are but divisions of "a single enterprise," and it is entitled to discovery, inspection and depositions in aid of such a showing. Pp. 399–404.

261 F. 2d 503, reversed.

Ralph S. Spritzer argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott* and *Dominick L. Manoli.*

James G. Wheeler argued the cause for respondents. With him on the brief were *Mervin N. Bachman, Thomas J. Marshall, Jr.* and *Sidney R. Zatz.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This litigation has been long and drawn out and the present case is merely a small segment of it. In 1949 petitioner found that respondent Deena Artware, Inc. (Artware), had violated the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. § 158 (a), by discharging and refusing to reinstate 66 employees who had engaged in a strike (86 N. L. R. B. 732, 95 N. L. R. B. 9); and it ordered Artware "and its officers, agents, successors, and assigns" to offer reinstatement to those employees and to make them whole for any loss of pay suffered by them as a result of the discriminating action. The Court of Appeals in 1952 affirmed the Board's decision with respect to 62 of the 66 employees and entered a decree enforcing the Board's order, 198 F. 2d 645, remanding the case to the Board to determine the amounts due the individual employees. In 1953 Artware offered reinstatement to all of these employees but shortly closed its plant (which was located in Kentucky), never resumed operations, and never paid any back pay to the employees in question.

It appears that Weiner, one of the respondents, created a series of corporations, at the top of which was Deena Products, Inc. (Products), an Illinois corporation. Beneath it was a group of subsidiaries—formed under Kentucky law—Artware, Deena of Arlington, Inc., Sippi Products Co., Inc., and Industrial Realty Co., Inc.—all of whose shares, except for qualifying shares, were owned

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by Products. Weiner owned all the shares of Products, except for qualifying shares; and all the officers and directors of Products and the several subsidiaries were Weiner, his wife, his son, and his secretary. Weiner was president and treasurer of Products and of each of the subsidiaries, including Artware.

Artware in 1949 gave Products a promissory note secured by a mortgage on Artware's property, allegedly for advances made. In 1952 Artware made an assignment to Products in partial satisfaction of its indebtedness. In 1953 the Board applied to the Court of Appeals for an order restraining that assignment. It also asked for an order of discovery, alleging that the affairs of Products and Artware were being conducted in such a way as to dissipate Artware's assets and to avoid making the back wage payments. The court denied these motions, holding that, until the amount of back pay was liquidated and payment of the fixed sum refused, there was no warrant for granting that relief (207 F. 2d 798), the court adding that if upon liquidation of Artware "any financial inability" on its part to pay the awards was shown to be "the result of improper actions on its part in the meantime, appropriate contempt action can then be taken." *Id.*, at 802.

At that time, the Board had not issued an order determining the specific amounts of back pay owed the individual employees. In 1955—nearly two years later—it made that determination and entered an order, directing payment of back pay totaling about $300,000; and the Court of Appeals ordered Artware, "its officers, agents, successors and assigns" to pay that amount to specified employees. 228 F. 2d 871. That was on December 16, 1955.

In 1957 the Board moved the Court of Appeals for discovery, inspection, and depositions, naming Artware, Weiner, Products, and the other subsidiaries of Products.

It alleged that Weiner had caused the assets of Artware to be siphoned off through the other corporations under his control for the purpose of evading the back pay obligation. The Court of Appeals denied the motion, 251 F. 2d 183, holding that a contempt proceeding, rather than discovery, was the proper procedure.

On August 20, 1958, the Board petitioned the Court of Appeals to hold Artware, Weiner, Products and the other subsidiaries in civil contempt for failure to pay the amounts due employees under the back pay order. On October 11, 1958, the Board renewed its motion for discovery, inspection, and the taking of depositions from Artware, the affiliated corporations, and Weiner and other officers of these corporations.

In its petition the Board made charges of dealings between these corporations and between them and Weiner occurring from 1949 to 1955 which, it maintained, showed both (1) fraud and wrongdoing for the purpose of frustrating the back pay order and (2) the operation of these various corporations "as a single enterprise," each of the corporations performing "a particular function, as a department or division of the one enterprise in the manufacture, sale and distribution of the common product." The allegations (which are summarized in the opinion below, 261 F. 2d 503, 506–507) need not be repeated here, as the Court of Appeals merely held that, although the enforcement order was entered July 30, 1952, it was not made specific as to amounts owed until December 16, 1955. It, therefore, concluded that prior to the latter date the decree was "not sufficiently definite and mandatory to serve as the basis for contempt proceedings." *Id.*, at 510. It, therefore, dismissed the Board's petition for adjudication in civil contempt. It also denied the Board's motion for discovery, inspection, and depositions. 261 F. 2d 503, 510. The case is here on a petition for certiorari, 359 U. S. 983, which we granted in order to consider the

validity of the action of the Court of Appeals in dismissing the petition insofar as it charged the existence of "a single enterprise."

The Court of Appeals dismissed the petition without considering the second group of allegations made by the Board, *viz.*, that these various corporations were in fact "a single enterprise." And it denied the motion for discovery even as it pertained to that alternative theory of liability. It may have done so because it thought that the issues tendered in the petition related solely to intercompany transactions alleged to be conveyances in fraud of creditors or preferences in favor of some creditors. That seemed to be its preoccupation, as is evident by its references to possible causes of action under Kentucky law to set those transactions aside. *Id.*, at 509.

We do not stop to consider what would be a proper formulation of a rule of law governing liability in contempt for frustration of a decree. The Court of Appeals may have considered the transactions and assignments as if they were made between separate and distinct corporations. If they are viewed in that light, we cannot say they are so colorable as to warrant us in reversing the Court of Appeals. But we think the Board is entitled to show that these separate corporations are not what they appear to be, that in truth they are but divisions or departments of a "single enterprise." That is the alternative theory of liability which the Court of Appeals did not consider. We think that the Board is entitled to a hearing on that alternative theory and to discovery in aid of it.

The question whether the corporations under Weiner's ownership were only departments or divisions in one single enterprise is in a different category than those that arise under either 13 Eliz. or the modern law of preferences. Whether one corporation is liable for the obligations of an affiliate turns on other considerations. The insulation of

a stockholder from the debts and obligations of his corporation is the norm, not the exception. See *Pullman Car Co.* v. *Missouri Pacific R. Co.*, 115 U. S. 587, 597. Yet as Mr. Justice Cardozo said in *Berkey* v. *Third Avenue R. Co.*, 244 N. Y. 84, 95, 155 N. E. 58, 61, "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice." That is not a complete catalogue. The several companies may be represented as one.[1] Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; [2] one may be only a shell, inadequately financed; [3] the affairs of the group may be so intermingled that no distinct corporate lines are maintained.[4] These are some, though by no means all,[5] of the

[1] See *Platt* v. *Bradner Co.*, 131 Wash. 573, 230 P. 633. Cf. *American Nat. Bank* v. *National Wall-Paper Co.*, 77 F. 85, 91.

[2] See *Foard Co.* v. *Maryland*, 219 F. 827, 829; *Portsmouth Cotton Oil Corp.* v. *Fourth Nat. Bank*, 280 F. 879; *Dillard & Coffin Co.* v. *Richmond Cotton Oil Co.*, 140 Tenn. 290, 296, 204 S. W. 758; *Costan* v. *Manila Electric Co.*, 24 F. 2d 383, 384–385. Cf. *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 529; *Chicago, M. & St. P. R. Co.* v. *Minneapolis Civic Assn.*, 247 U. S. 490, 500–502; *Erickson* v. *Minnesota & Ontario Power Co.*, 134 Minn. 209, 213–215, 158 N. W. 979, 980–981.

[3] See *Luckenbach S. S. Co.* v. *W. R. Grace & Co.*, 267 F. 676, 681; *Oriental Investment Co.* v. *Barclay*, 25 Tex. Civ. App. 543, 554–557, 64 S. W. 80, 86–87. For discussion of the situation where a company is "deliberately kept judgment-proof" see *Weisser* v. *Mursam Shoe Corp.*, 127 F. 2d 344, 346.

[4] See *The Willem van Driel*, 252 F. 35, 38; *Wichita Falls & N. W. R. Co.* v. *Puckett*, 53 Okla. 463, 502–505, 157 P. 112, 124–125. Cf. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 272–274.

[5] Cf. *Union Sulphur Co.* v. *Freeport Texas Co.*, 251 F. 634, 661–662; *Harlan Public Service Co.* v. *Eastern Constr. Co.*, 254 Ky. 135, 143, 71 S. W. 2d 24, 29.

relevant considerations, as the authorities recognize. See Lattin on Corporations (1959) ch. 2, §§ 13, 14; Stevens on Corporations (1949) § 17; Berle, The Theory of Enterprise Entity, 47 Col. L. Rev. 343.

We do not intimate an opinion on the merits of this alternative theory of liability. The authorities we have cited merely indicate the range of inquiry which the petition of the Board presented. Discovery is useful in determining what the facts are. It is, indeed, necessary to determine whether the decree of the court enforcing the Board's order should run to any of the affiliated corporations or their stockholders. When the facts are resolved, it will be time enough to consider what further enforcement decree, if any, would be appropriate.[6]

The petition should be reinstated insofar as it charges the existence of "a single enterprise," and the motion for discovery should be granted so that the Board will have an opportunity to prove those allegations.

Reversed.

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

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins, concurring in reversal on the grounds herein stated.

Due regard for the controlling facts in this case will lay bare their legal significance. This requires that the facts, and the procedural setting in which they are to be considered, be stated with particularity.

The respondents are an individual and several corporations. The individual respondent, one Weiner, is the sole stockholder, except for qualifying shares, of Deena Products (Products), an Illinois corporation engaged in the

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[6] Cf. *Regal Knitwear Co.* v. *Labor Board,* 324 U. S. 9, 16.

manufacture and sale of lamps. The remaining respondents are wholly owned subsidiaries of Products. They are Deena Artware (Artware), a now defunct Kentucky corporation which formerly engaged in the manufacture of china urns for use as lamp bases; Deena of Arlington, another Kentucky corporation, engaged in the production of shades and the assembly of lamps; Sippi Products Company (Sippi), a Kentucky corporation engaged, as was Artware formerly, in the manufacture of china urns for use as lamp bases; and Industrial Realty Company (Industrial), a Kentucky corporation organized to hold title to the physical assets formerly held by Artware. Weiner has, at all relevant times, completely controlled Products, which in turn has similarly dominated all of the respondent subsidiaries. Weiner served as President, Treasurer [1] and a director of all of the corporations; his wife, son and successive secretaries as the other directors.

Artware was organized by Products in 1946, and shortly thereafter acquired a factory for the production of lamp bases at Paducah, Kentucky. In 1947 construction was undertaken, allegedly by Products, of a lamp assembly plant adjacent to the Artware plant at Paducah. At about the same time the labor dispute arose which led to the Labor Board orders underlying this proceeding. On October 25, 1949, Artware was found by the Board to have violated § 8 (a)(1), (3) and (5) of the National Labor Relations Act (as amended) and was ordered, *inter alia,* to reinstate with back pay sixty-six named employees whose discharge during the dispute was found to have been improper. 86 N. L. R. B. 732, 736. On July 30, 1952, the Court of Appeals for the Sixth Circuit, at the Board's petition, granted enforcement of its order. 198 F. 2d 645. At about the same time that court also

[1] The respondents' answer denies that Weiner was in fact Treasurer of Artware or the other subsidiaries.

sustained Artware's recovery against the union of a money judgment for injuries it sustained by virtue of a secondary boycott engaged in by the union during the same dispute. 198 F. 2d 637.

The Board then petitioned the Court of Appeals for an injunction against payment of a part of the judgment Artware had recovered against the union, alleging that Artware had undertaken to render itself unable to pay any back pay in the amounts which the Board was authorized to fix by virtue of the court's order of July 30, 1952. The Court of Appeals refused the injunction primarily upon the ground that the definite amount of back pay owing under its order had not yet been determined by the Board. The court noted that if, after such determination, it appeared that Artware had acted improperly, the court could deal with the matter in contempt proceedings. 207 F. 2d 798.

As a result of the proceedings to fix the amount of back pay, the Board, by an order of April 21, 1955, directed Artware to pay the back pay it owed various employees in specified amounts totaling about $300,000. 112 N. L. R. B. 371. This order was sustained by the Court of Appeals. 228 F. 2d 871. On a showing that Artware was entirely without assets, had ceased operations on April 24, 1953, and had, on November 24, 1954, transferred all its assets to Products, purportedly in satisfaction of a mortgage, the Board sought a discovery order in the Court of Appeals to inquire into the disposition of Artware's assets. The Board proceeded on the assumption that discovery would reveal facts requiring payment of Artware's back-pay debt by the companies affiliated with it. Discovery was denied (one judge dissenting). 251 F. 2d 183. The court's ground for denying discovery was, surprisingly enough, that the Board should first test the legal sufficiency of a complaint charg-

ing respondents with contempt. The Board thereupon filed this petition alleging contempt of the court's decree of enforcement of July 30, 1952, and renewed its motion for discovery.

The Board's petition charged that pursuant to a plan to frustrate the award of back pay against Deena Artware, conceived by Weiner during or shortly after the dispute with the union and carried out by him through exercise of his control of Products and all its subsidiaries, all of the assets of Artware were systematically transferred to Products and its other subsidiaries for the purpose of rendering Artware unable to pay any back-pay order that might thereafter be enforced against it. It alleged that acts in pursuance of that plan occurred after, and therefore in contempt of, the decree of the Court of Appeals which was entered on July 30, 1952. All of the acts alleged in pursuance of the plan occurred before the entry of the 1955 decree affirming the Board's order to pay specific amounts. The Board charged that Weiner and Products prevented Artware from showing any operating profits and thereby from accumulating assets in the ordinary course of its business, by causing Artware to lower the price at which it sold urns to Products, so that Artware showed losses while Products made substantial profits; and that Weiner and Products caused Artware to issue notes, secured by mortgages on all of its assets, to Products, for which Artware received nothing in return, in order that Artware's assets could be, as they were, transferred to Products after Artware was adjudicated liable to pay back pay. The Board alleged the following:

1. Early in 1948, after Artware, under Weiner's direction, had committed the unfair labor practices so found by the Board, Products began to treat the new assembly plant construction at Paducah adjacent to Artware's plant as if it had been undertaken by Artware, and not, as was

the fact, by itself. Artware therefore recorded the losses resulting from abandonment of that construction in July 1948. Nevertheless, when Products undertook alternative new construction at Arlington for the same purpose, it used the construction materials, engineering and architectural plans and services, and other services and materials, which it had already charged to Artware, and did so without paying Artware or crediting it with their value.

2. Products thereafter made further use of its purported shift of the Paducah construction to Deena Artware. About October 31, 1949, a few days after the Board issued its order directing, *inter alia,* that Artware pay back pay, Products and Weiner caused Artware to execute a note to Products in the amount of $75,459.65, payable within five years, and secured by a mortgage on all the real and personal property of Artware, purportedly in return for advances by Products for the construction at Paducah, despite the fact that the construction had been abandoned more than a year before, and had been undertaken not by Artware, but by Products. A second note, similarly secured, was issued about September 19, 1952, in the amount of $5,797.74. On November 24, 1954, after the Court of Appeals' first enforcement order of July 30, 1952, but before the Board's fixation of the amounts due on April 21, 1955, Weiner and Products caused Artware to transfer to Products all of its assets in satisfaction of these mortgages. In December 1952 Products and Weiner also caused Artware to assign to Products part of the proceeds of the judgment Artware had recovered against the union, as additional security for its obligations to Products. In January 1954, $19,320.97 of Artware's recovery was received by Products, the remainder having been assigned to Artware's counsel in payment of attorney's fees.

3. Beginning about March 1949, after the hearing on the Board's complaint against Artware, Products and Weiner caused Artware to lower its prices to Products,

causing inflation of Products' profits, and operating losses to Artware.

4. About April 24, 1953, Products and Weiner caused Artware to cease all operations. From that time until November 24, 1954, Products and Sippi used Artware's plant premises, facilities and properties at Paducah, without payment to Artware, and Products obtained from Sippi the supplies it had formerly secured from Artware. On November 24, 1954, Products and Weiner caused Artware to transfer all its assets to Products in satisfaction of its obligations which then, with accrued interest (at 6% payable semi-annually, but not theretofore paid), totaled $105,000, leaving, as Artware's sole unsatisfied obligation, the back-pay order. Thereafter Sippi continued to use the Artware facilities, title to which, about May 4, 1955, Products caused to be transferred to the newly created subsidiary, Industrial. About November 17, 1955, Products and Weiner caused Industrial to lease the facilities formally to Sippi; and since December 1, 1955, Sippi has operated the Artware facilities in the same manner and to the same end as did Artware formerly.

The Court of Appeals, on respondents' motion, dismissed the complaint for failure to state a cause of action, and denied the Board's accompanying motion for discovery. It held that since its order of July 30, 1952, in affirming the Board's determination of liability for back pay which the Board had not yet individualized, did not specify the exact monetary amount which Artware owed its various employees, it was "not sufficiently definite and mandatory" to sustain an adjudication of contempt. The basis of this conclusion was not a construction by the court of the special terms of its own decree. This was in terms the order entered by the Board. The court applied what it believed to be a general principle of law that an enforcement decree of a Board order determining liability for back pay, but leaving for a later stage

determination of the specific amounts due to individual employees, is too indefinite to sustain contempt proceedings.

The respondents urge in support of the decision below that after the 1952 decree Artware was entitled to a further administrative hearing to determine whether the conduct of the named employees after their wrongful discharge disentitled them to recover, and that despite the 1952 decree it might therefore ultimately be determined that Artware was not in fact obligated to make any payment whatever. It follows, the argument runs, that since the Board's 1952 order did not purport to adjudicate a liability free of defenses to make back-pay payments, it could not, for purposes of such payments, be considered final. Accordingly, the 1952 decree which in terms enforced it could not embody a final mandate concerning the payments, disobedience of which could constitute contempt.[2]

The Board concedes that the 1952 decree having been entered before any determination of specific amounts owing, it did not direct present payment to be made, and that respondent Artware could not be held in contempt for failure to make payment before the entry of the 1955 decree. But it urges that the 1952 decree could and did impose an immediate and definite obligation upon Artware not to design and execute a plan for the very purpose of disabling itself from obeying the decree which had definitively adjudicated its obligation to pay whatever would be found to be the dollar-and-cents amount of its theretofore established liability. If the allegations in the petition for contempt are sustained by proof, there can

[2] The question involved here was not presented for decision in *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949. To the extent that the opinion in that case is inconsistent with the principles here announced, it is of course disapproved.

be no doubt that Artware disregarded this obligation not to frustrate the 1952 decree.

The vital question of the legal implications of enforcement of a Board order rendered in an unfair labor practice proceeding directing reinstatement and payment of back pay, was the sole question dealt with in the opinion below. It was the primary issue between the parties here. It is the issue for our decision. The Board's procedure in unfair labor practice cases is first to hold a hearing to determine whether an unfair labor practice was committed, and, if it was, whether it would "effectuate the policies" of the Act for the Board to order reinstatement with back pay of any employees who were discharged. § 10 (c). In such a proceeding the Board does not concern itself with the amount of back pay actually owing. This is excluded from the proceeding in the interest of the efficient administration of the Act. The determination of specific liabilities may involve a protracted contest. An employee who is wrongfully discharged may, for example, not be entitled to back pay because he failed to accept other employment. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 197–200. Since the determination that the discharge was wrongful is subject to review, extensive proceedings to determine the amount of liability may be rendered superfluous by reversal. And if the determination is sustained and becomes final, it may be expedient for a respondent to reach agreement and avoid further litigation. The propriety of this established two-stage procedure of the Board in these back-pay cases is not questioned.

It will not do to hold that because the Board's determination of the duty to make back-pay payments does not result in fixed money judgments, no final order with regard to back pay is in fact entered or enforced. The Board is not, as respondents suggest, merely the statutory

representative of the employees for recovery of their losses.[3] Its primary function under § 10, in connection with which it makes specific monetary orders for specific employees, is to prevent the conduct defined as unfair labor practices in § 8. Section 10 (c) provides that once the Board determines that an unfair labor practice occurred, it may make such remedial orders for reinstatement with back pay as will "effectuate the policies" of the Act. We have held that the Board is granted broad discretion over the fashioning of remedial orders by this provision. *Phelps Dodge Corp.* v. *Labor Board, supra,* at 195–199.

It is plainly within that area of discretion for the Board to order an employer who is found to have violated § 8 by the discriminatory discharge of employees, to refrain from conduct which is solely designed to defeat any remedial back-pay order which may be entered when specific amounts are finally determined. It is equally appropriate for the Court of Appeals, by a decree enforcing the Board's order, to place him at the hazard that if an amount is found to be owing, such conduct subsequent to the decree may be found to be contumacious. The salient fact which brings the Board's remedial power into play under § 10 (c) is its finding that the employer's conduct constituted an unfair labor practice. The separation of that finding from the determination of amounts being an eminently reasonable method for administering the Act, it is irrelevant that as yet undetermined matters subsequent to the discriminatory discharge may in fact disentitle some or all of the employees to receive payment. Cf. *McComb* v. *Jacksonville Paper Co.,* 336 U. S. 187. Enforcement of such a Board order does not inter-

[3] *Nathanson* v. *Labor Board,* 344 U. S. 25, is not to the contrary. We there held simply that a back-pay order does not establish a debt owing to the United States and therefore entitled to priority under § 64 (a) (5) of the Bankruptcy Act, 11 U. S. C. § 104 (a) (5).

fere with the ordinary conduct of the respondent's business, or subject it unreasonably to the hazard of contempt. The decree is a form of assurance that business will be conducted with reference to business motives, and not merely so as to evade the remedies designed to enforce the policies of the Act.

It is further urged, however, that even if power exists in the Board and the courts to enter and enforce such an order of liability for back pay in amounts to be ascertained, the 1952 decree contained no such direction. But the decree on its face is an exercise of the equity power to act *in personam* to direct a specific course of conduct. To fail to accord it at least the implied effect of a direction not to act solely for the purpose of defeating it, makes of the decree less than a *brutum fulmen* and transmutes it into a mockery. The Board's determinations are not merely administrative analogues of common-law judgments, and they do not purport to be. As here, they uniformly contain a specific direction to take "affirmative action." In enforcing the Board's orders the Courts of Appeals similarly act not merely to review a common-law judgment, but to "effectuate the policies" of the National Labor Relations Act by enforcement orders directing that action be taken to remove the unfair labor practice found to exist. Every affirmative order in equity carries with it the implicit command to refrain from action designed to defeat it. Such an implication may arise from the mere assumption of jurisdiction as to specific property. See *Merrimack River Savings Bank* v. *Clay Center,* 219 U. S. 527, 535–536. Here, although specific property is not involved, the 1952 order was more than an assumption of jurisdiction. It adjudicated a liability to redress the consequences of a discriminatory discharge. Implicit in that adjudication, and the direction to pay in which it was embodied, was the command to the respondent Deena Artware not to conduct its business and transfer

all its assets for the sole purpose of evading the specific dollar-and-cents obligations in the offing. In the *Merrimack River Savings Bank* case, *supra,* the Court held that "the willful removal beyond the reach of the court of the subject-matter of the litigation or its destruction pending an appeal from a decree praying, among other things, an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a contempt of the appellate jurisdiction of this court." 219 U. S., at 535–536. Our case is *a fortiori* governed by this principle. Here the Court of Appeals had already adjudicated that the respondents were subject to a liability for back-pay wages, and the individualization of the amounts flowing from this liability merely awaited the determination by the Board. The assumption that no money would be due to any of the workers is so fanciful as surely not to be made the basis of the legal assumption that although the Court of Appeals had adjudicated the liability of the respondents, no liability would follow. By putting beyond reach the means for satisfying the dollar-and-cents amount of their liability, the respondents certainly frustrated the Court of Appeals' power to effectuate enforcement of the liability which it had already established.

On the Board's allegations there can be no doubt of the liability of some or all of the other respondents in contempt. Weiner, Products and the subsidiaries are alleged to have been active participants in a deliberate scheme to frustrate enforcement of Artware's liability established by the 1952 decree. The alleged "relations and behaviors" of the several respondents are sufficient to bring them within the terms of Rule 65 (d) of the Federal Rules of Civil Procedure. See *Regal Knitwear Co.* v. *Labor Board,* 324 U. S. 9, 14–15.

Accordingly, the petition for contempt should have been sustained, and an appropriate motion for discovery

should have been granted. The ground here taken to sustain the petition, of course, makes it unnecessary to consider the Board's alternative theory that all respondents constitute a "single enterprise" and as such are liable in contempt for failure to pay the specific amounts decreed in 1955. That ground should, of course, be open for consideration by the Court of Appeals.

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FORMAN *v.* UNITED STATES.

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

No. 43. Argued November 19, 1959.—Decided February 23, 1960.

In 1953, petitioner and one Seijas were indicted for conspiring from 1942 to 1953 to attempt to evade income taxes of Seijas and his wife for the years 1942 through 1945. Petitioner contended that the conspiracy was consummated in 1946, when the return for 1945 was filed, and that prosecution was barred by the 6-year statute of limitations; and he requested and obtained instructions that the jury must acquit him unless it found that there was a subsidiary conspiracy, continuing to within 6 years of the indictment, to conceal the first conspiracy. He was convicted. On appeal, the Court of Appeals reversed on the ground that a subsidiary conspiracy cannot extend the statute of limitations which had run against the main conspiracy, and it ordered the case remanded with directions to enter a judgment of acquittal. On rehearing, however, it decided that petitioner might have been tried on the theory that the original conspiracy continued until 1952, and it ordered the case remanded for a new trial. *Held:* This did not subject petitioner to double jeopardy in violation of the Fifth Amendment. Pp. 417–426.

(a) The theory on which the case was tried and upon which an instruction should have been given was that there was a continuing conspiracy from 1942 to 1953 to evade income taxes by concealing income, and that this objective was not consummated in 1946 when the 1945 return was filed. Pp. 422–424.

(b) The fact that the Court of Appeals had originally ordered entry of a judgment of acquittal did not deprive it of the power to amend that direction on rehearing and order a new trial, in the exercise of its power under 28 U. S. C. § 2106 to "require such further proceedings to be had as may be just under the circumstances." P. 424.

(c) Petitioner's conviction having been set aside on his appeal, he was not subjected to double jeopardy by the action of the Court of Appeals in ordering a new trial, on rehearing, after having previously directed entry of a judgment of acquittal. *Sapir* v. *United States*, 348 U. S. 373, distinguished. Pp. 425–426.

261 F. 2d 181, 264 F. 2d 955, affirmed.

Solomon J. Bischoff argued the cause for petitioner. With him on the brief was *George W. Mead.*

Abbott M. Sellers argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks.*

MR. JUSTICE CLARK delivered the opinion of the Court.

In this criminal conspiracy case, petitioner raises questions of double jeopardy. Petitioner and one Seijas, his former partner in the pinball business, were convicted [1] of conspiracy to commit the offense of willfully attempting to evade the individual income taxes of Seijas and his wife, in violation of § 145 (b) of the Internal Revenue Code of 1939,[2] and of furnishing false books, records, and financial statements to officers and employees of the Treasury Department for the purpose of concealing the true income tax liabilities of Seijas and his wife, in violation of 18 U. S. C. § 1001.[3] The trial was prior to our

[1] Seijas pleaded guilty and testified for the Government.

[2] "SEC. 145. Penalties. . . . (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

[3] "SEC. 1001. STATEMENTS OR ENTRIES GENERALLY. Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

decision in *Grunewald* v. *United States,* 353 U. S. 391 (1957). The petitioner requested, and the trial judge included in his charge, language similar to that given in the charge in the *Grunewald* prosecution directing that petitioner should be acquitted unless the jury found that the partners entered into a subsidiary conspiracy, continuing to within six years of the indictment, to conceal their conspiracy to attempt to evade Seijas' and his wife's taxes. At the time of the appeal, our *Grunewald* opinion had come down. Citing *Grunewald,* the Court of Appeals reversed petitioner's conviction and remanded the case with instructions to enter a judgment of acquittal. 259 F. 2d 128. On rehearing, however, the Court of Appeals decided that "the case might have been tried" on an "alternative theory," namely, that "certain of the overt acts listed in the indictment and charged to have occurred in 1948, 1951 and 1952, involving false statements, could well have been in furtherance of and during a conspiracy having as its objective not the concealment of the conspirators' conspiracy but tax evasion." 261 F. 2d 181, 183. It modified its original order for an acquittal and entered one directing a new trial. Petitioner then contended that having once ordered his acquittal, the Court of Appeals, by directing a new trial, violated the command of the Fifth Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Petitioner's motion for rehearing was denied. 264 F. 2d 955. We granted certiorari. 359 U. S. 982. We affirm the order directing a new trial.

The facts are detailed in the original opinion of the Court of Appeals, 259 F. 2d 128, and it is sufficient here merely to summarize them. In 1941 petitioner and Seijas, a lawyer, formed a partnership to engage in the operation of pinball machines in Kitsap County, Washington. Receipts, less expenses, from the individual machines, were to be divided equally between the partners

and the location owners. Beginning in 1942 and continuing until December 1945, however, the partners robbed the machines by extracting "holdout" money from those located at the more profitable locations. These sums, without being split with the location owners, were divided between the partners. None of these amounts were entered on the books of the partnership, nor were they included in its tax returns. Seijas maintained diaries and kept a record of the amount of "holdout" income that he received, but he paid no tax on it. During this period, tax returns omitting the "holdout" income were filed each year. The Court of Appeals found that "there was abundant proof" of petitioner's participation in a conspiracy to "evade Seijas' income taxes for the years 1942 through 1945" through concealment of the "holdout" income during that period. It also found that "numerous false statements" were made by both Forman and Seijas in furtherance of this conspiracy and within the six-year period immediately prior to the indictment. The record shows, as the Court of Appeals indicated, that the concealment of the "holdout" income continued until soon before the indictment, at which time Seijas turned over to the agents his diaries covering the receipt of this income for the years 1942–1945. The Court of Appeals, on the original submission, however, found that the case was submitted to the jury on the theory of *Grunewald* as expounded in 233 F. 2d 556, namely, that a subsidiary conspiracy to conceal the main conspiracy to attempt to evade Seijas' tax may be implied from circumstantial evidence showing that the latter conspiracy was kept a secret. This subsidiary conspiracy would make the prosecution timely under the applicable statute of limitations. But the Court of Appeals pointed out that the reversal of that case by this Court soon after the trial of petitioner gave it "an advantage . . . that the trial court did not have" and required the conviction to be reversed and the

case remanded "with directions to enter judgment for the appellant" Forman.

On rehearing,[4] as here, the Government contended that the essence of the conspiracy charged in the indictment filed November 19, 1953, was to evade the tax on the "holdout" income and that at least five overt acts were committed within six years of the return of the indictment for the purpose of furthering that conspiracy to evade. Contrary to what the trial court found, the Government said that the conspiracy did not end with the filing of the false income tax returns in the years 1943 through 1946, but embraced the subsequent efforts, made during the years 1947 through 1952, to evade those taxes. The only flaw in the record to the contrary, it claimed, was the erroneous "subsidiary conspiracy" instruction, which it now points out was injected therein by the petitioner himself. The Government concluded that the interests of justice required the entry of an order directing a new trial rather than a judgment of acquittal. Although finding that the Government conceded "that the case was submitted to the jury on an impermissible theory," the Court of Appeals read the indictment as alleging that the conspiracy was one " 'to violate . . . § 145 (b) of the Internal Revenue Code . . . by furnishing officers and employees of the Revenue Department false books and records and false financial statements, and by making false statements to such officers and employees, for the purpose of concealing from the Treasury Department their share of the unreported [holdout] income . . . and for the purpose of concealing . . . the

[4] Although petitioner contends that the petition for rehearing was in fact a motion for a new trial, this is not true. The purpose of a petition for rehearing is to point out error in the original judgment. Here the Government pointed out that the Court of Appeals applied the wrong theory (the *Grunewald* theory instead of the continuing conspiracy theory).

true income tax liability of Amador A. Seijas.' " 261 F. 2d, at 182. It held that "the conspiracy continued past the filing of the returns" and "that certain of the overt acts listed in the indictment and charged to have occurred in 1948, 1951 and 1952, involving false statements, could well have been in furtherance of and during a conspiracy having for its objective not the concealment of the conspirators' conspiracy but tax evasion." *Id.*, at 183. It, therefore, modified its opinion "so as to provide that the judgment is reversed and the cause remanded for a new trial." *Ibid.* The petitioner then raised his plea of former jeopardy, which is the basis of his petition here. He says that the trial court correctly found that the conspiracy ended with the filing of the last false income tax return in 1946. Since there was no direct evidence of the existence of a subsidiary conspiracy to conceal the crime of attempting to evade, the trial court, he concludes, should have sustained his motion to acquit on that ground. When the Court of Appeals held that the trial court erred in failing to grant the motion, petitioner argues that it gave him a vested right to an acquittal, which matured at the time he so moved in the trial court. A new trial, he contends, would therefore place him in double jeopardy.[5]

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[5] Petitioner also argues that there is insufficient evidence in the record to support a conviction based upon the "alternative theory." He urges that *Grunewald* established that, regardless of the nature of the charge, there must be "*direct* evidence . . . to show . . . *an express original agreement* among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission." 353 U. S., at 404. (Emphasis supplied.) This statement, however, had reference to a subsidiary conspiracy to conceal, not to a continuing one. In *Grunewald* we were not required to decide whether a conviction under a proper charge could be supported where the only evidence during the period within the statute of limitations was independent acts of concealment, since more was present there. See 353 U. S., at 409, n. 23. Nor is that necessary here, since the Court of Appeals' determination that

The Government now says that through "inadvertence" it allowed the case to be submitted to the jury on the "impermissible theory" condemned in our *Grunewald* opinion, 353 U. S., at 399–406; and that the trial judge was led into error by the request of the petitioner for an instruction on the "subsidiary conspiracy" theory, which error was compounded by the failure of the Government to object thereto. This resulted, it maintains, in a *Grunewald* instruction being saddled onto a correct charge. In view of this complication, it concludes that the jury might well have based its conviction on either theory, and a new trial was therefore appropriate and would not place petitioner in double jeopardy.

I.

We believe that there was a misconstruction of the scope of the alleged conspiracy and its duration in both *Grunewald* and the present case. In *Grunewald* the indictment charged a conspiracy "to fix" criminal tax cases and to conceal the acts of the conspirators. That case was submitted to the jury on the theory that "the indictment alleges that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation . . . ." Did the conspiracy end when the "no prosecution" rulings were issued, the Court charged, "or was a part of the conspiracy a continuing agreement to conceal the acts done pursuant thereto?" The effect of the charge was that if there was such a continuing agreement, then the prosecution was timely. It appeared to us that the case should have been submitted to the jury on

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the evidence of record could sustain a conviction under a correct instruction was based upon evidence in addition to independent acts of concealment. See 259 F. 2d, at 132–134, and 261 F. 2d, at 183. We cannot say that this determination was erroneous.

the theory that the central object of the conspiracy was not merely to obtain the "no prosecution" rulings, but rather to immunize the taxpayers completely from prosecution for tax evasion. The evidence supported such a theory. We said, however, that, since this theory was not adequately submitted to the jury, the case should be remanded for a new trial rather than affirmed.

In petitioner's case the indictment charged him and Seijas with conspiracy, extending from 1942 to 1953, to attempt to evade the income taxes of Seijas and his wife for the period 1942–1945. Unlike *Grunewald,* the indictment did not allege that one of the objects of the conspiracy was to conceal the acts of the conspirators. The indictment specifically alleged that the conspiracy extended from 1942 to 1953 and, of the 33 overt acts charged, some were committed as late as 1953, the year of the indictment. This language, it must be admitted, certainly lends strong support to the Government's theory of the case. The petitioner says that the theory on which the case was submitted to the jury was that the conspiracy to attempt to evade the taxes "was consummated" when the income tax returns for 1945 were filed and that, unless the jury found "a subsidiary conspiracy" to conceal the conspiracy to attempt to evade the taxes, the "verdict would have to be not guilty." That was the theory he requested, but the charge differs little from the *Grunewald* one. In fact it appears to have been patterned after the *Grunewald* charge. The correct theory, we believe, was indicated by the indictment, *i. e.,* that the conspiracy was a continuing one extending from 1942 to 1953 and its principal object was to evade the taxes of Seijas and his wife for 1942–1945, inclusive, by concealing their "holdout" income. This object was not attained when the tax returns for 1945 concealing the "holdout" income were filed. As was said in *Grunewald,* this was but the first

step in the process of evasion. The concealment of the "holdout" income must continue if the evasion is to succeed. It must continue until action thereon is barred and the evasion permanently effected. In this regard, the indictment alleged that the conspiracy to attempt such evasion actually did continue until 1953, when Seijas revealed the "holdout" income for the first time. It therefore appears that the "subsidiary conspiracy" theory covered by petitioner's requested charge had no place in the case and should not have been given. There was no such conspiracy alleged or proven. In view of the possible confusion resulting, it was entirely appropriate for a new trial to be ordered. Petitioner's raising this ground on appeal, rather than specifically asserting it in his motion for new trial, had no effect on the power of the Court of Appeals to correct the error.

Petitioner insists, however, that the fatal difference between the *Grunewald* charge and the one here is that here the "alternative theory" was not submitted to the jury. Even if we agreed with this point, we do not believe that it would be relevant to our conclusion. The indictment was based on one continuing conspiracy to evade Seijas' tax. The evidence supported it and, if the petitioner had not injected the infected language into the charge, this clearly would have been the theory submitted to the jury. Its inclusion did make the charge ambiguous and the Court of Appeals, having power to direct "such further proceedings to be had as may be just under the circumstances," believed a new trial "appropriate," 28 U. S. C. § 2106, and so ordered. Petitioner concedes that this would have been appropriate if such action had been taken by the Court of Appeals upon original submission; but he says that, once having ordered the entry of an acquittal judgment, it lost power to amend that direction on rehearing and order a new trial. This would subject him, he says, to double jeopardy. We think not.

II.

It is elementary in our law that a person can be tried a second time for an offense when his prior conviction for that same offense has been set aside by his appeal. *United States* v. *Ball,* 163 U. S. 662, 672 (1896). See also *Green* v. *United States,* 355 U. S. 184, 189 (1957), which expressly affirmed the principle of the *Ball* case. Petitioner says that he does not come under that rule because he moved for a judgment of acquittal on the basis of a lack of evidence, and that his right to acquittal "matured" at that time. A new trial, however, was one of petitioner's remedies. As we said in *Bryan* v. *United States,* 338 U. S. 552, 560 (1950), where one seeks reversal of his conviction, "assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal . . . 'there is no double jeopardy upon a new trial.' " Even though petitioner be right in his claim that he did not request a new trial with respect to the portion of the charge dealing with the statute of limitations, still his plea of double jeopardy must fail. Under 28 U. S. C. § 2106, the Court of Appeals has full power to go beyond the particular relief sought. See *Ball* and other cases, *supra.* Nor does *Sapir* v. *United States,* 348 U. S. 373 (1955), require a different conclusion, as petitioner claims. The Court of Appeals there, holding the evidence insufficient to convict, had first reversed and remanded with instructions to dismiss the indictment, and later, on the Government's motion, had remanded instead for a new trial on the ground of newly discovered evidence. This Court held that the original order directing the indictment to be dismissed was the correct one, and refused to pass on questions presented by the order directing a new trial.

While petitioner contends that here the action of the Court of Appeals on rehearing was based on new evidence,

as in *Sapir,* this is incorrect. Here there was no lack of evidence in the record. As the Court of Appeals pointed out, "The jury was simply not properly instructed." 264 F. 2d, at 956. On the other hand, the order to dismiss in *Sapir* was based on the insufficiency of the evidence, which could be cured only by the introduction of new evidence, which the Government assured the court was available. Moreover, Sapir made no motion for a new trial in the District Court, while here petitioner filed such a motion. That was a decisive factor in Sapir's case. See concurring opinion, 348 U. S., at 374. Furthermore, the power of the Court of Appeals to revise its original judgment and order the new trial on rehearing was not questioned in *Sapir.*

We believe petitioner overlooks that, when he opened up the case by appealing from his conviction, he subjected himself to the power of the appellate court to direct such "appropriate" order as it thought "just under the circumstances." Its original direction was subject to revision on rehearing. The original opinion was entirely interlocutory and no mandate was ever issued thereon. It never became final and was subject to further action on rehearing. *Department of Banking* v. *Pink,* 317 U. S. 264 (1942). In *Pink,* we said that the petition on rehearing "operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." 317 U. S., at 266. To hold otherwise would deprive the Government of the right to file a petition for certiorari here in criminal cases decided favorably to the defendant in the Court of Appeals, for such a petition might be attacked as a prohibited appeal by the Government on a motion for a new trial. It would be tantamount to a verdict of acquittal at the hands of the jury, not subject to review by motion for rehearing, appeal, or certiorari in this Court. We cannot subscribe to such a theory.

Affirmed.

MR. JUSTICE HARLAN, concurring.

I feel it necessary to add a few words to make clear the basis on which I join in the Court's judgment.

1. As I read the record I believe the case is fairly to be viewed as having been submitted to the jury only on the subsidiary-conspiracy theory. For although there are passages in the trial court's charge which can be said to have proceeded on a continuing-conspiracy theory, these passages, taking the charge as a whole, are, in my view, too ambiguous to justify our saying that the jury must have understood that it could also consider the case on that basis.

2. I do not think that because of its omission to object to the trial court's failure to give a continuing-conspiracy charge, the Government was precluded, under Rule 30 of the Federal Rules of Criminal Procedure, from raising that point on appeal. That Rule provides:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

In my view the Rule has no application here. Accepting, as I do, petitioner's claim that the charge did not include a continuing-conspiracy theory, it erred in the Government's favor. I cannot believe that Rule 30 requires the party favored by an erroneous charge to point out to the court what the correct charge would be if its decision were to be reversed on appeal. Furthermore, since our opinion in the *Grunewald* case, 353 U. S. 391, was not yet available to the parties or the court, the charge undoubtedly appeared correct to both sides. The Government was no more culpable for not challenging it than petitioner was for requesting it. Nor does the Government's request for a new trial in the Court of Appeals

constitute a cross-appeal. It did not, and could not, seek a result more favorable to itself than that reached by the trial court; rather, it simply opposed the relief for which petitioner contended.

3. I think the record sustains petitioner's contention that he did not, either in the trial court or in the Court of Appeals, request a new trial with respect to the portion of the charge dealing with the statute of limitations.* He is subject to retrial solely because he appealed his conviction and because, in the circumstances disclosed by this record, such relief was just and appropriate under 28 U. S. C. § 2106. The *Ball, Green,* and *Bryan* cases, cited in the Court's opinion, *ante,* p. 425, establish that the right of an appellate court to order a new trial does not turn on the relief requested by the defendant, and the *Sapir* case does not suggest such a distinction.

4. Since the Court of Appeals held only that the case *might* have been tried on a continuing-conspiracy theory, I express no opinion on the permissible duration of a conspiracy to violate § 145 (b) or on the sufficiency of the evidence adduced to prove its continuation. Those questions should be resolved in further proceedings.

MR. JUSTICE WHITTAKER, concurring.

I join the Court's opinion but desire to add a word. MR. JUSTICE CLARK'S clear, full, and accurate statement of the facts demonstrates errors by nearly everyone having to do with the case in the lower courts except the Government; yet it lost the case on appeal.

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*It appears that while petitioner's post-trial memorandum assigned the sufficiency of the evidence in routine fashion as one of the grounds for a new trial, he relied in the trial court entirely on the ground of newly discovered evidence, and in the Court of Appeals on that ground plus erroneous admission of evidence and certain errors in the charge not here relevant.

Petitioner, though not charged by the indictment with a "subsidiary conspiracy," nevertheless asked, and induced the court to give in his very words, a charge to the jury saying that unless they found a "subsidiary conspiracy" they should acquit him. There being neither charge in the indictment nor evidence in the record of "subsidiary conspiracy," the requested and obtained charge to the jury amounted to a virtual direction to acquit. And if the jury, in obedience to that charge, had acquitted, its verdict would, of course, have ended the case. Therefore, petitioner, by requesting and inducing the court to give this erroneous charge, got much more than he was entitled to under the law. Yet, he claimed in the Court of Appeals that this very charge, because unsupported by evidence, was erroneous and required an outright reversal. The Court of Appeals, though finding adequate evidence to support the *indictment,* first took that view. It seems plain to me that petitioner, having asked and obtained an erroneous but far more favorable charge than he was entitled to, certainly invited the error, benefited by it, and surely may not be heard to attack it as prejudicial to him, especially when, as seems quite plain, it was prejudicial only to the Government. I realize there is no profit in decrying a spent transaction, but I cannot resist observing the obvious, namely, that in these circumstances, the law required affirmance of the judgment.

After the Court of Appeals had written its original opinion reversing, the Government, in an effort to salvage the case, timely moved for a rehearing, saying, in effect: "Perhaps, we were in error in not objecting to the charge requested by the accused, and given by the court to the jury, on 'subsidiary conspiracy,' but we should at least have an opportunity to retry the case." The Court of Appeals then agreed with the Government's forced contention, and accordingly modified its opinion and remanded the case for a new trial. Petitioner complains

of this, urging that the court's original *opinion* "acquitted" him, and that to try him again would violate the Fifth Amendment's prohibition against double jeopardy. That contention, it seems to me, is totally devoid of merit. The Court of Appeals rendered but one *judgment* in the case, and it was one remanding for a new trial. Petitioner, instead of complaining that he was given only a new trial, should be thankful that his conviction was not affirmed.

Syllabus.

UNITED STATES *v.* MERSKY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 31. Argued November 10, 1959.—Decided February 23, 1960.

An information filed in a Federal District Court charged appellees with having violated 19 U. S. C. § 1304 by removing from ten violins imported from the Soviet Zone of Germany, after their importation but prior to their sale to ultimate purchasers, labels reading "Germany/USSR Occupied," with intent to conceal the identity of the country of origin. The District Court dismissed the information on the ground that removal of the labels did not violate § 1304, because the applicable regulation appeared to require the Soviet Zone marking for tariff purposes only, rather than to apprise the ultimate purchasers of the place of origin, and also that the regulation was not sufficiently clear and unambiguous to justify a criminal prosecution. The Government appealed to the Court of Appeals, which held that the order of dismissal was appealable directly to this Court under 18 U. S. C. § 3731 because (a) the District Court's interpretation of the regulation was tantamount to a construction of the statute upon which the information was founded, and (b) the effect of the dismissal was to sustain a motion in bar. Accordingly, the Court of Appeals certified the case to this Court. *Held:*

1. The charges in the information are founded on § 1304 and the regulations thereunder; the information was dismissed solely because its allegations did not state an offense under § 1304, as amplified by the regulations; the statute and regulations are so inextricably intertwined that an interpretation of the regulations necessarily is a construction of the statute; and the case was properly certified to this Court by the Court of Appeals under 18 U. S. C. § 3731. Pp. 434–438.

2. The regulation here involved appears to be aimed at the collection of duties, rather than the protection of ultimate purchasers in the United States; it is not sufficiently clear and unambiguous to furnish a basis for a criminal prosecution for violation of 19 U. S. C. § 1304; and the information was properly dismissed. Pp. 438–441.

Affirmed.

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Eugene L. Grimm argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg.*

Julius L. Schapira argued the cause and filed a brief for appellees.

MR. JUSTICE CLARK delivered the opinion of the Court.

The Congress has provided in the Tariff Act of 1930, 46 Stat. 590, as amended, that imported articles be marked to indicate to an ultimate purchaser in the United States the English name of the country of origin. 19 U. S. C. § 1304.[1] Pursuant to the Act, the Secretary of the Treasury adopted implementing regulations. This case tests the application of these provisions to the importation of 10 violins from the Soviet Zone of Germany. Appellees were charged with removing the labels from the

[1] "19 U. S. C. § 1304. Marking of imported articles and containers.

"(a) Marking of articles.

". . . [E]very article of foreign origin . . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations—

"(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin . . . ;

"(2) Require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article . . . .

. . . . . .

"(e) Penalties.

"If any person shall, with intent to conceal the information given thereby or contained therein, deface, destroy, remove, alter, cover, obscure, or obliterate any mark required under the provisions of this chapter, he shall, upon conviction, be fined not more than $5,000 or imprisoned not more than one year, or both."

violins with intent to conceal from the ultimate purchasers in the United States the identity of the violins' country of origin. The District Court dismissed the information, holding that the changing of the labels did not violate the Act because the applicable regulation appeared to require the Soviet Zone marking only for tariff purposes rather than to apprise the ultimate purchasers of the place of origin. In any event, the court found, the intent of the regulation was not "manifested in a manner sufficiently clear and unambiguous to justify a criminal prosecution." On appeal by the Government, the Court of Appeals held that the District Court's opinion, interpreting the regulation, was tantamount to a construction of the statute upon which the information was founded; and hence, under the Criminal Appeals Act, 18 U. S. C. § 3731, the order of dismissal was appealable directly to this Court rather than to the Court of Appeals.[2] It was also of the opinion that the effect of the dismissal was to sustain a motion in bar, which, under

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[2] 18 U. S. C. § 3731 provides, in part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

. . . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

. . . . . .

"If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

§ 3731, likewise required appeal to this Court. Accordingly, it certified the appeal, 261 F. 2d 40, and we postponed the question of jurisdiction to a hearing on the merits, 359 U. S. 951. We have concluded to accept the certification of the Court of Appeals and, on the merits, to affirm the District Court judgment dismissing the information.

Appellees, dealers in musical instruments in the United States, had purchased the violins from importers and thereafter sold them to other dealers. Upon obtaining possession of the violins from the importers, appellees replaced labels marked "Germany/USSR Occupied," then on each of the violins, with others inscribed "Made in Germany." After resale of the violins, an information was filed against appellees, charging that they removed the original labels attached to the violins with intent to conceal from the ultimate purchasers the identity of the country of origin.[3] The Government's theory was that the removal of the labels violated 19 U. S. C. § 1304 and its implementing regulations.

I.

Our first consideration is the jurisdictional issue. The Criminal Appeals Act specifies several conditions, any one of which permits a direct appeal by the Government to this Court, and makes our jurisdiction in such cases exclusive. In the event that an appeal which should have been taken here is erroneously effected to a Court of Appeals, that court is directed to certify it here. Prior to 1907, the date of the original Act, the United States had no appeal whatever in criminal cases. As passed by the House, the bill gave the Government "the same right of review by writ of error that is given to the defendant." However, in the Senate, the bill was amended so as to allow review

[3] In addition to the substantive charges, there was a count alleging conspiracy so to alter the labels.

from judgments setting aside indictments, "where the ground for such motion or demurrer is the invalidity or construction of the statute upon which the indictment is founded." 41 Cong. Rec. 2819. The final language emerged from the Conference Committee of the two Houses. See H. R. Conf. Rep. No. 8113, 59th Cong., 2d Sess. As was stated by Senator Knox, one of the proponents of the measure, a member of the Judiciary Committee and a former Attorney General of the United States, the bill "only proposed to give it [the Government] an appeal upon questions of law raised by the defendant to defeat the trial . . . ." 41 Cong. Rec. 2752. The bill was intended to create "the opportunity to settle important questions of law," its "great purpose" being "to secure the ultimate decision of the court of final resort on questions of law." [4] The situation sought to be remedied was outlined by Senator Patterson, also of the Judiciary Committee and a proponent of the bill, in these words:

> "We have a district court in one jurisdiction holding that a law is ineffective for one reason or another—it may be that it is unconstitutional, or for some other reason—and we have a district court in another jurisdiction holding the reverse; and as the cases multiply in the several sections of the country we may find one half of the courts of the country arrayed against the other half of the courts of the country upon the same identical law; one half holding that it is entirely constitutional and the other half holding that it is unconstitutional. So, Mr. President, that confusion, that ridiculous condition, exists and must continue to exist, because, as the law now stands, until a case involving the question shall go to the Supreme Court and it is brought there by the de-

[4] Senator Bacon, a member of the Judiciary Committee. 41 Cong. Rec. 2195–2196.

> fendant, there can be no adjudication by a court whose decision and judgment is controlling. . . . The bill is intended to cure a defect in the administration of justice . . . ." [5]

It therefore appears abundantly clear that the remedial purpose of the Act was to avert "the danger of frequent conflicts, real or apparent, in the decisions of the various district or circuit courts, and the unfortunate results thereof"; and to eliminate "the impossibility of the government's obtaining final and uniform rulings by recourse to a higher court." 20 Harv. L. Rev. 219. Moreover, the desirability of expedition in the determination of the validity of Acts of Congress, which is pointed to as a desideratum for direct appeal, applies equally to regulations. In practical operation, correction of a regulation by agency revision invariably awaits judicial action.

The information charged violations of 19 U. S. C. § 1304 "and the regulations promulgated thereunder." This section requires imported articles to be marked "to indicate to an ultimate purchaser . . . the country of origin," and imposes criminal sanctions on anyone who removes such a mark with intent to conceal the information contained therein. The Secretary of the Treasury is authorized to implement it by appropriate regulations. The term "country," as used by the Congress in requiring the markings, was defined by regulation to mean "the political

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[5] 41 Cong. Rec. 2753. See also comments of Senator Clarke, who, after discussing the matter with Senator Nelson, the manager of the bill on the floor, stated:

"[W]henever the validity of a statute has been adversely decided by a trial court . . . the Government ought to have the right to promptly submit that to the tribunal having authority to dispose of such questions in order that there may be a uniform enforcement of the law throughout the entire limits of the United States." 41 Cong. Rec. 2820.

entity known as a nation." 19 CFR § 11.8. By Treasury Decision 51527, August 28, 1946, Germany was to be considered the country of origin of articles manufactured or produced in all parts of Germany. Following a change in duty rates applicable to Soviet Zone products, T. D. 53210 was issued in 1953, providing that articles from Eastern Germany should be "marked to indicate Germany (Soviet occupied)." [6] The issue posed to the District Court was whether this last regulation carried with it the sanctions of § 1304. As we see it, a construction of the regulation necessarily is an interpretation of the statute.

An administrative regulation, of course, is not a "statute." While in practical effect regulations may be called "little laws," [7] they are at most but offspring of statutes. Congress alone may pass a statute, and the Criminal Appeals Act calls for direct appeals if the District Court's dismissal is based upon the invalidity or construction of a statute. See *United States* v. *Jones,* 345 U. S. 377 (1953). This Court has always construed the Criminal Appeals Act narrowly, limiting it strictly "to the instances specified." *United States* v. *Borden Co.,* 308 U. S. 188, 192 (1939). See also *United States* v. *Swift & Co.,* 318 U. S. 442 (1943). Here the statute is not complete by itself, since it merely declares the range of its operation and leaves to its progeny the means to be utilized in the effectuation of its command. But it is the statute which creates the offense of the willful removal of the labels of origin and provides the punishment for violations. The regulations, on the other hand, prescribe the identifying language of the label itself, and assign the resulting tags to their respective geographical areas. Once promul-

[6] Several months later, T. D. 53281 was issued, providing alternative wordings for the Soviet Zone labels.

[7] Vom Baur, Federal Administrative Law, § 490, at 489.

gated, these regulations, called for by the statute itself, have the force of law, and violations thereof incur criminal prosecutions, just as if all the details had been incorporated into the congressional language. The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other. The charges in the information are founded on § 1304 and its accompanying regulations, and the information was dismissed solely because its allegations did not state an offense under § 1304, as amplified by the regulations. When the statute and regulations are so inextricably intertwined, the dismissal must be held to involve the construction of the statute. This, we believe, gives recognition to the congressional purpose to give the Government the right of appeal upon "questions of law raised by the defendant to defeat the trial" and thus promptly to "secure the ultimate decision" of this Court, affording a desired "uniform enforcement of the law throughout the entire limits of the United States." In view of this conclusion, we need not pass upon the claim that the District Court sustained in effect a "motion in bar." Our disposition requires that the case come directly here, and accordingly we accept the certificate of the Court of Appeals and now turn to the merits.

II.

In 1946, the Treasury implemented the country-of-origin provisions of § 1304 by issuance of T. D. 51527, which provided that, "For the purposes of the marking provisions of the Tariff Act of 1930, . . . Germany shall be considered the country of origin of articles manufactured . . . in all parts of the German area subject to the authority of the Allied Control Commission and the United States, British, Soviet, and French zone Com-

manders . . . ." Thus the marking on articles produced in the Soviet Zone were required to be labeled "Made in Germany."

In 1951 the Congress directed the President to suspend or withdraw any reduction in the rates of custom duties or other concessions then applicable to the importation of articles manufactured in any areas dominated by the Soviet Union. 65 Stat. 73; 19 U. S. C. § 1362. In Proclamation No. 2935, 65 Stat. C25, the President suspended any reduction in rates of duty applicable to any articles manufactured in the Soviet Zone of Germany and the Soviet Sector of Berlin. Treasury Decision 52788, issued the same day, changed the rate of duty as provided in this proclamation. In 1953 the Secretary issued T. D. 53210, the regulation in controversy. This Treasury Decision is headed: "Tariff status, marking to indicate the name of the country of origin, and customs valuation of products of Germany, Poland, and Danzig." The first paragraph of T. D. 53210 refers to the presidential proclamation changing the structure of the rates of duty. The second paragraph specifies that, "For the purposes of the value provisions of section 402, Tariff Act of 1930," Western Germany shall be treated as one country, and "the Soviet Zone . . . shall be treated as another 'country.'" The third paragraph is the one crucial to this prosecution: it provides that products of Western Germany shall be "marked to indicate Germany as the 'country of origin,' but products of the Soviet Zone . . . shall be marked to indicate Germany (Soviet occupied) as the 'country of origin.'" The District Court concluded that T. D. 53210 was "issued primarily to establish markings for purposes of the differences in the duties applicable"; thus the indication of Soviet Zone origin would not be required beyond entry into this country, the stage at which duty is payable.

We agree with the District Court. It appears that T. D. 53210, unlike T. D. 51527, is aimed at the collection of duties rather than the protection of the ultimate purchaser in the United States. Its caption indicates that it deals with "tariff status" and "customs valuation," and the marking requirements are but aids thereof. Taking up the body of the document, we note that the first paragraph deals entirely with the fact that Soviet-dominated areas "shall not receive reduced rates of duty," while Western Germany and the Western Sectors of Berlin shall "continue to receive most-favored-nation treatment." The second paragraph is introduced by the phrase, "For the purposes of the value provisions" of the Tariff Act, and provides that "the Soviet Zone . . . shall be treated as another 'country.'" This language, as well as the make-up of the regulation, suggests that the third paragraph (the one involved here), requiring distinctive marking for Soviet Zone products, is but another step in the implementation of the tariff changes. It contains no reference to the requirement of § 1304 that the article be marked in a "conspicuous place," "legibly, indelibly, and permanently," so that an "ultimate purchaser in the United States" would be on notice. We note that appellees placed on the violins the labels "Made in Germany" as required by T. D. 51527.

In the context of criminal prosecution, we must apply the rule of strict construction when interpreting this regulation and statute. *United States* v. *Halseth*, 342 U. S. 277, 280 (1952); *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96 (1820). A reading of the regulation leaves the distinct impression that it was intended to protect and expedite the collection of customs duties. Certainly its emphasis on duties and its silence on the protection of the public from deceit support the conclusion that the old provisions were to continue insofar as markings after

importation are concerned.[8] If the intent were otherwise, it should not have been left to implication. There must be more to support criminal sanctions: businessmen must not be left to guess the meaning of regulations. The appellees insist that they changed the labels in good faith, believing their actions to be permissible under the law. There is nothing in the record to the contrary. A United States district judge concurred in their reading of the regulation. In the framework of criminal prosecution, unclarity alone is enough to resolve the doubts in favor of defendants.

Accordingly, the judgment of the District Court is

Affirmed.

MR. JUSTICE BRENNAN, concurring.

I join the opinion of the Court. But I think it plain under our precedents that jurisdiction over this appeal also lies here on the ground that the dismissal was one "sustaining a motion in bar, when the defendant has not been put in jeopardy." Except that arguments are made here in dissent which would unsettle what has been settled by our precedents and reintroduce archaisms into federal criminal procedure, I would have refrained from expressing my views.

The touchstone of what constitutes a "judgment sustaining a motion in bar" is precisely what Judge Lumbard in the Court of Appeals said it was—whether the judgment is one which will end the cause and exculpate the defendant. *United States* v. *Hark,* 320 U. S. 531, 536; *United States* v. *Murdock,* 284 U. S. 141, 147; *United States* v. *Storrs,* 272 U. S. 652, 654. As established by these precedents, the focal point of inquiry is not the form

[8] Since we hold that T. D. 53210 deals only with the collection of duties, its marking provisions supersede those of T. D. 51527 only as the latter relate thereto.

of the defendant's plea, but the effect of the *ruling* of the District Court.[1] "The material question is not how the defendant's pleading is styled but the effect of the ruling sought to be reviewed . . . ." *United States* v. *Hark, supra,* at 536. "Its [the judgment's] effect, unless reversed, is to bar further prosecution for the offense charged. It follows unquestionably that, without regard to the particular designation or form of the plea or its propriety, this court has jurisdiction under the Criminal Appeals Act." *United States* v. *Murdock, supra,* at 147. To turn the thrust of these precedents around and focus on the common-law pigeonhole of the defendant's plea would be an anomaly indeed, as is recognized, particularly 15 years after the Federal Rules of Criminal Procedure swept away the old pleas. See Rule 12.

These cases establish criteria for judging the question that are foreign to the technicalities of the old pleas. It is suggested, however, that Justice Holmes' opinion in *United States* v. *Storrs, supra,* at 654, demonstrates that these technicalities still exist. A less selective quotation of his opinion, however, makes it plain that he was referring to one technical touchstone—the very one that Judge Lumbard applied below and which was followed in *Murdock* and *Hark*. *Storrs* involved the dismissal of an indictment for irregularities committed in the grand jury room. The statute of limitations had run at the time of the dismissal so that a new indictment could not be found. But the nature of the Court's action itself was not to exculpate the defendant, as the opinion explained: "[It] cannot be that a plea filed a week earlier is what it purports to be, and in its character is, but a week later becomes a plea in bar because of the extrinsic circumstance that the statute of limitations has run. The plea looks

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[1] See Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 77–78.

only to abating the indictment not to barring the action. It has no greater effect in any circumstances. If another indictment cannot be brought, that is not because of the judgment on the plea, but is an independent result of a fact having no relation to the plea and working equally whether there was a previous indictment or not. The statute uses technical words, 'a special plea in bar,' and we see no reason for not taking them in their technical sense." 272 U. S., at 654. Clearly the point of the discussion was not whether the plea was by way of "confession and avoidance" or the like, but whether the judgment on it was in itself an exculpatory one—the announced test that subsequent decisions have followed. There is, then, no inconsistency between *Storrs* and *Hark*—both turned on the same basic principle.

Whatever retrospective exegesis of the leading cases now suggests, the one thing reading their own language discloses is that none of them asserts the "confession and avoidance" rationale now ascribed to them. Rather they were conceived as turning on the rationale that the Court of Appeals explained below. I would adhere to the basic principles of *Hark, Murdock* and *Storrs* here, and put the nineteenth century pleading books back on the shelves.[2]

Memorandum of MR. JUSTICE WHITTAKER.

Although I agree with so much of the dissenting opinions of my Brothers FRANKFURTER and STEWART as concludes that a "regulation" is not embraced by the term "statute" as used in the Criminal Appeals Act, 18 U. S. C.

[2] It is suggested that this construction causes some overlap between those judgments appealable here as sustaining motions in bar and those appealable here as based on the construction or invalidity of the statute under which prosecution is had. The existence of such an overlap hardly would militate seriously against the construction of the statute espoused here and in *Hark, Murdock* and *Storrs;* where Congress has decided to make two categories of cases

§ 3731, I also agree with so much of my Brother BRENNAN'S concurring opinion as would hold that the dismissal was one "sustaining a motion in bar, when the defendant has not been put in jeopardy," and hence conclude that we have jurisdiction. On the merits, I join the Court's opinion.

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

The Criminal Appeals Act of 1907, 34 Stat. 1246, c. 2564, provides that in a criminal case an appeal from a District Court "[f]rom a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded," "[f]rom a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded," and "[f]rom the decision or judgment sustaining a special plea in bar, when the defendant

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appealable to this Court, it is not a valuable guide to construction to assume that congressional intent would be offended if some cases were appealable as belonging to both categories. And it cannot be maintained, as is suggested, that every judgment based on the invalidity of a statute must also be one sustaining a motion in bar. For an indictment may be dismissed because it does not allege facts sufficient to indicate a constitutional application of the statute under which the prosecution was brought; and if the omission is not a pleading defect, and the statute was interpreted by the District Court as covering the charge, the dismissal is appealable here as from a judgment based on the invalidity of the statute. Yet such a judgment would not necessarily exculpate the defendant, and thus would not constitute the sustaining of a plea in bar, for a new indictment for the same criminal offense might be found by alleging sufficient additional facts to obviate the constitutional defect. Cf. *United States* v. *Oppenheimer*, 242 U. S. 85, 87.

has not been put in jeopardy," [1] cannot be taken by the Government to the Court of Appeals, but must come to this Court directly. In this case the indictment rested upon a regulation of the Secretary of the Treasury, violation of which constitutes an offense under 19 U. S. C. § 1304 (e). The District Court decided against the Government, which thereupon appealed to the Court of Appeals. That court certified the case to this Court. 261 F. 2d 40.

The question whether construction of a "statute," as that term is used in the Act of 1907, includes construction of a regulation promulgated under a statute is another variant of the recurring problem of resolving an ambiguity of legal language. Here ambiguity inheres not only in the word "statute" as an English word (see "statute," Oxford English Dictionary), but also in the word "statute" as a legal term. (Compare the construction of the term "statute" in two cases decided contemporaneously, *King Mfg. Co.* v. *Augusta,* 277 U. S. 100 (1928), and *Ex parte Collins,* 277 U. S. 565 (1928). In the former, "statute" was held to include a city ordinance; in the latter, "statute" was held to exclude a class of legislative enactments "[d]espite the generality of the language." 277 U. S., at 568.) Judged by the dictionary, one meaning of "statute" is of course an enactment made by the legislature of a country. As a matter of English, it may also be respectably used to refer to the enactment of a body subordinate to a legislature or to the governing promulgations of a private body, like a college. Thus the dictionary does not resolve our problem, wholly apart from heeding the admonition, so frequently expressed by

[1] Formal changes in this language have been made by the Act of May 9, 1942, c. 295, 56 Stat. 271, the 1948 Judicial Code, Act of June 25, 1948, c. 645, § 3731, 62 Stat. 844, and the Act of May 24, 1949, c. 139, § 58, 63 Stat. 97.

Judge Learned Hand, that judges in construing legislation ought not to imprison themselves in the fortress of the dictionary.

The immediately relevant ambiguity of "statute" as a legal term derives from the fact that it may mean either the enactment of a legislature, technically speaking, that is the Congress of the United States or the respective legislatures of the fifty States; or it may have a more comprehensive scope, to wit, rules of conduct legally emitted by subordinate lawmaking agencies such as city councils or the various regulation-emitting bodies of the federal and state governments. Accordingly, whether the term "statute," as used in the Criminal Appeals Act of 1907, should be given the restrictive meaning, *i. e.*, enactments by Congress, or the more extensive meaning, *i. e.*, Treasury regulations, cannot be determined merely by reading the Criminal Appeals Act of 1907. The answer will turn on the total relevant environment into which that Act must be placed, including past relevant decisions, the legislative history of the Act, and due regard for the consequences resulting from a restrictive as against a latitudinarian construction.

For the problem in hand, there is no controlling authority in this Court nor are there decisions under other statutes helpful for decision; neither is there a body of practice reflected in lower court decisions over a sufficient period of time, unchallenged here, carrying the weight of professional understanding. The case, therefore, must be decided on the balance of considerations weighed here for the first time.

The origin of the legislation and the legislative history of its enactment leave no doubt as to the direction of its aim. Between the decision of this Court in *United States* v. *Sanges,* 144 U. S. 310 (1892), and the enactment of the Criminal Appeals Act, the United States had no

appellate remedy in criminal cases. (See the story as summarized in *United States* v. *Dickinson,* 213 U. S. 92.) This "left all federal criminal legislation at the mercy of single judges in the district and circuit courts. This defect became all the more serious because it became operative just at the beginning of the movement for increasing social control through criminal machinery." Frankfurter and Landis, The Business of the Supreme Court (1928), p. 114. Attorneys General had, since 1892, been emphasizing the need for the legislation which became the 1907 Act. See, *id.,* pp. 114–115. Attorney General (later Mr. Justice) Moody in 1906 put the situation to be remedied in these terms: "It is monstrous that a law which has received the assent of the Senate, the House of Representatives, and the President can be nullified by the opinion of a single man, not subject to review by the court of appeals and the Supreme Court." Atty. Gen. Ann. Rep. 4 (1906).

The particular incident which precipitated the legislation was the *Beef-Trust* case, *United States* v. *Armour & Co.,* 142 F. 808 (1906), where a plea in bar, in its technical sense, was sustained, thereby finally ending a Sherman Law prosecution in which President Theodore Roosevelt was much interested. In his message to the Congress which eventually enacted the Act of 1907 the President thus expressed the need for legislation: "It seems an absurdity to permit a single district judge, against what may be the judgment of the immense majority of his colleagues on the bench, to declare a law solemnly enacted by the Congress to be 'unconstitutional,' and then to deny to the Government the right to have the Supreme Court definitely decide the question." 41 Cong. Rec. 22. The concern of those in charge of the bill throughout the debate upon the measure in the Senate, in which alone there was full discussion, was to afford the Government

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appellate review when a single judge had frustrated the formally expressed will of Congress.[2]

The legislative history gives no hint of any concern over misconstruction or invalidation of regulations to which statutes might give rise. Regulations were not mentioned. It is significant, however, that the measure which ultimately became law was one deliberately narrower in scope than that originally proposed in the Congress. The legislation originated in the House, which, in the first session of the 59th Congress, passed a bill giving the United States in all criminal prosecutions "the same right of review by writ of error that is given to the defendant" provided that the defendant not be twice put in jeopardy for the same offense. 40 Cong. Rec. 5408. In the Senate, a less general measure, in the nature of a substitute for the House bill, was reported, giving the United States the right to take a writ of error from decisions or judgments "quashing or setting aside an indictment . . . sustaining a demurrer to an indictment . . . arresting a judgment of conviction for insufficiency of the indictment . . . [or] sustaining a special plea in bar . . . ." 40 Cong. Rec. 7589–7590; S. Rep. No. 3922, 59th Cong., 1st Sess. This bill went over in the Senate to the second session of the 59th

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[2] See, *e. g.*, 41 Cong. Rec. 2757 (Senator Nelson, the manager of the bill in the Senate): "[T]he question now before us is whether we will allow a nisi prius judge of an inferior court to render ineffective our efforts in this behalf to protect the American people against trusts and monopolies and other dangerous things; whether we will allow ourselves to be handicapped and crippled by the decision of an inferior nisi prius judge." See also, *id.*, 2192 (Senator Bacon): "[A]nd a law of Congress is set aside, made absolutely null and void and inoperative by the decision of one judge, without the opportunity for the nine judges who sit in the Supreme Court to pass upon the great question . . . affecting not simply that accused, affecting not simply all others who may be accused, but affecting the operation of the law of the land . . . ."

Congress. The chief objection to it was its breadth. Although it was amended to provide expressly for protection against double jeopardy, 41 Cong. Rec. 2819, Senators objected to any unnecessary extension of the number of situations in which defendants might, contrary to what had been the practice, be subjected to government appeals in criminal cases. *E. g.*, 41 Cong. Rec. 2192–2194, 2819.

In response to this objection, Senator Clarke introduced a substitute bill providing only three categories of cases in which the Government would be allowed to appeal: "From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment or any count thereof where the ground for such motion or demurrer is the invalidity or construction of the statute upon which the indictment is founded"; "From a decision arresting a judgment of conviction for insufficiency of the indictment, where the ground for the insufficiency thereof is the invalidity or construction of the statute upon which the same is founded"; "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." 41 Cong. Rec. 2823. The Clarke substitute, passed by the Senate (41 Cong. Rec. 2825), was substantially adopted in its relevant aspects by the House (see H. R. Rep. No. 8113, 59th Cong., 2d Sess.) and eventually became the Act of 1907. 41 Cong. Rec. 3994, 4128. In explaining the reason for his amendment, Senator Clarke stressed the aim not to have the scope of the legislation greater than necessary: "[T]he object . . . is to limit the right of appeal upon the part of the General Government to the validity or constitutionality of the statute in which the prosecution is proceeding. It has been enlarged by the addition of another clause, which gives the right of appeal where the construction by the trial court is such as to decide that there is no offense committed, notwithstanding the validity of the statute, and in other respects the proceeding

may remain intact. . . . A case recently occurring has drawn attention to the fact that if a circuit judge or a district judge holding the circuit should determine that a statute of Congress was invalid, the United States is without means of having that matter submitted to a tribunal that under the Constitution has power to settle that question. I do not believe the remedy ought to be any wider than the mischief that has been disclosed." 41 Cong. Rec. 2819.

It is manifest that the preoccupying thought of the primary promoter of the legislation, President Roosevelt, and of Congress, was to bar a single judge from destroying, either by way of construction or invalidation, congressional enactments. Extension of the range of the meaning of "statute" to include regulations to which penal consequences attach was apparently nobody's thought and certainly on nobody's tongue. This was at a time when the proliferation of regulations was not an unknown phenomenon in lawmaking. It is certainly not fictional to attribute to the preponderant profession represented in Congress knowledge of the elementary difference between statutes, conventionally speaking, and regulations authorized by statutes. Nor is this a formal or minor distinction. It is one thing to strike down a statute, or to eviscerate its meaning; it is quite another thing to construe a regulation adversely to the Government's desire. Legislation is complicated and cumbersome business. Correction of erroneous statutory construction, let alone invalidation of laws, is a difficult, even a hazardous process. Regulations are the products of officials unhobbled by legislative procedure with its potential opportunity for parliamentary roadblocking. In large measure, these officials have the means of self-help for correcting judicial misconception about a regulation.

Such being the practical differences between dealing with regulations and dealing with the laws of Congress

as such, what is the bearing of these practical differences upon our duty of construing the term "statute" in order to decide whether the right of direct appeal to this Court should be restricted to cases construing the formal enactments of Congress, or whether it should include cases construing regulations referable to such enactments? The answer to this question introduces a factor of weighty importance in deciding whether cases are required to be brought here in the first instance or may be brought here only by leave after adjudication by a Court of Appeals. That factor concerns due regard for the responsibility of this Court in relation to the judicial business of major public importance and the conditions necessary for its wise disposition.[3]

On more than one occasion this Court has given controlling consideration to the fact that by a latitudinarian construction of jurisdictional legislation the business of this Court would be "largely and irrationally increased." *American Security & Trust Co.* v. *Commissioners,* 224 U. S. 491, 495. Since the merely abstractly logical arguments permit "statute" to be construed in either a restrictive or a broad sense, that is, that appeals to this Court directly from an adjudication of a District Court under the Criminal Appeals Act may appropriately be confined to rulings under a statute as such, rather than to include interpretations of regulations arising under a statute, I not only feel free, but deem it incumbent, to oppose what is certainly a needless if not an irrational increase in the class of cases which can be brought directly to this Court from the District Courts. I would deny the

[3] Apart from other vital factors, increase in the range and mass of materials drawn upon in opinions during recent decades, and the investigation and appraisal thereby involved, entail a considerable increase in the burden of the Court's business compared with earlier periods.

right of the Government to appeal here every time one of the vast number of regulations to which penalties are attached is construed to its disfavor. I would leave the Government to revise its regulation, as so often can easily and effectively be accomplished by skillful drafting, to bring it within statutory authority, or to go to a Court of Appeals for review.

The presence in the Criminal Appeals Act of 1907 of the provision for an appeal by the Government from decisions or judgments sustaining a "special plea in bar" when the defendant has not been put in jeopardy, has an historical explanation and its scope presents a different problem of statutory construction than that of giving meaning to "statute." Barring stimulation by this Court, Congress seldom initiates judiciary legislation except when a dramatic case stirs public interest. Such was the *Beef-Trust* case, *United States* v. *Armour & Co.*, 142 F. 808. In that case, because of the then absence of the Government's right of appeal in a criminal case, the Government's antitrust prosecution was finally terminated by a successful plea in bar in the District Court. The Congress was determined not to permit a recurrence of that situation, and thus the inclusion in the Act of 1907 of a clause permitting appeals by the Government from decisions sustaining a "special plea in bar" is easily accounted for.

Regarding the meaning of this clause, I agree with the opinion of my Brother STEWART. When Congress uses technical legal language the Court disregards the obvious guidance to meaning if it departs from its technical legal connotation. There have been two cases before the Court dealing with the matter, between which we have to choose: *United States* v. *Storrs,* 272 U. S. 652, and *United States* v. *Hark,* 320 U. S. 531. In *Storrs* Mr. Justice Holmes, as spokesman for the Court, applied his authoritative learning of the common law to take "technical words" "in their technical sense." In *Hark,* the Court

did not notice the *Storrs* analysis and gave a colloquial meaning to the phrase. Having to choose between these two decisions, I follow *Storrs* because it applied the appropriate criterion of construction.

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

I do not reach the merits of this case, because I think the District Court's judgment was not of a kind which the Criminal Appeals Act makes directly reviewable by this Court. It seems clear to me that the dismissal of the information was not "based upon the invalidity or construction of the statute," and equally clear that the judgment was not one "sustaining a motion in bar." [1]

I.

The District Court's decision was based solely upon the interpretation of Treasury regulations, not upon the invalidity or construction of an Act of Congress. The court found it doubtful that the regulations in question were issued to implement the country-of-origin marking requirements of 19 U. S. C. § 1304,[2] and held that in any event the intent of the regulations was not sufficiently unambiguous to support a criminal prosecution. No contention was made that the statute itself was invalid. The trial court did not question that the statute validly and clearly confers power upon the Secretary of the Treasury to issue a properly worded regulation making the acts of the appellees unlawful. This is made apparent by the district judge's statement that "[t]he Secretary could very easily have indicated that East and West Ger-

[1] The relevant provisions of the Criminal Appeals Act are reproduced in the Court's opinion, *ante*, p. 433, note 2.

[2] The relevant provisions of this statute are reproduced in the Court's opinion, *ante*, p. 432, note 1.

many should be considered two separate countries for all purposes within the jurisdiction of the Treasury Department . . . ." Thus the decision we are asked to review in no way impinges upon or construes the legislation which Congress enacted. Compare *United States* v. *Foster,* 233 U. S. 515, 522–523.

Whether under the Criminal Appeals Act an appeal from an order of dismissal based upon a District Court's construction of an administrative regulation may be brought directly here is a question which apparently has not been considered until now. The Court's resolution of the question seems to me at odds with the tradition of strict construction of the Criminal Appeals Act and contrary to the policy, reflected notably in the Act of February 13, 1925, 43 Stat. 936, of narrowly limiting the appellate jurisdiction of this Court.[3] "The exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified." *United States* v. *Borden Co.,* 308 U. S. 188, 192. See *United States* v. *Dickinson,* 213 U. S. 92, 103.

Avoidance of prolonged uncertainty as to the validity or meaning of a federal criminal law is obviously a desideratum in the effective administration of justice. More-

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[3] The term "statute" as used in the jurisdictional legislation which is now 28 U. S. C. § 1257 (2), providing for an appeal to this Court "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," has from the beginning been given a broad interpretation, consistent with the purpose of this legislation. See *Williams* v. *Bruffy,* 96 U. S. 176, 182, 183; *Reinman* v. *Little Rock,* 237 U. S. 171; *Live Oak Assn.* v. *Railroad Comm'n of California,* 269 U. S. 354, 356. But it is one thing to say that "statute" should be construed broadly in cases involving allegedly unconstitutional state action, and quite another to say that a similar construction should be given to the term in cases involving simply the meaning of regulations made pursuant to concededly valid federal legislation.

over, it is clearly desirable to bring to the attention of Congress as promptly as possible any occasion for legislative clarification or amendment. When a District Court holds a criminal statute invalid or gives it a construction inconsistent with the understanding of those in the Executive Branch charged with enforcing it, this policy is well served by expediting ultimate determination of the matter. But expedited review of the judgment in the present case serves no such policy.[4] Uncertainty caused by the District Court's decision in this case could have been laid to rest at any time simply by issuance of a clearly worded Treasury regulation.

For these reasons I would hold that an administrative regulation such as is here involved is not a "statute" within the meaning of this provision of the Criminal Appeals Act.

II.

Even if the above views should prevail, the Court would still have jurisdiction of this appeal if the District Court's judgment was one "sustaining a motion in bar, when the defendant has not been put in jeopardy." The motion which the court sustained was for an order dismissing the information "on the ground that it does not state facts sufficient to constitute an offense against The United States." I think such a pleading is not "a motion in bar."

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[4] The Court notes "the remedial purpose of the Act was to avert 'the danger of frequent conflicts, real or apparent, in the decisions of the various . . . [trial courts], and the unfortunate results thereof', and to eliminate 'the impossibility of the government's obtaining final and uniform rulings by recourse to a higher court.'" *Ante*, p. 436. This purpose has now to a large degree been fulfilled by the Act of May 9, 1942, 56 Stat. 271, giving jurisdiction over government appeals in criminal cases to the Courts of Appeals. Any conflict between circuits could, of course, be resolved here. See Supreme Court Rule 19, par. 1 (b).

Until 1948 the Criminal Appeals Act provided for direct appeal to this Court from a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." [5] In 1948 the phrase "motion in bar" was substituted for "special plea in bar." 62 Stat. 845. The sole purpose of the change was to bring the terminology of the Criminal Appeals Act into conformity with Rule 12 of the Federal Rules of Criminal Procedure which abolished special pleas, demurrers and motions to quash as such, and substituted motions to dismiss or to grant appropriate relief. The statutory revision was not intended to, and did not, expand the Government's right of appeal. See H. R. Rep. No. 304, 80th Cong., 1st Sess. A–177.[6] That right is still limited to a judgment sustaining a motion of a kind historically considered a "special plea in bar."

The label which the defendant may have attached to his pleading is of no great importance in this connection. *United States* v. *Oppenheimer,* 242 U. S. 85, 86; *United States* v. *Goldman,* 277 U. S. 229, 236. As Mr. Justice Holmes remarked in *United States* v. *Storrs,* 272 U. S. 652, 654, "[t]he question is less what it is called than what it is." But, in deciding "what it is," the Court's opinion in *Storrs* underscores the essential point—"The

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[5] This was the language of the original Criminal Appeals Act (Act of March 2, 1907, c. 2564, 34 Stat. 1246), and the same wording was continued in subsequent re-enactments. See 18 U. S. C. (1940 ed.) § 682; 18 U. S. C. (1946 ed.) § 682.

[6] The 1948 revision supplemented Rule 54 (c), Fed. Rules Crim. Proc., which provided that "The words 'demurrer,' 'motion to quash,' 'plea in abatement,' 'plea in bar,' and 'special plea in bar,' or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12." The Notes of the Advisory Committee appended to Rule 54 make clear that an intent of this provision was to insure that the scope of the Government's right of appeal in criminal cases would remain unchanged.

statute uses technical words, 'a special plea in bar,' and we see no reason for not taking them in their technical sense." 272 U. S., at 654.[7]

At common law, a plea in bar had to either "*deny,* or *confess and avoid* the facts stated in the declaration." 1 Chitty, Pleading (16th Am. ed. 1883), *551; Stephen, Principles of Pleading (3d Am. ed. 1895), 89. Consequently, there were two types of pleas in bar—pleas by way of traverse and pleas by way of confession and avoidance. *Ibid.* Shipman, Common-Law Pleading (Ballantine ed. 1923), 30. When a plea in bar was a plea other than the general issue, it was a "special plea in bar." Shipman, *supra,* at 337; Stephen, *supra,* at 179. In civil cases pleas of this category included the specific traverse (equivalent to a special denial), the special traverse (a denial preceded by introductory affirmative matter), and the plea of confession and avoidance. In criminal cases special pleas in bar were primarily utilized by way of confession and avoidance, *e. g.,* autrefois acquit, autrefois convict, and pardon. 2 Bishop, New Criminal Procedure (2d ed. 1913), §§ 742, 805–818; Heard, Criminal Pleading (1879), 279–296; 1 Starkie, Criminal Pleading (2d ed. 1822), 316–338. The plea in confession and avoidance did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect. Stephen, *supra,* 89, 205–206; Shipman, *supra,* 348; 1 Chitty, *supra,* *551–*552. It set up affirmative defenses which would bar the prosecution.

This concept of a special plea in bar as a plea similar in substance to confession and avoidance has been consistently followed in the decisions of this Court. The

[7] The opinion in *United States* v. *Hark,* 320 U. S. 531, upon whose generalized language the Court of Appeals and my Brother BRENNAN here so heavily rely, did not cite *Storrs.* To the extent that the two opinions reflect divergent approaches, *Storrs* seems the more carefully considered and I would follow it.

cases in which jurisdiction has been accepted on the ground that the decision below sustained a special plea in bar have invariably involved District Court decisions upholding an affirmative defense in the nature of a confession and avoidance.[8] The motion to dismiss which was sustained by the District Court in this case was clearly not the equivalent of a special plea in bar, as thus historically understood, but, rather, the equivalent of a general demurrer. The judgment sustaining that motion is, therefore, not directly reviewable here.

This view is fully confirmed by an examination of the structure of the Criminal Appeals Act itself. For if, as the Court of Appeals thought, a "motion in bar" is any motion which, if sustained, would exculpate the defendants, then a significant portion of the provision of the Criminal Appeals Act discussed in Part I of this opinion would be a meaningless redundancy. Every motion based upon the invalidity of a statute would, under the rough and ready definition of the Court of Appeals, also be a "motion in bar," because a dismissal based upon such a motion would with equal effectiveness "end the cause and exculpate the defendants."

I would remand this case to the Court of Appeals.

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[8] See, *e. g.*, *United States* v. *Celestine*, 215 U. S. 278 (motion alleging special facts which showed that defendant was not subject to prosecution by the United States for the crime charged); *United States* v. *Oppenheimer*, 242 U. S. 85 (motion alleging that *res judicata* barred the action); *United States* v. *Thompson*, 251 U. S. 407 (motion raising the affirmative defense that the charges contained in the indictment had been submitted to a previous grand jury which had refused to make a presentment thereon); *United States* v. *Goldman*, 277 U. S. 229 (motion alleging that the statute of limitations barred prosecution); *United States* v. *Murdock*, 284 U. S. 141 (motion raising defense of privilege); *United States* v. *Hark*, 320 U. S. 531 (motion raising affirmative defense of revocation of pertinent provisions of regulation which appellees were charged with violating).

Syllabus.

LEWIS ET AL., TRUSTEES, *v.* BENEDICT COAL CORP.

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

No. 18. Argued October 21, 1959.—Decided February 23, 1960.*

Respondent is a party to a collective bargaining agreement between coal operators and the United Mine Workers providing for a union welfare fund meeting the requirements of § 302 (c)(5) of the Taft-Hartley Act and requiring each coal operator to pay into a trust fund "for the sole and exclusive benefit" of the employees, their families and dependents a stipulated royalty on each ton of coal produced. Respondent withheld royalties in an amount claimed to equal damages which it had sustained as a result of strikes alleged to be in violation of the same agreement, and the trustees sued to recover such royalties. Respondent defended on the ground that performance of its duty to pay the royalties to the trustees, as third-party beneficiaries of the agreement, was excused when the union violated the agreement, and it cross-claimed against the union for damages resulting from the strikes. The District Court awarded respondent a judgment on its claim against the union and awarded the trustees a judgment for the unpaid royalties, but provided that the trustees' judgment should be paid only out of the proceeds of respondent's judgment. The Court of Appeals affirmed except as to the amount of the damages awarded respondent. *Held:*

1. So far as it sustains the holding of the District Court that the union violated the collective bargaining agreement, the judgment of the Court of Appeals is affirmed by an equally divided Court. P. 464.

2. The judgment of the Court of Appeals is modified to provide that the District Court shall amend the judgment in favor of the trustees to allow immediate and unconditional execution, and interest, on the full amount of the trustees' judgment against respondent. Pp. 464–471.

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*Together with No. 19, *United Mine Workers of America et al.* v. *Benedict Coal Corp.*, also on certiorari to the same Court.

(a) The collective bargaining agreement here involved is not to be construed as making performance by the union of its promises a condition precedent to respondent's promise to pay royalties to the trustees, notwithstanding a provision to the effect that the agreement "is an integrated instrument and its provisions are interdependent." Pp. 464–466.

(b) Regardless of the inferences which may be drawn from other third-party beneficiary contracts, the parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund meeting the requirements of § 302 (c) (5); and the agreement here involved contains no such words. Pp. 466–471.

259 F. 2d 346, judgment modified.

Russell R. Kramer argued the cause for petitioners in No. 18. With him on the brief were *Val J. Mitch, Harold H. Bacon, E. H. Rayson* and *Charles E. McNabb.*

M. E. Boiarsky argued the cause for petitioners in No. 19. With him on the brief were *Welly K. Hopkins, Harrison Combs* and *Willard P. Owens.*

Robert T. Winston, Jr. argued the causes for respondent. With him on the briefs was *Fred B. Greear.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Bituminous Coal Wage Agreement of 1950, a collective bargaining agreement between coal operators and the United Mine Workers of America, provides for a union welfare fund meeting the requirements of § 302 (c) (5) of the Taft-Hartley Act.[1] The

[1] Section 302 (c) (5) is as follows:

"The provisions of this section [making it unlawful for the employer to deliver and a representative of the employees to receive anything of value] shall not be applicable . . . with respect to money or other thing of value paid to a trust fund established by such representative,

fund is the "United Mine Workers of America Welfare and Retirement Fund of 1950." Each signatory coal operator agreed to pay into the fund a royalty of 30¢, later increased to 40¢, for each ton of coal produced for use or for sale.

Benedict Coal Corporation, the respondent in both No. 18 and No. 19, is a signatory coal operator. From

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for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities." Act of June 23, 1947, § 302, 61 Stat. 157, 29 U. S. C. § 186 (c)(5).

March 5, 1950, through July 1953, Benedict produced coal upon which the amount of royalty was calculated to be $177,762.92. Benedict paid $101,258.68 of this amount but withheld $76,504.24. The petitioners in No. 18, who are the trustees of the fund, brought this action to recover that balance in the District Court for the Eastern District of Tennessee.[2] Benedict's main defense was that the performance of the duty to pay royalty to the trustees, regarding them as third-party beneficiaries of the collective bargaining agreement, was excused when the promisee contracting party, the union and its District 28—who are the petitioners in No. 19 and who will be referred to as the union—violated the agreement by strikes and stoppages of work. Benedict also cross-claimed against the union for damages sustained from the strikes and stoppages. By its answer to the cross-claim, the union denied that its conduct violated the agreement.

The jury, using a verdict form provided by the trial judge, found that the trustees were entitled to recover the full amount of the unpaid royalty but that Benedict was entitled to a setoff of $81,017.68; the jury also gave a verdict to Benedict for that sum on its cross-claim against the union. In a single entry, two judgments were entered on this verdict. One was a judgment in favor of Benedict on its cross-claim on which immediate execution was ordered, but with direction that the sum collected from the union be paid into the registry of the court. The other was a judgment in favor of the trustees for the unpaid balance of the royalty. However, effect was given to Benedict's defense in the trustees' suit by refusing immediate execution, and interest, on the trustees' judgment and ordering instead that that judgment be

[2] The article creating the fund provides that "Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund . . . ."

satisfied only out of the proceeds collected by Benedict on its judgment and paid into the registry of the court.[3]

The union and the trustees prosecuted separate appeals to the Court of Appeals for the Sixth Circuit. The union alleged that the District Court erred in holding that the strikes and stoppages violated the collective bargaining agreement, contending that, properly construed, the agreement did not forbid the strikes and stoppages; in the alternative, the union urged that the damages awarded were excessive. The trustees alleged as error, primarily, the refusal of the trial court to allow them immediate and unconditional execution, and interest, on their judgment against Benedict.

The Court of Appeals affirmed the District Court except as to the amount of damages awarded to Benedict

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[3] The District Court's entry reads in pertinent part as follows:

"Thereupon this action came on to be heard on a former day before the Court and a verdict was rendered by the jury in favor of Benedict Coal Corporation in the sum of $81,017.68 and in favor of John L. Lewis, Charles A. Owen and Josephine Roche [trustees of the fund] in the sum of $76,504.26, the verdict containing an offset provision.

"In accordance with the Court's interpretation of the offset provision in the jury's verdict and as a means of carrying out the intended effect of the verdict, it is ordered that the Benedict Coal Corporation have and recover the sum of $81,017.68 from United Mine Workers of America and United Mine Workers of America District 28, for which execution may issue.

"It is further ordered that said sum of $81,017.68 be paid into the registry of the Court to be disbursed by the clerk in accordance with instructions appearing below.

"It is further ordered that said Trustees, in accordance with the verdict rendered in their favor, have and recover of Benedict Coal Corporation the sum of $76,504.26, said recovery to be had in the manner following: From the aforesaid $81,017.68 ordered paid into the registry of the Court, that the sum of $76,504.26 be paid to said Trustees. That the difference between $76,504.26 and $81,017.68 be paid to Benedict Coal Corporation."

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on its cross-claim, which the court adjudged was excessive. The court held that, under the evidence, Benedict's damages would not equal the amount of the trustees' judgment of $76,504.26. The case was remanded for a redetermination of Benedict's damages, with instructions that "[t]he judgment in favor of the Trustees will then be amended by the district court to allow execution and interest on that part of the said judgment which is in excess of the set-off in favor of Benedict as so redetermined." 259 F. 2d 346, 355. This left unaffected so much of the District Court's order as predicated the trustees' recovery, to the extent of the amount of Benedict's judgment as finally determined, upon Benedict's recovery of that judgment. The trustees and the union filed separate petitions for certiorari. We granted the trustees' petition, No. 18, and also the union's petition, No. 19, except that we limited the latter grant to the question whether the strikes and stoppages complained of by Benedict violated the collective bargaining agreement. 359 U. S. 905.

In No. 19, the Court is equally divided. The judgment of the Court of Appeals, so far as it sustains the holding of the District Court that the union violated the collective bargaining agreement, is therefore affirmed.

We turn to the question presented in No. 18, whether the lower courts were correct in holding in effect that Benedict might assert the union's breaches as a defense to the trustees' suit, for to the extent Benedict (the promisor) does not collect from the union (the promisee) the union's liability is set off against Benedict's liability to the third-party beneficiary. The answer to that question requires, we think, our consideration of the nature of the interests of the union, the company, and the trustees in the fund under the collective bargaining agreement.

The provisions of the collective bargaining agreement creating the fund include the express provision that "this

Fund is an irrevocable trust created pursuant to Section 302 (c) of the 'Labor-Management Relations Act, 1947.' " Another provision specifies that the purposes of the fund shall be all purposes "provided for or permitted in Section 302 (c)."[4] In this way the agreement plainly declares what the statute requires, namely, that the fund shall be used "for the sole and exclusive benefit" of the employees, their families and dependents. Thus, the fund is in no way an asset or property of the union.

Benedict does not, however, base its claim of setoff on any contention that the royalty was owing to the union and might because of this be applied to the payment of its damages. Benedict's position is that in an amount equal to the amount of the damages sustained from the union's breaches, no fund property came into existence under the terms of the collective bargaining agreement. This depends upon whether the agreement is to be construed as making performance by the union of its promises a condition precedent to Benedict's promise to pay royalty to the trustees. Benedict argues that the contracting parties expressed this meaning in an article at the close of the agreement—"This Agreement is an integrated instrument and its respective provisions are interdependent"—and in the provision in another article that the no-strike clauses are "part of the consideration of this contract." However, the specific provisions of the article creating the fund provide: (1) "During the life of this [collective bargaining] Agreement, there shall be paid into such Fund by each operator signatory . . . [a royalty] on each ton of coal *produced for use or for sale.*" (2) The operator is required to make payment "on the 10th day of each . . . calendar month covering *the production of all coal for use or sale* during the preceding month." (3) "This obligation of each Operator signatory

[4] See note 1, *supra.*

hereto, which is several and not joint, to so pay such sums shall be a *direct and continuing obligation* of said Operator during the life of this Agreement . . . ." (4) "Title to all the moneys paid into and or *due and owing* said Fund shall be vested in and remain exclusively in the Trustees of the Fund . . . ." [5] (Emphasis added.) These provisions, rather than the stipulations of general application, are controlling. Their clear import is that the parties meant that the duty to pay royalty should arise on the production of coal independent of the union's performance. Indeed, Benedict's conduct was not consistent with the interpretation which it is now urging. Benedict continued despite the breaches to perform all of its several promises under the contract, including the promise to pay royalty, paying over $100,000 on coal produced during the period in dispute and withholding only the portion in suit.

But our conclusion that the union's performance of its promises is not a condition precedent to Benedict's duty to pay royalty does not fully answer the question we are to decide. For it may reasonably be argued that the damages sustained by Benedict may nevertheless affect the *amount* of the trustees' recovery. Professor Corbin, while acknowledging that "No case of the sort has been discovered," [6] states: "It may perhaps, be regarded as just to make the right of the beneficiary not only subject to the conditions precedent but also subject (as in the case of an assignee) to counter-claims against the promisee—at least if they arise out of a breach by the promisee of

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[5] In an earlier agreement the last clause read "moneys *paid into* said Fund" and was amended to read "moneys *paid into and or due and owing said Fund*" (emphasis added) after the decision in *Lewis* v. *Jackson & Squire, Inc.*, 86 F. Supp. 354, appeal dismissed, 181 F. 2d 1011, holding, among other things, that under the agreement, no trust arose as to royalty not paid into the fund.

[6] But cf. *Fulmer* v. *Goldfarb,* 171 Tenn. 218, 101 S. W. 2d 1108; *Depuy* v. *Loomis,* 74 Pa. Super. 497.

his duties created by the very same contract on which the beneficiary sues." [7] Using terms like "counterclaim" or "setoff" in a third-party beneficiary context may be confusing. In a two-party contract situation, when a promisor's duty to perform is absolute, the promisee's breaches will not excuse performance of that duty; the promisor has an independent claim against the promisee in damages. Formerly the promisor was required to bring a separate action to recover his damages. Under modern practice, when the promises are to pay money, or are reducible to a money amount, the promisor, when sued by the promisee, offsets the damages which he has sustained against the amount he owes, and usually obtains a judgment for any excess.[8]

However, a third-party beneficiary has made no promises and therefore has breached no duty to the promisor. Accordingly, to hold, as the lower courts in this case did, that a promisor may "set off" the damages caused by the promisee's breach is actually to read the contract, which is the measure of the third party's rights, as so providing. In other words, although the promisor's duty to perform has become fixed by the occurrence of applicable conditions precedent, the parties may be taken to have agreed that the *extent* of the promisor's duty to the third party will be affected by the promisee's breach of contract. When it is said that "it may be just" to make the third party subject to the counterclaim, what must be meant is that a court should infer an intention of the promisor and promisee that the third party's rights be so limited.

This may be a desirable rule of construction to apply to a third-party beneficiary contract where the promisor's interest in or connection with the third party, in

[7] 4 Corbin, Contracts, § 819.

[8] See 3 Corbin, Contracts, § 709. Cf. 3 Williston, Contracts, § 883 (Rev. ed. 1936). Compare *Thornton* v. *Wynn*, 12 Wheat. 183, with *Withers* v. *Greene*, 9 How. 213.

contrast with the promisee's, begins with the promise and ends with its performance. Of course, in entering into such a contract, the promisor may be held to have given up some defense against the third party's claim to performance of the promise, for example, the right to defeat that claim by rescinding the contract at any time he and the promisee agree. Nevertheless it may be fair to assume that had the parties anticipated the possibility of a breach by the promisee they would have provided that the promisor might protect himself by such means as would be available against the promisee under a two-party contract.[9] This suggestion has not been crystallized into a rule of construction. Our problem is whether we should infer such an intention in this contract because there may be reasons making it appropriate to do so in the generality of third-party beneficiary contracts.

This collective bargaining agreement, however, is not a typical third-party beneficiary contract. The promisor's interest in the third party here goes far beyond the mere performance of its promise to that third party, *i. e.*, beyond the payment of royalty. It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. While employers in many other industries assume this burden directly, this welfare fund was jointly created by the coal industry and the union for that purpose. Not only has Benedict entered into a long-term relationship with the union in this regard, but in compliance with § 302 (c)(5)(B) it has assumed equal responsibility with the union for the management of the fund. In a very real sense Benedict's interest in the soundness of the fund and its management is in no way

[9] To some degree the third-party beneficiary may be thought of as being "substituted" for the promisee. See *Dunning* v. *Leavitt*, 85 N. Y. 30, 35.

less than that of the promisee union. This of itself cautions against reliance upon language which does not explicitly provide that the parties contracted to protect Benedict by allowing the company to set off its damages against its royalty obligation.

Moreover, unlike the usual third-party beneficiary contract, this is an industry-wide agreement involving many promisors. If Benedict and other coal operators having damage claims against the union for its breaches may curtail royalty payments, the burden will fall in the first instance upon the employees and their families across the country. Ultimately this might result in pressures upon the other coal operators to increase their royalty payments to maintain the planned schedule of benefits. The application of the suggested rule of construction to this contract would require us to assume that the other coal operators who are parties to the agreement were willing to risk the threat of diminution of the fund in order to protect those of their number who might have become involved in local labor difficulties.

Furthermore, Benedict promised in the collective bargaining agreement to pay a specified scale of wages to the employees. It would not be contended that Benedict might recoup its damages by decreasing these wages. This could be rationalized by saying that the covenant to pay wages is included in separate contracts of hire entered into with each employee. The royalty payments are really another form of compensation to the employees,[10] and as such the obligation to pay royalty might be thought to be incorporated into the individual employment contracts. This is not to say that the same treatment should necessarily be accorded to royalty payments as is accorded to wages, but the similarity militates against the inference

[10] See 93 Cong. Rec. 4746–4747. See also S. Rep. No. 105, 80th Cong., 1st Sess. 52 (supplemental views).

that the parties intended that the trustees' claim be subject to offset.

Finally a consideration which is not present in the case of other third-party beneficiary contracts is the impact of the national labor policy. Section 301 (b) of the Taft-Hartley Act provides that "[a]ny money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." At the least, this evidences a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it.[11] Although this policy was prompted by a solicitude for the union members, because they might have little opportunity to prevent the union from committing actionable wrongs,[12] it seems to us to apply with even greater force to protecting the interests of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, and therefore without any direct voice in the conduct of union affairs. Thus the national labor policy becomes an important consideration in determining whether the same inferences which might be drawn as to other third-party agreements should be drawn here.

Section 301 authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448. In the discharge of this function, having appropriate regard for the several considerations we have discussed, including the national labor policy, we hold that the parties to a collective bar-

[11] See 93 Cong. Rec. 5014; *id.*, at 3839. Cf. Hearings before House Committee on Education and Labor on H. R. 8, H. R. 725, H. R. 880, H. R. 1095, and H. R. 1096, 80th Cong., 1st Sess. 135–136.

[12] See 93 Cong. Rec. 6283.

gaining agreement must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund meeting the requirements of § 302 (c)(5). We are unable to find such words in the general provisions already mentioned—"This Agreement is an integrated instrument and its respective provisions are interdependent," and "The contracting parties agree that [the no-strike clauses are] . . . part of the consideration of this contract"—or elsewhere in the agreement. The judgment of the Court of Appeals is therefore modified to provide that the District Court shall amend the judgment in favor of the trustees to allow immediate and unconditional execution, and interest, on the full amount of the trustees' judgment for $76,504.26 against Benedict.

It is so ordered.

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

MR. JUSTICE FRANKFURTER, dissenting.

This litigation arose out of an agreement entered into on March 5, 1950, between coal operators, including respondent, and United Mine Workers. It was the outcome of collective bargaining between the parties to fix the terms of industrial relations, wages and other conditions of employment, between the coal operators and their employees as represented by the union. It is an elaborate document of twenty pages, formulating the rights and obligations of the union on the one side and the rights and obligations of the operators on the other. Part of the agreement called for the establishment of a welfare and retirement fund for the benefit of employees and their families. This obligated the respondent, as one

of the operators bound by the agreement, to pay the Fund a fixed amount per ton of coal that it produced during the period in controversy. The narrow question before the Court is whether the respondent operator may withhold from the amount it is obligated, as a matter of arithmetic, to pay into the Fund, the amount of assessable damage owing it from the union in discharge of the union's liability for violation of its obligation under the agreement.

The suit was by the Trustees of the Fund, who claimed the payment in full of the scheduled amounts to be paid into the Fund. This liability is conceded, subject however to deduction for the amount owing from the union to Benedict on the basis of judicially determined liability. The Court of Appeals sustained the right of respondent to set off against its obligation to pay the defined amount into the Fund the amount arising out of liability by the union for breach of the union's obligation under the same agreement.

A considered reading of the Court's opinion compels the conclusion that if the agreement, which it is the Court's duty to construe, were "a typical third-party beneficiary contract" the respondent would not have to pay over the full amount payable to the Fund but could withhold the amount which is owing it for breach of the union's undertaking. The Court holds that this is not such a contract, although the agreement was not merely a single document with obviously interrelated sections, but specifically provided, "This agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after March 5, 1950." The Court justifies rejecting what is assumed to be applicable to "a typical third-party beneficiary contract," partly by devising a policy distilled from two provisions of the Taft-Hartley Act, §§ 301 (b) and 302 (c)(5), and partly by its assumptions about the community of interest

between the employer and the trust fund in the assertedly special context of labor relations.

I have no doubt that legislation may be a source for reasoning in court-made law. But when legislation is thus drawn upon there should be a close relation between the terms of an enactment and what the courts deduce therefrom as a direction for adjudication. I find none such here. The two provisions drawn upon do not afford the radiations attributed to them. The relevant language of § 301 (b) of the Taft-Hartley Act provides that "Any money judgment against a labor organization . . . shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." The text deals expressly only with the enforcement of a money judgment rendered against a labor organization. No such judgment is involved in this case. The undoubted concern of Congress behind this provision was to avoid the liability of union members solely by virtue of their union membership, a liability notoriously imposed by the laws of several of the States in 1947 and vividly remembered by labor unions by reason of the *Danbury Hatters'* case in federal courts. See *Loewe* v. *Lawlor,* 208 U. S. 274 (1908); *Lawlor* v. *Loewe,* 235 U. S. 522 (1915); *Loewe* v. *Savings Bank of Danbury,* 236 F. 444 (C. A. 2d Cir. 1916).* The intent and scope of § 301 (b) were accurately described in the Senate Report on what became the Taft-Hartley Act as affording members of a union "all the advantages of limited liability without incorporation of the union." S. Rep. No. 105, 80th Cong., 1st Sess., at 16.

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*The result of this litigation was a judgment for $250,000 against the goods and estate of over 150 named defendants and attachment was issued against them.

Nor does any emanation from § 302 (c)(5) of the Taft-Hartley Act negate what would otherwise dictate the right of setoff—setoff, be it remembered, not a condition on Benedict's duty to pay into the Fund—of what is owing to Benedict for breach of the contract by the union under the same contract by which Benedict promised the union to pay into the Fund for its mined coal. The function of § 302 (c)(5) is to define the conditions set by Congress for permitted industrial welfare funds. It was not an implied qualification of just principles relevant to the enforcement of contracts generally. Only the other day the Court stated the purpose of the Congress in enacting § 302 (c)(5):

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong. Rec. 4892–4894, 4899, 5181, 5345–5346; S. Rep. No. 105, 80th Cong., 1st Sess., at 52; 93 Cong. Rec. 4678, 4746–4747. To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." *Arroyo* v. *United States,* 359 U. S. 419, 426.

Congress was concerned with abuses by union officers, *e. g., United States* v. *Ryan,* 350 U. S. 299. It gave not a thought to withdrawing the enforcement of an agreement such as the one before us from rules relevant to the fair administration of justice.

The Court quotes one of the twin leading authorities on the law of contracts: "It may perhaps, be regarded as

just to make the right of the beneficiary not only subject to the conditions precedent but also subject (as in the case of an assignee) to counter-claims against the promisee—at least if they arise out of a breach by the promisee of his duties created by the very same contract on which the beneficiary sues." 4 Corbin, Contracts, § 819. As I understand it, apart from the effects attributed to §§ 301(b) and 302 (c)(5), the Court rejects this "just" view as simply not applicable to this kind of a collective bargaining agreement. But the rule stated by Professor Corbin is not a technical rule narrowly limited to particular kinds of contracts. It reflects the broader generalization that under a civilized system of law all just presuppositions of an agreement are to be deemed part of it, and that courts, whose duty it is to determine the legal consequences of agreements, should attribute to an agreement such just presuppositions.

Underlying the Court's view is the assumption that the law of contracts is a rigorously closed system applicable to a limited class of arrangements between parties acting at arm's length, and that collective bargaining agreements are a very special class of voluntary agreements to which the general law pertaining to the construction and enforcement of contracts is not relevant. As a matter of fact, the governing rules pertaining to contracts recognize the diversity of situations in relation to which contracts are made and duly allow for these variant factors in construing and enforcing contracts. And so, of course, in construing agreements for the reciprocal rights and obligations of employers and employees, account must be taken of the many implications relevant to construing a document that governs industrial relations. There is no reason for jettisoning principles of fairness and justice that are as relevant to the law's attitude in the enforce-

ment of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements.

One of the most experienced students of labor law has warned against the dangers of such an approach:

> "The ease with which one can show that collective bargaining agreements have characteristics which preclude the application of some of the familiar principles of contracts and agency creates the danger that those who are knowledgeable about collective bargaining will demand that we discard all the precepts of contract law and create a new law of collective bargaining agreements. I have already expressed the view that the courts would ignore the plea but surely it is unwise even if they would sustain it. Many legal rules have hardened into conceptual doctrines which lawyers invoke with little thought for the underlying reasons, but the doctrines themselves represent an accumulation of tested wisdom, they are bottomed upon notions of fairness and sound public policy, and it would be a foolish waste to climb the ladder all over again just because the suggested principles were developed in other contexts and some of them are demonstrably inapposite. . . ." Cox, The Legal Nature of Collective Bargaining Agreements, in Collective Bargaining and the Law (Univ. of Mich. Law School), pp. 121–122.

Judges will do well to heed this admonition. Their experience makes them much more sure-footed in applying principles pertinent to the enforcement of contracts than they are likely to be in discerning the needs of wise industrial relations.

I would affirm the judgment.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO.

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

No. 15. Argued December 7–8, 1959.—Decided February 23, 1960.

On a complaint before the National Labor Relations Board charging that a union had refused to bargain in good faith with an employer in violation of § 8 (b) (3) of the National Labor Relations Act, as amended, it appeared that the union had conferred with the employer at the bargaining table for the purpose and with the desire of reaching an agreement on contract terms, but that, during the negotiations, it had sponsored concerted on-the-job activities by its members of a harassing nature designed to interfere with the conduct of the employer's business, for the avowed purpose of putting economic pressure on the employer to accede to the union's bargaining demands. *Held:* Such tactics would not support a finding by the Board that the union had failed to bargain in good faith as required by § 8 (b) (3). Pp. 478–500.

(1) The basic premise of the duty of collective bargaining required in the Act is that it is a process in which the parties deal with each other in a serious, good-faith desire to reach agreement and to enter into a contract ordering their industrial relationship. Congress did not intend that the Board control the substantive terms of collective bargaining contracts through the administration of this requirement; and it added § 8 (d) in the Taft-Hartley Act to make the proper construction of the duty clear. Pp. 483–487.

(2) By adding § 8 (b) (3) to the Act through the Taft-Hartley amendments, Congress intended to require of unions the same standard of good faith in collective bargaining that it had already required of employers. P. 487.

(3) Section 8 (b) (3) does not authorize the Board to infer a lack of good faith in bargaining on the part of a union solely because the union resorts to tactics designed to exert economic pressure during the negotiations. Pp. 488–490.

(4) The use of economic pressure is not inconsistent with the duty of bargaining in good faith; and the Board is not empowered under § 8 (b) (3) to distinguish among various union economic

weapons and to brand those here involved inconsistent with good-faith collective bargaining. Pp. 490–496.

(a) A different conclusion is not required on the theory that a total strike is a concerted activity protected against employer interference by §§ 7 and 8 (a)(1) of the Act, whereas the activity here involved is not a protected concerted activity. Even if an activity is not protected against disciplinary action that does not necessarily mean that it amounts to a refusal to bargain in good faith. Pp. 492–495.

(b) A different conclusion is not required on the theory that, because an orthodox "total" strike is "traditional," its use must be taken as being consistent with § 8 (b)(3); whereas the tactics here involved are not "traditional" or "normal" and, therefore, need not be so viewed. Pp. 495–496.

(5) To construe § 8 (b)(3) as authorizing the Board to act as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands would inject the Board into the substantive aspects of the bargaining process to an extent that Congress did not intend and has not authorized. Pp. 496–500.

104 U. S. App. D. C. 218, 260 F. 2d 736, affirmed.

Dominick L. Manoli argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Stuart Rothman* and *Thomas J. McDermott.*

Isaac N. Groner argued the cause and filed a brief for respondent. He was also on a brief for Insurance Workers International Union, AFL-CIO.

Nahum A. Bernstein filed a brief for Prudential Insurance Company of America, as *amicus curiae,* urging reversal. *Donald R. Seawell* was of counsel.

Mr. Justice Brennan delivered the opinion of the Court.

This case presents an important issue of the scope of the National Labor Relations Board's authority under § 8 (b)(3) of the National Labor Relations Act,[1] which

[1] As added by the Labor Management Relations Act, 1947 (the Taft-Hartley Act), 61 Stat. 141, 29 U. S. C. § 158 (b)(3).

provides that "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees . . . ." The precise question is whether the Board may find that a union, which confers with an employer with the desire of reaching agreement on contract terms, has nevertheless refused to bargain collectively, thus violating that provision, solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying on of the employer's business.

Since 1949 the respondent Insurance Agents' International Union and the Prudential Insurance Company of America have negotiated collective bargaining agreements covering district agents employed by Prudential in 35 States and the District of Columbia. The principal duties of a Prudential district agent are to collect premiums and to solicit new business in an assigned locality known in the trade as his "debit." He has no fixed or regular working hours except that he must report at his district office two mornings a week and remain for two or three hours to deposit his collections, prepare and submit reports, and attend meetings to receive sales and other instructions. He is paid commissions on collections made and on new policies written; his only fixed compensation is a weekly payment of $4.50 intended primarily to cover his expenses.

In January 1956 Prudential and the union began the negotiation of a new contract to replace an agreement expiring in the following March. Bargaining was carried on continuously for six months before the terms of the new contract were agreed upon on July 17, 1956.[2] It is

[2] A stenographic record of the discussions at the bargaining table was kept, and the transcription of it fills 72 volumes.

not questioned that, if it stood alone, the record of negotiations would establish that the union conferred in good faith for the purpose and with the desire of reaching agreement with Prudential on a contract.

However, in April 1956, Prudential filed a § 8 (b)(3) charge of refusal to bargain collectively against the union. The charge was based upon actions of the union and its members outside the conference room, occurring after the old contract expired in March. The union had announced in February that if agreement on the terms of the new contract was not reached when the old contract expired, the union members would then participate in a "Work Without a Contract" program—which meant that they would engage in certain planned, concerted on-the-job activities designed to harass the company.

A complaint of violation of § 8 (b)(3) issued on the charge and hearings began before the bargaining was concluded.[3] It was developed in the evidence that the union's harassing tactics involved activities by the member agents such as these: refusal for a time to solicit new business, and refusal (after the writing of new business was resumed) to comply with the company's reporting procedures; refusal to participate in the company's "May Policyholders' Month Campaign"; reporting late at district offices the days the agents were scheduled to attend them, and refusing to perform customary duties at the offices, instead engaging there in "sit-in-mornings," "doing what comes naturally" and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as

[3] The hearings on the unfair labor practice charge were recessed in July to allow the parties to concentrate on the effort to negotiate the settlement which was arrived at in the new contract of July 17, 1956.

directed by the union; distributing leaflets each day to policyholders and others and soliciting policyholders' signatures on petitions directed to the company; and presenting the signed policyholders' petitions to the company at its home office while simultaneously engaging in mass demonstrations there.

The hearing examiner filed a report recommending that the complaint be dismissed. The examiner noted that the Board in the so-called *Personal Products* case, *Textile Workers Union,* 108 N. L. R. B. 743, had declared similar union activities to constitute a prohibited refusal to bargain; but since the Board's order in that case was set aside by the Court of Appeals for the District of Columbia Circuit, 97 U. S. App. D. C. 35, 227 F. 2d 409, he did not consider that he was bound to follow it.

However, the Board on review adhered to its ruling in the *Personal Products* case, rejected the trial examiner's recommendation, and entered a cease-and-desist order, 119 N. L. R. B. 768. The Court of Appeals for the District of Columbia Circuit also adhered to its decision in the *Personal Products* case, and, as in that case, set aside the Board's order. 104 U. S. App. D. C. 218, 260 F. 2d 736. We granted the Board's petition for certiorari to review the important question presented. 358 U. S. 944.

The hearing examiner found that there was nothing in the record, apart from the mentioned activities of the union during the negotiations, that could be relied upon to support an inference that the union had not fulfilled its statutory duty; in fact nothing else was relied upon by the Board's General Counsel in prosecuting the complaint.[4] The hearing examiner's analysis of the congres-

[4] Examining the matter *de novo* without the *Personal Products* decision of the Board as precedent, the examiner called repeatedly upon the Board's General Counsel for some evidence of failure to bargain in good faith, besides the harassing tactics themselves. When such evidence was not forthcoming, he commented, "It may well be

sional design in enacting the statutory duty to bargain led him to conclude that the Board was not authorized to find that such economically harassing activities constituted a § 8 (b)(3) violation. The Board's opinion answers flatly "We do not agree" and proceeds to say ". . . the Respondent's reliance upon harassing tactics during the course of negotiations for the avowed purpose of compelling the Company to capitulate to its terms is the antithesis of reasoned discussion it was duty-bound to follow. Indeed, it clearly revealed an unwillingness to submit its demands to the consideration of the bargaining table where argument, persuasion, and the free interchange of views could take place. In such circumstances, the fact that the Respondent continued to confer with the Company and was desirous of concluding an agreement does not *alone* establish that it fulfilled its obligation to bargain in good faith . . . ." 119 N. L. R. B., at 769, 770–771. Thus the Board's view is that irrespective of the union's good faith in conferring with the employer at the bargaining table for the purpose and with the desire of reaching agreement on contract terms, its tactics during the course of the negotiations constituted *per se* a violation of § 8 (b)(3).[5] Accordingly, as is said in the Board's brief,

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that the Board will be able to 'objectively evaluate' the 'impact' of activities upon 'collective-bargaining negotiations' from the mere 'nature of the activities,' but the Trial Examiner is reluctant even to attempt this feat of mental pole vaulting with only presumtion as a pole." 119 N. L. R. B., at 781–782.

[5] The Board observed that the union's continued participation in negotiations and desire to reach an agreement only indicated that it "was prepared to go through the motions of bargaining while relying upon a campaign of harassing tactics to disrupt the Company's business to achieve acceptance of its contractual demands." 119 N. L. R. B., at 771. The only apparent basis for the conclusion that the union was only going through the "motions" of bargaining is the Board's own postulate that the tactics in question were inconsistent with the statutorily required norm of collective bargaining,

"The issue here . . . comes down to whether the Board is authorized under the Act to hold that such tactics, which the Act does not specifically forbid but Section 7 does not protect,[6] support a finding of a failure to bargain in good faith as required by Section 8 (b)(3)."

First. The bill which became the Wagner Act included no provision specifically imposing a duty on either party to bargain collectively. Senator Wagner thought that the bill required bargaining in good faith without such a provision.[7] However, the Senate Committee in charge of the bill concluded that it was desirable to include a provision making it an unfair labor practice for an *employer* to refuse to bargain collectively in order to assure that the Act would achieve its primary objective of requiring an employer to recognize a union selected by his employees as their representative. It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement. It was said in the Senate Report:

> "But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the bill. It seems clear that a guarantee of the right of employees to bargain collectively

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and the Board's opinion, and its context, reveal that this was all that it meant. This *per se* rule amounted to the "pole vaulting" that the examiner said he was "reluctant even to attempt." See note 4, *supra*.

[6] We will assume without deciding that the activities in question here were not "protected" under § 7 of the Act. See p. 492 and note 22, *infra*.

[7] See Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., p. 43: "Therefore, while the bill does not state specifically the duty of an employer to recognize and bargain collectively with the representatives of his employees, because of the difficulty of setting forth this matter precisely in statutory language, such a duty is clearly implicit in the bill."

> through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives . . . and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace." S. Rep. No. 573, 74th Cong., 1st Sess., p. 12.

However, the nature of the duty to bargain in good faith thus imposed upon employers by § 8 (5) of the original Act [8] was not sweepingly conceived. The Chairman of the Senate Committee declared: "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." [9]

The limitation implied by the last sentence has not been in practice maintained—practically, it could hardly have been—but the underlying purpose of the remark has remained the most basic purpose of the statutory provision. That purpose is the making effective of the duty of management to extend recognition to the union; the duty of management to bargain in good faith is essentially

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[8] 49 Stat. 453. The corresponding provision in the current form of the Act is § 8 (a) (5), 61 Stat. 141, 29 U. S. C. § 158 (a) (5).

[9] Senator Walsh, at 79 Cong. Rec. 7660.

a corollary of its duty to recognize the union. Decisions under this provision reflect this. For example, an employer's unilateral wage increase during the bargaining processes tends to subvert the union's position as the representative of the employees in matters of this nature, and hence has been condemned as a practice violative of this statutory provision. See *Labor Board* v. *Crompton-Highland Mills, Inc.,* 337 U. S. 217. And as suggested, the requirement of collective bargaining, although so premised, necessarily led beyond the door of, and into, the conference room. The first annual report of the Board declared: "Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground. . . . The Board has repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining." [10] This standard had early judicial approval, *e. g., Labor Board* v. *Griswold Mfg. Co.,* 106 F. 2d 713. Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract. See *Heinz Co.* v. *Labor Board,* 311 U. S. 514. This was the sort of recognition that Congress, in the Wagner Act, wanted extended to labor unions; recognition as the bargaining agent of the employees in a process that looked to the ordering of the parties' industrial relationship through the formation of a contract. See *Teamsters Union* v. *Oliver,* 358 U. S. 283, 295.

But at the same time, Congress was generally not concerned with the substantive terms on which the parties

[10] 1 N. L. R. B. Ann. Rep., pp. 85–86.

contracted. Cf. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1, 6. Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. And in fact criticism of the Board's application of the "good-faith" test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice.[11] Thus, in 1947 in Congress the fear was expressed that the Board had "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 19. Since the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into § 8 (d) of the Act. That section defines collective bargaining as follows:

> "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

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[11] This Court related the history in *Labor Board* v. *American National Ins. Co.,* 343 U. S. 395, 404.

> such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." [12]

The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended. See *Labor Board* v. *Truitt Mfg. Co.*, 351 U. S. 149; *Labor Board* v. *Borg-Warner Corp.*, 356 U. S. 342, 349. But it remains clear that § 8 (d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements. *Labor Board* v. *American National Ins. Co.*, 343 U. S. 395, 404.

Second. At the same time as it was statutorily defining the duty to bargain collectively, Congress, by adding § 8 (b)(3) of the Act through the Taft-Hartley amendments, imposed that duty on labor organizations. Unions obviously are formed for the very purpose of bargaining collectively; but the legislative history makes it plain that Congress was wary of the position of some unions, and wanted to ensure that they would approach the bargaining table with the same attitude of willingness to reach an agreement as had been enjoined on management earlier. It intended to prevent employee representatives from putting forth the same "take it or leave it" attitude that had been condemned in management. 93 Cong. Rec. 4135, 4363, 5005.[13]

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[12] 61 Stat. 142, 29 U. S. C. § 158 (d).

[13] Senator Ellender was most explicit on the matter at 93 Cong. Rec. 4135.

The legislative history seems also to have contemplated that the provision would be applicable to a union which declined to identify its bargaining demands while attempting financially to exhaust the employer. See the remark by Senator Hatch at 93 Cong. Rec. 5005. Cf. note 15, *infra*. A closely related application is developed in *American Newspaper Publishers Assn.* v. *Labor Board*, 193 F. 2d 782, 804–805, affirmed as to other issues on limited grant of certiorari, 345 U. S. 100.

Third. It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace. See *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45. Discussion conducted under that standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take. The mainstream of cases before the Board and in the courts reviewing its orders, under the provisions fixing the duty to bargain collectively, is concerned with insuring that the parties approach the bargaining table with this attitude. But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences. See *Teamsters Union* v. *Oliver, supra,* at 295.

We believe that the Board's approach in this case—unless it can be defended, in terms of § 8 (b) (3), as resting on some unique character of the union tactics involved here—must be taken as proceeding from an erroneous view of collective bargaining. It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among

people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as "a prime motive power for agreements in free collective bargaining." [14] Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess. A close student of our national labor relations laws writes: "Collective bargaining is curiously ambivalent even today. In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics. As the relation matures, Lilliputian bonds control the opposing concentrations of economic power; they lack legal sanctions but are nonetheless effective to contain the use of power. Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason,

[14] G. W. Taylor, Government Regulation of Industrial Relations, p. 18.

a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion." Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1409.

For similar reasons, we think the Board's approach involves an intrusion into the substantive aspects of the bargaining process—again, unless there is some specific warrant for its condemnation of the precise tactics involved here. The scope of § 8 (b)(3) and the limitations on Board power which were the design of § 8 (d) are exceeded, we hold, by inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of the good-faith negotiations. Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.

Fourth. The use of economic pressure, as we have indicated, is of itself not at all inconsistent with the duty of

bargaining in good faith. But in three cases in recent years, the Board has assumed the power to label particular union economic weapons inconsistent with that duty. See the *Personal Products* case,[15] *supra,* 108 N. L. R. B. 743, set aside, 97 U. S. App. D. C. 35, 227 F. 2d 409; [16] the *Boone County* case, *United Mine Workers,* 117 N. L. R. B. 1095, set aside, 103 U. S. App. D. C. 207, 257 F. 2d 211; [17] and the present case. The Board freely (and we think correctly) conceded here that a "total" strike called by the union would not have subjected it to sanctions under § 8 (b)(3), at least if it were called after the old contract, with its no-strike clause, had expired. Cf. *United Mine Workers, supra.* The Board's opinion in the instant case is not so unequivocal as this

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[15] The facts in *Personal Products* did, in the Board's view, present the case of a union which was using economic pressure against an employer in a bargaining situation without identifying what its bargaining demands were—a matter which can be viewed quite differently in terms of a § 8 (b)(3) violation from the present case. See note 13, *supra.* The Board's decision in *Personal Products* may have turned on this to some extent, see 108 N. L. R. B., at 746; but its decision in the instant case seems to view *Personal Products* as turning on the same point as does the present case.

[16] This Court granted certiorari, 350 U. S. 1004, on the Board's petition, to review that judgment; but in the light of intervening circumstances which at least indicated that the litigation had become less meaningful to the parties, cf. *The Monrosa* v. *Carbon Black Export, Inc.,* 359 U. S. 180, the order granting certiorari was vacated and certiorari was denied. 352 U. S. 864.

[17] The court there displayed a want of sympathy to the Board's theory that a strike in breach of contract violated § 8 (b)(3), see 103 U. S. App. D. C., at 210–211, 257 F. 2d, at 214–215. Cf. Feinsinger, The National Labor Relations Act and Collective Bargaining, 57 Mich. L. Rev. 806–807. However, the court turned its decision on its ruling, *contra* the Board, that there was no breach of the contract involved. On this point, *contra* is *United Mine Workers* v. *Benedict Coal Corp.,* 259 F. 2d 346, 351, affirmed this day by an equally divided Court, *ante,* p. 459.

concession (and therefore perhaps more logical).[18] But in the light of it and the principles we have enunciated, we must evaluate the claim of the Board to power, under § 8 (b)(3), to distinguish among various economic pressure tactics and brand the ones at bar inconsistent with good-faith collective bargaining. We conclude its claim is without foundation.[19]

(a) The Board contends that the distinction between a total strike and the conduct at bar is that a total strike is a concerted activity protected against employer interference by §§ 7 [20] and 8 (a)(1) [21] of the Act, while the activity at bar is not a protected concerted activity. We may agree *arguendo* with the Board [22] that this Court's decision in the *Briggs-Stratton* case, *Automobile Workers* v. *Wisconsin Board,* 336 U. S. 245, establishes that

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[18] Said the Board: "Consequently, whether or not an inference of bad faith is permissible where a union engages in a protected strike to enforce its demands, there is nothing unreasonable in drawing such an inference where, as here, the union's conduct is not sanctioned by the Act." 119 N. L. R. B., at 771–772.

[19] Our holding on this ground makes it unnecessary for us to pass on the other grounds for affirmance of the Court of Appeals' judgment urged by respondent. These we take to include the argument that the Board's order violated the standards of § 8 (c) of the Act, 61 Stat. 142, 29 U. S. C. § 158 (c), and the points touched upon in notes 22 and 23, *infra.*

[20] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. § 157.

[21] "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. § 158 (a)(1).

[22] Respondent cites a number of specific circumstances in the activities here that might distinguish them from the *Briggs-Stratton* case as to protection under § 7. We do not pass on the matter.

the employee conduct here was not a protected concerted activity.[23] On this assumption the employer could have discharged or taken other appropriate disciplinary action against the employees participating in these "slow-down,"

[23] *Briggs-Stratton* held, among other things, that employee conduct quite similar to the conduct at bar was neither protected by § 7 of the Act nor prohibited (made an unfair labor practice) by § 8. The respondent urges that the holding there that the conduct was not prohibited by § 8 in and of itself requires an affirmance of the judgment here, since in this case the Board's order found a violation of § 8. In fact the Board's General Counsel on oral argument made the concession that *Briggs-Stratton* would have to be overruled for the Board to prevail here.

But regardless of the status today of the other substantive rulings in the *Briggs-Stratton* case, we cannot say that the case's holding as to § 8 requires a judgment for the respondent here. *Briggs-Stratton* was a direct review on certiorari here of a state board order, as modified and affirmed in the State Supreme Court, against the union conduct in question. The order was assailed by the union here primarily as being beyond the competence of the State to make, by reason of the federal labor relations statutes. This Court held that the activities in question were neither protected by § 7 nor prohibited by § 8, and allowed the state order to stand. The primary focus of attention was whether the activities were protected by § 7; there seems to have been no serious contention made that they were prohibited by § 8. The case arose long before the line of cases beginning with *Personal Products* in which the Board began to relate such activities to § 8 (b) (3). But of special significance is the fact that the approach to pre-emption taken in *Briggs-Stratton* was that the state courts and this Court on review were required to decide whether the activities were either protected by § 7 or prohibited by § 8. This approach is "no longer of general application," *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245, n. 4, as this Court has since developed the doctrine in pre-emption cases that questions of interpretation of the National Labor Relations Act are generally committed in the first instance to the Board's administrative processes, *San Diego Building Trades Council* v. *Garmon, supra,* except in the atypical situation where those processes are not relevant to an answer to the question. See *Teamsters Union* v. *Oliver, supra.* Therefore to view *Briggs-Stratton* as controlling on the § 8 issue here would be to compound the defects of a now discarded approach to pre-emption; it would amount to

"sit-in," and arguably unprotected disloyal tactics. See *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Labor Board* v. *Electrical Workers*, 346 U. S. 464. But surely that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith. The reason why the ordinary economic strike is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that, as we have developed, there is simply no inconsistency between the application of

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saying that the Board would be foreclosed in its adjudicative development of interpretation of the Act by a decision rendered long ago, not arising in review of one of its own orders, at a time when its own views had not come to what they now are, and in which the precise issue (as to § 8 (b) (3)) was not litigated at all, and the general § 8 issue not litigated seriously. Hence we construe § 8 here uninfluenced by what was said in *Briggs-Stratton*.

However, we will not here re-examine what was said in *Briggs-Stratton* as to §§ 13 and 501. The union here contends that the definition of "strike" in § 501 (2) of the Taft-Hartley Act, 61 Stat. 161, 29 U. S. C. § 142 (2), which is broad enough to include the activities here in question, must be applied here under § 13 of the NLRA, which provides that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 49 Stat. 457, as amended, 61 Stat. 151, 29 U. S. C. § 163. And if it is so applied, the union argues that § 13 would prevent the Board from considering the conduct in question as an unfair labor practice. The issue was tendered in much the same light in *Briggs-Stratton*, and the Court quite plainly indicated that the definition in § 501 (2) was only to be considered in connection with § 8 (b) (4) and not with § 13, see 336 U. S., at 258–263, especially the last page; at the very least this was a holding alternative to a holding, 336 U. S., at 263–264, that, however defined, § 13, unlike § 7, was not an inhibition on state power. Perhaps this element of the *Briggs-Stratton* decision has become open also, but certainly this is not so clear as is the fact that the § 8 point is open. In any event, we shall not consider the matter further since our affirmance of the Court of Appeals' reversal of the Board's order is, we believe, more properly bottomed on a construction of § 8 (b) (3).

economic pressure and good-faith collective bargaining. The Board suggests that since (on the assumption we make) the union members' activities here were unprotected, and they could have been discharged, the activities should also be deemed unfair labor practices, since thus the remedy of a cease-and-desist order, milder than mass discharges of personnel and less disruptive of commerce, would be available. The argument is not persuasive. There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law. Our problem remains that of construing § 8 (b)(3)'s terms, and we do not see how the availability of self-help to the employer has anything to do with the matter.

(b) The Board contends that because an orthodox "total" strike is "traditional" its use must be taken as being consistent with § 8 (b)(3); but since the tactics here are not "traditional" or "normal," they need not be so viewed.[24] Further, the Board cites what it conceives to be the public's moral condemnation of the sort of employee tactics involved here. But again we cannot see how these distinctions can be made under a statute which simply enjoins a duty to bargain in good faith. Again, these are relevant arguments when the question is the scope of the concerted activities given affirmative protection by the Act. But as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining. On this basis, we

[24] The Board quotes, in support of this, general language from a decision of this Court, *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 346, dealing with a wholly different matter—the scope of subjects appropriate for collective bargaining.

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fail to see the relevance of whether the practice in question is time-honored or whether its exercise is generally supported by public opinion. It may be that the tactics used here deserve condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it.[25] The same may be said for the Board's contention that these activities, as opposed to a "normal" strike, are inconsistent with § 8 (b)(3) because they offer maximum pressure on the employer at minimum economic cost to the union. One may doubt whether this was so here,[26] but the matter does not turn on that. Surely it cannot be said that the only economic weapons consistent with good-faith bargaining are those which minimize the pressure on the other party or maximize the disadvantage to the party using them. The catalog of union and employer [27] weapons that might thus fall under ban would be most extensive.[28]

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[25] "To say 'there ought to be a law against it' does not demonstrate the propriety of the NLRB's imposing the prohibition." Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1437.

[26] Though it is much urged in the Board's brief here as a general proposition, the Board's opinion (following its *per se* approach) contains no discussion of this point at all insofar as the facts of the case were concerned; it did not discuss the economic effect of the activities on the agents themselves and expressly declined to pass on their effect on the employer. 119 N. L. R. B., at 771. Respondent here urges that the evidence establishes quite the opposite conclusion.

[27] "If relative power be the proper test, surely one who believed the unions to be weak would come to the opposite conclusion. Is it an abuse of 'bargaining *powers*' to threaten a strike at a department store two weeks before Easter instead of engaging in further discussion, postponing the strike until after Easter when the employer will feel it less severely? Is it unfair for an employer to stall negotiations through a busy season or while he is building up inventory so that he can stand a strike better than the workers?" Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1440–1441.

[28] There is a suggestion in the Board's opinion that it regarded the union tactics as a unilateral setting of the terms and conditions of

Fifth. These distinctions essayed by the Board here, and the lack of relationship to the statutory standard inherent in them, confirm us in our conclusion that the judgment of the Court of Appeals, setting aside the order of the Board, must be affirmed. For they make clear to us that when the Board moves in this area, with only § 8 (b)(3) for support, it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly "balanced" [29] bargaining power, or some new distinction of justifiable and unjustifiable, proper and "abusive" [30] economic weapons into the collective bargaining duty imposed by the Act. The Board's assertion of power under § 8 (b)(3) allows it to sit in judgment upon every

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employment and hence also on this basis violative of § 8 (b)(3), just as an employer's unilateral setting of employment terms during collective bargaining may amount to a breach of its duty to bargain collectively. *Labor Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217. See 119 N. L. R. B., at 772. Prudential, as *amicus curiae* here, renews this point though the Board does not make it here. It seems baseless to us. There was no indication that the practices that the union was engaging in were designed to be permanent conditions of work. They were rather means to another end. The question whether union conduct could be treated, analogously to employer conduct, as unilaterally establishing working conditions, in a manner violative of the duty to bargain collectively, might be raised for example by the case of a union, anxious to secure a reduction of the working day from eight to seven hours, which instructed its members, during the negotiation process, to quit work an hour early daily. Cf. Note, 71 Harv. L. Rev. 502, 509. But this situation is not presented here, and we leave the question open.

[29] The Board's opinion interprets the National Labor Relations Act to require, in this particular, "a background of balanced bargaining relations." 119 N. L. R. B., at 772.

[30] The Board in *Personal Products* condemned the union's tactics as an "abuse of the Union's bargaining powers." 108 N. L. R. B., at 746.

economic weapon the parties to a labor contract negotiation employ, judging it on the very general standard of that section, not drafted with reference to specific forms of economic pressure. We have expressed our belief that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.

It is one thing to say that the Board has been afforded flexibility to determine, for example, whether an employer's disciplinary action taken against specific workers is permissible or not, or whether a party's conduct at the bargaining table evidences a real desire to come into agreement. The statute in such areas clearly poses the problem to the Board for its solution. Cf. *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87. And specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences from the conduct of the parties as a whole. It is quite another matter, however, to say that the Board has been afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful. Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. See § 8 (b)(4) of the National Labor Relations Act, as added by the Taft-Hartley Act, 61 Stat. 141, and as supplemented by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 542; (29 U. S. C. § 158 (b)(4)); § 8 (b)(7), as added by the latter Act, 73 Stat. 544. But the activities here involved have never been specifically outlawed by Congress.[31] To

[31] It might be noted that the House bill, when the Taft-Hartley Act was in the legislative process, contained a list of "unlawful concerted activities" one of which would quite likely have reached some of the union conduct here, but the provision never became law. H. R. 3020, 80th Cong., 1st Sess., § 12.

be sure, the express prohibitions of the Act are not exclusive—if there were any questions of a stratagem or device to evade the policies of the Act, the Board hardly would be powerless. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. But it is clear to us that the Board needs a more specific charter than § 8 (b)(3) before it can add to the Act's prohibitions here.

We recognize without hesitation the primary function and responsibility of the Board to resolve the conflicting interests that Congress has recognized in its labor legislation. Clearly, where the "ultimate problem is the balancing of the conflicting legitimate interests" it must be remembered that "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Labor Board* v. *Truck Drivers Union, supra,* at 96. Certainly a "statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application." *Phelps Dodge Corp.* v. *Labor Board, supra,* at 194. But recognition of the appropriate sphere of the administrative power here obviously cannot exclude all judicial review of the Board's actions. On the facts of this case we need not attempt a detailed delineation of the respective functions of court and agency in this area. We think the Board's resolution of the issues here amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but to a movement into a new area of regulation which Congress had not committed to it. Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked. We see no indication here that Con-

gress has put it to the Board to define through its processes what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.

It is suggested here that the time has come for a re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. Major revisions of the basic statute were enacted in 1947 and 1959. To be sure, then, Congress might be of opinion that greater stress should be put on the role of "pure" negotiation in settling labor disputes, to the extent of eliminating more and more economic weapons from the parties' grasp, and perhaps it might start with the ones involved here; or in consideration of the alternatives, it might shrink from such an undertaking. But Congress' policy has not yet moved to this point, and with only § 8 (b)(3) to lean on, we do not see how the Board can do so on its own.[32]

Affirmed.

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[32] After we granted certiorari, we postponed to the consideration of the case on the merits a motion by the Board to join as a party here Insurance Workers International Union, AFL–CIO, the style of a new union formed by merger of respondent and another union after the decision of this case in the Court of Appeals, and a contingent motion by respondent that it be deleted as a party. 361 U. S. 872. In the light of our ruling on the merits, there is little point in determining here and now what the legal status of the predecessor and successor union is, and if the issue ever becomes important, we think that the matter is best decided then. For what it is worth, we shall treat both as parties before us in this proceeding. The Board's motion is granted and respondent's is denied. See *Labor Board* v. *Lion Oil Co.*, 352 U. S. 282.

Separate opinion of MR. JUSTICE FRANKFURTER, which MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join.

The sweep of the Court's opinion, with its far-reaching implications in a domain of lawmaking of such nation-wide importance as that of legal control of collective bargaining, compels a separate statement of my views.

The conduct which underlies this action was the respondent union's "Work Without a Contract" program which it admittedly initiated after the expiration of its contract with the Prudential Insurance Company on March 19, 1956. In brief, the union directed its members at various times to arrive late to work; to decline, by "sitting-in" the company offices, to work according to their regular schedule; to refuse to write new business or, when writing it, not to report it in the ordinary fashion; to decline to attend special business meetings; to demonstrate before company offices; and to solicit petitions in the union's behalf from policyholders with whom they dealt. Prudential was given notice in advance of the details of this program and of the demands which the union sought to achieve by carrying it out.

This action was commenced by a complaint issued on June 5, 1956, alleging respondent's failure to bargain in good faith. After a hearing, the Trial Examiner recommended that the complaint be dismissed, finding that "[f]rom the 'circumstantial evidence' [of the union's state of mind] of the bargaining itself . . . but one inference is possible . . . the Union's motive was one of good faith . . ."; and that "whatever inference may be as reasonably drawn from the Union's concurrent 'unprotected' activities" is not sufficient to outweigh this evidence of good faith.

The Board sustained exceptions to the Trial Examiner's report, concluding that respondent failed to bargain in good faith. The only facts relied on by the Board were based on the "Work Without a Contract" program. The

Board found that such tactics on respondent's part "clearly revealed an unwillingness to submit its demands to the consideration of the bargaining table" and that respondent therefore failed to bargain in good faith. In support of its conclusion of want of bargaining in good faith, the Board stated that "[h]arassing activities are plainly 'irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest' . . . ." The Board made no finding that the outward course of the negotiations gave rise to an inference that respondent's state of mind was one of unwillingness to reach agreement. It found from the character of respondent's activities in carrying out the "Work Without a Contract" program that what appeared to be good faith bargaining at the bargaining table was in fact a sham:

> "[T]he fact that the Respondent continued to confer with the Company and was desirous of concluding an agreement does not *alone* establish that it fulfilled its obligation to bargain in good faith, as the Respondent argues and the Trial Examiner believes. At most, it demonstrates that the Respondent was prepared to go through the motions of bargaining while relying upon a campaign of harassing tactics to disrupt the Company's business to achieve acceptance of its contractual demands."

The Board issued a cease-and-desist order [1] and sought its enforcement in the Court of Appeals for the District of Columbia. Respondent cross-petitioned to set it aside.

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[1] The order in part provided: "[T]he Respondent . . . shall: 1. Cease and desist from refusing to bargain collectively in good faith with The Prudential Insurance Company of America . . . by authorizing, directing, supporting, inducing or encouraging the Company's employees to engage in slowdowns, harassing activities or

The Court of Appeals, relying exclusively on its prior decision in *Textile Workers Union* v. *Labor Board,* 97 U. S. App. D. C. 35, 227 F. 2d 409 (1955), denied enforcement and set aside the order. In the *Textile Workers* case the court had held (one judge dissenting) that the Board could not consider the "harassing" activities of the union there involved as evidence of lack of good faith during the negotiations. "There is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants." 97 U. S. App. D. C. 35, 36, 227 F. 2d 409, 410.

The record presents two different grounds for the Board's action in this case. The Board's own opinion proceeds in terms of an examination of respondent's conduct as it bears upon the genuineness of its bargaining in the negotiation proceedings. From the respondent's conduct the Board drew the inference that respondent's state of mind was inimical to reaching an agreement, and that inference alone supported its conclusion of a refusal to bargain. The Board's position in this Court proceeded in terms of the relation of conduct such as respondent's to the kind of bargaining required by the statute, without regard to the bearing of such conduct on the proof of good faith revealed by the actual bargaining. The Board maintained that it

> "could appropriately determine that the basic statutory purpose of promoting industrial peace through the collective bargaining process would be defeated by sanctioning resort to this form of industrial warfare as a collective bargaining technique."

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other unprotected conduct, in the course of their employment and in disregard of their duties and customary routines, for the purpose of forcing the Company to accept its bargaining demands, or from engaging in any like or related conduct in derogation of its statutory duty to bargain . . . ."

The opinion of this Court, like that of the Court of Appeals, disposes of both questions by a single broad stroke. It concludes that conduct designed to exert pressure on the bargaining situation with the aim of achieving favorable results is to be deemed entirely consistent with the duty to bargain in good faith. No evidentiary significance, not even an inference of a lack of good faith, is allowed to be drawn from the conduct in question as part of a total context.

I agree that the position taken by the Board here is not tenable. In enforcing the duty to bargain the Board must find the ultimate fact whether, in the case before it and in the context of all its circumstances, the respondent has engaged in bargaining without the sincere desire to reach agreement which the Act commands. I further agree that the Board's action in this case is not sustainable as resting upon a determination that respondent's apparent bargaining was in fact a sham, because the evidence is insufficient to justify that conclusion even giving the Board, as we must, every benefit of its right to draw on its experience in interpreting the industrial significance of the facts of a record. See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. What the Board has in fact done is lay down a rule of law that such conduct as was involved in carrying out the "Work Without a Contract" program necessarily betokens bad faith in the negotiations.

The Court's opinion rests its conclusion on the generalization that "the ordinary economic strike is not evidence of a failure to bargain in good faith . . . because . . . there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining." This large statement is justified solely by reference to § 8 (b)(3) and to the proposition that inherent in bargaining is room for the play of forces which reveal the strength of one party, or the weakness of

the other, in the economic context in which they seek agreement. But in determining the state of mind of a party to collective bargaining negotiations the Board does not deal in terms of abstract "economic pressure." It must proceed in terms of specific conduct which it weighs as a more or less reliable manifestation of the state of mind with which bargaining is conducted. No conduct in the complex context of bargaining for a labor agreement can profitably be reduced to such an abstraction as "economic pressure." An exertion of "economic pressure" may at the same time be part of a concerted effort to evade or disrupt a normal course of negotiations. Vital differences in conduct, varying in character and effect from mild persuasion to destructive, albeit "economic," violence [2] are obscured under cover of a single abstract phrase.

While § 8 (b)(3) of course contemplates some play of "economic pressure," it does not follow that the purpose in engaging in tactics designed to exert it is to reach agreement through the bargaining process in the manner which the statute commands, so that the Board is precluded from considering such conduct, in the totality of circumstances, as evidence of the actual state of mind of the actor. Surely to deny this scope for allowable judgment to the Board is to deny it the special function with which it has been entrusted. See *Universal Camera Corp.* v. *Labor Board, supra.* This Court has in the past declined to pre-empt by broad proscriptions the Board's competence in the first instance to weigh the significance of the raw facts of conduct and to draw from them an informed judgment as to the ultimate fact. It has recognized that the significance of conduct, itself apparently innocent and evidently insufficient to sustain a finding of

[2] "There are plenty of methods of coercion short of actual physical violence." Senator Taft, at 93 Cong. Rec. 4024.

an unfair labor practice, "may be altered by imponderable subtleties at work, which it is not our function to appraise" but which are, first, for the Board's consideration upon all the evidence. *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 479. Activities in isolation may be wholly innocent, lawful and "protected" by the Act, but that ought not to bar the Board from finding, if the record justifies it, that the isolated parts "are bound together as the parts of a single plan [to frustrate agreement]. The plan may make the parts unlawful." *Swift & Co.* v. *United States,* 196 U. S. 375, 396. See also *Aikens* v. *Wisconsin,* 195 U. S. 194, 206.

Moreover, conduct designed to exert and exerting "economic pressure" may not have the shelter of § 8 (b)(3) even in isolation. Unlawful violence, whether to person or livelihood, to secure acceptance of an offer, is as much a withdrawal of included statutory subjects from bargaining as the "take it or leave it" attitude which the statute clearly condemns.[3] One need not romanticize the community of interest between employers and employees, or be unmindful of the conflict between them, to recognize that utilization of what in one set of circumstances may only signify resort to the traditional weapons of labor may in another and relevant context offend the attitude toward bargaining commanded by the statute. Section 8 (b)(3) is not a specific direction, but an expression of a governing viewpoint or policy to which, by the process of specific application, the Board and the courts must give concrete, not doctrinaire content.

The main purpose of the Wagner Act was to put the force of law behind the promotion of unionism as the legitimate and necessary instrument "to give laborers opportunity to deal on equality with their employer."

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[3] As the Court states, the prevention of union conduct designed to enforce such an attitude was a primary purpose of the enactment of § 8 (b)(3). See, *e. g.*, 93 Cong. Rec. 4135.

Mr. Chief Justice Taft for the Court, in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209. Equality of bargaining power between capital and labor, to use the conventional terminology of our predominant economic system, was the aim of this legislation. The presupposition of collective bargaining was the progressive enlargement of the area of reason in the process of bargaining through the give-and-take of discussion and enforcing machinery within industry, in order to substitute, in the language of Mr. Justice Brandeis, "processes of justice for the more primitive method of trial by combat." *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 488 (dissenting). Promotion of unionism by the Wagner Act, with the resulting progress of rational collective bargaining, has been gathering momentum for a quarter of a century. In view of the economic and political strength which has thereby come to unions, interpretations of the Act ought not to proceed on the assumption that it actively throws its weight on the side of unionism in order to redress an assumed inequality of bargaining power. For the Court to fashion the rules governing collective bargaining on the assumption that the power and position of labor unions and their solidarity are what they were twenty-five years ago, is to fashion law on the basis of unreality. Accretion of power may carry with it increasing responsibility for the manner of its exercise.

Therefore, in the unfolding of law in this field it should not be the inexorable premise that the process of collective bargaining is by its nature a bellicose process. The broadly phrased terms of the Taft-Hartley Act should be applied to carry out the broadly conceived policies of the Act. At the core of the promotion of collective bargaining, which was the chief means by which the great social purposes of the National Labor Relations Act were sought to be furthered, is a purpose to discourage, more

and more, industrial combatants from pressing their demands by all available means to the limits of the justification of self-interest. This calls for appropriate judicial construction of existing legislation. The statute lays its emphasis upon reason and a willingness to employ it as the dominant force in bargaining. That emphasis is respected by declining to take as a postulate of the duty to bargain that the legally impermissible exertions of so-called economic pressure must be restricted to the crudities of brute force. Cf. *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

However, it of course does not follow because the Board may find in tactics short of violence evidence that a party means not to bargain in good faith that every such finding must be sustained. Section 8 (b)(3) itself, as previously construed by the Board and this Court and as amplified by § 8 (d), provides a substantial limitation on the Board's becoming, as the Court fears, merely "an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." The Board's function in the enforcement of the duty to bargain does not end when it has properly drawn an inference unfavorable to the respondent from particular conduct. It must weigh that inference as part of the totality of inferences which may appropriately be drawn from the entire conduct of the respondent, particularly its conduct at the bargaining table. The state of mind with which the party charged with a refusal to bargain entered into and participated in the bargaining process is the ultimate issue upon which alone the Board must act in each case, and on the sufficiency of the whole record to justify its decision the courts must pass. *Labor Board* v. *American National Ins. Co.*, 343 U. S. 395.

The Board urges that this Court has approved its enforcement of § 8 (b)(3) by the outlawry of conduct *per se*, and without regard to ascertainment of a state of

mind. It relies upon four cases: *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514; *Labor Board* v. *Crompton-Highland Mills,* 337 U. S. 217; *Labor Board* v. *F. W. Woolworth Co.,* 352 U. S. 938; and *Labor Board* v. *Borg-Warner Corp.,* 356 U. S. 342. These cases do not sustain its position. While it is plain that the *per se* proscription of an employer's refusal to reduce a collective agreement to writing was approved in the *Heinz* case, it is equally plain from its opinion in that case as well as its argument before this Court that the Board itself regarded the act of refusal to agree to the integration of the agreement in a writing as a manifestation that the employer's state of mind was hostile to agreement with the union. This Court so regarded the evidence. 311 U. S., at 525–526. Decision in the *Borg-Warner* case proceeded from a similar premise. By forcing a deadlock upon a non-statutory subject of bargaining the employer manifested his intention to withdraw the statutory subjects from bargaining. The *Crompton-Highland* decision rested not on approval of a *per se* rule that unilateral changes of the conditions of employment by an employer during bargaining constitute a refusal to bargain, but upon the inferences of a lack of good faith which arose from the facts, among others, that the employer instituted a greater increase than it had offered the union and that it did so without consulting the union. Finally, no such conclusion as the Board urges can be drawn from the summary disposition of the *Woolworth* case here.[4] To the extent that in any of these cases

[4] The Court held that "The Board acted within its allowable discretion in finding that under the circumstances of this case failure to furnish the wage information constituted an unfair labor practice." It cited *Labor Board* v. *Truitt Mfg. Co.,* 351 U. S. 149; and in *Truitt* the entire Court was in agreement both that the withholding of wage information by the employer was weighty evidence of a lack of willingness to bargain sincerely, and that the judgment of the Board had to be predicated on all the facts pertinent to state

language referred to a *per se* proscription of conduct it was in relation to facts strongly indicating a lack of a sincere desire to reach agreement.

Moreover, in undertaking to fashion the law of collective bargaining in this case in accordance with the command of § 8 (b)(3), the Board has considered § 8 (b)(3) in isolation, as if it were an independent provision of law, and not a part of a reticulated legislative scheme with interlacing purposes. It is the purposes to be drawn from the statute in its entirety, with due regard to all its interrelated provisions, in relation to which § 8 (b)(3) is to be applied. Cf. *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 456. A pertinent restraint on the Board's power to consider as inimical to fair bargaining the exercise of the "economic" weapons of labor is expressed in the Act by § 13: [5]

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Section 501 (2) of the Labor Management Relations Act provides a definition of "strike": [6]

> "When used in this Act—. . . (2) The term "strike" includes any strike or other concerted stoppage of

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of mind. 351 U. S., at 153, 155. Moreover, the lower court in the *Woolworth* case found that the Board had not proceeded by a *per se* determination, 235 F. 2d 319, 322 (C. A. 9th Cir.), but that there was no basis for its conclusion that the information requested was relevant to administration of the agreement.

[5] While the Board does consider these sections in connection with respondent's assertion that they afford protection to its conduct from Board regulation, see n. 8, *infra,* it does not consider their application as a rule of construction of § 8 (b)(3).

[6] Although I am in sympathy with the Court's conclusion that the construction of § 8 in this case is to be uninfluenced by what

work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

As the last clause of § 13 makes plain, the section does not recognize an unqualified right, free of Board interference, to engage in "strikes," as respondent contends. The Senate Report[7] dealing with the addition of the clause to the section confirms that its purpose was to approve the elaboration of limitations on the right to engage in activities nominally within the definition of § 501 (2) which this Court had heretofore developed in such cases as *Labor Board* v. *Fansteel Metallurgical Corp., supra; Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332; and *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31. But "limitations and qualifications" do not extinguish the rule. For the Board to proceed, as it apparently claims

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was said in *Automobile Workers* v. *Wisconsin Board*, 336 U. S. 245, I do not agree that that case held that the definitions of § 501 (2) are inapplicable to § 13. The question which the Court there considered was whether § 13, as defined in § 501 (2), independently rendered activities within its terms immune from state regulation. The Court's observation that for § 501 (2) to have so extended the force of § 13 would have been inconsistent with the purpose of the inclusion of the definition, which was to extend the Board's power with reference to the unfair labor practice defined by § 8 (b) (4), 336 U. S., at 263, was made in light of the contention that § 13 itself had the effect of precluding the States. The crux of the decision with regard to § 13 was that it announced no more than a rule of construction of the Federal Act. It was neither argued nor decided that § 501 (2) does not apply to § 13. There appears to be no support for such a conclusion either in the text of the Act or in its legislative history. It is hardly conceivable that such a word as "strike" could have been defined in these statutes without congressional realization of the obvious scope of its application.

[7] S. Rep. No. 105, 80th Cong., 1st Sess. (1947), at p. 28. This provision of the Taft bill was adopted by the Conference. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), at p. 59.

power to do, against conduct which, but for the bargaining context in which it occurs, would not be within those limitations,[8] it must rely upon the specific grant of power to enforce the duty to bargain which is contained in § 8 (b)(3). In construing that section the policy of the rule of construction set forth by § 13, see *Automobile Workers* v. *Wisconsin Board,* 336 U. S. 245, 259, must be taken into account. In the light of that policy there is no justification for divorcing from the total bargaining situation particular tactics which the Board finds undesirable, without regard to the actual conduct of bargaining in the case before it.

The scope of the permission embodied in § 13 must be considered by the Board in determining, under a proper rule of law, whether the totality of the respondent's conduct justifies the conclusion that it has violated the "specific" command of § 8 (b)(3). When the Board emphasizes tactics outside the negotiations themselves as the basis of the conclusion that the color of illegitimacy is imparted to otherwise apparently bona fide negotiations, § 13 becomes relevant. A total, peaceful strike in compliance with the requirements of § 8 (d) would plainly not suffice to sustain the conclusion; prolonged union-sponsored violence directed at the company to secure com-

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[8] The Board urges that respondent's activities are not within the "dispensation or protection" of § 13, because *Automobile Workers* v. *Wisconsin Board,* 336 U. S. 245, held "slowdowns" to be "unprotected" activities subject to state regulation. The argument misreads the significance of that case as regards § 13. See n. 6, *supra.* Nor is it valid to assume that all conduct loosely described as a "slowdown" has the same legal significance, or that union sponsorship of such conduct falls within the "limitations or qualifications" on the right to strike incorporated in § 13 in every case in which employee participation in it would be "unprotected" by § 7, and therefore subject to economic retaliation by the employer. See the portions of the Board's order quoted in n. 1, *supra.*

pliance as plainly would. Here, as in so many legal situations of different gradations, drawing the line between them is not an abstract, speculative enterprise. Where the line ought to be drawn should await the decision of particular cases by the Board. It involves experienced judgment regarding the justification of the means and the severity of the effect of particular conduct in the specialized context of bargaining.

Section 8 (d), which was added in the amendments of 1947, is also inconsistent with the Board's claim of power to proscribe conduct without regard to the state of mind with which the actor participated in negotiations. The 1935 Act did not define the "practice and procedure of collective bargaining" which it purposed to "encourage." Act of July 5, 1935, § 1, 49 Stat. 449. That definition, until 1947, was evolved by the Board and the courts in the light of experience in the administration of the Act. See, *e. g., H. J. Heinz Co.* v. *Labor Board, supra.* In 1947, after considerable controversy over the need to objectify the elements of the duty to bargain, § 8 (d) was enacted. We have held that the history of that enactment demonstrates an intention to restrain the Board's power to regulate, whether directly or indirectly, the substantive terms of collective agreements. *Labor Board* v. *American National Ins. Co., supra,* at 404. In the same case we recognized that implicit in that purpose is a restraint upon the Board's proceeding by the proscription of conduct *per se* and without regard to inferences as to state of mind to be drawn from the totality of the conduct in each case. *Id.,* at 409.

Finally, it is not disputed that the duty to bargain imposed on unions in 1947 was the same as that previously imposed on employers, and it is therefore not without significance for its present assertion of power that for 25 years of administration of the employer's duty

to bargain, which was imposed by the Act of 1935 and preserved by the amendments of 1947, the Board has not found it necessary to assert that it may proscribe conduct as undesirable in bargaining without regard to the actual course of the negotiations. See *Federal Trade Comm'n* v. *Bunte Bros.*, 312 U. S. 349, 351–352.

These considerations govern the disposition of the case before the Court. Viewed as a determination upon all the evidence that the respondent bargained without the sincere desire to compose differences and reach agreement which the statute commands, the Board's conclusion must fall for want of support in the evidence as a whole. See *Universal Camera Corp.* v. *Labor Board, supra.* Apart from any restraint upon its conclusion imposed by § 13, a matter which the Board did not consider, no reason is manifest why the respondent's nuisance tactics here should be thought a sufficient basis for the conclusion that all its bargaining was in reality a sham. On this record it does not appear that respondent merely stalled at the bargaining table until its conduct outside the negotiations might force Prudential to capitulate to its demands, nor does any other evidence give the color of pretence to its negotiating procedure. From the conduct of its counsel before the Trial Examiner, and from its opinion, it is apparent that the Board proceeded upon the belief that respondent's tactics were, without more, sufficient evidence of a lack of a sincere desire to reach agreement to make other consideration of its conduct unnecessary. For that reason the case should be remanded to the Board for further opportunity to introduce pertinent evidence, if any there be, of respondent's lack of good faith.

Viewed as a determination by the Board that it could, quite apart from respondent's state of mind, proscribe its tactics because they were not "traditional," or were

thought to be subject to public disapproval, or because employees who engaged in them may have been subject to discharge, the Board's conclusion proceeds from the application of an erroneous rule of law.

The decision of the Court of Appeals should be vacated, and the case remanded to the Board for further proceedings consistent with these views.

BATES ET AL. *v.* CITY OF LITTLE ROCK ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 41. Argued November 18, 1959.—
Decided February 23, 1960.

Petitioners, custodians of the records of local branches of the National Association for the Advancement of Colored People, were tried, convicted and fined for violating identical occupational license tax ordinances of two Arkansas cities by refusing to furnish the city officials with lists of the names of the members of the local branches of the Association. *Held:* On the record in this case, compulsory disclosure of the membership lists would work unjustified interference with the members' freedom of association, which is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States; and the convictions are reversed. Pp. 517–527.

(a) It is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States. Pp. 522–523.

(b) On the record in this case, it sufficiently appears that compulsory disclosure of the membership lists of the local branches of the Association would work a significant interference with the freedom of association of their members. Pp. 523–524.

(c) The cities here, as instrumentalities of the State, have not demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures would effect, since the record discloses no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of these membership lists. Pp. 524–527.

229 Ark. 819, 319 S. W. 2d 37, reversed.

Robert L. Carter argued the cause for petitioners. With him on the brief was *George Howard, Jr.*

Joseph C. Kemp argued the cause for the City of Little Rock, respondent. With him on the brief was *C. Richard Crockett.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Each of the petitioners has been convicted of violating an identical ordinance of an Arkansas municipality by refusing a demand to furnish city officials with a list of the names of the members of a local branch of the National Association for the Advancement of Colored People. The question for decision is whether these convictions can stand under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Municipalities in Arkansas are authorized by the State to levy a license tax on any person, firm, individual, or corporation engaging in any "trade, business, profession, vocation or calling" within their corporate limits.[1] Pursuant to this authority, the City of Little Rock and the City of North Little Rock have for some years imposed annual license taxes on a broad variety of businesses, occupations, and professions.[2] Charitable organizations which engage in the activities affected are relieved from paying the taxes.

In 1957 the two cities added identical amendments to their occupation license tax ordinances. These amendments require that any organization operating within the municipality in question must supply to the City Clerk,

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[1] Ark. Stat., 1947, § 19–4601.

[2] Little Rock Ord. No. 7444. North Little Rock Ord. No. 1786. These ordinances have been amended numerous times by adding various businesses, occupations and professions to be licensed, and by changing the rates of the taxes imposed.

upon request and within a specified time, (1) the official name of the organization; (2) its headquarters or regular meeting place; (3) the names of the officers, agents, servants, employees, or representatives, and their salaries; (4) the purpose of the organization; (5) a statement as to dues, assessments, and contributions paid, by whom and when paid, together with a statement reflecting the disposition of the funds and the total net income; (6) an affidavit stating whether the organization is subordinate to a parent organization, and if so, the latter's name. The ordinances expressly provide that all information furnished shall be public and subject to the inspection of any interested party at all reasonable business hours.[3]

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[3] The pertinent provisions of the ordinances are as follows:

"Whereas, it has been found and determined that certain organizations within the City . . . have been claiming immunity from the terms of [the ordinance], governing the payment of occupation licenses levied for the privilege of doing business within the city, upon the premise that such organizations are benevolent, charitable, mutual benefit, fraternal or non-profit, and

"Whereas, many such organizations claiming the occupation license exemption are mere subterfuges for businesses being operated for profit which are subject to the occupation license ordinance;

"Now, Therefore, Be It Ordained by the City Council of the City . . . .

"Section 1. The word 'organization' as used herein means any group of individuals, whether incorporated or unincorporated.

"Section 2. Any organization operating or functioning within the City . . . including but not limited to civic, fraternal, political, mutual benefit, legal, medical, trade, or other organization, upon the request of the Mayor, Alderman, Member of the Board of Directors, City Clerk, City Collector, or City Attorney, shall list with the City Clerk the following information within 15 days after such request is submitted:

"A. The official name of the organization.

"B. The office, place of business, headquarters or usual meeting place of such organization.

[*Footnote 3 continued on p. 519.*]

Petitioner Bates was the custodian of the records of the local branch of the National Association for the Advancement of Colored People in Little Rock, and petitioner Williams was the custodian of the records of the North Little Rock branch. These local organizations supplied the two municipalities with all the information required by the ordinances, except that demanded under § 2E of each ordinance which would have required disclosure of the names of the organizations' members and contributors. Instead of furnishing the detailed breakdown required by this section of the North Little Rock ordinance, the petitioner Williams wrote to the City Clerk as follows:

"C. The officers, agents, servants, employees or representatives of such organization, and the salaries paid to them.

"D. The purpose or purposes of such organization.

"E. A financial statement of such organization, including dues, fees, assessments and/or contributions paid, by whom paid, and the date thereof, together with the statement reflecting the disposition of such sums, to whom and when paid, together with the total net income of such organization.

"F. An affidavit by the president or other officiating officer of the organization stating whether the organization is subordinate to a parent organization, and if so, the name of the parent organization.

"Section 3. This ordinance shall be cumulative to other ordinances heretofore passed by the City with reference to occupation licenses and the collection thereof.

"Section 4. All information obtained pursuant to this ordinance shall be deemed public and subject to the inspection of any interested party at all reasonable business hours.

"Section 5. Any section or part of this ordinance declared to be unconstitutional or void shall not affect the remaining sections of the ordinance, and to this end the sections or subsections hereof are declared to be severable.

"Section 6. Any person or organization who shall violate the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined . . . ."

"E. The financial statement is as follows:

January 1, 1957 to December 4, 1957.

Total receipts from membership and contributors $252.00.

Total expenditures (to National Office)	$183.60
Secretarial help	5.00
Stationery, stamps, etc	3.00
Total	$191.60
On Hand	60.40

"F. I am attaching my affidavit as president indicating that we are a Branch of the National Association for the Advancement of Colored People, a New York Corporation.

"We cannot give you any information with respect to the names and addresses of our members and contributors or any information which may lead to the ascertainment of such information. We base this refusal on the anti-NAACP climate in this state. It is our good faith and belief that the public disclosure of the names of our members and contributors might lead to their harassment, economic reprisals, and even bodily harm. Moreover, even aside from that possibility, we have been advised by our counsel, and we do so believe that the city has no right under the Constitution and laws of the United States, and under the Constitution and laws of the State of Arkansas to demand the names and addresses of our members and contributors. We assert on behalf of the organization and its members the right to contribute to the NAACP and to seek under its aegis to accomplish the aims and purposes herein described free from any restraints or interference from city or state officials. In addition we assert the right of our

> members and contributors to participate in the activities of the NAACP, anonymously, a right which has been recognized as the basic right of every American citizen since the founding of this country. . . ."

A substantially identical written statement was submitted on behalf of the Little Rock branch of the Association to the Clerk of that city.

After refusing upon further demand to submit the names of the members of her organization,[4] each petitioner was tried, convicted, and fined for a violation of the ordinance of her respective municipality. At the Bates trial evidence was offered to show that many former members of the local organization had declined to renew their membership because of the existence of the ordinance in question.[5] Similar evidence was received in the Williams

[4] Section 2E of the ordinances does not explicitly require submission of membership lists, but, rather, of "dues . . . and/or contributions paid, by whom paid . . . ." That the effect of this language was to require submission of the names of all members was made clear in the supplemental request made by the City Clerk of North Little Rock to the petitioner Williams:

"Dear Madam:

"At a regular meeting of the North Little Rock City Council held in the Council Chamber on December 9, 1957, I was instructed to request a list of the names and addresses of all the officers and members of the North Little Rock Branch of the NAACP.

"This portion of the questionaire answered by you on December 4, 1957 did not furnish this information. The above information must be received not later than December 18, 1957 as requested in the original questionaire received by you on December 3, 1957."

(In fact, the names of all the officers of the North Little Rock branch had already been submitted in accordance with § 2C of the ordinance.)

[5] For example, petitioner Bates testified: "Well, I will say it like this—for the past five years I have been collecting, I guess, 150 to 200 members each year—just renewals of the same people. This year, I guess I lost 100 or 150 of those same members because when I went back for renewals they said, 'Well, we will wait and see what happens in the Bennett Ordinance.' "

trial,[6] as well as evidence that those who had been publicly identified in the community as members of the National Association for the Advancement of Colored People had been subjected to harassment and threats of bodily harm.[7]

On appeal the cases were consolidated in the Supreme Court of Arkansas, and, with two justices dissenting, the convictions were upheld. 229 Ark. 819, 319 S. W. 2d 37. The court concluded that compulsory disclosure of the membership lists under the circumstances was "not an unconstitutional invasion of the freedoms guaranteed . . ." but "a mere incident to a permissible legal result." [8] Because of the significant constitutional question involved, we granted certiorari. 359 U. S. 988.

Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government

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[6] For example, a witness testified: "Well, the people are afraid to join, afraid to join because the people—they don't want their names exposed and they are afraid their names will be exposed and they might lose their jobs. They will be intimidated and they are afraid to join. They said, 'Well, you will have to wait. I can't do it.' They are afraid to give their—because they are afraid somebody, if their names are publicized, then they will lose their jobs or be intimidated or what-not."

[7] For example, petitioner Williams testified: "Well, I have—we were not able to rest at night or day for quite a while. We had to have our phone number changed because they call that day and night and then we—they have found out the second phone number and they did the same way and they called me all hours of night over the telephone and then I had to get a new number and they have been trying to find out that one, of course. I would tell them who is talking and they have throwed stones at my home. They wrote me—I got a—I received a letter threatening my life and they threaten my life over the telephone. That is the way."

[8] The Arkansas Supreme Court construed § 2E of the ordinances as requiring disclosure "of the membership list." 229 Ark., at —, 319 S. W. 2d, at 41.

based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. U. S. Const., Amend. I. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States. *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460.

Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *American Communications Assn.* v. *Douds,* 339 U. S. 382, 402; *N. A. A. C. P.* v. *Alabama, supra; Smith* v. *California,* 361 U. S. 147. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . 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 circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *N. A. A. C. P.* v. *Alabama,* 357 U. S., at 462.

On this record it sufficiently appears that compulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members.[9] There was

[9] The cities do not challenge petitioners' right to raise any objections or defenses available to their organizations, nor do the cities challenge the right of the organizations in these circumstances to assert the individual rights of their members. Cf. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, at 458–459.

substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm. There was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw. This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names. *N. A. A. C. P.* v. *Alabama,* 357 U. S., at 463. Thus, the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote.

Decision in this case must finally turn, therefore, on whether the cities as instrumentalities of the State have demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449. See also *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Schneider* v. *State,* 308 U. S. 147; *Cox* v. *New Hampshire,* 312 U. S. 569, 574; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Prince* v. *Massachusetts,* 321 U. S. 158; *Kovacs* v. *Cooper,* 336 U. S. 77.

It cannot be questioned that the governmental purpose upon which the municipalities rely is a fundamental one. No power is more basic to the ultimate purpose and function of government than is the power to tax. See *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 150. Nor can it be doubted that the proper and efficient exercise of this

essential governmental power may sometimes entail the possibility of encroachment upon individual freedom. See *United States* v. *Kahriger,* 345 U. S. 22; *Hubbard* v. *Mellon,* 55 App. D. C. 341, 5 F. 2d 764.

It was as an adjunct of their power to impose occupational license taxes that the cities enacted the legislation here in question.[10] But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

In this record we can find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the Advancement of Colored People. The occupational license tax ordinances of the municipalities are squarely aimed at reaching all the commercial, professional, and business occupations within the communities. The taxes are not, and as a matter of state law cannot be, based on earnings or income, but upon the nature of the occupation or enterprise conducted.

Inquiry of organizations within the communities as to the purpose and nature of their activities would thus appear to be entirely relevant to enforcement of the ordinances. Such an inquiry was addressed to these organizations and was answered as follows:

> "We are an affiliate of a national organization seeking to secure for American Negroes their rights as

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[10] See note 3, *supra.*

guaranteed by the Constitution of the United States. Our purposes may best be described by quoting from the Articles of Incorporation of our National Organization where these purposes are set forth as:

"'. . . voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law. To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any kind and all things which may lawfully be done by a membership corporation organized under the laws of the State of New York for the further advancement of these objects.'

"The Articles of Incorporation hereinabove referred to are on file in the office of the Secretary of State of the State of Arkansas. In accord with these purposes and aims, [this] . . . Branch, NAACP was chartered and organized, and we are seeking to effectuate these principles within [this municipality]."

The municipalities have not suggested that an activity so described, even if conducted for profit, would fall within any of the occupational classifications for which a license is required or a tax payable. On oral argument counsel for the City of Little Rock was unable to relate any activity of these organizations to which a license tax might attach.[11] And there is nothing in the record to indicate

[11] A "catch-all" provision of the Little Rock ordinance imposes an annual tax upon "[a]ny person, firm, or corporation within the City . . . engaging in the business of selling any and all kinds of goods, wares, and merchandise, whether raw materials or finished products, or both, from a regularly established place of business main-

that a tax claim has ever been asserted against either organization. If the organizations were to claim the exemption which the ordinance grants to charitable endeavors, information as to the specific sources and expenditures of their funds might well be a subject of relevant inquiry. But there is nothing to show that any exemption has ever been sought, claimed, or granted—and positive evidence in the record to the contrary.

In sum, there is a complete failure in this record to show (1) that the organizations were engaged in any occupation for which a license would be required, even if the occupation were conducted for a profit; (2) that the cities have ever asserted a claim against the organizations for payment of an occupational license tax; (3) that the organizations have ever asserted exemption from a tax imposed by the municipalities, either because of their alleged nonprofit character or for any other reason.

We conclude that the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause. The petitioners cannot be punished for refusing to produce information which the municipalities could not constitutionally require. The judgments cannot stand.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring.

We concur in the judgment and substantially with the opinion because we think the facts show that the ordinances as here applied violate freedom of speech and

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tained within the City . . . ." The tax is measured by "the gross value of the average stock inventory for the preceding year," with a minimum of $25. It was conceded on oral argument by counsel for the City of Little Rock that this provision was inapplicable. No brief was filed nor oral argument made on behalf of the City of North Little Rock.

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assembly guaranteed by the First Amendment which this Court has many times held was made applicable to the States by the Fourteenth Amendment, as for illustration in *Jones* v. *Opelika,* 316 U. S. 584, at 600, dissenting opinion adopted by the Court in 319 U. S. 103; *Murdock* v. *Pennsylvania,* 319 U. S. 105, at 108; *Kingsley Corp.* v. *Regents,* 360 U. S. 684. And see cases cited in *Speiser* v. *Randall,* 357 U. S. 513, 529, at 530 (concurring opinion).

Moreover, we believe, as we indicated in *United States* v. *Rumely,* 345 U. S. 41, 48, at 56 (concurring opinion), that First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right as *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, at 460, and *De Jonge* v. *Oregon,* 299 U. S. 353, at 363, hold. These are principles applicable to all people under our Constitution irrespective of their race, color, politics, or religion. That is, for us, the essence of the present opinion of the Court.

PETITE *v.* UNITED STATES.

ON MOTION TO VACATE THE JUDGMENT AND DISMISS THE INDICTMENT.

No. 45. Decided February 23, 1960.

In a case where double jeopardy was the sole question presented, based on separate indictments and convictions in two different United States District Courts for the same criminal conduct, the Solicitor General moved to vacate the second judgment and to dismiss the second indictment, on the ground that it is the general policy of the Federal Government that several offenses arising out of a single transaction should not be made the basis of multiple prosecutions. Counsel for petitioner joined in and consented to the motion. *Held:* Without passing on the merits of the question of double jeopardy, the case is remanded to the Court of Appeals to vacate its judgment and to direct the District Court to vacate its judgment and dismiss the indictment. Pp. 529–531.

262 F. 2d 788, remanded with directions to vacate judgments and dismiss indictment.

Edward Bennett Williams, Raymond W. Bergan and *Agnes A. Neill* for petitioner.

Solicitor General Rankin, Assistant Attorney General Wilkey, Wayne G. Barnett, Beatrice Rosenberg and *Jerome M. Feit* for the United States.

PER CURIAM.

Petitioner was indicted, with others, in the Eastern District of Pennsylvania for conspiring to make false statements to an agency of the United States at hearings held in Philadelphia and Baltimore under proceedings for the deportation of an alien. Petitioner was also separately indicted for suborning perjury at the Philadelphia hearings. Petitioner's co-defendants pleaded guilty to the conspiracy charged. Petitioner went to trial on both indictments, but at the close of the Government's case he

changed his plea to *nolo contendere* to the conspiracy charge, and the Government dismissed the subornation indictment. He was fined $500 and sentenced to two months' imprisonment, which he served. Petitioner was subsequently indicted in the District of Maryland for suborning the perjury of two witnesses at the Baltimore hearings. Among the overt acts which had been relied upon in the Pennsylvania conspiracy indictment was the testimony of these two witnesses. Because of this, petitioner moved to dismiss the Maryland indictment on the ground of double jeopardy, but his motion was denied, 147 F. Supp. 791, and the conviction which resulted was affirmed by the Court of Appeals for the Fourth Circuit, 262 F. 2d 788.

Thereupon a petition for a writ of certiorari was filed with the double jeopardy issue as the single question presented, and certiorari was granted. 360 U. S. 908. The Government did not oppose the granting of this petition, but informed the Court that the case was under consideration by the Department of Justice to determine whether the second prosecution in the District of Maryland was consistent with the sound policy of the Department in discharging its responsibility for the control of government litigation wholly apart from the question of the legal validity of the claim of double jeopardy.

In due course the Government filed this motion for an order vacating the judgment below and remanding the case to the United States District Court for the District of Maryland with directions to dismiss the indictment. It did so on the ground that it is the general policy of the Federal Government "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement."

The Solicitor General on behalf of the Government represents this policy as closely related to that against duplicating federal-state prosecutions, which was formally defined by the Attorney General of the United States in a memorandum to the United States Attorneys. (Department of Justice Press Release, Apr. 6, 1959.) Counsel for petitioner "joins in and consents" to the Government's motion.

The case is remanded to the Court of Appeals to vacate its judgment and to direct the District Court to vacate its judgment and to dismiss the indictment. In the interest of justice, the Court is clearly empowered thus to dispose of the matter, 28 U. S. C. § 2106, and we do so with due regard for the settled rule that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39. By thus disposing of the matter, we are of course not to be understood as remotely intimating in any degree an opinion on the question of double jeopardy sought to be presented by the petition for certiorari.

MR. CHIEF JUSTICE WARREN, concurring.

I concur with the judgment of the Court, but desire to record my reasons for so doing.

The Solicitor General, who has statutory authority to conduct litigation in this Court,[1] has requested us to vacate the judgment and remand for dismissal in the interests of justice. The petitioner has consented. Under these circumstances, I believe that 28 U. S. C. § 2106 empowers us to entertain the motion.[2]

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[1] 1 Stat. 92; 16 Stat. 162; R. S. § 359; 5 U. S. C. § 309.

[2] Section 2106 reads as follows:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree,

Authority to grant this type of motion is one thing, however, and determination of the considerations relevant to a proper exercise of that authority is another. As I believe that the Court should not deny all such motions peremptorily, so do I believe that we should not automatically grant them through invocation of the policy of avoiding decision of constitutional issues. There are circumstances in which our responsibility of definitively interpreting the law of the land and of supervising its judicial application would dictate that we dispose of a case on its merits. In a situation, for example, where the invalidity of the judgment is clear and the motion to vacate and remand is obviously a means of avoiding an adjudication, I think we would be remiss in our duty were we to grant the motion.

But this is not such a case. Although a full hearing might well establish petitioner's contention that his conviction violated the Double Jeopardy Clause of the Constitution, no devious purpose can be ascribed to the Government, which asserts that the prosecution of petitioner "was . . . by inadvertence," and that it "does not intend to take [such action] in the future." Its representation with respect to future practice is given support by the Attorney General's memorandum to United States Attorneys which establishes a closely related policy against successive federal-state prosecutions; and the reasonableness of its request is demonstrated by the fact that this memorandum was issued after the prosecution, the conviction, and the judgment of the Court of Appeals in this case. For these reasons the action requested is, in the words of § 2106, "just under the circumstances."

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or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

MR. JUSTICE BRENNAN, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join.

The Government has commendably done the just and right thing in asking us to wipe the slate clean of this second federal conviction for the same criminal conduct. But with all deference, I do not see how our duty can be fully performed in this case if our action stops with simply giving effect to a "policy" of the Government—a policy whose only written expression does not even cover the case at bar. Even where the Government confesses error, this Court examines the case on the merits itself, *Young* v. *United States,* 315 U. S. 257, 258–259, and one would not have thought our duty less in this case—particularly where the Government has reserved the right to apply or not apply its "policy" in its discretion. Presumably this reservation would apply to cases at the appellate level as well. "[T]he proper administration of the criminal law cannot be left merely to the stipulation of parties." *Id.,* at 259. I believe that the Double Jeopardy Clause of the Fifth Amendment was an insurmountable barrier to this second prosecution. My reasons supporting this view have been detailed in my separate opinion in *Abbate* v. *United States,* 359 U. S. 187, 196. On this basis I agree that the judgment of the Court of Appeals is not to stand; but I would reverse it on the merits.

NEW YORK EX REL. VALENTI *v.* McCLOSKEY, SHERIFF, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 563. Decided February 23, 1960.

Appeal dismissed for want of a properly presented federal question. Reported below: 6 N. Y. 2d 390, 160 N. E. 2d 647.

Gilbert S. Rosenthal for appellant.

Eliot H. Lumbard and *Nathan Skolnik* for appellees.

PER CURIAM.

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

NATIONAL CAN CORP. *v.* STATE TAX COMMISSION OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 564. Decided February 23, 1960.

Appeal dismissed for want of a substantial federal question. Reported below: 220 Md. 418, 153 A. 2d 287.

Herbert M. Brune for appellant.

C. Ferdinand Sybert, Attorney General of Maryland, and *John Martin Jones, Jr.,* Assistant Attorney General, for appellee.

PER CURIAM.

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

SIEBEL *v.* DEPARTMENT OF WELFARE OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 568. Decided February 23, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 6 N. Y. 2d 536, 161 N. E. 2d 1.

Albert Oppido for appellant.

Seymour B. Quel for appellee.

PER CURIAM.

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

BOARD OF EDUCATION OF UNION FREE SCHOOL DIST. NO. 3 ET AL. *v.* ALLEN, COMMISSIONER OF EDUCATION.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 571. Decided February 23, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 6 N. Y. 2d 871, 983; 160 N. E. 2d 119, 161 N. E. 2d 738.

John W. Burke for appellants.

Charles A. Brind for appellee.

PER CURIAM.

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

ALLENDALE CONGREGATION OF JEHOVAH'S WITNESSES *v.* GROSMAN ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 579. Decided February 23, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 30 N. J. 273, 152 A. 2d 569.

Hayden C. Covington for appellant.

Gerald E. Monoghan for appellees.

PER CURIAM.

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

DUNITZ ET AL. *v.* CITY OF LOS ANGELES ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 581. Decided February 23, 1960.

Appeal dismissed and certiorari denied.
Reported below: See 170 Cal. App. 2d 399, 338 P. 2d 1001.

John W. Holmes for appellants.

Roger Arnebergh and *Bourke Jones* for appellees.

PER CURIAM.

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

HUGHES *v.* OKLAHOMA.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF OKLAHOMA.

No. 594. Decided February 23, 1960.

Appeal dismissed and certiorari denied.
Reported below: 346 P. 2d 355.

Sid White for appellant.

PER CURIAM.

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

McABEE *v.* UNITED STATES.

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

No. 111, Misc. Decided February 23, 1960.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 104 U. S. App. D. C. 278, 261 F. 2d 744.

Petitioner *pro se.*

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Upon the suggestion of the Solicitor General the judgment of the Court of Appeals is vacated and the case is remanded to that court for consideration in light of *Johnson* v. *United States,* 352 U. S. 565, and *Ellis* v. *United States,* 356 U. S. 674.

HIGGINS *v.* STATE BAR OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 389, Misc. Decided February 23, 1960.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Herman F. Selvin for appellee.

PER CURIAM.

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

RYAN *v.* TINSLEY, WARDEN.

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

No. 490, Misc. Decided February 23, 1960.

PER CURIAM.

The appeal is dismissed.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 538 and 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

ORDERS FROM OCTOBER 12, 1959, THROUGH FEBRUARY 23, 1960.

OCTOBER 12, 1959.

Miscellaneous Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning October 1, 1959, and ending June 30, 1960, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE BURTON (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning October 1, 1959, and ending June 30, 1960, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

No. 518, October Term, 1958. ATLANTIC REFINING CO. ET AL. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL.; and

No. 536, October Term, 1958. TENNESSEE GAS TRANSMISSION CO. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL., 360 U. S. 378. The motion of Long Island Lighting Company to recall and amend the judgment is denied. *David K. Kadane* and *Bertram D. Moll* for Long Island Lighting Co., respondent-movant. *William C. Braden, Harry S. Littman* and *Jack Werner* for Tennessee Gas Transmission Co., petitioner in No. 536, in opposition.

No. 76. Superior Court of Washington for King County et al. *v.* Washington ex rel. Yellow Cab Service, Inc. On petition for writ of certiorari to the Supreme Court of Washington. The Solicitor General is invited to file a brief by November 16, 1959, setting forth the views of the National Labor Relations Board. Reported below: 53 Wash. 2d 644, 333 P. 2d 924.

No. 162. S. S. Silberblatt, Inc., *v.* Tax Commission of New York. On petition for writ of certiorari to the Court of Appeals of New York. The Solicitor General is invited to file a brief setting forth his views as to the importance to the Federal Government of the issues involved. Reported below: 5 N. Y. 2d 635, 159 N. E. 2d 195.

No. 10, Original. United States *v.* Louisiana et al. The motion of the State of Louisiana for leave to file a reply brief is granted. The motion of the State of Texas for leave to file a memorandum is granted. The motion of the United States for leave to file a supplemental memorandum is granted. The Chief Justice and Mr. Justice Clark took no part in the consideration or decision of these motions. *Solicitor General Rankin* for the United States. *Jack P. F. Gremillion,* Attorney General of Louisiana, *W. Scott Wilkinson, Victor A. Sachse, Edward M. Carmouche, John L. Madden* and *Bailey Walsh,* Special Assistant Attorneys General, and *Hugh M. Wilkinson* and *Marc Dupuy, Jr.* for the State of Louisiana; *Price Daniel,* Governor of Texas, *Will Wilson,* Attorney General of Texas, *James N. Ludlum,* First Assistant Attorney General, *Houghton Brownlee, Jr., James H. Rogers* and *John Flowers,* Assistant Attorneys General, *James P. Hart, J. Chrys Dougherty* and *Robert J. Hearon, Jr.* for the State of Texas, respondents.

No. 67, October Term, 1958. DYER ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL., 359 U. S. 499. The motion to clarify the judgment is denied. The motion to retax costs is granted. The judgment of this Court of May 18, 1959, is recalled and the Clerk is directed to incorporate therein a reassessment of the costs so as to provide for the payment of one-half of the costs by the Union Electric Company. *J. Raymond Dyer* for petitioners-movants.

No. 824, October Term, 1958. VANT ET AL. *v.* MUTUAL BENEFIT LIFE INSURANCE CO., 359 U. S. 1002. The motion to withdraw the motion for leave to file a motion to remand is granted. *Paul Ginsburg* for petitioners-movants.

No. 4. JOHNSON, SUPERINTENDENT OF PUBLIC WORKS, *v.* TUSCARORA NATION OF INDIANS, ALSO KNOWN AS TUSCARORA INDIAN NATION. Appeal from the United States Court of Appeals for the Second Circuit. The motion to substitute John Burch McMorran as the party appellant in the place of John W. Johnson is granted. *Louis J. Lefkowitz,* Attorney General of New York, for appellant. Reported below: 257 F. 2d 885.

No. 153. MCGANN *v.* UNITED STATES. Certiorari, 360 U. S. 929, to the United States Court of Appeals for the Second Circuit. The motion for the appointment of counsel is granted and it is ordered that *Thomas Homer Davis, Esquire,* of Leavenworth, Kansas, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. ——. IN RE MALONE. Joseph Malone, Jr., of Catskill, New York, having resigned as a member of the Bar of this Court, it is ordered that his name be stricken from the rolls of attorneys admitted to practice in this Court.

No. 66, Misc. ZIESEMER *v.* RIEDMAN, WARDEN;
No. 90, Misc. HART *v.* TAYLOR, WARDEN, ET AL.;
No. 92, Misc. MILLER *v.* WILKINSON, WARDEN;
No. 113, Misc. JEFFERSON *v.* BANMILLER, WARDEN;
No. 127, Misc. COLLINS *v.* ILLINOIS ET AL.;
No. 154, Misc. CASH *v.* CLEMMER, DIRECTOR, DEPT. OF CORRECTIONS, D. C., ET AL.;
No. 155, Misc. BROADUS-BEY *v.* CLEMMER, DIRECTOR, DEPT. OF CORRECTIONS, D. C., ET AL.;
No. 158, Misc. GLENN *v.* ROBERTSON;
No. 218, Misc. MAHURIN *v.* NASH, WARDEN;
No. 221, Misc. OTTEN *v.* MARYLAND;
No. 240, Misc. TELLEZ *v.* UNITED STATES; and
No. 246, Misc. ELLIS *v.* REID, SUPERINTENDENT, DISTRICT OF COLUMBIA JAIL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 32, Misc. MILLER *v.* BENNETT, WARDEN. Motion for leave to file petition for writ of habeas corpus and for other relief denied. Petitioner *pro se*. *Norman A. Erbe*, Attorney General of Iowa, and *Freeman H. Forrest*, Assistant Attorney General, for respondent.

No. 156, Misc. ATLANTIC COAST LINE RAILROAD CO. ET AL. *v.* RISS & COMPANY, INC. Motion for leave to file petition for writ of certiorari denied. *Francis M. Shea, Lawrence J. Latto, Richard T. Conway, Hugh B. Cox, James H. McGlothlin, Stuart S. Ball, Joseph H. Hays, Joseph D. Feeney, Jr., Prime F. Osborn, Charles T. Abeles, Henry L. Walker, Edwin H. Burgess, J. Raymond Hoover, H. Graham Morison, Newell A. Clapp, John D. Lane, Fred S. Gilbert, Jr., Martin A. Meyer, Jr., Edward K. Wheeler* and *Robert G. Seaks* for petitioners. *A. Alvis Layne, Lester M. Bridgeman* and *Robert L. Wright* for respondent. Reported below: 170 F. Supp. 354.

No. 85, Misc. BASCELIO *v.* MAYO, STATE PRISON CUSTODIAN; and

No. 210, Misc. BARBER *v.* BANNAN, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus and for other relief denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 104, Misc. AKINS *v.* TINSLEY;

No. 220, Misc. MCCORKLE *v.* BANMILLER, SUPERINTENDENT, EASTERN STATE PENITENTIARY; and

No. 241, Misc. CULLEY *v.* MARYLAND. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 34, Misc. EASTERN STATES PETROLEUM CORP. *v.* PRETTYMAN, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, ET AL.;

No. 112, Misc. WORZ, INC., *v.* PRETTYMAN, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, ET AL.;

No. 139, Misc. ODUM *v.* ILLINOIS; and

No. 172, Misc. FOUTTY *v.* MARSHALL, COMMON PLEAS COURT JUDGE, FRANKLIN COUNTY. Motions for leave to file petitions for writs of mandamus denied. *Gerard R. Moran* and *Edwin G. Martin* for petitioner in No. 34, Misc. *Eliot C. Lovett* for petitioner in No. 112, Misc. Petitioners *pro se* in Nos. 139, Misc., and 172, Misc. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *Seymour Farber* for respondents in No. 34, Misc. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Ernest L. Folk III, John L. Fitzgerald* and *Max D. Paglin* for respondents and for the Federal Communications

Commission in opposition in No. 112, Misc. Reported below: No. 34, Misc., 105 U. S. App. D. C. 219, 265 F. 2d 593; No. 112, Misc., 106 U. S. App. D. C. 14, 268 F. 2d 889.

Probable Jurisdiction Noted.

No. 71. De Veau *v.* Braisted, District Attorney. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. *Thomas W. Gleason* for appellant. *Thomas R. Sullivan* for appellee. *Nanette Dembitz* filed a brief for the New York Civil Liberties Union, as *amicus curiae,* in support of appellant. Reported below: 5 N. Y. 2d 236, 157 N. E. 2d 165.

No. 74. American Trucking Associations, Inc., et al. *v.* United States et al. Appeal from the United States District Court for the District of Columbia. Probable jurisdiction noted. *Peter T. Beardsley* for appellants. *Robert W. Ginnane* for the Interstate Commerce Commission, *Edward M. Reidy, William Meinhold* and *Robert L. Pierce* for Pacific Motor Trucking Co., and *Henry M. Hogan, Walter R. Frizzell* and *Beverley S. Simms* for General Motors Corp., appellees. Reported below: 170 F. Supp. 38.

No. 86. Huron Portland Cement Co. *v.* City of Detroit et al. Appeal from the Supreme Court of Michigan. Probable jurisdiction noted. *Alfred E. Lindbloom, Charles Wright, Jr.* and *Laurence A. Masselink* for appellant. *Nathaniel H. Goldstick* for appellees. Reported below: 355 Mich. 227, 93 N. W. 2d 888.

No. 80. Scripto, Inc., *v.* Carson, Sheriff, et al. Appeal from the Supreme Court of Florida. Probable jurisdiction noted. *Ernest P. Rogers* for appellant. Reported below: 105 So. 2d 775.

No. 258. International Association of Machinists et al. *v.* Street et al. Appeal from the Supreme Court of Georgia. Probable jurisdiction noted. *Milton Kramer, Lester P. Schoene* and *Cleburne E. Gregory, Jr.* for appellants. Reported below: 215 Ga. 27, 108 S. E. 2d 796.

No. 98. Union Pacific Railroad Co. *v.* United States. Appeal from the United States District Court for the Southern District of Iowa. Probable jurisdiction noted. *Elmer B. Collins* and *James H. Anderson* for appellant. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *John G. Laughlin, Jr.* for the United States. Reported below: 173 F. Supp. 397.

Certiorari Granted. (*See also No. 120, ante, p. 11; No. 2, Misc., ante, p. 4; No. 12, Misc., ante, p. 5; and No. 33, Misc., ante, p. 13.*)

No. 83. Mitchell, Secretary of Labor, *v.* H. B. Zachry Co. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Stuart Rothman, Harold C. Nystrom, Bessie Margolin* and *Jacob I. Karro* for petitioner. *Chester H. Johnson* and *R. Dean Moorhead* for respondent. Reported below: 262 F. 2d 546.

No. 139. Kimm *v.* Hoy, District Director, Immigration and Naturalization Service. C. A. 9th Cir. Certiorari granted. *Joseph Forer* and *David Rein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *Robert G. Maysack* for respondent. Reported below: 263 F. 2d 773.

No. 156. Miner et al., Judges, U. S. District Court, *v.* Atlass. C. A. 7th Cir. Certiorari granted. *Harold A. Liebenson* and *John E. Harris* for petitioners. *Edward B. Hayes* for respondent. Reported below: 265 F. 2d 312.

No. 130. NIUKKANEN, ALIAS MACKIE, *v.* MCALEXANDER, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. *Reuben Lenske* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *Julia P. Cooper* for respondent. Reported below: 265 F. 2d 825.

No. 176. MITCHELL *v.* TRAWLER RACER, INC. C. A. 1st Cir. Certiorari granted. *Morris D. Katz* for petitioner. *Paul J. Kirby* for respondent. Reported below: 265 F. 2d 426.

No. 213. LEGERLOTZ *v.* ROGERS, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. Counsel are directed to discuss in their briefs and oral arguments, among other questions, the question whether the amendment of a "Return Order," as opposed to a "Notice of Intention to Return," is permissible, under the pertinent regulations or otherwise, and, if not, the effect of such an amendment on the pertinent limitations period.* *Robert H. Reiter* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, George B. Searls* and *Irwin A. Seibel* for respondent. Reported below: 105 U. S. App. D. C. 256, 266 F. 2d 457.

No. 278. NEEDELMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *A. C. Dressler* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 261 F. 2d 802.

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* [NOTE: This sentence was added by an order entered October 19, 1959.]

No. 214. Miller Music Corp. *v.* Charles N. Daniels, Inc. C. A. 2d Cir. Certiorari granted. *Harold H. Corbin* for petitioner. *Milton A. Rudin* for respondent. Reported below: 265 F. 2d 925.

No. 26. Sullivan, Chief Judge, U. S. District Court, *v.* Behimer et al. C. A. 7th Cir. Certiorari granted. *John C. Butler* for petitioner. *Warren E. King* for respondents. Reported below: 261 F. 2d 467.

No. 100. Order of Railroad Telegraphers et al. *v.* Chicago & North Western Railway Co. Motion of Railway Labor Executives' Association for leave to file brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. *Alex Elson, Lester P. Schoene, Brainerd Currie, Philip B. Kurland* and *Milton Kramer* for petitioners. *Carl McGowan* and *Jordan Jay Hillman* for respondent. *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for the Railway Labor Executives' Association. Reported below: 264 F. 2d 254.

No. 111. Schaffer et al. *v.* United States. C. A. 2d Cir. Certiorari granted. *Jacob Kossman* and *Irving W. Coleman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 266 F. 2d 435.

No. 122. Karp et al. *v.* United States. C. A. 2d Cir. Certiorari granted. *Harris B. Steinberg* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 266 F. 2d 435.

No. 126. ELKINS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Frederick Bernays Wiener* and *Walter H. Evans, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *Eugene L. Grimm* for the United States. Reported below: 266 F. 2d 588.

No. 141. MASSEY MOTORS, INC., *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *James P. Hill* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 264 F. 2d 552.

No. 165. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to Question No. 1 presented by the petition which reads as follows:

"Whether a district court under circumstances where a dispute arising under the Railway Labor Act has been submitted by a railroad to the National Railroad Adjustment Board and an injunction against a strike by employees is sought on authority of *Brotherhood of Railroad Trainmen* v. *Chicago River and Ind. RR Co.*, 353 U. S. 30, may on the granting of an injunction impose reasonable conditions designed to protect the employees against a harmful change in working conditions during pendency of the dispute before the Adjustment Board by ordering that the railroad restore the status quo, or, in the alternative, pay the employees the amount they would have been paid had changes in working conditions giving rise to the dispute not been made."

J. Hart Willis, Wayland K. Sullivan, Harold C. Heiss, Clarence E. Weisell and *V. C. Shuttleworth* for petitioners. *M. E. Clinton* and *O. O. Touchstone* for respondents. Reported below: 266 F. 2d 335.

No. 137. UNITED STATES *v.* BROSNAN ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States. Respondents *pro se*. Reported below: 264 F. 2d 762.

No. 167. TEXAS GAS TRANSMISSION CORP. ET AL. *v.* SHELL OIL CO.; and

No. 170. FEDERAL POWER COMMISSION *v.* SHELL OIL CO. C. A. 3d Cir. Certiorari granted. *Mathias F. Correa* for Texas Gas Transmission Corp., and *Gavin H. Cochran* for Louisville Gas & Electric Co. (*Lawrence W. Keepnews* of counsel), petitioners in No. 167. *Solicitor General Rankin, Assistant Attorney General Doub, Wayne G. Barnett, Samuel D. Slade, Willard W. Gatchell* and *Howard E. Wahrenbrock* for petitioner in No. 170. *William F. Kenney, Oliver L. Stone* and *George C. Schoenberger, Jr.* for respondent. Reported below: 263 F. 2d 223.

No. 183. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Samuel B. Stewart* and *Kenneth M. Johnson* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 265 F. 2d 862.

No. 229. CONTINENTAL GRAIN CO. *v.* BARGE FBL–585 ET AL. C. A. 5th Cir. Certiorari granted. *Eberhard P. Deutsch, Malcolm W. Monroe* and *René H. Himel, Jr.* for petitioner. Reported below: 268 F. 2d 240.

No. 283. HERTZ CORPORATION (SUCCESSOR TO J. FRANK CONNOR, INC.) *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Roswell Magill* and *Harry N. Wyatt* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 268 F. 2d 604.

No. 21, Misc. RODRIGUEZ *v.* NEW YORK. On petition for writ of certiorari to the Appellate Division of the Supreme Court of New York, First Judicial Department; and

No. 161, Misc. MOUNSEY *v.* NEW YORK. On petition for writ of certiorari to the Court of Appeals of New York. Motions for leave to proceed *in forma pauperis* and petitions for writs of certiorari granted. Cases transferred to the appellate docket and counsel are directed in their briefs and oral arguments to discuss the case of *Burns* v. *Ohio,* 360 U. S. 252. *Walter Gellhorn, Esquire,* of New York, New York, is appointed to serve as counsel for petitioners in these cases. *Frank S. Hogan* for respondent in No. 21, Misc. *Paxton Blair,* Solicitor General of New York, for respondent in No. 161, Misc.

No. 143. COMMISSIONER OF INTERNAL REVENUE *v.* EVANS ET UX. C. A. 9th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice, J. Dwight Evans, Jr.* and *Melva M. Graney* for petitioner. *Roswell Magill* and *Harry N. Wyatt* for respondents. Reported below: 264 F. 2d 502.

No. 270. ARMSTRONG ET AL. *v.* UNITED STATES. Court of Claims. Certiorari granted. *Solomon Dimond* and *Burton R. Thorman* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Leonard, Samuel D. Slade* and *John G. Laughlin, Jr.* for the United States. Reported below: 144 Ct. Cl. 441, 169 F. Supp. 259.

No. 22, Misc. HUDSON *v.* NORTH CAROLINA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of North Carolina granted. Case transferred to the appellate docket. Peti-

tioner *pro se*. *Malcolm B. Seawell,* Attorney General of North Carolina, *T. W. Bruton* and *Ralph Moody,* Assistant Attorneys General, for respondent.

No. 4, Misc. Noto *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 Second Circuit granted. Case transferred to the appellate docket. *John J. Abt* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 262 F. 2d 501.

Certiorari Denied. (See also No. 104, ante, p. 8; No. 110, ante, p. 9; No. 117, ante, p. 10; No. 132, ante, p. 9; No. 140, ante, p. 2; No. 157, ante, p. 12; No. 253, ante, p. 12; No. 59, Misc., ante, p. 13; No. 162, Misc., ante, p. 14; No. 201, Misc., ante, p. 14; and Misc. Nos. 85, 104, 156, 210, 220 and 241, supra.

No. 67. United States et al. *v.* Functional Music, Inc. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Ernest L. Folk III, John L. Fitzgerald* and *Max D. Paglin* for petitioners. *Paul A. Porter* and *George Bunn* for respondent. Reported below: 107 U. S. App. D. C. —, 274 F. 2d 543.

No. 77. Calder *v.* Hammond, Administrator. Supreme Court of Utah. Certiorari denied. Petitioner *pro se*. Reported below: 8 Utah 2d 333, 334 P. 2d 562.

No. 79. Kammerer et al. *v.* Jamison, Administrator. C. A. 3d Cir. Certiorari denied. *Charles E. Pledger, Jr., Justin L. Edgerton* and *Randolph C. Richardson* for petitioners. Reported below: 264 F. 2d 789.

No. 78. LOHR *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Robert M. Brake* and *Benjamin W. Turner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 264 F. 2d 619.

No. 82. COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO, *v.* OHIO BELL TELEPHONE CO. C. A. 6th Cir. Certiorari denied. *Howard M. Metzenbaum* and *Charles V. Koons* for petitioner. *Ashley M. Van Duzer* for respondent. Reported below: 265 F. 2d 221.

No. 84. MOHAWK REFINING CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 3d Cir. Certiorari denied. *Seymour Friedman* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon* and *P. B. Morehouse* for respondent. Reported below: 263 F. 2d 818.

No. 87. STATES MARINE CORPORATION OF DELAWARE *v.* ALDRIDGE. C. A. 9th Cir. Certiorari denied. *Francis L. Tetreault* for petitioner. *Richard Gladstein* and *Norman Leonard* for respondent. Reported below: 265 F. 2d 554.

No. 88. BERNSTEIN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *John T. Corrigan* for respondent.

No. 89. DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 745, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *L. N. D. Wells, Jr., David Previant* and *Herbert Thatcher* for petitioner. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott* and *Dominick L. Manoli* for respondent. Reported below: 264 F. 2d 642.

No. 90. Magnolia Motor & Logging Co. *v.* United States. C. A. 9th Cir. Certiorari denied. *Philip C. Wilkins* and *Richard N. Little* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *Eugene L. Grimm* for the United States. Reported below: 264 F. 2d 950.

No. 91. Audett *v.* United States. C. A. 9th Cir. Certiorari denied. *Thomas M. Jenkins* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 265 F. 2d 837.

No. 92. Selby *v.* United States. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 264 F. 2d 632.

No. 93. Pearson et al. *v.* United States. C. A. 4th Cir. Certiorari denied. *R. Kyle Hayes* and *T. R. Bryan* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Robert S. Erdahl* for the United States. Reported below: 265 F. 2d 167.

No. 94. Lee, Trustee in Bankruptcy, *v.* Fox Jewelry Co. C. A. 5th Cir. Certiorari denied. *J. Kurt Holland* for petitioner. Reported below: 264 F. 2d 720.

No. 102. James Blackstone Memorial Library Association et al. *v.* Gulf, Mobile & Ohio Railroad Co. C. A. 7th Cir. Certiorari denied. *Watson Washburn* for petitioners. *Kenneth F. Burgess, D. Robert Thomas, Walter J. Cummings, Jr.* and *Arthur R. Seder, Jr.* for respondent. Reported below: 264 F. 2d 445.

No. 96. Custom Built Homes Co., Inc., *v.* Kansas State Commission of Revenue and Taxation. Supreme Court of Kansas. Certiorari denied. *Paul Van Osdol, Jr.* for petitioner. *Clarence J. Malone* for respondent. Reported below: 184 Kan. 31, 334 P. 2d 808.

No. 99. Nacirema Operating Co., Inc., *v.* Calmar Steamship Corp. C. A. 4th Cir. Certiorari denied. *William L. Marbury* and *Jesse Slingluff* for petitioner. *George W. P. Whip* and *Robert E. Coughlan, Jr.* for respondent. Reported below: 266 F. 2d 79.

No. 101. Adair *v.* Stokes. C. A. 4th Cir. Certiorari denied. *G. Kenneth Miller* for petitioner. Reported below: 265 F. 2d 662.

No. 103. Far West Engineering Co., Inc., *v.* Craig et al. C. A. 9th Cir. Certiorari denied. *Victor R. Hansen* for petitioner. *Samuel Maidman* for respondents. Reported below: 265 F. 2d 251.

No. 105. International Woodworkers of America, Local Union No. 13–433, AFL–CIO, *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. *John Halpin, Jr.* for petitioner. *Solicitor General Rankin, Stuart Rothman, Thomas L. McDermott, Dominick L. Manoli* and *Margaret M. Farmer* for respondent. Reported below: 264 F. 2d 649.

No. 108. Mill Ridge Coal Co. *v.* Patterson, District Director of Internal Revenue. C. A. 5th Cir. Certiorari denied. *William B. White* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 264 F. 2d 713.

No. 107. MALFI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 264 F. 2d 147.

No. 109. ATWOOD ET AL. *v.* KERLIN. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *MacIlburne Van Voorhies* for respondent. Reported below: 264 F. 2d 4.

No. 113. NATIONAL LABOR RELATIONS BOARD *v.* CLEAVER-BROOKS MFG. CORP. C. A. 7th Cir. Certiorari denied. *Solicitor General Rankin, Jerome D. Fenton, Thomas J. McDermott* and *Dominick L. Manoli* for petitioner. *Victor M. Harding* for respondent. Reported below: 264 F. 2d 637.

No. 116. LOUISIANA EX REL. HOLIFIELD *v.* SEWERAGE AND WATER BOARD OF NEW ORLEANS. Court of Appeal for the Parish of Orleans, Louisiana. Certiorari denied. *James B. O'Neill* for petitioner. Reported below: 108 So. 2d 277.

No. 118. GINSBURG *v.* STERN ET AL., JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. *Paul Ginsburg* for petitioner. *Anne X. Alpern,* Attorney General of Pennsylvania, and *Harry J. Rubin,* Deputy Attorney General, for respondents. *Elder W. Marshall* and *Carl E. Glock, Jr.* for Stern et al., respondents. Reported below: 263 F. 2d 457.

No. 121. 396 CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frank J. Donner, Arthur Kinoy* and *Marshall Perlin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *Harold S. Harrison* for the United States. Reported below: 264 F. 2d 704.

No. 114. HOLT ET AL. *v.* RALEIGH CITY BOARD OF EDUCATION. C. A. 4th Cir. Certiorari denied. *Herman L. Taylor, Samuel S. Mitchell* and *James R. Walker, Jr.* for petitioners. *J. C. B. Ehringhaus, Jr.* for respondent. *Malcolm B. Seawell,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for the State of North Carolina, as *amicus curiae,* in support of respondent. Reported below: 265 F. 2d 95.

No. 123. HOSHMAN, TUTRIX, *v.* ESSO STANDARD OIL CO. C. A. 5th Cir. Certiorari denied. *Warren E. Miller* and *H. Alva Brumfield* for petitioner. *Einar B. Paust* for respondent. Reported below: 263 F. 2d 499.

No. 125. DOUBLE EAGLE REFINING CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 10th Cir. Certiorari denied. *Josh Lee* and *John Ogden* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon* and *P. B. Morehouse* for respondent. Reported below: 265 F. 2d 246.

No. 128. OSTHEIMER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Bernard V. Lentz* and *Herbert W. Reisner* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *Myron C. Baum* for the United States. *Orrie P. Stevens* for the National Association of Life Underwriters, as *amicus curiae,* in support of the petition. Reported below: 264 F. 2d 789.

No. 134. ALBAUGH *v.* ROGERS, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William A. Albaugh,* petitioner, *pro se. Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent.

No. 129. HOHENSEE *v.* FERGUSON ET AL. Supreme Court of Pennsylvania. Certiorari denied. *James C. Newton* for petitioner. *W. S. Moorhead, Jr.* for Ferguson, respondent.

No. 131. A. L. KORNMAN CO. *v.* AMALGAMATED CLOTHING WORKERS OF AMERICA. C. A. 6th Cir. Certiorari denied. *Cecil Sims* for petitioner. *William J. Isaacson* for respondent. Reported below: 264 F. 2d 733.

No. 133. D. C. TRANSIT SYSTEM, INC., *v.* SLINGLAND ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frank F. Roberson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Lionel Kestenbaum* for the United States, respondent. Reported below: 105 U. S. App. D. C. 264, 266 F. 2d 465.

No. 135. DEMPSTER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Charles D. Snepp* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *George F. Lynch* for the United States. Reported below: 265 F. 2d 666.

No. 136. DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Rowland L. Davis, Jr.* and *Walter L. Hill, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 264 F. 2d 112.

No. 142. CHAS. PFIZER & CO., INC., *v.* G. D. SEARLE & CO. C. A. 7th Cir. Certiorari denied. *Arthur G. Connolly* for petitioner. *Stuart S. Ball* and *Wm. T. Woodson* for respondent. Reported below: 265 F. 2d 385.

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No. 144. TISCH ET AL. *v.* ZABLE. C. A. 5th Cir. Certiorari denied. *Robert C. Ward* and *William G. Ward* for petitioners. *Claude Pepper* and *Alfred I. Hopkins* for respondent.

No. 145. GIGLIO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Harold W. Wolfram* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Heffron* and *Meyer Rothwacks* for the United States. Reported below: 263 F. 2d 410.

No. 146. ILLINOIS CENTRAL RAILROAD CO. *v.* ANDRE. C. A. 5th Cir. Certiorari denied. *H. Payne Breazeale, Joseph H. Wright* and *John W. Freels* for petitioner. *A. Leon Hebert* and *Percy J. Landry, Jr.* for respondent. Reported below: 267 F. 2d 372.

No. 147. S. C. JOHNSON & SON, INC., *v.* JOHNSON ET AL., DOING BUSINESS AS JOHNSON PRODUCTS CO. C. A. 6th Cir. Certiorari denied. *Francis C. Browne, William E. Schuyler, Jr., Andrew B. Beveridge* and *Walter P. Armstrong, Jr.* for petitioner. Reported below: 266 F. 2d 129.

No. 148. PANHANDLE EASTERN PIPE LINE CO. *v.* THORNTON, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. *William E. Miller* and *Joseph J. Daniels* for petitioner. *Robert E. McKean* for respondent. Reported below: 267 F. 2d 459.

No. 151. LIETZ *v.* FLEMMING, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 6th Cir. Certiorari denied. *Rowland W. Fixel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondent. Reported below: 264 F. 2d 311.

No. 149. Crookham *v.* New York Central Railroad Co. Supreme Court of Appeals of West Virginia. Certiorari denied. *J. G. F. Johnson* and *Ernest Franklin Pauley* for petitioner. *Robert H. C. Kay* for respondent. Reported below: 144 W. Va. —, 107 S. E. 2d 516.

No. 158. Palmer et al. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *John E. Marshall* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz, Meyer Rothwacks* and *L. W. Post* for respondent. Reported below: 267 F. 2d 434.

No. 160. Armour & Co. et al. *v.* United States. Court of Claims. Certiorari denied. *Clarence E. Dawson* and *Weston Vernon, Jr.* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, Meyer Rothwacks* and *Marvin W. Weinstein* for the United States. Reported below: 144 Ct. Cl. 697, 169 F. Supp. 521.

No. 174. Aplington, Administrator, *v.* United States. Court of Claims. Certiorari denied. *J. Paul Aplington* and *Frederick W. Irion* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, Harry Baum* and *Helen A. Buckley* for the United States. Reported below: 144 Ct. Cl. 683, 169 F. Supp. 815.

No. 180. Denton *v.* United States. Court of Claims. Certiorari denied. *Guy Emery* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 144 Ct. Cl. 840.

No. 159. GELB, ALIAS GORDIN, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Gertrude Gottlieb* and *Harry Salvan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *Theodore George Gilinsky* for the United States. Reported below: 269 F. 2d 675.

No. 161. GRAYBAR ELECTRIC CO., INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Paul L. Peyton* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron* and *Robert N. Anderson* for respondent. Reported below: 267 F. 2d 403.

No. 163. TERMINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 267 F. 2d 18.

No. 168. FEDERAL BROADCASTING SYSTEM, INC., *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles F. O'Neall* and *Francis C. Brooke* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, John L. Fitzgerald, Max D. Paglin* and *Ruth V. Reel* for the Federal Communications Commission, and *James A. McKenna, Jr.* and *Vernon L. Wilkinson* for WBBF, Inc., respondents. Reported below: 105 U. S. App. D. C. 324, 266 F. 2d 922.

No. 171. HANLON *v.* WATERMAN STEAMSHIP CORP. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Leavenworth Colby* for respondent. Reported below: 265 F. 2d 206.

No. 166. Pennsylvania Labor Relations Board *v.* Napoli, doing business as Seven-Up Bottling Co. Supreme Court of Pennsylvania. Certiorari denied. *Anne X. Alpern,* Attorney General of Pennsylvania, *Herbert N. Shenkin* and *Harry J. Rubin,* Deputy Attorneys General, for petitioner. *Jack J. Rosenberg* and *David E. Feller* for respondent. Reported below: 395 Pa. 301, 150 A. 2d 546.

No. 169. Diatomite Corporation of America *v.* Lehigh Portland Cement Co. C. A. 5th Cir. Certiorari denied. *Walter Humkey* for petitioner. *Harry H. Mitchell* and *George F. Gilleland* for respondent. Reported below: 265 F. 2d 444.

No. 172. Dupree *v.* United States. C. A. 3d Cir. Certiorari denied. *William J. Woolston* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *John G. Laughlin, Jr.* for the United States. Reported below: 264 F. 2d 140, 266 F. 2d 373.

No. 173. Little *v.* Missouri Pacific Railroad Co. Court of Civil Appeals of Texas, First Supreme Judicial District. Certiorari denied. *Albert P. Jones* for petitioner. *Howard S. Hoover* for respondent. Reported below: 319 S. W. 2d 785.

No. 175. Beacon Federal Savings & Loan Assn. *v.* Federal Home Loan Bank Board. C. A. 7th Cir. Certiorari denied. *Horace Russell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 266 F. 2d 246.

No. 177. HEATH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Watson Washburn* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron* and *Robert N. Anderson* for respondent. Reported below: 265 F. 2d 662.

No. 178. PECKHAM ET AL. *v.* FAMILY LOAN CO. ET AL. C. A. 5th Cir. Certiorari denied. *Jay E. Darlington* for petitioners. *William Gresham Ward* for Family Loan Co. et al., and *Louis S. Bonsteel* for Seaboard Finance Co., respondents. Reported below: 262 F. 2d 422.

No. 181. ATHERHOLT *v.* A. & C. ENGINEERING CO. Supreme Court of Michigan. Certiorari denied. *Max Dean* for petitioner. *Howard D. Cline, Francis J. George* and *Earl J. Cline* for respondent. Reported below: 355 Mich. 677, 95 N. W. 2d 871.

No. 185. NATIONAL CANCER HOSPITAL OF AMERICA *v.* WEBSTER, RECEIVER, ET AL. C. A. 2d Cir. Certiorari denied. *Albert Adams* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *Samuel A. Hirshowitz* for the State of New York, and *Whitman Knapp* for Webster, respondents.

No. 187. MALOY ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSN. OF WEST PALM BEACH. Supreme Court of Florida. Certiorari denied. Petitioners *pro se. Theodore A. Miller* for respondent. Reported below: 109 So. 2d 574.

No. 191. DUNCAN ET UX. *v.* DISTRICT COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, ET AL. Supreme Court of California. Certiorari denied. *Morton Galane* for petitioners. *Henry F. Walker* for Garrett et al., respondents.

No. 190. ARMSTRONG ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Donald S. Dawson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 144 Ct. Cl. 659.

No. 192. SOMERSET MACHINE & TOOL CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Hugh M. Matchett* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 144 Ct. Cl. 481.

No. 221. PHILCO CORPORATION *v.* UNITED STATES. Court of Claims. Certiorari denied. *Henry B. Weaver, Jr.* and *Thomas M. Cooley II* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Joseph Kovner* for the United States. Reported below: —— Ct. Cl. ——.

No. 231. KANSAS CITY SOUTHERN RAILWAY CO. *v.* ARKANSAS COMMERCE COMMISSION ET AL. Supreme Court of Arkansas. Certiorari denied. *Joseph R. Brown* and *William E. Davis* for petitioner. *Harry E. McDermott, Jr.* for respondents. Reported below: —— Ark. ——, 323 S. W. 2d 193.

No. 243. ROBERTS *v.* ROBERTS ET AL. Supreme Court of Montana. Certiorari denied. *H. Cleveland Hall* for petitioner. *Julius J. Wuerthner* for respondents. Reported below: 135 Mont. 149, 338 P. 2d 719.

No. 198. BLACKFORD, TRUSTEE IN BANKRUPTCY, *v.* COMMERCIAL CREDIT CORP. C. A. 5th Cir. Certiorari denied. *Francis H. Hare* for petitioner. *Benjamin Leader, Berthold Muecke, Jr.* and *J. Francis Ireton* for respondent. Reported below: 263 F. 2d 97.

No. 189. In re Citroen. C. A. 2d Cir. Certiorari denied. *Henry A. Lowenberg* for petitioner. Reported below: 267 F. 2d 915.

No. 193. Standard Motor Products, Inc., *v.* Federal Trade Commission. C. A. 2d Cir. Certiorari denied. *David M. Levitan* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon* and *P. B. Morehouse* for respondent. Reported below: 265 F. 2d 674.

No. 194. San Soucie et al. *v.* Letts, U. S. District Judge. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William Goffen* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Seymour Farber* for respondent.

No. 196. Bateh *v.* Florida. Supreme Court of Florida. Certiorari denied. *Thomas A. Larkin* for petitioner. *Richard W. Ervin,* Attorney General of Florida, for respondent. Reported below: 110 So. 2d 7.

No. 197. Joseph J. Brunetti Construction Co., Inc., *v.* Gray. C. A. 3d Cir. Certiorari denied. *Aaron Heller* for petitioner. *Thomas P. Ford, Jr.* for respondent. Reported below: 266 F. 2d 809.

No. 200. In re Estate of Peck et al. *v.* Board of Trustees of Leland Stanford Junior University. Supreme Court of California; District Court of Appeal of California, First Appellate District; and Superior Court of California, County of San Francisco. Certiorari denied. *Aaron M. Sargent* for petitioners. *Walker W. Lowry* for respondent. Reported below: 168 Cal. App. 2d 25, 335 P. 2d 185.

No. 201. De Simone *v.* United States. C. A. 2d Cir. Certiorari denied. *Emanuel Thebner* and *Abraham S. Robinson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 267 F. 2d 741.

No. 203. Continental Oil Co. *v.* Federal Power Commission. C. A. 5th Cir. Certiorari denied. *Thomas Fletcher* and *Lloyd F. Thanhouser* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell, Howard E. Wahrenbrock* and *Robert L. Russell* for respondent. Reported below: 266 F. 2d 208.

No. 204. Mississippi River Fuel Corp. *v.* Koehler et al. C. A. 8th Cir. Certiorari denied. *Christian B. Peper* and *William A. Dougherty* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Helen A. Buckley* for respondents. Reported below: 266 F. 2d 190.

No. 205. Texas Mexican Railway Co. *v.* Yeckes-Eichenbaum Inc. et al. C. A. 5th Cir. Certiorari denied. *Hugh M. Patterson* for petitioner. Reported below: 263 F. 2d 791.

No. 207. Rochelle, Trustee in Bankruptcy, *v.* City of Dallas. C. A. 5th Cir. Certiorari denied. *Marvin S. Sloman* for petitioner. *H. P. Kucera* and *Ted P. MacMaster* for respondent. Reported below: 264 F. 2d 166.

No. 209. Continental Trading, Inc., *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Frederick R. Tansill* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for respondent. Reported below: 265 F. 2d 40.

No. 206. Carpenters Union, Local 131, et al. *v.* Cisco Construction Co. C. A. 9th Cir. Certiorari denied. *Samuel B. Bassett* for Carpenters Union, Local 131, et al., *L. Presley Gill* for Union of Operating Engineers, Local 302, and *Roy E. Jackson* for International Hod Carriers, Building and Common Laborers' Union of America, Local 440, petitioners. *McDannell Brown* for respondent. Reported below: 266 F. 2d 365.

No. 211. South East National Bank *v.* United States. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 265 F. 2d 734.

No. 212. Mass Communicators, Inc., *v.* Federal Communications Commission. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Seymour M. Chase* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Edgar W. Holtz* and *Max D. Paglin* for respondent. *Harry J. Daly* for Roberts, intervenor below, in opposition. Reported below: 105 U. S. App. D. C. 277, 266 F. 2d 681.

No. 215. Denton & Anderson Co. et al. *v.* Kavanagh, Administrator. C. A. 6th Cir. Certiorari denied. *H. H. Hoppe* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Lee A. Jackson* for respondent. Reported below: 265 F. 2d 930.

No. 217. Clinton Foods, Inc., *v.* Youngs. C. A. 8th Cir. Certiorari denied. *Wayne G. Cook* and *Craig M. Cook* for petitioner. *Ben T. Reidy* for respondent. Reported below: 266 F. 2d 116.

No. 216. Traders Oil Co. of Houston *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *H. Fletcher Brown* for petitioner. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott* and *Dominick L. Manoli* for respondent. Reported below: 263 F. 2d 835.

No. 218. In re Estes. Supreme Court of Michigan. Certiorari denied. *Walter O. Estes pro se. Ernest C. Wunsch* for the State Bar of Michigan. Reported below: 355 Mich. 411, 94 N. W. 2d 916.

No. 219. Estate of McNichol *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. *James J. Regan, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *L. W. Post* for respondent. Reported below: 265 F. 2d 667.

No. 223. Pennsylvania Turnpike Commission *v.* McGinnes, District Director of Internal Revenue, et al. C. A. 3d Cir. Certiorari denied. *William T. Coleman, Jr.* and *Harold E. Kohn* for petitioner. *Frederick G. McGavin* for Manu-Mine Research & Development Co., and *Daniel Mungall, Jr.* for Seaboard Surety Co., respondents. Reported below: 268 F. 2d 65.

No. 225. Ordnance Gauge Co. *v.* Jacquard Knitting Machine Co. C. A. 3d Cir. Certiorari denied. *Leonard L. Kalish* for petitioner. *H. Francis DeLone* for respondent. Reported below: 265 F. 2d 189.

No. 228. Taylor *v.* Tradewind Transportation Co., Ltd. C. A. 9th Cir. Certiorari denied. *Kenneth E. Young* for petitioner. *J. Russell Cades* for respondent. Reported below: 267 F. 2d 185.

No. 224. KEAHEY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Grover C. Morris* for petitioner.

No. 226. BRINSON ET UX. *v.* TOMLINSON, DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Michel G. Emmanuel* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for respondent. Reported below: 264 F. 2d 30.

No. 227. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL. *v.* ALLEN ET AL. C. A. 4th Cir. Certiorari denied. *Albertis S. Harrison, Jr.,* Attorney General of Virginia, and *Henry T. Wickham* for the Commonwealth of Virginia, and *Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.* for the Prince Edward County School Authorities, petitioners. Reported below: 266 F. 2d 507.

No. 230. MOEBUS *v.* PAUL TISHMAN CO., INC., ET AL. Court of Appeals of New York. Certiorari denied. *Rutherford P. Day* for petitioner. *John P. Smith* for Paul Tishman Co., Inc., et al., and *Harold Shapiro* for Horn Construction Co., respondents. Reported below: 5 N. Y. 2d 945, 156 N. E. 2d 919.

No. 232. KOBLITZ *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Nathan B. Kogan* and *David M. Palley* for petitioner. *John D. Calhoun* for respondent. Reported below: 266 F. 2d 320.

No. 242. PETERSON *v.* SEABOARD MARINE SERVICE CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Louis Bloch* for petitioner. *Charles G. Tierney* for respondents. Reported below: 266 F. 2d 822.

No. 233. Wiley et al. *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. *William Waller* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Meyer Rothwacks* and *Carolyn R. Just* for respondent. Reported below: 266 F. 2d 48.

No. 236. Stern & Stern Textiles, Inc. (Successor in Interest to Huguet Fabrics Corp.) *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Howe P. Cochran, Margaret F. Luers* and *Betty Cochran Stockvis* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 263 F. 2d 538.

No. 237. Giovannetti, Administratrix, *v.* Georgetown University Hospital et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *I. William Stempil* for petitioner. *Paul R. Connolly* and *H. Mason Welch* for respondents.

No. 238. Proctor et al. *v.* Sagamore Big Game Club et al. C. A. 3d Cir. Certiorari denied. *John E. Evans, Sr.* and *James C. Evans* for petitioners. *W. Pitt Gifford* and *J. Villard Frampton* for respondents. Reported below: 265 F. 2d 196.

No. 240. Wolin et ux. *v.* Zenith Homes, Inc., et al. Court of Appeals of Maryland. Certiorari denied. *Walter J. Cahill* for petitioners.

No. 245. Affiliated Music Enterprises, Inc., *v.* SESAC, Inc. C. A. 2d Cir. Certiorari denied. *Irving Lemov* and *Michael Halperin* for petitioner. *Thomas F. Daly* for respondent. Reported below: 268 F. 2d 13.

No. 239. BADGER MUTUAL INSURANCE CO. ET AL. *v.* SERIO, DOING BUSINESS AS MAGNOLIA CANNING CO. C. A. 5th Cir. Certiorari denied. *Thos. H. Watkins* and *Elizabeth Hulen Grayson* for petitioners. *Malcolm B. Montgomery* for respondent. Reported below: 266 F. 2d 418.

No. 244. ELMORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James P. Mozingo III* and *John L. Nettles* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 267 F. 2d 595.

No. 246. SYPERT *v.* MINER, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied. *James A. Dooley* for petitioner. *Albert M. Howard* and *Charles D. Snewind* for respondent. Reported below: 266 F. 2d 196.

No. 247. KRAFT FOODS CO. OF WISCONSIN ET AL. *v.* COMMODITY CREDIT CORP. C. A. 7th Cir. Certiorari denied. *John T. Chadwell, George E. Leonard, Jr., Richard J. Faletti, Claude A. Roth* and *Stuart S. Ball* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for respondent. Reported below: 266 F. 2d 254.

No. 252. MASTERSON *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 3d Cir. Certiorari denied. *Samuel T. Gaines* for petitioner. *William F. Illig* and *John E. Britton* for respondent. Reported below: 266 F. 2d 1.

No. 256. KAYE-MARTIN ET AL. *v.* BROOKS. C. A. 7th Cir. Certiorari denied. *Vernon R. Loucks* and *James L. Henry* for petitioners. *Paul B. O'Flaherty* and *Erwin M. Arnold* for respondent. Reported below: 267 F. 2d 394.

No. 249. PERRY *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Herman L. Taylor* and *Samuel S. Mitchell* for petitioner. *Malcolm B. Seawell,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 250 N. C. 119, 108 S. E. 2d 447.

No. 250. GOULD, DOING BUSINESS AS ROBERT GOULD CO., *v.* LAKE ET AL. C. A. 7th Cir. Certiorari denied. *Robert S. Marx* and *Roy G. Holmes* for petitioner. *Clarence W. Heyl* and *Robert G. Day* for respondents. Reported below: 266 F. 2d 249.

No. 254. ROCK CREEK PLAZA, INC., *v.* ZIMMERMAN, COMMISSIONER OF THE FEDERAL HOUSING ADMINISTRATION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward Bennett Williams* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondent. Reported below: 105 U. S. App. D. C. 291, 266 F. 2d 695.

No. 260. ROGERS ET AL. *v.* DOUGLAS TOBACCO BOARD OF TRADE, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Norman M. Littell* and *Frederick Bernays Wiener* for petitioners. *William Simon* for respondents. Reported below: 266 F. 2d 636.

No. 266. CENTRAL STATES DRIVERS COUNCIL ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Previant* and *David Leo Uelmen* for petitioners. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott, Dominick L. Manoli* and *Herman M. Levy* for respondent. Reported below: 105 U. S. App. D. C. 338, 267 F. 2d 166.

No. 262. PADILLA *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: 267 F. 2d 351.

No. 263. DIAMOND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Louis A. Sabatino* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 267 F. 2d 23.

No. 267. SCOTT *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *William T. Bennett* for petitioner. Reported below: 237 La. 71, 110 So. 2d 530.

No. 273. LUPINO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Sydney W. Goff* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Ryan, Harold H. Greene* and *William A. Kehoe, Jr.* for the United States. Reported below: 268 F. 2d 799.

No. 274. ST. MAURICE, HELMKAMP & MUSSER *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Gilford G. Rowland, George O. Bahrs* and *Raymond S. Smethurst* for petitioner. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott* and *Dominick L. Manoli* for respondent. Reported below: 105 U. S. App. D. C. 307, 266 F. 2d 905.

No. 276. FINLEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *C. E. Ram Morrison* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for respondent. Reported below: 265 F. 2d 885.

No. 269. Dyer et al. *v.* Securities and Exchange Commission et al. C. A. 8th Cir. Certiorari denied. *J. Raymond Dyer* for petitioners. *Solicitor General Rankin, Thomas G. Meeker, Solomon Freedman, Aaron Levy* and *Arthur Blasburg, Jr.* for the Securities and Exchange Commission, respondent. Reported below: 266 F. 2d 33.

No. 275. In re Local 824, International Longshoremen's Association (Ind.), et al. *v.* Waterfront Commission of New York Harbor. Court of Appeals of New York. Certiorari denied. *Henry A. Lowenberg* for petitioners. *William P. Sirignano, Harold X. McGowan* and *Irving Malchman* for respondent.

No. 277. Davis *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *Roberson L. King* for petitioner.

No. 281. Los Angeles County Flood Control District *v.* Southern California Gas Co. et al. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Harold W. Kennedy* and *Baldo M. Kristovich* for petitioner. *T. J. Reynolds* and *L. T. Rice* for respondents. Reported below: 169 Cal. App. 2d 840, 338 P. 2d 29.

No. 286. Duckworth et al. *v.* James et al. C. A. 4th Cir. Certiorari denied. *Leonard H. Davis* and *W. R. C. Cocke* for petitioners. Reported below: 267 F. 2d 224.

No. 289. Bausch & Lomb Optical Co. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Hugh Satterlee* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Lee A. Jackson* for respondent. Reported below: 267 F. 2d 75.

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No. 280. BLOCK ET AL. *v.* BAR ASSOCIATION OF ARKANSAS ET AL. Supreme Court of Arkansas. Certiorari denied. *Eugene R. Warren* and *Bruce T. Bullion* for petitioners. *Usco A. Gentry, John H. Lookadoo, J. M. Smallwood, Lamar Williamson, Terrell Marshall, Joe C. Barrett* and *Willis B. Smith* for respondents.

No. 290. 222 EAST CHESTNUT STREET CORP. *v.* LA-SALLE NATIONAL BANK, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. *Joseph F. Elward* for petitioner. Reported below: 267 F. 2d 247.

No. 302. STATE CORPORATION COMMISSION OF KANSAS ET AL. *v.* CITIES SERVICE GAS CO. Supreme Court of Kansas. Certiorari denied. *J. Robert Wilson* and *Dale M. Stucky* for petitioners. *Conrad C. Mount, Joe Rolston, Robert R. McCracken* and *Mark H. Adams* for respondent. A brief of *amici curiae* in support of the petition was filed by *John Anderson, Jr.,* Attorney General of Kansas, *Bruce Bennett,* Attorney General of Arkansas, *Grenville Beardsley,* Attorney General of Illinois, *Jack P. F. Gremillion,* Attorney General of Louisiana, *Clarence S. Beck,* Attorney General of Nebraska, *Hilton A. Dickson, Jr.,* Attorney General of New Mexico, *Mac Q. Williamson,* Attorney General of Oklahoma, *Will Wilson,* Attorney General of Texas, *Thomas O. Miller,* Attorney General of Wyoming, *Wade Church,* Attorney General of Arizona, *Duke W. Dunbar,* Attorney General of Colorado, *Jo M. Ferguson,* Attorney General of Kentucky, *Paul L. Adams,* Attorney General of Michigan, *Roger Foley,* Attorney General of Nevada, *Leslie R. Burgum,* Attorney General of North Dakota, *Parnell J. Donohue,* Attorney General of South Dakota, and *Walter L. Budge,* Attorney General of Utah. Reported below: 184 Kan. 540, 337 P. 2d 640.

No. 293. Buford et al. *v.* Texas. Court of Civil Appeals of Texas, Third Supreme Judicial District. Certiorari denied. *Dan Moody* and *Fred W. Moore* for petitioners. *Will Wilson,* Attorney General of Texas, and *L. P. Lollar* and *Howard W. Mays,* Assistant Attorneys General, for respondent. Reported below: 322 S. W. 2d 366.

No. 301. Virginian Railway Co. *v.* Rose et al. C. A. 4th Cir. Certiorari denied. *Francis S. Bensel* and *Hancock Griffin, Jr.* for petitioner. *W. A. Thornhill, Jr.* for respondents. Reported below: 267 F. 2d 312.

No. 309. Hancock *v.* United States. C. A. 2d Cir. Certiorari denied. *David I. Shapiro* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 268 F. 2d 205.

No. 332. Murphy *v.* Washington American League Base Ball Club, Inc., et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Daniel M. Gribbon, Joel Barlow* and *John B. Jones, Jr.* for petitioner. *John E. Powell, Arthur P. Drury, John M. Lynham, David C. Bastian* and *Henry H. Paige* for respondents. Reported below: 105 U. S. App. D. C. 378, 267 F. 2d 655.

No. 95. Hofflund *v.* Seaton, Secretary of the Interior, et al. Motion to substitute Roger W. Jones as a party respondent in the place of Harry Ellsworth granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 105 U. S. App. D. C. 171, 265 F. 2d 363.

No. 85. Richman Brothers Co. *v.* Amalgamated Clothing Workers of America et al. Supreme Court of Ohio. Certiorari denied. Mr. Justice Stewart took no part in the consideration or decision of this application. *Victor DeMarco* for petitioner. *William J. Isaacson* for respondents.

No. 97. Miller et al. *v.* Sulmeyer, Trustee in Bankruptcy. C. A. 9th Cir. Motion to supplement petitioners' reply brief granted. Certiorari denied. *Arthur B. Willis* for petitioners. *Francis F. Quittner* for respondent. Reported below: 263 F. 2d 513.

No. 112. Harpole, Superintendent, Mississippi State Penitentiary, *v.* United States ex rel. Goldsby. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Joe T. Patterson,* Attorney General of Mississippi, *J. R. Griffin* and *John H. Price, Jr.,* Assistant Attorneys General, and *Ross R. Barnett* for petitioner. *George N. Leighton* for respondent. Reported below: 263 F. 2d 71.

No. 115. Hays *v.* Anderson et al. Motion of American Federation of Government Employees for leave to file brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Warner W. Gardner, Alfred L. Scanlan, Samuel I. Sherwood* and *George Schwartz* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. *Edward L. Merrigan* for the American Federation of Government Employees, in support of petitioner. Reported below: 105 U. S. App. D. C. 3, 262 F. 2d 725.

No. 124. PHILLIPS *v.* TEXAS. Motion for leave to file supplemental memorandum in support of petition for certiorari granted. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *A. L. Wirin, Fred Okrand, Joe Tonahill, Melvin Belli* and *Julius Lucius Echeles* for petitioner.

No. 184. DINAN ET AL. *v.* NEW YORK. County Court of New York, Westchester County. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *George W. Scapolito* and *Walter B. Solinger II* for petitioners. *Warren J. Schneider* for respondent. Reported below: 6 N. Y. 2d 715, 158 N. E. 2d 501.

No. 186. WONG KWAI SING, BY HIS NEXT FRIEND, WONG LUM SANG, *v.* DULLES, SECRETARY OF STATE. Motion to dispense with printing the petition and motion to substitute Christian A. Herter in the place of John Foster Dulles, deceased, granted. Motion to prepare and circulate copies of the record denied. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Verne O. Warner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 265 F. 2d 131.

No. 188. HOMAN MFG. CO., INC., *v.* ALL, DISTRICT DIRECTOR OF INTERNAL REVENUE. Motion to supplement the petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *George B. Christensen* and *William T. Kirby* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for respondent. Reported below: 264 F. 2d 158.

No. 127. WALKER, TRUSTEE, ET AL. *v.* FELMONT OIL CORP. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Henry B. Walker* and *Henry B. Walker, Jr.* for petitioners. Reported below: 262 F. 2d 163.

No. 195. UNITED STATES EX REL. TIE SING ENG *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Motion to proceed on typewritten papers granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Abraham Lebenkoff* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 266 F. 2d 957.

No. 222. COVINGTON ET AL. *v.* EDWARDS, SUPERINTENDENT OF SCHOOLS OF MONTGOMERY COUNTY, N. C., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Conrad O. Pearson, Thurgood Marshall, Jack Greenberg, James M. Nabrit III, Frank D. Reeves* and *Spottswood W. Robinson III* for petitioners. *Malcolm B. Seawell,* Attorney General of North Carolina, *Ralph Moody,* Assistant Attorney General, and *J. C. B. Ehringhaus, Jr.* for respondents. Reported below: 264 F. 2d 780.

No. 248. FARMER, ADMINISTRATOR, ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. Motion of petitioners to defer consideration of the petition for certiorari denied. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. *Fyke Farmer* for petitioners. *John J. Hooker* for respondent. Reported below: 264 F. 2d 248.

No. 241. LIEBMANN BREWERIES, INC., *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES ET AL. Petitioner's motion to strike portions of the record and respondents' brief denied. Petition for writ of certiorari to the District Court of Appeal of California, Second Appellate District, denied. *Leon M. Cooper* and *Walter H. Liebman* for petitioner. *Gordon E. Youngman* and *Glenn Warner* for respondents.

No. 251. ANDERSON, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Thomas A. Larkin* and *William Mizelle Howell* for petitioner. *Louis Kurz* and *Clark W. Toole, Jr.* for respondent. Reported below: 267 F. 2d 329.

No. 17, Misc. LAUGHLIN *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent.

No. 25, Misc. PEABODY *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. 36, Misc. JONES *v.* SUMMERFIELD, POSTMASTER GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William J. Woolston* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Yeagley* and *Kevin T. Maroney* for respondents. Reported below: 105 U. S. App. D. C. 140, 265 F. 2d 124.

No. 26, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 29, Misc. GREEN *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *John M. Dalton,* Attorney General of Missouri, and *Calvin K. Hamilton,* Assistant Attorney General, for respondent.

No. 31, Misc. MARINACCIO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 37, Misc. UNITED STATES EX REL. FREY *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 38, Misc. UNITED STATES EX REL. FERRARO *v.* RICHMOND, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 40, Misc. PHILLIPS *v.* ELLIS, GENERAL MANAGER, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 41, Misc. GEISE *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: 262 F. 2d 151, 265 F. 2d 659.

No. 43, Misc. WATKINS *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 44, Misc. PANNELL *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 45, Misc. HENDERSHOT *v.* STEINER, WARDEN. Baltimore City Court of Maryland. Certiorari denied.

No. 47, Misc. GIOVENGO *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 48, Misc. SMITH *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. 49, Misc. MAJESKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl* and *Theodore George Gilinsky* for the United States. Reported below: 266 F. 2d 947.

No. 50, Misc. CURTIS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Arthur S. Curtis,* petitioner, *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 144 Ct. Cl. 194, 168 F. Supp. 213.

No. 61, Misc. RODRIGUEZ *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Fred Okrand* for petitioner. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondent. Reported below: See 168 Cal. App. 2d 452, 336 P. 2d 266.

No. 51, Misc. ANDERSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *De Long Harris* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 53, Misc. RAMOS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 55, Misc. BELL *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 56, Misc. SISK *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 62, Misc. UNITED STATES EX REL. JACKSON *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 63, Misc. GILFORD *v.* MARTIN, WARDEN. County Court of Wyoming County, New York. Certiorari denied.

No. 64, Misc. WILSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 65, Misc. SCHAEFER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 265 F. 2d 750.

No. 68, Misc. MERRIMAN *v.* STEWART ET AL. C. A. 10th Cir. Certiorari denied. *Charles Evan Henderson* for petitioner. *Walter L. Budge,* Attorney General of Utah, for respondents.

No. 69, Misc. DeLevay *v.* Scott et al. C. A. 4th Cir. Certiorari denied.

No. 71, Misc. Gordon *v.* Rhay, Superintendent, Washington State Penitentiary. Supreme Court of Washington. Certiorari denied.

No. 72, Misc. Russo *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 73, Misc. Edwards *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 265 F. 2d 909.

No. 74, Misc. Hoyland *v.* United States. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 264 F. 2d 346.

No. 77, Misc. McCartney *v.* United States. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States. Reported below: 264 F. 2d 628.

No. 78, Misc. Barker *v.* Ohio. Supreme Court of Ohio. Certiorari denied.

No. 81, Misc. Holly *v.* Smyth, Superintendent, Virginia State Penitentiary. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 82, Misc. Vance *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 84, Misc. In re Bifield et al. C. A. 2d Cir. Certiorari denied.

No. 86, Misc. Schlette *v.* Gibson, Chief Justice, Supreme Court of California, et al. C. A. 9th Cir. Certiorari denied.

No. 87, Misc. Morgan *v.* Anderson, Secretary of the Treasury, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 105 U. S. App. D. C. 66, 263 F. 2d 903.

No. 89, Misc. Isaac *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. 91, Misc. Jones *v.* Texas et al. Court of Criminal Appeals of Texas. Certiorari denied.

No. 93, Misc. Lucas *v.* Randolph, Warden. Supreme Court of Illinois. Certiorari denied.

No. 94, Misc. McGuire *v.* Texas et al. Court of Criminal Appeals of Texas. Certiorari denied.

No. 95, Misc. Tucker *v.* California Adult Authority. Supreme Court of California. Certiorari denied.

No. 96, Misc. Trinkle *v.* Hand, Warden. Supreme Court of Kansas. Certiorari denied.

No. 97, Misc. Banghart *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 98, Misc. WHITE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 99, Misc. VIVONA *v.* CONBOY, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL INSTITUTION. Court of Appeals of New York. Certiorari denied.

No. 100, Misc. PENNSYLVANIA EX REL. FLETCHER *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. *Marjorie Hanson Matson* for petitioner. Reported below: 395 Pa. 134, 149 A. 2d 434.

No. 101, Misc. TURPIN *v.* ALVIS, WARDEN. Court of Appeals of Ohio, Franklin County. Certiorari denied.

No. 102, Misc. BULLUCK *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se*. *C. Ferdinand Sybert,* Attorney General of Maryland, and *Joseph S. Kaufman,* Assistant Attorney General, for respondent. Reported below: 220 Md. 658, 152 A. 2d 184.

No. 103, Misc. WILLIAMS *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Fred G. Minnis* for petitioner. Reported below: 110 So. 2d 654.

No. 105, Misc. EARNSHAW *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 *Julia P. Cooper* for the United States.

No. 109, Misc. SAM *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 106, Misc. SCHWITZENBERG *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 107, Misc. JEFFERY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 108, Misc. FOWLER *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 114, Misc. GIRONDA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Selig Lenefsky* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Philip R. Monahan* for the United States. Reported below: 267 F. 2d 312.

No. 115, Misc. ROBERTSON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 117, Misc. WISSENFELD *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 123, Misc. LAWSON *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 124, Misc. BOOKER *v.* DISTRICT ATTORNEY OF BRONX COUNTY. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 125, Misc. PRICE *v.* WARDEN. Court of Appeals of Maryland. Certiorari denied.

No. 136, Misc. LARSEN *v.* GIBSON, CHIEF JUSTICE, SUPREME COURT OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 267 F. 2d 386.

No. 126, Misc. BATES *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 129, Misc. JORDAN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 131, Misc. PRESCIMONE *v.* WARDEN. Court of Appeals of Maryland. Certiorari denied.

No. 138, Misc. DEMARIOS *v.* SINCLAIR, SUPERINTENDENT, FLORIDA STATE PENITENTIARY. Supreme Court of Florida. Certiorari denied.

No. 140, Misc. BALLARD *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 141, Misc. THOMAS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 142, Misc. DOZIER *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 144, Misc. BOSTICK *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John J. Dwyer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 147, Misc. MCDONALD *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 148, Misc. RAMOS ET AL. *v.* CALIFORNIA. Appellate Department of the Superior Court of California, County of Los Angeles. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioners. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 149, Misc. JACKSON *v.* MARYLAND. Circuit Court of Washington County, Maryland. Certiorari denied.

No. 150, Misc. MCCAMEY *v.* WYOMING. Supreme Court of Wyoming. Certiorari denied.

No. 151, Misc. BAILEY *v.* ALVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 152, Misc. CHERRIE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 159, Misc. LIGHTFRITZ *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 160, Misc. OUGHTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 163, Misc. GOLDSBY *v.* HARPOLE, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. *William R. Ming, Jr.* and *George N. Leighton* for petitioner. *Joe T. Patterson*, Attorney General of Mississippi, *J. R. Griffin* and *John H. Price, Jr.*, Assistant Attorneys General, and *Ross R. Barnett* for respondent. Reported below: 263 F. 2d 71.

No. 164, Misc. RICKS *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 170, Misc. CARRIKER *v.* UNITED STATES. C. A. 4th 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: 269 F. 2d 31.

No. 165, Misc. PATTERSON *v.* VIRGINIA ELECTRIC & POWER CO. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 168, Misc. TURNER, ADMINISTRATOR, *v.* HIWASSEE LAND CO. C. A. 6th Cir. Certiorari denied. *Harold Herbert Gearinger* for petitioner. *Lawrence N. Spears* for respondent. Reported below: 265 F. 2d 929.

No. 169, Misc. BARAN *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 171, Misc. DUNKLE *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 173, Misc. JACKSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 179, Misc. STUMP *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 181, Misc. GRANIERI *v.* CALIFORNIA. Appellate Department of the Superior Court of California, County of San Diego. Certiorari denied.

No. 183, Misc. WRIGHT *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 188, Misc. BAKER *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 189, Misc. CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Clyde W. Woody* and *Carl E. F. Dally* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 266 F. 2d 719.

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No. 190, Misc. HANLON *v.* NEW YORK. Supreme Court of New York, Dutchess County. Certiorari denied.

No. 192, Misc. ROMANO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 193, Misc. MANCINI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 194, Misc. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 197, Misc. SHERWOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Rankin* and *Acting Assistant Attorney General Yeagley* for the United States.

No. 198, Misc. KAPATOS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 200, Misc. FULLER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jean F. Dwyer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 202, Misc. MORGAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 203, Misc. POINDEXTER *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 206, Misc. ZIZZO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 211, Misc. SOSTRE *v.* NEW YORK. 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: 6 N. Y. 2d 706.

No. 213, Misc. EVANS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 214, Misc. GRIFFIN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 105 U. S. App. D. C. 264, 266 F. 2d 465.

No. 227, Misc. MILLWOOD *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 229, Misc. MUMMIANI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 24, Misc. MARTIN *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied because of mootness. Petitioner *pro se.* *Solicitor General Rankin* for the United States. Reported below: 105 U. S. App. D. C. 348, 267 F. 2d 625.

No. 60, Misc. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Erwin W. Roemer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 266 F. 2d 310.

No. 30, Misc. JOHNSON *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Petitioner *pro se*. *John J. O'Connell,* Attorney General of Washington, for respondent.

No. 237, Misc. WITT *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 88, Misc. CARSWELL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

No. 166, Misc. HILL *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. Reported below: 268 F. 2d 203.

No. 196, Misc. DECKHART *v.* CAVELL, WARDEN. Motion to substitute James F. Maroney as party respondent in the place of Angelo C. Cavell granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Rehearing Denied.

No. 35, October Term, 1958. BARENBLATT *v.* UNITED STATES, 360 U. S. 109;

No. 57, October Term, 1958. HOWARD *v.* LYONS ET AL., 360 U. S. 593; and

No. 74, October Term, 1958. MILLS ET AL. *v.* LOUISIANA, 360 U. S. 230. Petitions for rehearing denied.

No. 347, October Term, 1958. County of Allegheny *v.* Frank Mashuda Co. et al., 360 U. S. 185;

No. 350, October Term, 1958. Barr *v.* Matteo et al., 360 U. S. 564;

No. 447, October Term, 1958. Simplicity Pattern Co., Inc., *v.* Federal Trade Commission, 360 U. S. 55;

No. 471, October Term, 1958. Palermo *v.* United States, 360 U. S. 343;

No. 489, October Term, 1958. Pittsburgh Plate Glass Co. *v.* United States, 360 U. S. 395;

No. 561, October Term, 1958. United States et al. *v.* Hine Pontiac et al., 360 U. S. 715;

No. 761, October Term, 1958. United States *v.* Colonial Chevrolet Corp. et al., 360 U. S. 716;

No. 799, October Term, 1958. Anderson et al. *v.* United States, 360 U. S. 929;

No. 877, October Term, 1958. Woolfson *v.* Doyle, Trustee in Reorganization, et al., 360 U. S. 903;

No. 880, October Term, 1958. Zeddies *v.* Commissioner of Internal Revenue, 360 U. S. 910;

No. 883, October Term, 1958. Embry Brothers, Inc., et al. *v.* Davis et al., 360 U. S. 910;

No. 897, October Term, 1958. Walker *v.* Washington et al., 360 U. S. 911;

No. 901, October Term, 1958. Cage *v.* Texas, 360 U. S. 917;

No. 902, October Term, 1958. Ginsburg *v.* Mutual Life Insurance Company of New York, 360 U. S. 917;

No. 922, October Term, 1958. Marchese *v.* United States, 360 U. S. 930;

No. 944, October Term, 1958. Hershey Mfg. Co. *v.* Adamowski et al., 360 U. S. 717;

No. 957, October Term, 1958. United States Steel Corp. *v.* Giguere, 360 U. S. 934; and

No. 966, October Term, 1958. Kasper *v.* United States, 360 U. S. 932. Petitions for rehearing denied.

No. 34, October Term, 1958. UPHAUS *v.* WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE, 360 U. S. 72. Motions of Religious Freedom Committee, Inc., and American Civil Liberties Union for leave to file briefs, as *amici curiae,* granted. Petition for rehearing denied.

No. 435, October Term, 1958. LEV *v.* UNITED STATES, 360 U. S. 470;

No. 436, October Term, 1958. WOOL *v.* UNITED STATES, 360 U. S. 470;

No. 437, October Term, 1958. RUBIN *v.* UNITED STATES, 360 U. S. 470; and

No. 753, October Term, 1958. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* ALABAMA EX REL. PATTERSON, 360 U. S. 240. Petitions for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

No. 457, October Term, 1958. INGRAM ET AL. *v.* UNITED STATES, 360 U. S. 672. Petition for rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application.

No. 493, October Term, 1958. REISTROFFER ET AL. *v.* UNITED STATES, 358 U. S. 927. Motion for leave to file petition for rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

No. 733, Misc., October Term, 1958. CORBETT *v.* COMMON PLEAS COURT OF STARK COUNTY, OHIO, 360 U. S. 907. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 876, October Term, 1958. HELMS BAKERIES *v.* COMMISSIONER OF INTERNAL REVENUE, 360 U. S. 903. Motion to supplement petition for rehearing granted. Petition for rehearing denied.

No. 7, Misc., October Term, 1958. DEGREGORY *v.* WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE, 360 U. S. 717;

No. 706, Misc., October Term, 1958. BAKER *v.* UNITED STATES, 360 U. S. 934;

No. 749, Misc., October Term, 1958. CHRISTY *v.* UNITED STATES, 360 U. S. 919;

No. 774, Misc., October Term, 1958. CROSS *v.* TUSTIN, PERSONNEL DIRECTOR OF SANTA CLARA COUNTY, ET AL., 359 U. S. 1014;

No. 775, Misc., October Term, 1958. CROSS *v.* SUPREME COURT OF CALIFORNIA ET AL., 359 U. S. 1010;

No. 791, Misc., October Term, 1958. PITTS *v.* UNITED STATES, 360 U. S. 935;

No. 799, Misc., October Term, 1958. BAKER *v.* UNITED STATES, 359 U. S. 1005;

No. 803, Misc., October Term, 1958. PITTS *v.* UNITED STATES, 360 U. S. 919;

No. 835, Misc., October Term, 1958. ALPAR *v.* PERPETUAL BUILDING ASSOCIATION ET AL., 360 U. S. 934;

No. 855, Misc., October Term, 1958. WAGNER ET AL. *v.* UNITED STATES, 360 U. S. 936;

No. 857, Misc., October Term, 1958. BLACK *v.* CITY NATIONAL BANK & TRUST COMPANY OF KANSAS CITY, EXECUTOR, 360 U. S. 920;

No. 858, Misc., October Term, 1958. KELLEY *v.* CITY OF RICHMOND, 360 U. S. 716; and

No. 912, Misc., October Term, 1958. BARNES *v.* NEW YORK, 360 U. S. 938. Petitions for rehearing denied.

No. 806, October Term, 1958. BELLEW ET AL. *v.* MISSISSIPPI, 360 U. S. 473. Motion for leave to file supplemental and amended petition for rehearing granted. Petition for rehearing denied.

No. 613, Misc., October Term, 1958. MULLEN ET AL. *v.* DISTRICT OF COLUMBIA, 359 U. S. 971. Motion for leave to file second petition for rehearing denied.

No. 812, Misc., October Term, 1958. CONVERSE *v.* MENTAL HYGIENE DEPARTMENT OF CALIFORNIA ET AL., 360 U. S. 905. Motion for leave to file petition for rehearing denied.

OCTOBER 19, 1959.

Miscellaneous Orders.

No. 1, October Term, 1957. UNITED STATES *v.* SHOTWELL MANUFACTURING CO. ET AL. The motion for leave to file motions to vacate orders of December 16, 1957, granting certiorari etc. and for other relief is denied. *George B. Christensen* for Shotwell Manufacturing Co. et al., and *William T. Kirby* for Sullivan, movants. *Solicitor General Rankin* for the United States in opposition. [See 355 U. S. 233, 352 U. S. 997.]

No. 187. MALOY ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF WEST PALM BEACH. The application for stay of the issuance of the order denying petition for writ of certiorari (*ante,* p. 824) referred to the Court by MR. JUSTICE BLACK is granted pending the timely filing and disposition of a petition for rehearing.

No. 330, Misc. SCHLETTE *v.* UNITED STATES DISTRICT COURT ET AL. Motion for leave to file petition for writ of certiorari and other relief denied.

No. 19, Misc. SHERWOOD *v.* GLADDEN, WARDEN;
No. 271, Misc. FINLEY *v.* UNITED STATES ET AL.;
No. 287, Misc. WARREN *v.* TAYLOR, WARDEN; and
No. 334, Misc. FAVORS *v.* ADAMS, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se*. *Robert Y. Thornton*, Attorney General of Oregon, and *Robert G. Danielson*, Assistant Attorney General, for respondent in No. 19, Misc.

No. 278, Misc. CLIFTON *v.* MYERS, SUPERINTENDENT OF STATE PENITENTIARY. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 204, Misc. MATEY *v.* MARSHALL, COMMON PLEAS COURT JUDGE;
No. 209, Misc. JONES *v.* GOODMAN, U. S. DISTRICT JUDGE;
No. 242, Misc. KING *v.* CLEMMER ET AL.;
No. 243, Misc. JOHNSON *v.* CLEMMER ET AL.; and
No. 282, Misc. DUMOULIN *v.* REYNOLDS, JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 295. ROHR AIRCRAFT CORP. *v.* COUNTY OF SAN DIEGO ET AL. Appeal from the Supreme Court of California. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and the case is transferred to the summary calendar. *Leroy A. Wright* for appellant. *Carroll H. Smith* and *Duane J. Carnes* for the County of San Diego, appellee. Reported below: 51 Cal. 2d 759, 336 P. 2d 521.

Probable Jurisdiction Noted.

No. 297. GREAT NORTHERN RAILWAY CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Minnesota. Probable jurisdiction noted. *Louis E. Torinus, Jr.* and *Anthony Kane* for appellant. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, John H. D. Wigger, Robert W. Ginnane* and *Francis A. Silver* for the United States et al., and *Samuel J. Wettrick* for Centennial Mills, Inc., appellees. Reported below: 172 F. Supp. 705.

Certiorari Granted. (*See also No. 81, ante, p. 15; No. 328, ante, p. 29; and No. 58, Misc., ante, p. 34.*)

No. 164. LEVINE *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to Questions No. 1 and No. 2 presented by the petition which read as follows:

"1. Whether the secrecy of the proceedings, including the adjudication and sentence for contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure, deprived petitioner of Due Process of Law in violation of the Fifth Amendment to the United States Constitution.

"2. Whether the secrecy of the proceedings and of the adjudication and sentence of petitioner for criminal contempt under Rule 42 (a) of the Federal Rules of Criminal Procedure deprived petitioner of a public trial as required by the Sixth Amendment to the United States Constitution."

Myron L. Shapiro and *J. Bertram Wegman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Robert S. Erdahl* for the United States. Reported below: 267 F. 2d 335.

No. 138. United States *v.* American-Foreign Steamship Corp. et al. C. A. 2d Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *Herbert E. Morris* for the United States. *Arthur M. Becker, Gerald B. Greenwald, John Cunningham, Israel Convisser* and *J. Franklin Fort* for respondents. Reported below: 265 F. 2d 136.

No. 76, Misc. Ward *v.* Atlantic Coast Line Railroad Co. 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. Case transferred to the appellate docket and placed on the summary calendar. *Neal P. Rutledge* for petitioner. Reported below: 265 F. 2d 75.

Certiorari Denied. (See also Nos. 155, 279 and 291, ante, p. 30; No. 300, ante, p. 33; and No. 278, Misc., supra.)

No. 235. Missouri Pacific Railroad Co. *v.* Moore et al. C. A. 5th Cir. Certiorari denied. *Howard S. Hoover* for petitioner. *Maurice M. Davis* and *James A. Copeland* for respondents. Reported below: 264 F. 2d 754.

No. 261. MacNeil *v.* Julian. C. A. 1st Cir. Certiorari denied. *Angus M. MacNeil,* petitioner, *pro se. Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Seymour Farber* for respondent. Reported below: 266 F. 2d 167.

No. 264. Smith *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. *William Richter* and *Robert W. Hicks* for petitioner. *Guy W. Calissi* for respondent. Reported below: 29 N. J. 561, 150 A. 2d 769.

No. 199. WILLIAMS, ADMINISTRATRIX, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Sol Goodman* and *Theodore M. Berry* for appellants. *Solicitor General Rankin, Acting Assistant Attorney General Sellers, A. F. Prescott* and *Carolyn R. Just* for the United States. Reported below: 264 F. 2d 227.

No. 220. O'DWYER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Paul O'Dwyer* and *Howard N. Meyer* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Myron C. Baum* for respondent. Reported below: 266 F. 2d 575.

No. 284. BAKER, OBERMEIER & ROSNER *v.* SURFACE TRANSIT, INC., ET AL.;

No. 285. SAXE, BACON & O'SHEA *v.* SURFACE TRANSIT, INC., ET AL.;

No. 374. HAYS, ST. JOHN, ABRAMSON & HEILBRON *v.* GARLOCK ET AL.;

No. 382. GANS *v.* SURFACE TRANSIT, INC., ET AL.; and

No. 384. GARLOCK *v.* SURFACE TRANSIT, INC., ET AL. Petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit denied. *Oscar S. Rosner* for petitioner in No. 284. *Ralph M. Carson, Thomas O'Gorman FitzGibbon* and *Philip C. Potter, Jr.* for petitioner in No. 285. *Osmond K. Fraenkel* and *Morris Shilensky* for petitioner in No. 374. *Hiram S. Gans,* petitioner in No. 382, *pro se. Edward M. Garlock,* petitioner in No. 384 and respondent in No. 374, *pro se. John A. Wilson, W. M. L. Robinson* and *M. Van Voorhies* for Surface Transit, Inc., et al., respondents. *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* (also *Arthur Blasberg, Jr.* in Nos. 284 and 382) for the Securities and Exchange Commission, in opposition. Reported below: 266 F. 2d 862.

No. 234. Puco *v.* United States;
No. 257. Lessa et al. *v.* United States;
No. 304. Stromberg et al. *v.* United States;
No. 305. Teitelbaum *v.* United States;
No. 308. Behrman *v.* United States;
No. 310. Maimone *v.* United States; and
No. 313. Mirra et al. *v.* United States. Petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit denied. *Henry K. Chapman* for petitioners in Nos. 234 and 257. *Moses Polakoff, Samuel Mezansky* and *Sheldon Lowe* for petitioners in No. 304. *Daniel H. Greenberg* for petitioner in No. 305. *Maurice Edelbaum* for petitioner in No. 308. *Edward H. Levine* for petitioner in No. 310. *Joseph Leary Delaney* for petitioners in No. 313. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Philip R. Monahan* for the United States. Reported below: 268 F. 2d 256.

No. 292. Keenan et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *Myer H. Gladstone* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Joseph M. Howard* for the United States. Reported below: 267 F. 2d 118.

No. 294. Geilich Tanning Co. *v.* Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO, et al. C. A. 1st Cir. Certiorari denied. *Harold Rosenwald* for petitioner. Reported below: 267 F. 2d 169.

No. 28, Misc. Kravarick et al. *v.* Colorado. Supreme Court of Colorado. Certiorari denied. Petitioners *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *Gerald Harrison,* Assistant Attorney General, for respondent.

No. 298. BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL. *v.* ANACONDA COMPANY ET AL.; and No. 311. BUTTE, ANACONDA & PACIFIC RAILWAY CO. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL. C. A. 9th Cir. Certiorari denied. *David L. Holland, Russell B. Day* and *Harold C. Heiss* for petitioners in No. 298. *William N. Geagan* for petitioner in No. 311. *Nathan Witt* for International Union of Mine, Mill and Smelter Workers et al., respondents in No. 298. *David L. Holland* for respondents in No. 311. Reported below: 268 F. 2d 54.

No. 299. SCRIPTO, INC., *v.* FERBER CORPORATION. C. A. 3d Cir. Certiorari denied. *Ernest P. Rogers* for petitioner. *Maxwell E. Sparrow* for respondent. Reported below: 267 F. 2d 308.

No. 306. ILLINOIS EX REL. JAMES *v.* LYNCH, SHERIFF. Supreme Court of Illinois. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 16 Ill. 2d 380, 158 N. E. 2d 60.

No. 307. ILLINOIS DISTRICT COUNCIL OF THE ASSEMBLY OF GOD *v.* OLD SALEM CHAUTAUQUA ASSOCIATION. Supreme Court of Illinois. Certiorari denied. *Matthew Steinberg* for petitioner. *Montgomery S. Winning* for respondent. Reported below: 16 Ill. 2d 470, 158 N. E. 2d 38.

No. 271. RETAIL CLERKS UNION, LOCAL NO. 1364, AFL–CIO, ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF TRINITY, ET AL. Supreme Court of California. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Charles P. Scully* and *Jack Halpin* for petitioners. *Nathan R. Berke* for Hood et al., respondents.

No. 150. McCrary et al. *v.* Aladdin Radio Industries, Inc., et al. Motion to use record in No. 116, October Term, 1957, granted. Petition for writ of certiorari to the Court of Appeals of Tennessee, Middle Section, denied. Mr. Justice Black and Mr. Justice Stewart took no part in the consideration or decision of this motion and application. *Albert Williams, Cecil D. Branstetter* and *Jerome A. Cooper* for petitioners. *Dick L. Lansden* and *William Waller* for respondents. Reported below: —— Tenn. App. ——, 323 S. W. 2d 222.

No. 132, Misc. Leggett *v.* Henslee, Superintendent and Warden. Supreme Court of Arkansas. Certiorari denied. *Kenneth Coffelt* for petitioner. Reported below: —— Ark. ——, 321 S. W. 2d 764.

No. 184, Misc. Griffiths *v.* United States. Court of Claims. Certiorari denied. *William J. Woolston* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: —— Ct. Cl. ——, 172 F. Supp. 691.

No. 216, Misc. Ruffin *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frederic P. Lee* and *Floyd F. Toomey* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 106 U. S. App. D. C. 97, 269 F. 2d 544.

No. 228, Misc. Smith *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *J. Robert Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 106 U. S. App. D. C. 26, 269 F. 2d 217.

No. 255. Missouri Pacific Railroad Co. *v.* Cook. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Josh H. Groce* for petitioner. Reported below: 263 F. 2d 954.

No. 287. DeWitt et al. *v.* United States. C. A. 5th Cir. Certiorari denied. The Chief Justice and Mr. Justice Black are of the opinion certiorari should be granted. *W. C. Peticolas* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 265 F. 2d 393.

No. 312. Gentry *v.* United States. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion certiorari should be granted. *Raymond Kyle Hayes* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 268 F. 2d 63.

No. 314. Mates *v.* United States. The motion to proceed on typewritten petition is granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. Mr. Justice Stewart took no part in the consideration or decision of this motion and application. *Phillip Bartell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 57, Misc. Carter *v.* New York. County Court of Wyoming County, New York. Certiorari denied.

No. 79, Misc. Akers *v.* Gladden, Warden. Supreme Court of Oregon. Certiorari denied.

No. 35, Misc. WILSON *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se.* *A. S. Harrison, Jr.,* Attorney General of Virginia, and *Thomas M. Miller,* Assistant Attorney General, for respondent.

No. 130, Misc. UNITED STATES EX REL. DAWKINS *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 153, Misc. MCGUINN *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 *Robert G. Maysack* for the United States.

No. 157, Misc. LINDEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 176, Misc. LINDEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 177, Misc. HARRISON *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 180, Misc. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 267 F. 2d 559.

No. 182, Misc. DAUGHARTY *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 185, Misc. COLE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 195, Misc. GRAY *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 205, Misc. BIGGS *v.* CUMMINS ET AL. Supreme Court of Illinois. Certiorari denied.

No. 207, Misc. HUNTER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 208, Misc. IN RE MCDANIEL. C. A. 9th Cir. Certiorari denied.

No. 215, Misc. RICKETTS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 219, Misc. SNEAD *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *William Alfred Hall, Jr.* for petitioner. *A. S. Harrison, Jr.*, Attorney General of Virginia, and *Reno S. Harp III*, Assistant Attorney General, for respondent. Reported below: 200 Va. 850, 108 S. E. 2d 399.

No. 225, Misc. PRESNELL *v.* MANNING, WARDEN, ET AL. Supreme Court of South Carolina. Certiorari denied.

No. 230, Misc. EGAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 268 F. 2d 820.

No. 235, Misc. DE SAVERIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry K. Chapman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Philip R. Monahan* for the United States.

No. 226, Misc. ALEXANDER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 236, Misc. MOORE *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.

No. 245, Misc. MCKINZIE *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 247, Misc. BOIDAKOWSKI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 248, Misc. FORCE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 249, Misc. KONETZKE *v.* RANDOLPH, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 250, Misc. SAUNDERS *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. 256, Misc. MACOMBER *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 258, Misc. ANDERSON *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 275, Misc. WALLACE, NEE GOLDBERG, *v.* STATE OF NEW YORK INSURANCE DEPARTMENT. Court of Appeals of New York. Certiorari denied.

No. 257, Misc. KYLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Robert Satter* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 266 F. 2d 670.

No. 259, Misc. FINLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General White, Harold H. Greene* and *D. Robert Owen* for the United States. Reported below: 266 F. 2d 29.

No. 260, Misc. MASSENGALE *v.* MCMANN, ACTING 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, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondent. Reported below: 6 N. Y. 2d 707.

No. 261, Misc. FORSYTHE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 263, Misc. BUNNER *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 264, Misc. ELMORE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 276, Misc. SOLOMON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 291, Misc. PALMA *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 290, Misc. FORCE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 299, Misc. FREEMAN ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 300, Misc. WONTROBA *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 311, Misc. SYPNIEWSKI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 320, Misc. SHAMPO *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

Rehearing Denied.

No. 619, October Term, 1958. HARRIS ET AL. *v.* UNITED STATES, 360 U. S. 933; and

No. 828, October Term, 1958. SIEGEL ET AL. *v.* UNITED STATES, 359 U. S. 1012. Petitions for rehearing denied.

OCTOBER 20, 1959.

Dismissal Under Rule 60.

No. 345. ABT *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Rowland W. Fixel* for petitioner. *Solicitor General Rankin* for the United States. Reported below: —— Ct. Cl. ——.

OCTOBER 21, 1959.

Stay of Execution.

No. ——. CHESSMAN *v.* CALIFORNIA. The application for a stay of execution of the death penalty imposed upon the petitioner presented to MR. JUSTICE DOUGLAS, and by

him referred to the Court, is granted pending the timely filing and consideration of a petition for certiorari. The application for extension of time to file such a petition for certiorari is denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications. *A. L. Wirin, Fred Okrand, Rosalie S. Asher* and *George T. Davis* for petitioner. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

OCTOBER 26, 1959.

Miscellaneous Orders.

No. 10, Original. UNITED STATES *v.* LOUISIANA ET AL. The motion of the State of Texas for leave to file a supplemental brief is granted. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Price Daniel,* Governor of Texas, *Will Wilson,* Attorney General of Texas, *James N. Ludlum,* First Assistant Attorney General, *Houghton Brownlee, Jr., James H. Rogers* and *John Flowers,* Assistant Attorneys General, *James P. Hart, J. Chrys Dougherty* and *Robert J. Hearon, Jr.* for the State of Texas.

No. 15. NATIONAL LABOR RELATIONS BOARD *v.* INSURANCE AGENTS INTERNATIONAL UNION, AFL–CIO. Certiorari, 358 U. S. 944, to the United States Court of Appeals for the District of Columbia Circuit. The contentions raised by respondent's memorandum respecting abatement or mootness are overruled. The contingent motion of Insurance Workers International Union, AFL–CIO, for leave to file a brief is denied. Consideration of petitioner's motion to join Insurance Workers International Union, AFL–CIO, and respondent's contingent motion to delete it as a party respondent are postponed to the hearing of the case on the merits. The motion

of the Prudential Insurance Company of America for leave to file a brief, as *amicus curiae,* is granted. *Solicitor General Rankin* and *Stuart Rothman* for petitioner. *Isaac N. Groner* for respondent and for Insurance Workers International Union, AFL–CIO. *Nahum A. Bernstein* and *Donald R. Seawell* for Prudential Insurance Company of America. Reported below: 104 U. S. App. D. C. 218, 260 F. 2d 736.

No. 202. De Simone *v.* United States. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. In light of the Government's contention that the issues in this case are now moot, the Solicitor General is requested to advise the Court as promptly as possible whether the Government deems (1) the District Court's order of May 29, 1959, which directed petitioner to appear before the grand jury on July 30, 1959, (2) the order to show cause issued by the District Court on May 19, 1959, or (3) the writ of habeas corpus ad testificandum, to be presently outstanding, in that any of the above can possibly hereafter be made the foundation for contempt proceedings against petitioner. *Joseph K. Hertogs* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

Probable Jurisdiction Noted.

No. 342. Nostrand et al. *v.* Balmer et al., as the Board of Regents of the University of Washington, et al. Appeal from the Supreme Court of Washington. Probable jurisdiction noted. *Francis Hoague* for appellants. *John J. O'Connell,* Attorney General of Washington, and *Herbert H. Fuller,* Acting Chief Assistant Attorney General, for respondents. Reported below: 53 Wash. 2d 460, 335 P. 2d 10.

Certiorari Granted. (*See also No. 8, Misc., ante, p. 37; and No. 27, Misc., ante, p. 38.*)

No. 319. SCHILLING *v.* ROGERS, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Isadore G. Alk, Henry I. Fillman* and *Otto C. Sommerich* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, Irving Jaffe* and *George B. Searls* for respondent. Reported below: 106 U. S. App. D. C. 8, 268 F. 2d 584.

No. 349. CLAY *v.* SUN INSURANCE OFFICE LIMITED. C. A. 5th Cir. Certiorari granted. *W. Terry Gibson* for petitioner. *Eugene A. Leiman* for respondent. Reported below: 265 F. 2d 522.

No. 269, Misc. PHILLIPS *v.* NEW YORK. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Court of Appeals of New York granted limited to the question of the admissibility of the confession. Case transferred to the appellate docket. *Anthony T. Antinozzi* for petitioner. Reported below: 6 N. Y. 2d 788, 159 N. E. 2d 677.

Certiorari Denied. (*See also No. 265, ante, p. 35; and No. 174, Misc., ante, p. 38.*)

No. 282. SHAHADI ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *George P. Walker* and *Robert M. Taylor* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Joseph Kovner* for respondent. Reported below: 266 F. 2d 495.

No. 303. ROTHFELDER *v.* SUPREME COURT OF MISSOURI. Supreme Court of Missouri. Certiorari denied. *John E. Downs* and *Theodore Kranitz* for petitioner. *Richmond C. Coburn* for respondent.

No. 315. Ross *v.* United States. Court of Claims. Certiorari denied. *Robert H. Myers* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, Lee A. Jackson* and *Grant W. Wiprud* for the United States. Reported below: —— Ct. Cl. ——, 173 F. Supp. 793.

No. 318. Sinason Teicher Inter American Grain Corp. *v.* Commodity Credit Corp. C. A. 2d Cir. Certiorari denied. *Charles A. Ellis* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondent. Reported below: 267 F. 2d 493.

No. 320. Howard *v.* Louisiana. Supreme Court of Louisiana. Certiorari denied. *Russell Morton Brown* for petitioner.

No. 324. Kennedy *v.* United States; and

No. 325. Meyer et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Edward Bennett Williams* and *W. Sanders Gramling* for petitioner in No. 324. *W. G. Ward, Charles Bedell, George F. Gilleland* and *Harris B. Steinberg* for petitioners in No. 325. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 266 F. 2d 747.

No. 330. Balancio *v.* United States. C. A. 2d Cir. Certiorari denied. *Morris Hirschhorn* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 267 F. 2d 135.

No. 280, Misc. Darling *v.* New York. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 331. SUPERIOR MANUFACTURING CORP. *v.* HESSLER MANUFACTURING CO. ET AL. C. A. 10th Cir. Certiorari denied. *Thomas K. Hudson* for petitioner. *William L. Bromberg* and *Edward Philip Kurz* for respondents. Reported below: 267 F. 2d 302.

No. 333. HASKELL, BY ALBERTS, GUARDIAN AD LITEM, *v.* HASKELL. Court of Appeals of New York. Certiorari denied. *I. Stanley Stein* for petitioner. *Irving I. Erdheim* for respondent. Reported below: 6 N. Y. 2d 79, 160 N. E. 2d 33.

No. 336. TAHIR *v.* LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. *Henry C. Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for respondent. Reported below: 264 F. 2d 892.

No. 343. STAMFORD TRANSIT CO. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 145. Supreme Court of Errors of Connecticut. Certiorari denied. *Robert C. Bell, Jr.* for petitioner. Reported below: 146 Conn. 467, 152 A. 2d 502.

No. 344. FIDELITY & DEPOSIT COMPANY OF MARYLAND *v.* STUDDS. C. A. 4th Cir. Certiorari denied. *Barron F. Black* and *Hugh S. Meredith* for petitioner. *William L. Parker* for respondent. Reported below: 267 F. 2d 875.

No. 13, Misc. WESTON *v.* WALKER, WARDEN. Supreme Court of Louisiana. Certiorari denied. *Lemuel C. Parker* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, *George M. Ponder,* First Assistant Attorney General, and *J. St. Clair Favrot* for respondent.

No. 346. HOLMES *v.* CONTINENTAL CASUALTY CO. ET AL. C. A. 5th Cir. Certiorari denied. *Francis H. Hare* and *Truman M. Hobbs* for petitioner. *Reid B. Barnes* and *James A. Simpson* for Continental Casualty Co., respondent. Reported below: 266 F. 2d 269.

No. 348. KLOTZ *v.* SEARS, ROEBUCK & Co. C. A. 7th Cir. Certiorari denied. *Edward H. Norton* for petitioner. *Burton Y. Weitzenfeld* for respondent. Reported below: 267 F. 2d 53.

No. 234, Misc. NELSON *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied. Petitioner *pro se*. *Hilton A. Dickson, Jr.*, Attorney General of New Mexico, *Thomas O. Olson* and *Boston E. Witt*, Assistant Attorneys General, and *Dean S. Zinn* for respondent.

No. 270, Misc. FAITH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 316, Misc. FENTON *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. *W. Edward Morgan* for petitioner. *Wade Church*, Attorney General of Arizona, *Leslie C. Hardy*, Chief Assistant Attorney General, and *Franklin K. Gibson*, Assistant Attorney General, for respondent. Reported below: 86 Ariz. 111, 341 P. 2d 237.

OCTOBER 28, 1959.

Miscellaneous Order.

No. 504. UNITED STEELWORKERS OF AMERICA *v.* UNITED STATES. The application of the Solicitor General to vacate stay of injunction unless petition for a writ of certiorari is filed by noon, October 29, 1959, is denied. *Solicitor General Rankin* for the United States. *Arthur J. Goldberg* for petitioner.

OCTOBER 30, 1959.

Certiorari Granted; Injunction Stayed.

No. 504. UNITED STEELWORKERS OF AMERICA *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. The petition for writ of certiorari is granted and the case is assigned for oral argument on Tuesday, November 3, 1959, at 11 a. m. All briefs must be on file by noon, Monday, November 2, 1959. The injunction issued by the United States District Court for the Western District of Pennsylvania on October 21, 1959, as modified by the United States Court of Appeals for the Third Circuit on October 22, 1959, is stayed pending the issuance of the judgment of this Court. *Arthur J. Goldberg, David E. Feller* and *Bernard Dunau* for petitioner. *Attorney General Rogers, Solicitor General Rankin, Assistant Attorney General Doub, Wayne G. Barnett, Samuel D. Slade, Seymour Farber* and *Herbert E. Morris* for the United States. Reported below: 271 F. 2d 676.

NOVEMBER 9, 1959.

Miscellaneous Orders.

No. 42. LOCAL NO. 8–6, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* MISSOURI. Appeal from the Supreme Court of Missouri. The motion of the Chamber of Commerce of Metropolitan St. Louis for leave to file brief, as *amicus curiae,* is granted. The motion of the Missouri State Chamber of Commerce et al. for leave to file brief, as *amici curiae,* is granted. *Richmond C. Coburn* for the Chamber of Commerce of Metropolitan St. Louis. *Myron K. Ellison* for the Missouri State Chamber of Commerce et al. Reported below: 317 S. W. 2d 309.

No. 61. FEDERAL TRADE COMMISSION *v.* HENRY BROCH & Co. Certiorari, 360 U. S. 908, to the United States Court of Appeals for the Seventh Circuit. The motion of the National Association of Retail Grocers of the United States for leave to file brief, as *amicus curiae,* is granted. *Henry J. Bison, Jr.* for movant. Reported below: 261 F. 2d 725.

No. 352. MAGNOLIA PETROLEUM CO. *v.* FEDERAL POWER COMMISSION. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The motion to substitute Socony Mobil Oil Company, Inc., as the petitioner in place of Magnolia Petroleum Company is granted. *William S. Richardson, Frank C. Bolton, Jr.* and *John E. McClure* on the motion. Reported below: 266 F. 2d 234.

No. 466. HUDSON *v.* NORTH CAROLINA. On petition for writ of certiorari to the Supreme Court of North Carolina. The motion for appointment of counsel is granted and it is ordered that *William Joslin, Esquire,* of Raleigh, North Carolina, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 371, Misc. BROWN *v.* BOSLOW, DIRECTOR, PATUXENT INSTITUTION. Motion for leave to file petition for writ of habeas corpus denied.

No. 134, Misc. SHAW *v.* NEW JERSEY;

No. 328, Misc. HORTON *v.* BLALOCK; and

No. 348, Misc. RILEY *v.* NEW JERSEY. 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. Norman Heine* for respondent in No. 134, Misc.

No. 346, Misc. LONG *v.* IOWA; and

No. 379, Misc. IN RE COON. Motions for leave to file petitions for writs of certiorari denied.

Probable Jurisdiction Noted.

No. 350. UNITED STATES *v.* MANUFACTURERS NATIONAL BANK OF DETROIT, EXECUTOR. Appeal from the United States District Court for the Eastern District of Michigan. Probable jurisdiction noted. *Solicitor General Rankin, Acting Assistant Attorney General Sellers, Myron C. Baum* and *L. W. Post* for the United States. *Henry I. Armstrong, Jr.* and *Louis F. Dahling* for appellee. Reported below: 175 F. Supp. 291.

Certiorari Granted.

No. 321. SUN OIL CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari granted. *Martin A. Row, Robert E. May* and *Omar L. Crook* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell* and *Howard E. Wahrenbrock* for respondent. Reported below: 266 F. 2d 222.

No. 389. FEDERAL TRADE COMMISSION *v.* ANHEUSER-BUSCH, INC. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Charles H. Weston* and *Alan B. Hobbes* for petitioner. *Charles M. Price, Robert C. Keck, Edgar Barton* and *Thomas J. Carroll* for respondent. Reported below: 265 F. 2d 677.

No. 335. SUNRAY MID-CONTINENT OIL CO. *v.* FEDERAL POWER COMMISSION. C. A. 10th Cir. Certiorari granted. *James C. Denton, Jr., M. Darwin Kirk* and *Dale E. Doty* for petitioner. *Solicitor General Rankin, Assistant Attor-*

ney General Doub, Samuel D. Slade, Willard W. Gatchell and *Howard E. Wahrenbrock* for respondent. Reported below: 267 F. 2d 471.

No. 339. New Hampshire Fire Insurance Co. *v.* Scanlon, District Director of Internal Revenue, et al. C. A. 2d Cir. Certiorari granted. *Myron Engelman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Joseph Kovner* for the District Director of Internal Revenue, respondent. Reported below: 267 F. 2d 941.

No. 359. Commissioner of Internal Revenue *v.* Gillette Motor Transport, Inc. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for petitioner. *Joseph A. Maun* and *John A. Murray* for respondent. Reported below: 265 F. 2d 648.

No. 360. United Steelworkers of America *v.* American Manufacturing Co. C. A. 6th Cir. Certiorari granted. Mr. Justice Black took no part in the consideration or decision of this application. *Arthur J. Goldberg* and *David E. Feller* for petitioner. *Harold M. Humphreys* for respondent. Reported below: 264 F. 2d 624.

Certiorari Denied. (*See also No. 265, Misc., ante, p. 86; and Misc. Nos. 134, 328, 346, 348 and 379, supra.*)

No. 317. International Association of Machinists, Local Lodge No. 311, AFL-CIO, et al. *v.* National Labor Relations Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Plato E. Papps* and *Bernard Dunau* for petitioners. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott, Dominick L. Manoli* and *Norton J. Come* for respondent.

No. 329. NOVAK *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Walter Stein* and *Mervyn R. Turk* for petitioner. Reported below: 395 Pa. 199, 150 A. 2d 102.

No. 341. TRANSAMERICAN FREIGHT LINES, INC., *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *James M. Marsh* and *J. Harry LaBrum* for petitioner. *Anne X. Alpern,* Attorney General of Pennsylvania, and *Edward Friedman,* Deputy Attorney General, for respondent. Reported below: 396 Pa. 64, 151 A. 2d 630.

No. 347. BORGMEIER *v.* FLEMING ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Ray M. Stroud* for Lake Delton Development Co. et al., respondents. Reported below: 267 F. 2d 254.

No. 354. ALLEN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Bernard Susman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: —— Ct. Cl. ——, 173 F. Supp. 358.

No. 355. PAN ATLANTIC STEAMSHIP CORP. *v.* O/Y FINLAYSON-FORSSA A/B ET AL. C. A. 5th Cir. Certiorari denied. *John W. Sims* and *T. K. Jackson, Jr.* for petitioner. *Leonard J. Matteson, Richard F. Shaw* and *Donald M. Waesche, Jr.* for respondents. Reported below: 259 F. 2d 11.

No. 357. LARSEN *v.* IDAHO. Supreme Court of Idaho. Certiorari denied. *J. M. Lampert* for petitioner. Reported below: 81 Idaho 90, 337 P. 2d 1.

No. 353. BEDAMI *v.* FLORIDA. District Court of Appeal of Florida, Second District. Certiorari denied. *Pat Whitaker* for petitioner. Reported below: 112 So. 2d 284.

No. 356. SPAULDING, DOING BUSINESS AS WHITEWAY MANUFACTURING CO., *v.* GUARDIAN LIGHT CO., INC. C. A. 7th Cir. Certiorari denied. *J. Warren Kinney, Jr.* for petitioner. *Charles B. Cannon* and *Geo. H. Wallace* for respondent. Reported below: 267 F. 2d 111.

No. 358. REEDEREI BLUMENFELD, G. M. B. H., *v.* HOLLEY, ADMINISTRATRIX. C. A. 4th Cir. Certiorari denied. *Barron F. Black* and *Hugh S. Meredith* for petitioner. *Louis B. Fine* for respondent. Reported below: 269 F. 2d 317.

No. 361. STOFFEL SEALS CORP. *v.* E. I. BROOKS CO. C. A. 2d Cir. Certiorari denied. *Whitney North Seymour, A. Yates Dowell, Jr.* and *E. Barrett Prettyman, Jr.* for petitioner. *Henry R. Ashton* and *Francis J. Sullivan* for respondent. Reported below: 266 F. 2d 841.

No. 362. WYBRANT SYSTEM PRODUCTS CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Edward F. Howrey* and *John Bodner, Jr.* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon* and *Alan B. Hobbes* for respondent. Reported below: 266 F. 2d 571.

No. 365. GUTHRIE *v.* SINCLAIR REFINING CO. Court of Civil Appeals of Texas, First Supreme Judicial District. Certiorari denied. *Arthur J. Mandell* for petitioner. *Tom M. Davis* for respondent. Reported below: 320 S. W. 2d 396.

No. 364. Local Lodge 2040, International Association of Machinists, AFL-CIO, et al. *v.* Servel, Inc. C. A. 7th Cir. Certiorari denied. *Plato E. Papps* and *Sydney L. Berger* for petitioners. *Kenneth F. Burgess* and *Walter J. Cummings, Jr.* for respondent. Reported below: 268 F. 2d 692.

No. 366. Carter Products, Inc., *v.* Federal Trade Commission. C. A. 9th Cir. Certiorari denied. *William L. Hanaway, Herman Phleger* and *Alvin J. Rockwell* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon* and *Alan B. Hobbes* for respondent. Reported below: 268 F. 2d 461.

No. 367. Elizabeth Hospital, Inc., *v.* Richardson et al. C. A. 8th Cir. Certiorari denied. *James R. Hale* for petitioner. *Eugene R. Warren* for respondents. Reported below: 269 F. 2d 167.

No. 369. Glagovsky *v.* Bowcraft Trimming Co. et al. C. A. 1st Cir. Certiorari denied. *David Rines* and *Robert H. Rines* for petitioner. *Theodore S. Kenyon* for respondents. Reported below: 267 F. 2d 479.

No. 370. Quinton et al. *v.* Rooney. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Hervey Yancey* for respondent. Reported below: 267 F. 2d 142.

No. 372. View Crest Garden Apartments, Inc., et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Lyle L. Iversen* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *Seymour Farber* for the United States. Reported below: 268 F. 2d 380.

No. 371. MANSFIELD HARDWOOD LUMBER CO. *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied. *Charles D. Egan* and *Benjamin C. King* for petitioner. *John M. Madison, Ned A. Stewart* and *Vernon W. Woods* for respondents. Reported below: 263 F. 2d 748, 268 F. 2d 317.

No. 373. NOLAND ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *George D. Gibson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Helen A. Buckley* for respondent. Reported below: 269 F. 2d 108.

No. 377. ROYSTER DRIVE-IN THEATRES, INC., *v.* AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Francis T. Anderson* and *Eugene Gressman* for petitioner. *Albert C. Bickford, John F. Caskey, E. Compton Timberlake* and *Myles J. Lane* for respondents. Reported below: 268 F. 2d 246.

No. 378. NATIONAL AIRLINES, INC., *v.* STILES; and
No. 437. STILES *v.* NATIONAL AIRLINES, INC. C. A. 5th Cir. Certiorari denied. *George Foster, Jr.* for National Airlines, Inc. *Eberhard P. Deutsch, R. Emmett Kerrigan* and *René H. Himel, Jr.* for Stiles. Reported below: 268 F. 2d 400.

No. 351. MORRIS *v.* UNITED STATES. Motion for leave to proceed on typewritten petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Henry A. Lowenberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 269 F. 2d 100.

No. 380. American Sign and Indicator Corp. *v.* Schulenburg et al., doing business as Time-O-Matic Company, et al. C. A. 7th Cir. Certiorari denied. *Albert Foster York* for petitioner. *Charles B. Spangenberg* for respondents. Reported below: 267 F. 2d 388.

No. 381. Cone Mills Corp. *v.* Textile Workers Union of America. C. A. 4th Cir. Certiorari denied. *Thornton H. Brooks* for petitioner. *Arthur J. Goldberg* and *David E. Feller* for respondent. Reported below: 268 F. 2d 920.

No. 385. Union Pacific Railroad Co. et al. *v.* Structural Steel and Forge Co. et al. C. A. 10th Cir. Certiorari denied. *Elmer B. Collins, James H. Anderson, Bryan P. Leverich, A. U. Miner* and *Wood R. Worsley* for petitioners. *Calvin L. Rampton* for respondents. Reported below: 269 F. 2d 714.

No. 387. American Trading and Production Corp. *v.* Railroad Commission of Texas et al. Court of Civil Appeals of Texas, Third Supreme Judicial District. Certiorari denied. *Thurman Arnold, Abe Fortas, Robert E. Herzstein* and *Harry S. Pollard* for petitioner. *Will Wilson,* Attorney General of Texas, and *Houghton Brownlee, Jr.,* Assistant Attorney General, for the Railroad Commission of Texas, *Rayburn L. Foster* and *Harry D. Turner* for Phillips Petroleum Co., and *Raymond A. Lynch* for Baxter et al., respondents. Reported below: 323 S. W. 2d 474.

No. 392. Illinois Central Railroad Co. *v.* Cain. C. A. 5th Cir. Certiorari denied. *J. L. Byrd, Joseph H. Wright* and *John W. Freels* for petitioner. Reported below: 266 F. 2d 942.

No. 388. APPALACHIAN POWER CO. ET AL. *v.* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS ET AL. C. A. 2d Cir. Certiorari denied. *Whitney North Seymour* for petitioners. *Howard C. Westwood, Fontaine C. Bradley, Stanley L. Temko* and *Robert L. Randall* for respondents. Reported below: 268 F. 2d 844.

No. 390. WHITE *v.* SEATTLE LOCAL UNION No. 81, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, ET AL. Supreme Court of Washington. Certiorari denied. *John J. Kennett* and *Joseph D. Holmes* for petitioner. *L. Presley Gill* for respondents. Reported below: 53 Wash. 2d 802, 337 P. 2d 289.

No. 394. CHRYSLER CORPORATION *v.* UNITED STATES. Court of Claims. Certiorari denied. *Hancock Griffin, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Myron C. Baum* for the United States. Reported below: —— Ct. Cl. ——.

No. 386. SMITH *v.* CALIFORNIA. Motion for relief from default re timeliness denied. Petition for writ of certiorari to the Appellate Department of the Superior Court of California, County of Los Angeles, denied. *Russell E. Parsons* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 118, Misc. TOUCHSTONE *v.* SINCLAIR, SUPERINTENDENT, FLORIDA STATE PRISON. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *B. Clarke Nichols,* Assistant Attorney General, for respondent.

No. 137, Misc. FOX *v.* UNITED STATES. Court of Claims. Certiorari denied. Reported below: —— Ct. Cl. ——.

No. 146, Misc. WOOTEN *v.* BOMAR, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 267 F. 2d 900.

No. 212, Misc. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 232, Misc. REID *v.* RUTHAZER, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 233, Misc. SMITH *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 251, Misc. TURNER *v.* BASS, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Robert W. Driscoll* for petitioner. Reported below: 267 F. 2d 308.

No. 254, Misc. HOLLEY *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. 351, 267 F. 2d 628.

No. 262, Misc. RHEIM *v.* MURPHY, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 266, Misc. ROBERTSON *v.* MYERS, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 268, Misc. SIMS *v.* TEXAS & NEW ORLEANS RAILROAD CO. C. A. 5th Cir. Certiorari denied. Reported below: 267 F. 2d 37.

No. 274, Misc. CECIL ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 281, Misc. DANIEL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 283, Misc. PENNSYLVANIA EX REL. SHARP *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 293, Misc. CANTRELL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 296, Misc. MORRIS *v.* NOWOTNY ET AL. Court of Civil Appeals of Texas, Third Supreme Judicial District, and Supreme Court of Texas. Certiorari denied. Reported below: 323 S. W. 2d 301.

No. 297, Misc. HESS *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 305, Misc. SCOTT *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 306, Misc. JOHNSON *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: 267 F. 2d 813.

No. 314, Misc. DABNEY *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *David H. Kubert* for petitioner.

No. 315, Misc. KUMITIS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 326, Misc. EDDY *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied. *William Alfred Hall, Jr.* for petitioner. *A. S. Harrison, Jr.,* Attorney General of Virginia, and *Thomas M. Miller,* Assistant Attorney General, for respondent.

No. 337, Misc. THOMAS *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied. *William Alfred Hall, Jr.* for petitioner. *A. S. Harrison, Jr.,* Attorney General of Virginia, and *Thomas M. Miller,* Assistant Attorney General, for respondent.

No. 338, Misc. TAYLOR *v.* KLINGER, SUPERINTENDENT, CALIFORNIA MEN'S COLONY. Supreme Court of California. Certiorari denied.

No. 343, Misc. UNITED STATES EX REL. EGITTO *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 354, Misc. WILSON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 356, Misc. LOTHRIDGE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 357, Misc. ALLEN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 394, Misc. FURTAK *v.* OREGON. Supreme Court of Oregon. Certiorari denied.

No. 116, Misc. STURDEVANT *v.* SETTLE, WARDEN. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit and other relief denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Ryan, Harold H. Greene* and *William A. Kehoe, Jr.* for respondent. Reported below: 264 F. 2d 827.

No. 120, Misc. BURKE *v.* OKLAHOMA. Petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court.

Rehearing Denied.

No. 190. ARMSTRONG ET AL. *v.* UNITED STATES, *ante*, p. 825. Rehearing denied.

NOVEMBER 16, 1959.

Miscellaneous Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Claims beginning November 30, 1959, and ending June 30, 1960, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

No. 42. LOCAL NO. 8–6, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* MISSOURI. Appeal from the Supreme Court of Missouri. The motion of Kansas City Power & Light Company for leave to file brief, as *amicus curiae*, is granted. *Irvin Fane, Harry L. Browne* and *Howard F. Sachs* for movant. Reported below: 317 S. W. 2d 309.

No. 66. Power Authority of the State of New York *v.* Tuscarora Indian Nation. Certiorari, 360 U. S. 915, to the United States Court of Appeals for the District of Columbia Circuit. The motion to advance is granted and this case, together with the companion case of No. 63, is set for argument on Monday, December 7, 1959. *Thomas F. Moore, Jr.* for petitioner-movant. *Arthur Lazarus, Jr.* for respondent. Reported below: 105 U. S. App. D. C. 146, 265 F. 2d 338.

No. 448, Misc. Chessman *v.* California. On petition for writ of certiorari to the Supreme Court of California. The motion of the petitioner to certify designated portions of the record is granted limited to the certification by the Clerk of the Supreme Court of California of the original record now on file in that Court. The Chief Justice took no part in the consideration or decision of this motion. *A. L. Wirin, Fred Okrand, Rosalie S. Asher* and *George T. Davis* for petitioner. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

No. 303, Misc. Lewis *v.* Florida;

No. 377, Misc. Hurley *v.* United States et al.; and

No. 381, Misc. Sands *v.* Warden, Attica Prison, et al. Motions for leave to file petitions for writs of habeas corpus denied.

No. 368, Misc. Hancock *v.* Pennsylvania; and

No. 398, Misc. Sumpter *v.* Alvis, Warden. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 399, Misc. Flowers *v.* Igoe, U. S. District Judge. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted.

No. 398. UNITED STATES *v.* ALABAMA ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General White, Ralph S. Spritzer, Harold H. Greene* and *J. Harold Flannery, Jr.* for the United States. *MacDonald Gallion,* Attorney General of Alabama, *Nicholas S. Hare* and *Gordon Madison,* Assistant Attorneys General, and *L. K. Andrews* for respondents. Reported below: 267 F. 2d 808.

No. 403. MARINE COOKS & STEWARDS, AFL, ET AL. *v.* PANAMA STEAMSHIP CO., LTD., ET AL. C. A. 9th Cir. Certiorari granted. *John Paul Jennings* for petitioners. *John D. Mosser* and *Charles B. Howard* for respondents. Reported below: 265 F. 2d 780.

No. 418. COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari granted. *Charles V. Koons, Thomas S. Adair* and *J. R. Goldthwaite, Jr.* for petitioners. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott, Dominick L. Manoli* and *Herman M. Levy* for respondent. Reported below: 266 F. 2d 823.

Certiorari Denied. (See also Misc. Nos. 368 and 398, supra.)

No. 395. HUFFMAN ET AL. *v.* WILLARD. Supreme Court of North Carolina. Certiorari denied. *Thornton H. Brooks* for petitioners. Reported below: 250 N. C. 396, 109 S. E. 2d 233.

No. 404. KEMART CORPORATION *v.* PRINTING ARTS RESEARCH LABORATORIES, INC. C. A. 9th Cir. Certiorari denied. *Carl Hoppe* and *Henry Gifford Hardy* for petitioner. Reported below: 269 F. 2d 375.

No. 399. MORRISON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *William Rosenberger, Jr., W. Graham Claytor, Jr.* and *Robert L. Randall* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 270 F. 2d 1.

No. 400. HUKE, ADMINISTRATRIX, *v.* THE ANCILLA DOMINI SISTERS, AN INDIANA CORPORATION. C. A. 7th Cir. Certiorari denied. *Dominic P. Sevald* for petitioner. *Lester F. Murphy* for respondent. Reported below: 267 F. 2d 96.

No. 401. CALIFORNIA *v.* DICKENSON. Appellate Department, Superior Court of California, County of San Diego. Certiorari denied. *Aaron W. Reese* and *Frederick B. Holoboff* for petitioner. Reported below: 171 Cal. App. 2d Supp. 872, 343 P. 2d 809.

No. 402. BROOKS ET AL. *v.* SCHOOL DISTRICT OF THE CITY OF MOBERLY, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. *Robert L. Carter* for petitioners. *Arthur M. O'Keefe* for respondents. Reported below: 267 F. 2d 733.

No. 411. BALDWIN-LIMA-HAMILTON CORP. ET AL. *v.* TATNALL MEASURING SYSTEMS CO. ET AL. C. A. 3d Cir. Certiorari denied. *Arthur Littleton* and *Walter J. Blenko* for petitioners. *Joseph W. Swain, Jr.* and *Dexter N. Shaw* for respondents. Reported below: 268 F. 2d 395.

No. 412. BADON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Guy Johnson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 269 F. 2d 75.

No. 405. Pan American Petroleum Corp. *v.* Federal Power Commission. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *W. W. Heard, John F. Jones* and *William J. Grove* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell* and *Howard E. Wahrenbrock* for respondent. Reported below: 106 U. S. App. D. C. 37, 269 F. 2d 228.

No. 407. First National City Bank of New York *v.* Southwestern Shipping Corp. Supreme Court of New York, New York County. Certiorari denied. *Chauncey B. Garver* and *Charles C. Parlin, Jr.* for petitioner. *Lloyd I. Isler* for respondent. Reported below: 6 N. Y. 2d 454, 160 N. E. 2d 836.

No. 410. National Aircraft Maintenance Corp. *v.* United States. Court of Claims. Certiorari denied. *Edward R. Finch, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: —— Ct. Cl. ——, 171 F. Supp. 946.

No. 414. Collins *v.* South Carolina. Supreme Court of South Carolina. Certiorari denied. *C. T. Graydon* for petitioner. Reported below: 235 S. C. 65, 110 S. E. 2d 270.

No. 421. Geagan et al. *v.* Massachusetts. Supreme Judicial Court of Massachusetts. Certiorari denied. *Paul T. Smith* and *Lawrence O'Donnell* for petitioners. *Edward J. McCormack, Jr.,* Attorney General of Massachusetts, *John F. McAuliffe* and *George F. Hurley,* Special Assistant Attorneys General, for respondent. Reported below: 339 Mass. 487, 159 N. E. 2d 870.

No. 408. General Houses, Inc., *v.* Reconstruction Finance Corp. et al. C. A. 2d Cir. Certiorari denied. *Horace A. Young* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *Marvin S. Shapiro* for Floete, Administrator of General Services, respondent. Reported below: 267 F. 2d 306.

No. 413. Morgan Drive Away, Inc., *v.* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America et al. C. A. 7th Cir. Certiorari denied. *Patrick J. Smith* and *Robert D. Morgan* for petitioner. *Edward J. Fillenwarth, Herbert S. Thatcher, David Previant* and *David Leo Uelmen* for the Brotherhood of Teamsters, respondent. Reported below: 268 F. 2d 871.

No. 417. Refinery Employees' Union of the Lake Charles Area *v.* Continental Oil Co. C. A. 5th Cir. Certiorari denied. *George W. Liskow* and *Russell T. Tritico* for petitioner. *William R. Tete* and *Keith W. Blinn* for respondent. Reported below: 268 F. 2d 447.

No. 420. Leatherhide Industries, Inc., *v.* Lieberman. C. A. 2d Cir. Certiorari denied. *Jacob W. Friedman* for petitioner. Reported below: 268 F. 2d 206.

No. 422. Gilligan, Will & Co. et al. *v.* Securities and Exchange Commission. C. A. 2d Cir. Certiorari denied. *Francis J. Purcell* and *James T. Glavin* for petitioners. *Solicitor General Rankin, Thomas G. Meeker, Joseph B. Levin* and *Richard B. Pearl* for respondent. Reported below: 267 F. 2d 461.

No. 9, Misc. Popovich *v.* Clerk of Quarter Sessions Court et al. Supreme Court of Pennsylvania. Certiorari denied.

No. 383. CUNNINGHAM *v.* ENGLISH ET AL. The motion to correct or amend title to designate or confirm the Board of Monitors as a party respondent is denied. Leave to file brief of the Board of Monitors in opposition to the petition for certiorari is granted. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is denied.* *Jacques M. Schiffer* and *J. Benjamin Simmons* for petitioner. *Edward Bennett Williams, David Previant, Harold Ungar* and *Raymond W. Bergan* for English et al., respondents. *Martin F. O'Donoghue* for the Board of Monitors. Reported below: 106 U. S. App. D. C. 92, 269 F. 2d 539.

No. 415. ENGLISH ET AL. *v.* CUNNINGHAM ET AL. The motion to correct or amend the caption to designate or confirm the Board of Monitors as a party respondent is denied. Leave to file brief of the Board of Monitors in opposition to the petition for certiorari is granted. The application for a stay of the judgment and the motion of Anthony J. Distinti, Individually and as President of Local 277, I. B. T., et al., for leave to file brief, as *amici curiae,* are denied. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is also denied.* *Edward Bennett Williams, David Previant, Harold Ungar* and *Raymond W. Bergan* for petitioners. *Godfrey P. Schmidt* for respondents (except Cunningham). *Martin F. O'Donoghue* for the Board of Monitors. *Raymond R. Dickey* for Distinti et al. Reported below: 106 U. S. App. D. C. 70, 269 F. 2d 517.

No. 122, Misc. HILL *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *W. V. Geppert* and *Geo. P. Blackburn,* Assistant Attorneys General, for respondents.

*[NOTE: These orders were amended December 7, 1959, *post,* p. 905.]

No. 178, Misc. CREAGAN *v.* RIGG, WARDEN. Supreme Court of Minnesota. Certiorari denied. Petitioner *pro se*. *Miles Lord,* Attorney General of Minnesota, and *Charles E. Houston,* Solicitor General, for respondent.

No. 272, Misc. BOLISH *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 335, Misc. RAY *v.* HEINZE, WARDEN. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 336, Misc. MCCOLLIN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 118. GINSBURG *v.* STERN ET AL., JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA, ET AL., *ante,* p. 817;

No. 173. LITTLE *v.* MISSOURI PACIFIC RAILROAD CO., *ante,* p. 823;

No. 187. MALOY ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSN. OF WEST PALM BEACH, *ante,* pp. 824, 858;

No. 262. PADILLA *v.* UNITED STATES, *ante,* p. 834;

No. 127, Misc. COLLINS *v.* ILLINOIS ET AL., *ante,* p. 804; and

No. 227, Misc. MILLWOOD *v.* HEINZE, WARDEN, ET AL., *ante,* p. 853. Petitions for rehearing denied.

NOVEMBER 23, 1959.

Miscellaneous Orders.

No. —. PAUL *v.* WASHINGTON. Appeal from the Supreme Court of Washington. The motion to dismiss under Rule 14 (2) is granted. *John J. O'Connell,* Attorney General of Washington, and *E. P. Donnelly,* Assistant Attorney General, for appellee-movant. Reported below: 53 Wash. 2d 789, 337 P. 2d 33.

No. 327. Organized Village of Kake et al. *v.* Egan, Governor of Alaska. Appeal from the District Court for Alaska. The motion of *Edward G. Dobrin* to withdraw appearance as counsel for appellant is granted. Reported below: 18 Alaska ——, 174 F. Supp. 500.

Certiorari Granted. (*See also No. 24, ante, p. 116; No. 450, ante, p. 115; and No. 54, Misc., ante, p. 117.*)

No. 416. Gonzales *v.* United States. C. A. 10th Cir. Certiorari granted. *Hayden C. Covington* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 269 F. 2d 613.

No. 436. Cory Corporation et al. *v.* Sauber. C. A. 7th Cir. Certiorari granted. *Stanford Clinton* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Grant W. Wiprud* for respondent. Reported below: 266 F. 2d 58, 267 F. 2d 802.

No. 441. Hendricks, Administratrix, *v.* Southern Pacific Co. Supreme Court of Arizona. Certiorari granted. *Alfred C. Marquez* for petitioner. *Harold C. Warnock* for respondent. Reported below: 85 Ariz. 373, 339 P. 2d 731.

Certiorari Denied. (*See also No. 419, ante, p. 117.*)

No. 393. Order of Railway Conductors and Brakemen et al. *v.* Switchmen's Union of North America et al. C. A. 5th Cir. Certiorari denied. *Benning M. Grice, V. Craven Shuttleworth, Harry E. Wilmarth* and *Wayland K. Sullivan* for petitioners. *Ralph L. Crawford, John B. Miller* and *Julian C. Sipple* for respondents. Reported below: 269 F. 2d 726.

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No. 424. SPRUNT *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. Supreme Court of Utah. Certiorari denied. *Ray R. Murdock* for petitioner. *Paul H. Ray* for respondent. Reported below: 9 Utah 2d 142, 340 P. 2d 85.

No. 426. MORRISON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *David H. Caplow* for petitioner. Reported below: 168 Cal. App. 2d 235, 335 P. 2d 1022.

No. 427. IN RE EASTERN SUPPLY CO. C. A. 3d Cir. Certiorari denied. *Meyer W. Gordon* and *Leonard M. Mendelson* for petitioner. Reported below: 267 F. 2d 776.

No. 454. SUSSMAN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 270 F. 2d 122.

No. 470. EVANS *v.* WATSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Al. Philip Kane* and *Charles V. Koons* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondents. Reported below: 106 U. S. App. D. C. 108, 269 F. 2d 775.

No. 431. CITY OF CORINTH, MISSISSIPPI, *v.* FEDERAL POWER COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. *William L. Sharp* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell, Howard E. Wahrenbrock* and *David J. Bardin* for the Federal Power Commission, and *Stanley M. Morley* for the Alabama-Tennessee Natural Gas Co., respondents. Reported below: 268 F. 2d 10.

No. 428. Columbia Boiler Co., Inc., *v.* Manville Boiler Co., Inc. C. A. 4th Cir. Certiorari denied. *Ralph H. Hudson* and *Wirt P. Marks, Jr.* for petitioner. *Stanton T. Lawrence, Jr.* for respondent. Reported below: 269 F. 2d 600.

No. 429. Air Line Stewards and Stewardesses Association, International, *v.* Northwest Airlines, Inc. C. A. 8th Cir. Certiorari denied. *Ruth Weyand* for petitioner. *Leland W. Scott* for respondent. Reported below: 267 F. 2d 170.

No. 433. Abney Mills *v.* Scapa Dryers, Inc. C. A. 5th Cir. Certiorari denied. *James B. Burke, Charles L. Gowen, J. Frederic Taylor* and *Harold W. Wolfram* for petitioner. *Robert B. Troutman, John W. Bennett* and *Laszlo Kormendi* for respondent. Reported below: 269 F. 2d 6.

No. 434. Leggett *v.* United States. C. A. 7th Cir. Certiorari denied. *Joseph I. Bulger* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 269 F. 2d 35.

No. 439. Mihalchak *v.* American Dredging Co. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Wilfred R. Lorry* for petitioner. *Thomas E. Byrne, Jr.* for respondent. Reported below: 266 F. 2d 875.

No. 442. Local No. 9, Journeymen Barbers, Hairdressers and Cosmetologists International Union, et al. *v.* Grimaldi. Supreme Court of Pennsylvania. Certiorari denied. *Richard H. Markowitz* for petitioners. *Drew J. T. O'Keefe* and *John Ryan* for respondent. Reported below: 397 Pa. 1, 153 A. 2d 214.

No. 440. American Securit Co. *v.* Shatterproof Glass Corp. C. A. 3d Cir. Certiorari denied. *Joseph W. Burns* and *John L. Seymour* for petitioner. *Wm. C. McCoy* and *Caleb S. Layton* for respondent. Reported below: 268 F. 2d 769.

No. 449. Gaudiosi et al. *v.* Mellon et al. C. A. 3d Cir. Certiorari denied. *Joseph B. Hyman* for petitioners. *Philip Price* for respondents. Reported below: 269 F. 2d 873.

No. 452. Forfari *v.* United States. C. A. 9th Cir. Certiorari denied. *George Olshausen* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 268 F. 2d 29.

No. 455. Fudeman et al. *v.* Pennsylvania. Supreme Court of Pennsylvania. Certiorari denied. *Stanford Shmukler* for petitioners. *Anne X. Alpern,* Attorney General of Pennsylvania, and *Victor Wright,* Deputy Attorney General, for respondent. Reported below: 396 Pa. 236, 277, 152 A. 2d 428, 449.

No. 430. Connolly *v.* Farrell Lines, Inc. Motion for leave to proceed on typewritten papers granted. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied. *Paul Frederick* for petitioner. *Robert A. Lilly, William J. O'Neill* and *George W. Sullivan* for respondent. Reported below: 268 F. 2d 653.

No. 318, Misc. West Virginia ex rel. Siemon *v.* Adams, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 435. KINNEAR-WEED CORPORATION *v.* HUMBLE OIL & REFINING CO. Motions of C. W. Kinnear for leave to file typewritten brief and supplemental brief, as *amicus curiae,* denied. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *William E. Kinnear* for petitioner. *Nelson Jones* for respondent. Reported below: 259 F. 2d 398, 266 F. 2d 352.

No. 453. WALKER *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION ET AL. Motion to dispense with printing petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Petitioner *pro se. Samuel B. Stewart, Kenneth M. Johnson* and *Robert T. Shinkle* for Bank of America National Trust and Savings Association, and *Christopher M. Jenks* for Transamerica Corporation, respondents. Reported below: 268 F. 2d 16.

No. 294, Misc. SMITH *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 329, Misc. ROBINSON *v.* CULVER, CUSTODIAN OF FLORIDA STATE PRISON. Supreme Court of Florida. Certiorari denied.

No. 378, Misc. CASTRO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

Rehearing Denied.

No. 200. IN RE ESTATE OF PECK ET AL. *v.* BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, *ante,* p. 826. Motion for oral argument on petition for rehearing denied. Petition for rehearing denied.

No. 96. CUSTOM BUILT HOMES CO., INC., *v.* KANSAS STATE COMMISSION OF REVENUE AND TAXATION, *ante*, p. 816;

No. 124. PHILLIPS *v.* TEXAS, *ante*, p. 839;

No. 149. CROOKHAM *v.* NEW YORK CENTRAL RAILROAD CO., *ante*, p. 821;

No. 182. BIRNEL *v.* TOWN OF FIRCREST, *ante*, p. 10;

No. 194. SAN SOUCIE ET AL. *v.* LETTS, U. S. DISTRICT JUDGE, *ante*, p. 826;

No. 195. UNITED STATES EX REL. TIE SING ENG *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 840;

No. 224. KEAHEY *v.* TEXAS, *ante*, p. 830;

No. 251. ANDERSON, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO., *ante*, p. 841;

No. 253. MISSOURI PACIFIC RAILROAD CO. *v.* DEERING, REGISTER OF DEEDS, ET AL., *ante*, p. 12;

No. 74, Misc. HOYLAND *v.* UNITED STATES, *ante*, p. 845;

No. 105, Misc. EARNSHAW *v.* UNITED STATES, *ante*, p. 847;

No. 165, Misc. PATTERSON *v.* VIRGINIA ELECTRIC & POWER CO., *ante*, p. 851; and

No. 258, Misc. ANDERSON *v.* CALIFORNIA ET AL., *ante*, p. 869. Petitions for rehearing denied.

No. 120. JONES MOTOR CO., INC., *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL., *ante*, p. 11. Petitions for reconsideration and clarification denied.

No. 551, Misc., October Term, 1957. MCGINTY *v.* BROWNELL ET AL., 356 U. S. 952. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

DECEMBER 7, 1959.

Miscellaneous Orders.

No. 383. CUNNINGHAM *v.* ENGLISH ET AL. The order of this Court of November 16, 1959, *ante,* p. 897, is amended to read as follows: "The motion to correct or amend title to designate or confirm the Board of Monitors as a party respondent is denied. Leave to file brief of the Board of Monitors in opposition to the petition for certiorari is granted. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted."

No. 415. ENGLISH ET AL. *v.* CUNNINGHAM ET AL. The order of the Court of November 16, 1959, *ante,* p. 897, is amended to read as follows: "The motion to correct or amend the caption to designate or confirm the Board of Monitors as a party respondent is denied. Leave to file brief of the Board of Monitors in opposition to the petition for certiorari is granted. The application for a stay of the judgment and the motion of Anthony J. Distinti, Individually and as President of Local 277, I. B. T., et al., for leave to file brief, as *amici curiae,* are denied. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is also denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. MR. JUSTICE FRANKFURTER has filed the following memorandum:

" 'For me, the reasons that govern the normal practice of the Court in not recording votes on dispositions of petitions for certiorari are controlling against departures from that practice. On appropriate occasions, however, I deem

it desirable to indicate the issues presented by such a petition and the legal significance of its denial. Here, this will become manifest from the following memorandum in which on August 4, 1959, as a Circuit Justice, I denied the application for a stay of the judgment, review of which is sought in this petition for certiorari:

"'"This is an application for a stay of the decree entered on July 9, 1959, by the United States Court of Appeals for the District of Columbia Circuit against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, hereafter called the Teamsters, and certain of their officers, who, together with the Teamsters, will be called defendants. The litigation was initiated by thirteen members of locals of the Teamsters (one of whom has dissociated himself from the rest), to be called plaintiffs. This application is in effect a review of the refusal of the Court of Appeals to grant such a stay.

"'"The basis of the application is to enable defendants to file a petition for certiorari to review the decree of the Court of Appeals, the validity of which they propose to challenge and the enforcement of which, pending potential review and potential reversal here, will, they claim, cause them irreparable damage. Since the contemplated petition for certiorari cannot be considered prior to the reconvening of this Court on October 5, 1959, the threshold question on this application is whether the issues which defendants plan to bring before the Court are not of such a legal nature that they may fairly be deemed so lacking in substantiality as to preclude a reasonable likelihood of satisfying the considerations governing review on certiorari, as guided by Rule 19 and the practice of the Court. Informed by the illuminating opinion of Judge Fahy and having had the advantage to hear elucidation of the issues by counsel for the parties and by the Chairman of the Board of Monitors appointed

by the United States District Court for the District of Columbia, as provided by a consent decree entered January 31, 1958 (the scope of which underlies the immediate litigation), I cannot say, on a balance of probabilities, that these issues may not commend themselves to at least four members of this Court as warranting review here of the decree below. I am confirmed in this view by the candid acknowledgment of the Chairman of the Board of Monitors and counsel for plaintiffs that serious legal questions are at stake.

" ' "Accordingly, the matter before me is reduced to the very narrow question whether I should overrule the discretion exercised by the Court of Appeals in refusing a stay of its mandate until October 12, which is the earliest day when this Court, in the normal course of affairs, will determine whether to grant the prospective petition for certiorari (assuming that it will have duly come before the Court) and also determine, in case the petition be granted, that the decree to be reviewed is not to be enforced pending final adjudication.

" ' "As already indicated, at the core of this litigation is the scope of a consent decree entered in the District Court on January 31, 1958, and the power of the District Court, in enforcing that decree, to order the defendants to carry out the specific directions defined by the Court of Appeals in its decree of July 9, 1959, in accordance with the procedure defined in that decree and in the opinion which gave rise to it, rendered on June 10, 1959. By the consent decree, the defendants, as officers of the Teamsters, undoubtedly assumed certain obligations judicially enforcible. Whatever may or may not have been the freedom of action of these officers prior to this consent decree, by it their freedom of action was circumscribed to the extent that the consent decree imposed upon them enforcible obligations. The legal issue growing out of this voluntary restriction of defendants' action is the validity

of specific recommendations by the Board of Monitors as judicially defined and approved. Such orders, as they have been defined by the Court of Appeals, are concededly unconsented and are challenged as unwarranted, unilateral modifications of the consent decree.

"'"I have said that these specific commands, about half a dozen in number, restrict what is asserted to be the freedom of the power of officers of the Teamsters, claimed to be theirs under the constitution of the union. According to the Court of Appeals, these judicial commands upon the defendants are merely enforcement of the obligations which they undertook by the consent decree and are not one-sided modifications of it. This is the controversy to be raised by the petition for certiorari which the defendants plan to file. But, in any event, they claim that by denying a stay until the matter can duly come before this Court, the Court of Appeals has commanded them to take action of an irreparable nature claimed to be outside the scope of the consent decree and in derogation of the powers of the officers under the constitution of the Teamsters, before this Court has had an opportunity to pass on the petition for certiorari, with the derivative problem whether to keep matters in status quo until such a petition, if granted, could be disposed of on its merits.

"'"If it were clear that between now and October 12, which is the earliest day for the disposition of the proposed petition for certiorari, what the Court of Appeals has directed to be done would be capable of being carried out so as to change, irrevocably and adversely, the rights and powers claimed by defendants, before this Court had an opportunity to determine the validity of what the defendants have been ordered to do, I would feel constrained to grant the stay. It may well be that the Court of Appeals, after due consideration, on July 15, 1959, denied this stay on its forecast that its decree could

not, in view of all the circumstances, be effectuated before this Court could pass on a petition for certiorari, with the ancillary question of a stay in case such petition were granted. In any event, my appreciation of the intrinsic elements in carrying out the various items of the decree still left in controversy (several of them have become either moot or taken out of contest by agreement) leads me to conclude that, in the setting of the immediate circumstances, they are not of a nature to cause irreparable harm between now and October 12. I am reinforced in this conclusion by the responsible assurances of the Chairman of the Board of Monitors regarding the course of events which will control such matters. The details of the half-dozen items in controversy are so specialized and technical that nothing would be gained by particularizing them.

"'"One thing more does need to be said.

"'"As is recognized by all concerned, judicial supervision of a union with a membership of 1,500,000 and some 800 locals through the agency of a mechanism like the Board of Monitors is an unusual manifestation of equity powers. Defendants seek to enlarge the significance of the immediate items in controversy by their anticipation of an expansion of the powers of the Board of Monitors and their resulting fear of disruption of forces within the Teamsters as well as a heavy drain on the Teamsters' treasury in the course of such far-flung judicial administration. These are matters not immediately involved in the decree of the Court of Appeals now before me. But I deem it appropriate to say that the Court of Appeals, in its decision of June 10, 1959, as well as on preliminary proceedings and in the procedure which it followed in formulating its decree of July 9, 1959, has manifested an alert understanding of the gravity of the litigation, and has made manifest its sense of the high importance of assuring the most protective procedure on the part of the Board of

Monitors in making recommendations and of the District Court in issuing orders on the basis of such recommendations; it has been mindful of the importance of working out problems between the Monitors and the Teamsters on the basis of ample consultation, with full regard for the interests of the membership of the union of which, after all, the union is the collective expression. As to the fear of excessive drain on the Teamsters' treasury, one may safely rely on the Court of Appeals in affording a shining example in the spending of other people's money. A court should be the most sensitive of fiduciaries. In sanctioning fees and other expenditures it will be guided by frugality and not generosity." ' "

No. 549. HANNAH ET AL. *v.* LARCHE ET AL. Appeal from the United States District Court for the Western District of Louisiana; and

No. 550. HANNAH ET AL. *v.* SLAWSON ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Upon consideration of the motion to advance filed by the Solicitor General wherein he states that his brief on the merits will be filed on or before December 15, 1959, the Court directs that on or before Wednesday, January 13, 1960, the appellees shall file any motion or motions responsive to the statement as to jurisdiction and on the merits of the case, the respondents shall file any brief relating to the granting or denying of the petition for writ of certiorari and on the merits of the case, and the cases are set for oral argument on Monday, January 18, 1960, on the petition for writ of certiorari, the jurisdiction on appeal, and on the merits of the cases. *Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for appellants in No. 549 and petitioners in No. 550. *David Rubin* also for appellants in No. 549. Reported below: No. 549, 177 F. Supp. 816.

No. 269. DYER ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL., *ante*, p. 835. The motion to supplement the record and the petition for rehearing are denied. *J. Raymond Dyer* for petitioners.

No. 326. METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, *v.* EGAN, GOVERNOR OF ALASKA, ET AL.; and

No. 327. ORGANIZED VILLAGE OF KAKE ET AL. *v.* EGAN, GOVERNOR OF ALASKA. Appeals from the District Court for Alaska. Further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. *Richard Schifter* for appellant in No. 326. *John W. Cragun* and *Frances L. Horn* for appellants in No. 327. *John L. Rader*, Attorney General of Alaska, *Douglas L. Gregg*, Assistant Attorney General, and *James M. Fitzgerald* for appellees. Reported below: 18 Alaska —, 174 F. Supp. 500.

No. 387, Misc. CREVIER *v.* HAND, WARDEN;

No. 388, Misc. MOORE *v.* LAVALLEE, WARDEN;

No. 407, Misc. COULTON *v.* OHIO;

No. 409, Misc. MCCARTHY *v.* NEW YORK;

No. 416, Misc. MCDANIEL *v.* CALIFORNIA ADULT AUTHORITY ET AL.;

No. 425, Misc. JONES *v.* NASH, WARDEN; and

No. 468, Misc. BURKS *v.* RAGEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 408, Misc. BLEVINS *v.* STEINER, WARDEN; and

No. 411, Misc. MCFREDERICK *v.* COCHRAN, DIRECTOR, DIVISION OF CORRECTIONS. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 199, Misc. Going *v.* Missouri. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *John M. Dalton,* Attorney General of Missouri, for respondent.

Certiorari Granted. (*See also No. 202, ante, p. 125, and No. 75, Misc., ante, p. 126.*)

No. 391. Parr et al. *v.* United States. C. A. 5th Cir. Certiorari granted. *Abe Fortas, Paul A. Porter, Charles A. Reich* and *T. Gilbert Sharpe* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Edgar O. Bottler, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 265 F. 2d 894.

No. 443. United Steelworkers of America *v.* Warrior & Gulf Navigation Co. C. A. 5th Cir. Certiorari granted. Mr. Justice Black took no part in the consideration or decision of this application. *Arthur J. Goldberg* and *David E. Feller* for petitioner. *Richard C. Keenan* and *T. K. Jackson, Jr.* for respondent. Reported below: 269 F. 2d 633.

Certiorari Denied. (*See also No. 432, ante, p. 128; No. 447, ante, p. 127; No. 397, Misc., ante, p. 128; and Misc. Nos. 408 and 411, supra.*)

No. 162. S. S. Silberblatt, Inc., *v.* Tax Commission of New York. Court of Appeals of New York. Certiorari denied. *Harold A. Jerry* and *Clyde A. Lewis* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *Julius L. Sackman* for respondent. *Solicitor General Rankin, Assistant Attorney General Rice* and *Myron C. Baum* filed a memorandum for the United States, as *amicus curiae*. Reported below: 5 N. Y. 2d 635, 159 N. E. 2d 195.

No. 397. MANAIA ET AL. *v.* POTOMAC ELECTRIC POWER CO. C. A. 4th Cir. Certiorari denied. *Sheldon E. Bernstein* and *Herbert M. Brune* for petitioners. *William B. Jones, Robert R. Bair* and *Cornelius Means* for respondent. Reported below: 268 F. 2d 793.

No. 461. ISELIN ET AL. *v.* MENG ET AL. C. A. 5th Cir. Certiorari denied. *L. Bryan Dabney* for petitioners. Reported below: 269 F. 2d 345.

No. 462. LEE *v.* JENKINS BROTHERS ET AL. C. A. 2d Cir. Certiorari denied. *Frank J. Donner* for petitioner. *Morgan P. Ames* and *Francis J. McNamara, Jr.* for respondents. Reported below: 268 F. 2d 357.

No. 472. RAUCH ET AL. *v.* STOCKINGER ET AL. C. A. 2d Cir. Certiorari denied. *Max J. LeBoyer* for petitioners. *Alexander Dreiband* filed a brief in opposition on behalf of the Attorney General of the Province of Ontario, Canada, as *amicus curiae*. Reported below: 269 F. 2d 681.

No. 475. MANUFACTURERS RECORD PUBLISHING CO. *v.* LAUER, EXECUTRIX, ET AL. C. A. 5th Cir. Certiorari denied. *W. Scott Wilkinson* and *John M. Madison* for petitioner. *Clem H. Sehrt* and *Kalford K. Miazza* for respondents. Reported below: 268 F. 2d 187.

No. 476. BROCKMUELLER *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se*. *Wade Church,* Attorney General of Arizona, *Leslie C. Hardy,* Chief Assistant Attorney General, and *Franklin K. Gibson,* Assistant Attorney General, for respondent. Reported below: 86 Ariz. 82, 340 P. 2d 992.

No. 478. KIZZIAR ET UX. *v.* DOLLAR, DOING BUSINESS AS B. L. DOLLAR CONSTRUCTION CO. C. A. 10th Cir. Certiorari denied. *C. E. Hall* for petitioners. *Ross Rutherford* for respondent. Reported below: 268 F. 2d 914.

No. 480. LOCAL 135, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Edward J. Fillenwarth* for petitioner. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott, Dominick L. Manoli* and *Herman M. Levy* for respondent. Reported below: 267 F. 2d 870.

No. 481. JOHNSON, DOING BUSINESS AS JOHNSON HAIR AND SCALP CLINIC, *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. *James I. McCain* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. Reported below: 266 F. 2d 560.

No. 483. NATIONAL SURETY CORP. ET AL. *v.* LLEWELLYN MACHINERY CORP. C. A. 5th Cir. Certiorari denied. *Walter Humkey* and *Frank M. Harris* for petitioners. *Thomas H. Wakefield* for respondent. Reported below: 268 F. 2d 610.

No. 484. J. RAY MCDERMOTT & CO., INC., *v.* DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA. C. A. 5th Cir. Certiorari denied. *C. Dickerman Williams* for petitioner. *Norman L. Sisson* for respondent. Reported below: 267 F. 2d 317.

No. 486. SCHREIBER ET AL., TRADING AS SCHREIBER & GOLDBERG, *v.* AMERICAN SAFETY TABLE CO., INC. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *Leon Edelson* for respondent. Reported below: 269 F. 2d 255.

No. 487. MARSHALL, DOING BUSINESS AS MARSHALL PIPE & SUPPLY CO., ET AL. *v.* STANDARD OIL CO. OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied. *Neth L. Leachman* for petitioners. Reported below: 265 F. 2d 46.

No. 489. KIRK MANUFACTURING CO. *v.* CALDWELL MANUFACTURING CO. ET AL. C. A. 8th Cir. Certiorari denied. *Thomas E. Scofield* for petitioner. Reported below: 269 F. 2d 506.

No. 491. TATKO BROTHERS SLATE CO., INC., *v.* HANNON. C. A. 2d Cir. Certiorari denied. *J. Preston Swecker, Maxwell E. Sparrow* and *William L. Mathis* for petitioner. *John C. Blair* for respondent. Reported below: 270 F. 2d 571.

No. 493. SMITH *v.* GLIKIN, DOING BUSINESS AS BELTONE HEARING CENTER. C. A. 5th Cir. Certiorari denied. *J. Vincent Martin* for petitioner. *Will Freeman* for respondent. Reported below: 269 F. 2d 641.

No. 499. BARNES ET AL. *v.* CITY OF GADSDEN, ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied. *Arthur Burns* for petitioners. *W. B. Dortch* and *John A. Lusk, Jr.* for respondents. Reported below: 268 F. 2d 593.

No. 500. FRUIT INDUSTRIES, INC., *v.* PETTY, ADMINISTRATRIX, ET AL. C. A. 5th Cir. Certiorari denied. *Robert H. Walker* and *Morris E. White* for petitioner. *R. W. Shackleford* for respondents. Reported below: 268 F. 2d 391.

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No. 463. WARREN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *John E. McClure* and *William P. McClure* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney* for the United States. Reported below: —— Ct. Cl. ——, 171 F. Supp. 846.

No. 474. HOWARD *v.* INTERNATIONAL TRUST CO., SPECIAL ADMINISTRATOR. Supreme Court of Colorado. Certiorari denied. *Arthur E. Neuman* for petitioner. *John Fleming Kelly* for respondent. Reported below: 139 Colo. 314, 338 P. 2d 689.

No. 494. ELLIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* and *William B. Bryant* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 106 U. S. App. D. C. 145, 270 F. 2d 448.

No. 506. BOOKER ET AL. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, INC., ET AL. Supreme Court of Georgia. Certiorari denied. *Aaron Kravitch* and *Phyllis Kravitch* for petitioners. *E. Ormonde Hunter* for respondents. Reported below: 215 Ga. 277, 110 S. E. 2d 360.

No. 507. MACK ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Nicholas J. Chase* and *Arthur J. Hilland* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 107 U. S. App. D. C. ——, 274 F. 2d 582.

No. 498. Quaker State Oil Refining Corp. *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. *John C. Bane, Jr.* and *Benjamin G. McFate* for petitioner. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 270 F. 2d 40.

No. 501. Truck Drivers and Helpers Local Union No. 728, I. B. T., *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Edwin Pearce* for petitioner. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott, Dominick L. Manoli* and *Florian J. Bartosic* for respondent. Reported below: 265 F. 2d 439.

No. 502. Lincoln National Life Insurance Co. *v.* Roosth. C. A. 5th Cir. Certiorari denied. *Thos. B. Ramey* for petitioner. *Chas. F. Potter* for respondent. Reported below: 269 F. 2d 171.

No. 505. Brice *v.* Superior Court of California, in and for the County of Los Angeles. District Court of Appeal of California, Second Appellate District. Certiorari denied. *James C. Purcell* for petitioner. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *William B. McKesson* for respondent.

No. 496. Columbia Casualty Co. *v.* LoCicero et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Black is of the opinion certiorari should be granted. *Ernest A. Carrere, Jr.* for petitioner. *Robert R. Rainold* for respondents. Reported below: 268 F. 2d 440.

No. 444. WORTHY *v.* HERTER, SECRETARY OF STATE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *William M. Kunstler* and *Walter E. Dillon, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley, John F. Davis* and *Kevin T. Maroney* for respondent. Reported below: 106 U. S. App. D. C. 153, 270 F. 2d 905.

No. 445. FRANK *v.* HERTER, SECRETARY OF STATE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Leonard B. Boudin, Victor Rabinowitz* and *David Rein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley, John F. Davis* and *Kevin T. Maroney* for respondent. Reported below: 106 U. S. App. D. C. 54, 269 F. 2d 245.

No. 488. PORTER *v.* HERTER, SECRETARY OF STATE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Joseph L. Rauh, Jr.* and *John Silard* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 107 U. S. App. D. C. ——, 278 F. 2d 280.

No. 439, Misc. CULLEY *v.* WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 220 Md. 687, 154 A. 2d 813.

No. 441, Misc. MALLORY *v.* BUCHKOE, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 456. DAVIS *v.* UNITED STATES. The motion for leave to file an amended petition for certiorari is granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Frank J. Donner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. Reported below: 269 F. 2d 357.

No. 469. CITY OF MURFREESBORO, TENNESSEE, *v.* RUTHERFORD COUNTY, TENNESSEE. The motion to strike memorandum of Tennessee Valley Authority, as *amicus curiae,* is denied. Petition for writ of certiorari to the Supreme Court of Tennessee, Middle Division, denied. *Alfred B. Huddleston, Edwin F. Hunt* and *Joseph C. Swidler* for petitioner. *Granville S. Ridley* and *Granville S. Ridley Bouldin* for respondent. *Solicitor General Rankin* and *Charles J. McCarthy* filed a memorandum for the Tennessee Valley Authority, as *amicus curiae. John Frank Bryant, Walter Lee Price, Robert E. Banks* and *B. B. Fraker* filed a brief for the Cities of Johnson City, Elizabethton and Greeneville, Tennessee, as *amici curiae,* in support of the petition. Reported below: —— Tenn. ——, 326 S. W. 2d 653.

No. 83, Misc. HULLOM *v.* BURROWS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 266 F. 2d 547.

No. 128, Misc. RUSSELL *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Petitioner *pro se. John J. O'Connell,* Attorney General of Washington, and *Lawrence Ross,* Assistant Attorney General, for respondent.

No. 267, Misc. WILLIAMS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 331, Misc. MANCHESTER *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 339, Misc. REBETTER *v.* CROUCH ET AL. Appellate Department of the Superior Court of California, County of Los Angeles. Certiorari denied.

No. 344, Misc. HAMILTON *v.* KANSAS. Supreme Court of Kansas. Certiorari denied.

No. 350, Misc. AHLET *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 361, Misc. FINK *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 365, Misc. CAWLEY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 367, Misc. MCAULIFFE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 375, Misc. HARP *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 385, Misc. WILLIAMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 6 N. Y. 2d 18, 159 N. E. 2d 549.

No. 391, Misc. WEBSTER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 17 Ill. 2d 177, 161 N. E. 2d 104.

No. 449, Misc. MATERA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

Rehearing Denied. (*See also No. 269, ante, p. 911.*)

No. 172. DUPREE *v.* UNITED STATES, *ante,* p. 823;

No. 292. KEENAN ET AL. *v.* UNITED STATES, *ante,* p. 863;

No. 312. GENTRY *v.* UNITED STATES, *ante,* p. 866;

No. 366. CARTER PRODUCTS, INC., *v.* FEDERAL TRADE COMMISSION, *ante,* p. 884;

No. 296, Misc. MORRIS *v.* NOWOTNY ET AL., *ante,* p. 889;

No. 306, Misc. JOHNSON *v.* UNITED STATES, *ante,* p. 889; and

No. 379, Misc. IN RE COON, *ante,* p. 880. Petitions for rehearing denied.

DECEMBER 11, 1959.

Miscellaneous Order.

No. —. TWO GUYS FROM HARRISON-ALLENTOWN, INC., *v.* MCGINLEY, DISTRICT ATTORNEY, LEHIGH COUNTY, PENNSYLVANIA. The application for a stay or in the alternative for writ of injunction presented to MR. JUSTICE BRENNAN, and by him referred to the Court, is denied. The motion of Pennsylvania Retailers' Association for leave to file brief, as *amicus curiae,* is denied. *Harold E. Kohn, William T. Coleman, Jr.* and *Louis E. Levinthal* for the applicant. *Harry J. Rubin* in opposition. *W. James MacIntosh* for Pennsylvania Retailers' Association. Reported below: 179 F. Supp. 944.

DECEMBER 14, 1959.

Miscellaneous Orders.

No. 445, Misc. JUSTUS *v.* NEW MEXICO; and

No. 472, Misc. SCHUITEN *v.* ATTORNEY GENERAL OF THE UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 471, Misc. BONILLA *v.* NEW YORK. 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. 187, Misc. CHAPMAN *v.* WILSON, SUPERINTENDENT, CALIFORNIA STATE PRISON, ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, and *John S. McInerny* and *Arlo E. Smith,* Deputy Attorneys General, for respondents.

No. 20, Misc. CHAPMAN *v.* WILSON, WARDEN, ET AL.; and

No. 404, Misc. STEWART *v.* MILLER, JUDGE, COURT OF APPEALS OF FRANKLIN COUNTY, OHIO, ET AL. Motions for leave to file petitions for writs of mandamus denied. Petitioners *pro se.* *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondents in No. 20, Misc.

Certiorari Granted. (*See also Nos. 459 and 473, ante, p. 195.*)

No. 451. PENNSYLVANIA RAILROAD CO. *v.* UNITED STATES. Court of Claims. Certiorari granted. *Hugh B. Cox* and *William F. Zearfaus* for petitioner. *Solicitor General Rankin* for the United States. Reported below: —— Ct. Cl. ——.

No. 503. UNITED STATES *v.* GRAND RIVER DAM AUTHORITY. Court of Claims. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. *Q. B. Boydstun* for respondent. Reported below: —— Ct. Cl. ——, 175 F. Supp. 153.

No. 513. United States *v.* Cannelton Sewer Pipe Co. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, Ralph S. Spritzer* and *Melva M. Graney* for the United States. *Howard P. Travis* for respondent. Reported below: 268 F. 2d 334.

No. 376. Commissioner of Internal Revenue *v.* Duberstein et al. C. A. 6th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice* and *Assistant Attorney General Barnett* for petitioner. *Sidney G. Kusworm* for respondents. Reported below: 265 F. 2d 28.

No. 546. Stanton et al. *v.* United States. C. A. 2d Cir. Certiorari granted. *Basil O'Connor, John C. Farber* and *William F. Snyder* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 268 F. 2d 727.

Certiorari Denied. (*See also No. 273, Misc., ante, p. 198, and No. 471, Misc., supra.*)

No. 268. Lohman *v.* United States. C. A. 6th Cir. Certiorari denied. *J. Paul Prear* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Yeagley* for the United States. Reported below: 266 F. 2d 3.

No. 509. P. Lorillard Co. et al. *v.* Federal Trade Commission. C. A. 3d Cir. Certiorari denied. *Cyrus Austin, Robert McCormack* and *John F. Dooling, Jr.* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Charles H. Weston, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. Reported below: 267 F. 2d 439.

No. 508. COLLINS *v.* RISNER, DOING BUSINESS AS CAPITAL TRUCKING CO. C. A. 4th Cir. Certiorari denied. *Thomas E. McCutchen, Jr.* for petitioner. Reported below: 269 F. 2d 654.

No. 512. MONACO ET AL. *v.* WATSON, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harry A. Toulmin, Jr., F. E. Drummond* and *George W. Stengel* for petitioners. *Solicitor General Rankin* and *Assistant Attorney General Doub* for respondent. Reported below: 106 U. S. App. D. C. 142, 270 F. 2d 335.

No. 516. MARCAL PULP & PAPER, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Richard W. Wilson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Morton K. Rothschild* for respondent. Reported below: 268 F. 2d 739.

No. 477. KELLEY ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NASHVILLE ET AL. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN, although cognizant that the District Court retained jurisdiction of the action during the transition, would grant the petition for certiorari limited to the fourth question: whether the provisions of paragraphs four and five of the plan are constitutionally invalid for the reason that they "explicitly recognized race as an absolute ground for the transfer of students between schools, thereby perpetuating rather than limiting racial discrimination." *Z. Alexander Looby, Thurgood Marshall, Jack Greenberg, Constance Baker Motley* and *James M. Nabrit III* for petitioners. *Edwin F. Hunt* for respondents. Reported below: 270 F. 2d 209.

No. 288, Misc. ASHCRAFT *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: — F. 2d —.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, dissenting.

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . . ." In this connection it seems appropriate to us to place on record the facts of this case in which certiorari is denied. Ashcraft was convicted of robbery in violation of California laws and given a sentence of five years to life imprisonment. Now the United States has convicted him of precisely the same robbery and sentenced him to prison for 25 years. We are still unable to believe such a second punishment for one crime is either fair or consistent with the Fifth Amendment's prohibition against double jeopardy. See the dissents in *Abbate* v. *United States,* 359 U. S. 187, 201; *Bartkus* v. *Illinois,* 359 U. S. 121, 150; *Gore* v. *United States,* 357 U. S. 386, 395–397.

No. 448, Misc. CHESSMAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *A. L. Wirin, Fred Okrand, Rosalie S. Asher* and *George T. Davis* for petitioner. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondent. *Loren Miller* filed a brief on behalf of the American Civil Liberties Union of Southern California, as *amicus curiae,* in support of the petition. Reported below: 52 Cal. 2d 467, 341 P. 2d 679.

No. 285, Misc. NEW YORK EX REL. SMITH *v.* MARTIN, 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 *Winifred C. Stanley,* Assistant Attorney General, for respondent. Reported below: 8 App. Div. 1004, 191 N. Y. S. 2d 160.

No. 396, Misc. BROWNING *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 432, Misc. RANDOLPH *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

Rehearing Denied.

No. 329. NOVAK *v.* PENNSYLVANIA, *ante,* p. 882;

No. 371. MANSFIELD HARDWOOD LUMBER CO. *v.* JOHNSON ET AL., *ante,* p. 885; and

No. 378. NATIONAL AIRLINES, INC., *v.* STILES, *ante,* p. 885. Petitions for rehearing denied.

No. 91. AUDETT *v.* UNITED STATES, *ante,* p. 815. Motion for leave to file petition for rehearing denied.

No. 187. MALOY ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSN. OF WEST PALM BEACH, *ante,* pp. 824, 858, 898. Motion for leave to file second petition for rehearing denied.

JANUARY 7, 1960.

Certiorari Denied.

No. 576, Misc. JONES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, and *Arlo E.*

Smith and *John S. McInerny,* Deputy Attorneys General, for respondent. Reported below: 52 Cal. 2d 636, 343 P. 2d 577.

JANUARY 11, 1960.

Miscellaneous Orders.

No. 4, Original. NEW YORK *v.* ILLINOIS ET AL. The motion for leave to file a supplemental and amended complaint and the response thereto are referred to the Special Master for an expression of his views as to the relationship of the matters presented therein to the issues in this cause. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, *Richard H. Shepp,* Assistant Attorney General, and *Randall J. Le Boeuf, Jr.* for complainant-movant. *William C. Wines,* Assistant Attorney General of Illinois, *Grenville Beardsley, Lawrence J. Fenlon, Peter G. Kuh, George A. Lane, Joseph B. Fleming, Joseph H. Pleck* and *Thomas M. Thomas* for defendants, in opposition. [See 360 U. S. 712.]

No. 62. MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *v.* UNITED STATES; and

No. 73. UNITED STATES *v.* MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC. Appeals from the United States District Court for the District of Columbia. The motion of *Daniel J. Freed* for leave to withdraw his appearance as counsel for the appellant in No. 62 and for the appellee in No. 73 is granted. Reported below: 167 F. Supp. 45, 799, 168 F. Supp. 880.

No. 362, Misc. YANCY *v.* RAGEN, WARDEN;

No. 476, Misc. OUGHTON *v.* UNITED STATES;

No. 492, Misc. BRABSON *v.* SILBERGLITT, WARDEN; and

No. 527, Misc. MCNALLY *v.* TEXAS ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 319. SCHILLING *v.* ROGERS, ATTORNEY GENERAL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The motion of Hannah von Bredow et al. for leave to file brief, as *amici curiae,* is denied. *Chisman Hanes* and *Gerald G. Schulsinger* for movants. Reported below: 106 U. S. App. D. C. 8, 268 F. 2d 584.

No. 368. HUMBLE OIL & REFINING CO. *v.* FEDERAL POWER COMMISSION. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The motion to substitute Humble Oil & Refining Company, a Delaware corporation, in the place of Humble Oil & Refining Company, a Texas corporation, is granted. *Carl Illig, William J. Merrill* and *Bernard A. Foster, Jr.* were on the motion. Reported below: 266 F. 2d 235.

No. 495, Misc. HATLER, GENERAL CHAIRMAN OF GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF RAILROAD TRAINMEN, HUDSON & MANHATTAN RAILROAD CO., ET AL. *v.* DAWSON, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writs of mandamus and certiorari denied. *Arnold B. Elkind* for Hatler, petitioner. *William W. Golub* for Stichman, Trustee, in opposition. Reported below: 172 F. Supp. 329; 178 F. Supp. 106.

No. 143, Misc. FIRSTAMERICA CORPORATION *v.* UNITED STATES; and

No. 491, Misc. HOLLAND FURNACE CO. *v.* FEDERAL TRADE COMMISSION. Motions for leave to file petitions for writs of certiorari denied. *Gerhard A. Gesell, Homer I. Mitchell, Hamilton Carothers* and *Warren M. Christopher* for petitioner in No. 143, Misc. *Stuart S. Ball* and *Robert H. Trenkamp* for petitioner in No. 491, Misc. *Solicitor General Rankin, Acting Assistant Attorney General*

Bicks, Richard A. Solomon and *Ernest L. Folk III* for the United States in No. 143, Misc. Reported below: No. 491, Misc., 269 F. 2d 203.

Certiorari Granted.

No. 538. UNITED STEELWORKERS OF AMERICA *v.* ENTERPRISE WHEEL & CAR CORP. C. A. 4th Cir. Certiorari granted. *Arthur J. Goldberg* and *David E. Feller* for petitioner. *Jackson N. Huddleston* for respondent. Reported below: 269 F. 2d 327.

No. 539. MEYER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Alfred M. Saperston* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 275 F. 2d 83.

Certiorari Denied. (*See also No. 252, Misc., ante, p. 233.*)

No. 446. E. INGRAHAM CO. *v.* BOARD OF TAX REVIEW OF THE TOWN AND CITY OF BRISTOL. Supreme Court of Errors of Connecticut. Certiorari denied. *Charles E. Pledger, Jr.* and *Justin L. Edgerton* for petitioner. *Edward C. Krawiecki* for respondent. Reported below: 146 Conn. 403, 151 A. 2d 700.

No. 482. KORHOLZ ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Philip B. Perlman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 269 F. 2d 897.

No. 517. QUALITY COAL CORP. *v.* LEWIS ET AL., TRUSTEES. C. A. 7th Cir. Certiorari denied. *John R. Jett* and *N. George Nasser* for petitioner. *Val J. Mitch, Harold H. Bacon* and *M. E. Boiarsky* for respondents. Reported below: 270 F. 2d 140.

No. 511. STEWART *v.* THOMAS ET AL. Supreme Court of Florida. Certiorari denied. *O. K. Reaves* and *Joseph A. McClain, Jr.* for petitioner. Reported below: —— So. 2d ——.

No. 521. CASELLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Stanford Shmukler* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 270 F. 2d 503.

No. 545. AIRCOACH TRANSPORT ASSOCIATION, INC., ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILROAD CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David I. Shapiro* and *Gerhard P. Van Arkel* for petitioners. *Stephen Ailes, Hugh B. Cox, Douglas F. Smith* and *Edward K. Wheeler* for respondents. Reported below: 102 U. S. App. D. C. 355, 253 F. 2d 877; —— U. S. App. D. C. ——, —— F. 2d ——.

No. 547. SMITH ET AL. *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Cecil D. Branstetter, William A. Reynolds* and *G. Edward Friar* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 327 S. W. 2d 308.

No. 561. KASPER *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *J. Benjamin Simmons* and *Herbert S. Ward* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 326 S. W. 2d 664.

No. 514. ROTH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* and *Bernard J. Mellman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 270 F. 2d 655.

No. 515. BERSON ET AL. *v.* KAUFMAN ET AL. C. A. 7th Cir. Certiorari denied. *Horace A. Young* for petitioners. *Leslie Hodson, William B. McIlvaine, Clarence E. Fox, Harold A. Smith, Charles R. Aiken, Richard F. Watt* and *A. Bradley Eben* for respondents. Reported below: 267 F. 2d 337.

No. 518. POSNER ET AL., EXECUTORS, *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 269 F. 2d 742.

No. 519. RITTENBERG ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert Weinstein* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for the United States. Reported below: 267 F. 2d 605.

No. 530. BLUE MOUNTAIN CONSTRUCTION CO. *v.* WERNER ET AL. C. A. 9th Cir. Certiorari denied. *Richard S. Munter* for petitioner. *Maurice E. Tarshis* for respondents. Reported below: 270 F. 2d 305.

No. 531. PEORIA HOUSING AUTHORITY *v.* SECURITY INSURANCE CO. ET AL. C. A. 7th Cir. Certiorari denied. *James T. McNelis* for petitioner. *John E. Cassidy, Sr.* for respondents. Reported below: 269 F. 2d 159.

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No. 520. Holland Furnace Co. *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari denied. *Stuart S. Ball* and *Robert H. Trenkamp* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Henry Geller, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. Reported below: 269 F. 2d 203.

No. 522. Senco Products, Inc., *v.* Fastener Corporation et al. C. A. 7th Cir. Certiorari denied. *John W. Melville* and *William J. Stellman* for petitioner. *M. Hudson Rathburn* and *Walther E. Wyss* for respondents. Reported below: 269 F. 2d 33.

No. 524. Panichella *v.* Pennsylvania Railroad Co. et al. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *John David Rhodes, Robert L. Randall* and *Roberts B. Owen* for the Pennsylvania Railroad Co., respondent. Reported below: 268 F. 2d 72.

No. 525. Springer et al. *v.* Allstate Insurance Co. C. A. 6th Cir. Certiorari denied. *Fred Roland Allaben* for petitioners. *Alexis J. Rogoski* for respondent. Reported below: 269 F. 2d 805.

No. 529. Security Insurance Co. et al. *v.* Edlin et al. C. A. 7th Cir. Certiorari denied. *Donald N. Clausen, Herbert W. Hirsh* and *John P. Gorman* for petitioners. *John E. Cassidy, Sr.* for respondents. Reported below: 269 F. 2d 159.

No. 536. Greenberg *v.* American Surety Company of New York. Supreme Court of New York, New York County. Certiorari denied. *Emanuel Harris* for petitioner. *Leo T. Kissam* and *Howard C. Wood* for respondent. Reported below: 8 App. Div. 2d 600, 185 N. Y. S. 2d 221.

No. 543. Philadelphia Saving Fund Society *v.* United States. C. A. 3d Cir. Certiorari denied. *Charles J. Biddle, Frederick E. S. Morrison* and *Calvin H. Rankin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *Helen A. Buckley* for the United States. Reported below: 269 F. 2d 853.

No. 548. Holder et al. *v.* United States. C. A. 8th Cir. Certiorari denied. *Edgar Musgrave* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 271 F. 2d 214.

No. 551. Laycock *v.* Kenney. C. A. 9th Cir. Certiorari denied. *Paul Bakewell, Jr.* and *Norman L. Easley* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 270 F. 2d 580.

No. 553. La Gloria Oil & Gas Co. et al. *v.* Scofield, Formerly Collector of Internal Revenue. C. A. 5th Cir. Certiorari denied. *Binford Arney* and *Clyde L. Wilson, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney* for respondent. Reported below: 268 F. 2d 699.

No. 558. Vance *v.* American Society of Composers, Authors and Publishers et al. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Maurice J. O'Sullivan* and *Thomas M. Sullivan* for respondents. Reported below: 271 F. 2d 204.

No. 560. Pyramid Life Insurance Co. *v.* Curry. C. A. 8th Cir. Certiorari denied. *Terence M. O'Brien* for petitioner. *Keith Martin* for respondent. Reported below: 271 F. 2d 1.

No. 562. DICKSON, WARDEN, *v.* CARMEN. C. A. 9th Cir. Certiorari denied. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for petitioner. *Mason A. Bailey* for respondent. Reported below: 270 F. 2d 809.

No. 577. SHAVIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* and *Anna R. Lavin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 566. SKIBS A/S JOLUND *v.* AMERICAN SMELTING & REFINING CO. ET AL.; and

No. 567. BLACK DIAMOND STEAMSHIP CORP. *v.* AMERICAN SMELTING & REFINING CO. ET AL. The motions of Koninklijke Nederlandsche Reedersvereeniging (Royal Netherlands Shipowners' Association) et al. and the Britannia Steam Ship Insurance Association, Ltd., et al., for leave to file briefs, as *amici curiae,* are granted. The motions of the American Merchant Marine Institute, Inc., and Norges Rederforbund (the Norwegian Shipowners' Association) for leave to file briefs, as *amici curiae,* are granted. Petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit denied. *Warner Pyne* and *Dudley C. Smith* for petitioner in No. 566. *Daniel L. Stonebridge* and *John C. Crawley* for petitioner in No. 567. *Henry N. Longley* and *John W. R. Zisgen* for respondents. *Charles S. Haight* and *Charles S. Haight, Jr.* for Koninklijke Nederlandsche Reedersvereeniging et al.; *L. de Grove Potter* and *James J. Higgins* for the Britannia Steam Ship Insurance Association, Ltd., et al.; *Walter E. Maloney* for the American Merchant Marine Institute, Inc.; and *Eugene Underwood, Harold M. Kennedy* and *Hervey C. Allen* for Norges Rederforbund. Reported below: 269 F. 2d 68, 273 F. 2d 61.

No. 460. DYE *v.* MICHIGAN. The motion for leave to file supplement to petition for certiorari is granted. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Andrew J. Transue* for petitioner. Reported below: 356 Mich. 271, 96 N. W. 2d 788.

No. 18, Misc. HECTOR *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondents.

No. 70, Misc. KLING *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se.* *Frank D. O'Connor, Benj. J. Jacobson* and *Morton Greenspan* for respondent.

No. 121, Misc. BRYANT *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Paul L. Adams,* Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondent.

No. 175, Misc. CARSON *v.* SMYTH, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se.* *A. S. Harrison, Jr.,* Attorney General of Virginia, and *Thomas M. Miller,* Assistant Attorney General, for respondent.

No. 222, Misc. EVANS *v.* LEEDOM ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph L. Rauh, Jr.* and *John Silard* for petitioner. *Solicitor General Rankin* and *Acting Assistant Attorney General Yeagley* for respondents. Reported below: 105 U. S. App. D. C. 141, 265 F. 2d 125.

No. 110, Misc. ALLEN *v.* LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS ET AL. Supreme Court of California. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. Reported below: 51 Cal. 2d 805, 337 P. 2d 457.

No. 295, Misc. KLETTER *v.* HERTER, SECRETARY OF STATE. 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 respondent. Reported below: 106 U. S. App. D. C. 6, 268 F. 2d 582.

No. 313, Misc. BOMAR *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: 106 U. S. App. D. C. 136, 270 F. 2d 329.

No. 332, Misc. FULLER *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. *G. Ernest Jones, Jr.* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *Bernard F. Sykes,* Assistant Attorney General, for respondent. Reported below: 269 Ala. 312, 113 So. 2d 153.

No. 14, Misc. BROWN *v.* INDIANA. Petition for writ of certiorari to the Supreme Court of Indiana denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court. Petitioner *pro se*. *Edwin K. Steers,* Attorney General of Indiana, for respondent. Reported below: —— Ind. ——, 154 N. E. 2d 720.

No. 217, Misc. GOODLOW *v.* BUCHKOE, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 239, Misc. BURT *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondents.

No. 253, Misc. AGNELLO *v.* LOHMAN, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied.

No. 279, Misc. CHAPMAN *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 169 Ohio St. 359, 159 N. E. 2d 453.

No. 286, Misc. NIEDZIALKOWSKI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Paul L. Adams,* Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondent.

No. 298, Misc. GLASS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 16 Ill. 2d 595, 158 N. E. 2d 639.

No. 301, Misc. BURMAN *v.* FLORIDA ET AL. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondents.

No. 302, Misc. LYONS *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *John T. Corrigan* for respondent.

No. 322, Misc. SCOTT *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 323, Misc. BLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 269 F. 2d 38.

No. 327, Misc. BROWN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 333, Misc. SPADER *v.* MYERS, SUPERINTENDENT OF STATE PENITENTIARY. Supreme Court of Pennsylvania. Certiorari denied.

No. 341, Misc. HARRIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 351, Misc. BARTLETT *v.* WEIMER. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Robert B. Gosline* for respondent. Reported below: 268 F. 2d 860.

No. 358, Misc. DER HAGOPIAN *v.* ESKANDARIAN ET AL. Supreme Court of Pennsylvania. Certiorari denied. *Paul W. Knox* for petitioner. Reported below: 396 Pa. 401, 153 A. 2d 897.

No. 369, Misc. NEAL *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 374, Misc. KEESLER *v.* MARONEY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 386, Misc. MCCANTS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 380, Misc. LEE *v.* HAND, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied.

No. 390, Misc. CARPENTER *v.* KLINGER ET AL. Supreme Court of California. Certiorari denied.

No. 412, Misc. COOPER *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 421, Misc. WILSON *v.* FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 427, Misc. BLAIR, ALIAS BROWN, *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 344 P. 2d 282.

No. 442, Misc. BAILEY *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 *Kirby W. Patterson* for the United States.

No. 443, Misc. UNITED STATES EX REL. CALDWELL *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 444, Misc. CARAKER *v.* COCHRAN, DIRECTOR, DIVISION OF CORRECTIONS. Supreme Court of Florida. Certiorari denied.

No. 452, Misc. GROVE *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 454, Misc. WEST *v.* VIRGINIA ET AL. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 456, Misc. KENYON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 467, Misc. CRAWFORD *v.* BUCHKOE, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 478, Misc. ADAM *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.

No. 482, Misc. WILSON *v.* COCHRAN, DIRECTOR, DIVISION OF CORRECTIONS. Supreme Court of Florida. Certiorari denied.

No. 493, Misc. STAPLES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 349, Misc. CARTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 267 F. 2d 492.

Rehearing Denied.

No. 266. CENTRAL STATES DRIVERS COUNCIL ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 833. Motion for leave to file petition for rehearing denied.

No. 426. MORRISON *v.* CALIFORNIA, *ante*, p. 900. Motion for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 110. FIRESTONE TIRE & RUBBER CO. *v.* BOARD OF SUPERVISORS OF LOS ANGELES COUNTY ET AL., *ante*, p. 9;

No. 237. GIOVANNETTI, ADMINISTRATRIX, *v.* GEORGETOWN UNIVERSITY HOSPITAL ET AL., *ante*, p. 831;

No. 365. GUTHRIE *v.* SINCLAIR REFINING CO., *ante*, p. 883;

No. 434. LEGGETT *v.* UNITED STATES, *ante*, p. 901;

No. 453. WALKER *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION ET AL., *ante*, p. 903; and

No. 507. MACK ET AL. *v.* UNITED STATES, *ante*, p. 916. Petitions for rehearing denied.

No. 803, October Term, 1958. IN RE SARNER, 359 U. S. 533. Motion for leave to file second petition for rehearing and for other relief denied.

No. 50, Misc. CURTIS *v.* UNITED STATES, *ante*, p. 843; and

No. 137, Misc. FOX *v.* UNITED STATES, *ante*, p. 887. Petitions for rehearing denied.

No. 448, Misc. CHESSMAN *v.* CALIFORNIA, *ante*, p. 925. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

JANUARY 15, 1960.

Dismissal Under Rule 60.

No. 441. HENDRICKS, ADMINISTRATRIX, *v.* SOUTHERN PACIFIC CO. Certiorari, 361 U. S. 899, to the Supreme Court of Arizona. Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Alfred C. Marquez* for petitioner. *Harold C. Warnock* for respondent. Reported below: 85 Ariz. 373, 339 P. 2d 731.

JANUARY 18, 1960.

Miscellaneous Orders.

No. 30. OHIO EX REL. EATON *v.* PRICE, CHIEF OF POLICE. Appeal from the Supreme Court of Ohio. The motion of J. Harvey Crow for leave to present oral argument is denied. MR. JUSTICE STEWART took no part in the consideration or decision of this motion. Reported below: 168 Ohio St. 123, 151 N. E. 2d 523.

No. 165. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. Certiorari, 361 U. S. 810, to the United States Court of Appeals for the Fifth Circuit. The motion to strike Items 1 and 2 of the cross-designation and amended cross-designation of parts of the record to be printed is granted. The motion to strike other portions of the cross-designation and amended cross-designation is denied without prejudice to such further order of the Court as to the taxation of costs as it may deem proper if it appears that the respondents have caused unnecessary parts of the record to be printed. Rule 36, Par. 7. *J. Hart Willis, Wayland K. Sullivan, Harold C. Heiss, Clarence E. Weisell* and *V. C. Shuttleworth* for petitioners-movants. Reported below: 266 F. 2d 335.

No. 594, Misc. NIBLETT *v.* STEINER, WARDEN; and
No. 595, Misc. BANKS *v.* STEINER, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 573, Misc. GOLDBERG *v.* MCNEILL, SUPERINTENDENT OF MATTEAWAN STATE HOSPITAL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Certiorari Denied. (*See also No. 573, Misc., supra.*)

No. 542. MARSHALL ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL. C. A. 5th Cir. Certiorari denied. *Joseph L. Rauh, Jr.* and *John Silard* for petitioners. *Benning M. Grice, Russell B. Day* and *Harold C. Heiss* for the Brotherhood of Locomotive Firemen and Enginemen, respondent. Reported below: 268 F. 2d 445.

No. 559. NATIONAL LABOR RELATIONS BOARD *v.* PITTSBURGH PLATE GLASS CO. ET AL. C. A. 4th Cir. Certiorari denied. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Milton C. Denbo, Leland Hazard* and *Joseph T. Owens* for Pittsburgh Plate Glass Co., and *Samuel L. Rothbard* and *Abraham L. Friedman* for United Glass & Ceramic Workers of North America, respondents. Reported below: 270 F. 2d 167.

No. 578. MANNINA *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *Arthur L. Johnson* for petitioner. *Everett A. Corten* for the Industrial Accident Commission of California, respondent.

No. 496, Misc. JOHNSON *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Reported below: 140 Colo. 256, 344 P. 2d 181.

No. 635, Misc. MERKOURIS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *George T. Davis* for petitioner. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Norman H. Sokolow,* Deputy Attorney General, for respondent. Reported below: 52 Cal. 2d 672, 344 P. 2d 1.

No. 570. DAQUINO ET AL. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Sam Weiss* for petitioners. Reported below: 30 N. J. 603, 154 A. 2d 675.

No. 284, Misc. GOULD *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 309, Misc. SHERWOOD *v.* JACKSON COUNTY CIRCUIT COURT. Supreme Court of Oregon. Certiorari denied.

No. 325, Misc. SPAMPINATO ET UX. *v.* M. BREGER & CO. INC. ET AL. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *James V. Masone* for M. Breger & Co. Inc. et al., and *Charles H. Tenney* for the City of New York et al., respondents. Reported below: 270 F. 2d 46.

No. 359, Misc. GLANCY *v.* KLINGER, SUPERINTENDENT, CALIFORNIA MEN'S COLONY, ET AL. Supreme Court of California. Certiorari denied.

No. 477, Misc. MURRAY *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 499, Misc. WRIGHT *v.* RHAY, SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 500, Misc. KELLY *v.* RHAY, SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 506, Misc. WRIGHT *v.* RHAY, SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 561, Misc. SWANSON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 167, Misc. BAILEY *v.* HENSLEE, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied without prejudice to a further application for writ of habeas corpus in the appropriate United States District Court, on the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution. Petitioner *pro se*. *Bruce Bennett,* Attorney General of Arkansas, and *Thorp Thomas,* Assistant Attorney General, for respondent. Reported below: 264 F. 2d 744.

Rehearing Denied.

No. 12. MINNEAPOLIS & ST. LOUIS RAILWAY CO. *v.* UNITED STATES ET AL., *ante,* p. 173;

No. 27. SOUTH DAKOTA ET AL. *v.* UNITED STATES ET AL., *ante,* p. 173;

No. 28. MINNESOTA ET AL. *v.* UNITED STATES ET AL., *ante,* p. 173;

No. 461. ISELIN ET AL. *v.* MENG ET AL., *ante,* p. 913; and

No. 480. LOCAL 135, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD, *ante,* p. 914. Petitions for rehearing denied.

No. 707, Misc., October Term, 1958. ELLIS *v.* UNITED STATES, 359 U. S. 998. Motion for leave to file petition for rehearing denied.

JANUARY 21, 1960.

Certiorari Denied.

No. 673, Misc. MERKOURIS *v.* DICKSON, WARDEN, ET AL. Supreme Court of California. Certiorari denied. *George T. Davis* and *Michael D. Konomos* for petitioner.

JANUARY 25, 1960.

Miscellaneous Orders.

No. 25. HOFFMAN, U. S. DISTRICT JUDGE, *v.* BLASKI ET AL. Certiorari, 359 U. S. 904, to the United States Court of Appeals for the Seventh Circuit;

No. 26. SULLIVAN, CHIEF JUDGE, U. S. DISTRICT COURT, *v.* BEHIMER ET AL. Certiorari, 361 U. S. 809, to the United States Court of Appeals for the Seventh Circuit; and

No. 229. CONTINENTAL GRAIN CO. *v.* BARGE FBL–585 ET AL. Certiorari, 361 U. S. 811, to the United States Court of Appeals for the Fifth Circuit. The motion to postpone argument is granted. *Daniel V. O'Keeffe* on the motion.

No. 71. DE VEAU *v.* BRAISTED, DISTRICT ATTORNEY. Appeal from the Court of Appeals of New York. (Probable jurisdiction noted, *ante,* p. 806.) Consideration of the motion of appellee to dismiss the appeal as moot is postponed to the hearing of the case on the merits. *Thomas R. Sullivan* for appellee. *Thomas W. Gleason* for appellant. Reported below: 5 N. Y. 2d 236, 157 N. E. 2d 165.

No. 430, Misc. KOENIG *v.* POWELL, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 130. NIUKKANEN, ALIAS MACKIE, *v.* MCALEXANDER, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 361 U. S. 808, to the United States Court of Appeals for the Ninth Circuit. The motion of National Lawyers Guild for leave to file brief, as *amicus curiae,* is denied. *Osmond K. Fraenkel* and *Leonard B. Boudin* for movant. Reported below: 265 F. 2d 825.

Probable Jurisdiction Noted.

No. 541. SHELTON ET AL. *v.* MCKINLEY ET AL. Appeal from the United States District Court for the Eastern District of Arkansas. Probable jurisdiction noted. *J. R. Booker, Robert L. Carter, George Howard, Jr.* and *Frank D. Reeves* for appellants. Reported below: 174 F. Supp. 351.

Certiorari Granted. (*See No. 307, Misc., ante, p. 375.*)

Certiorari Denied. (*See also No. 544; ante, p. 374.*)

No. 569. RUSKIN, TRUSTEE UNDER COLLATERAL AGREEMENT, *v.* GRIFFITHS, TRUSTEE IN REORGANIZATION OF GENERAL STORES CORP.; and

No. 592. GRIFFITHS, TRUSTEE IN REORGANIZATION OF GENERAL STORES CORP., *v.* RUSKIN, TRUSTEE UNDER COLLATERAL AGREEMENT. Petitions for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Harry H. Ruskin* and *Joseph Rosenbaum* for Ruskin, Trustee. *Arthur F. Gaynor* for Griffiths, Trustee. *Solicitor General Rankin, Thomas G. Meeker* and *David Ferber* filed a brief in No. 569 for the Securities and Exchange Commission in opposition. Reported below: 269 F. 2d 827.

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No. 575. First National City Bank of New York *v.* Internal Revenue Service. C. A. 2d Cir. Certiorari denied. *John A. Wilson, MacIlburne Van Voorhies* and *Michael J. DeSantis* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for respondent. *Donald MacKinnon* filed a brief for the Chase Manhattan Bank, as *amicus curiae,* in support of the petition. Reported below: 271 F. 2d 616.

No. 576. Tanner *v.* Ervin, Executor. Supreme Court of North Carolina. Certiorari denied. *Henry H. Edens* for petitioner. Reported below: 250 N. C. 602, 109 S. E. 2d 460.

No. 584. Short *v.* United States. C. A. 9th Cir. Certiorari denied. *George B. Grigsby* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 271 F. 2d 73.

No. 598. Pacific Mutual Life Insurance Co. *v.* Dixon. C. A. 2d Cir. Certiorari denied. *Henry I. Fillman* and *Otto C. Sommerich* for petitioner. *Samuel W. Sherman* for respondent. Reported below: 268 F. 2d 812.

No. 618. International Basic Economy Corp. *v.* Blanco-Lugo. C. A. 1st Cir. Certiorari denied. *John T. Noonan* for petitioner. *Felix Ochoteco, Jr.* for respondent. Reported below: 271 F. 2d 437.

No. 224, Misc. Hatcher *v.* Culver, State Prison Custodian. Supreme Court of Florida. Certiorari denied. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *Leonard R. Mellon,* Assistant Attorney General, for respondent.

No. 580. DONNELLY *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Horace J. Donnelly, Jr.* and *Warren W. Grimes* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for respondents. Reported below: 106 U. S. App. D. C. 99, 269 F. 2d 546.

No. 595. GREAT NORTHERN RAILWAY CO. *v.* BRACY. Supreme Court of Montana. Certiorari denied. *T. B. Weir* and *Edwin S. Booth* for petitioner. *George R. Maury* for respondent. Reported below: —— Mont. ——, 343 P. 2d 848.

No. 244, Misc. WEST *v.* CLEMMER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for respondents.

No. 340, Misc. SPENCER *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Reported below: 170 Cal. App. 2d 145, 338 P. 2d 484.

No. 277, Misc. MENNELLI *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. Petitioner *pro se. Mac Q. Williamson,* Attorney General of Oklahoma, and *Sam H. Lattimore,* Assistant Attorney General, for respondent. Reported below : 341 P. 2d 921.

No. 419, Misc. VAN HORN *v.* HOME OF THE AGED AND ORPHANS OF THE BALTIMORE CONFERENCE, METHODIST CHURCH, SOUTH, INC., ET AL. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 591. LaVallee, Warden, et al. *v.* Corbo. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Irving Anolik* and *Walter E. Dillon* for petitioners. *M. Bernard Aidinoff* for respondent. Reported below: 270 F. 2d 513.

No. 308, Misc. Cannon *v.* Gladden, Warden. Supreme Court of Oregon. Certiorari denied. Petitioner *pro se*. *Robert Y. Thornton,* Attorney General of Oregon, and *Robert G. Danielson,* Assistant Attorney General, for respondent.

Rehearing Denied.

No. 9. Smith *v.* California, *ante,* p. 147; and

No. 383. Cunningham *v.* English et al., *ante,* pp. 897, 905. Petitions for rehearing denied.

January 26, 1960.

No. —. United States *v.* Thomas, Registrar of Voters of Washington Parish, Louisiana, et al. On application to vacate order of the Court of Appeals granting stay of injunction pending appeal and to reinstate injunction issued by the District Court. *Per Curiam:* The application of the United States for an order vacating the stay order of the Court of Appeals entered January 21, 1960, and reinstating the decree of the District Court, together with the request of the Attorney General of Louisiana for argument thereon, has been considered by the Court.

1. It appears, as respondents pointed out in their application to the Court of Appeals for the stay herein, that the issues in No. 64, *United States* v. *Raines,* now pending on appeal in this Court, are pertinent to the disposition of this case. In view of this, and of the fact

that the issues raised by this application are closely related to those involved on the merits of the controversy now before the Court of Appeals, the Court believes that the entire matter should be considered at one time. In light of the foregoing, and of the imminence of the State general election scheduled for April 19, 1960, the Court will entertain a petition for certiorari to review the judgment of the District Court, 28 U. S. C. §§ 1254 (1), 2101 (e), if filed by the Solicitor General on or before January 29, 1960. The petition may be filed in typewritten form. See the action of the Court as to *Bolling* v. *Sharpe,* 344 U. S., at 3.

2. In the event that such a petition is so filed, the Court will hear argument upon the present application, the petition, and the merits, on February 23, 1960, the case to be set at the head of the calendar for that day. See No. 549, *Hannah* v. *Larche,* and No. 550, *Hannah* v. *Slawson,* 361 U. S. 910, December 7, 1959.

3. The record, which may be filed in typewritten form, and the Government's brief on all matters will be filed on or before February 10, 1960, and the answering briefs of the respondents will be filed on or before February 20, 1960. The Government may file a reply brief on or before February 22, 1960.

Solicitor General Rankin for the United States. *Jack P. F. Gremillion,* Attorney General of Louisiana, for respondents. Reported below: 180 F. Supp. 10.

FEBRUARY 5, 1960.

Miscellaneous Orders.

No. 537. COMMUNIST PARTY OF THE UNITED STATES *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. Motion for leave to use as part of the record the printed record heretofore filed with this Court in No. 48, October Term, 1955,

granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. *John J. Abt* and *Joseph Forer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley, Kevin T. Maroney, George B. Searls* and *Frank R. Hunter, Jr.* for respondent. Reported below: 107 U. S. App. D. C. —, 277 F. 2d 78.

No. 8. SCALES *v.* UNITED STATES. Certiorari, 358 U. S. 917, to the United States Court of Appeals for the Fourth Circuit, reported below, 260 F. 2d 21; and

No. 464. NOTO *v.* UNITED STATES. Certiorari, 361 U. S. 813, to the United States Court of Appeals for the Second Circuit, reported below, 262 F. 2d 501.

Telford Taylor and *McNeill Smith* for petitioner in No. 8. *John J. Abt* for petitioner in No. 464.

Solicitor General Rankin, Assistant Attorney General Yeagley and *Kevin T. Maroney* for the United States. *John F. Davis* also for the United States in No. 8.

These two cases were set for argument on February 23 next. In the meantime there intervened the filing of the petition in No. 537, which we have just granted. Nos. 8 and 464 arose under the Smith Act (Act of June 25, 1948, c. 645, § 2385, 62 Stat. 808) and No. 537 under Title I of the Internal Security Act of 1950 (Act of September 23, 1950, c. 1024, 64 Stat. 987). However, some of the constitutional and statutory issues raised by these two enactments are clearly interrelated and their determination in the two former cases may affect their determination in the latter case and *vice versa*. Accordingly, the Court deems it important that these three cases be heard and considered together. Since the Court's calendar for the remainder of the Term precludes this, Nos. 8 and 464 are reset for argument on Monday, October 10, 1960, to be followed immediately by the argument in No. 537.

MR. JUSTICE CLARK, dissenting.

This order, coming as it does in mid-Term with five months of sessions yet remaining, is without precedent. It delays for another year decisions on two important Acts of the Congress—the Smith Act and the Internal Security Act of 1950.

Scales' case has already been on our active docket for five successive Terms and has twice been fully argued. Petition for certiorari was first granted during the October Term 1955, 350 U. S. 992, and the first oral argument was on October 10, 1956 (October Term 1956). The case was held under advisement until June 3, 1957, when it was put over to the October Term 1957 for reargument. At that time, on motion of the Solicitor General, it was remanded on a subsidiary issue in the light of our opinion in *Jencks* v. *United States,* 353 U. S. 657, decided in the interim. 355 U. S. 1. On retrial, Scales was convicted again and the Court of Appeals affirmed, 260 F. 2d 21. We granted certiorari again on December 15, 1958, in our October Term 1958. 358 U. S. 917. It was argued the second time in 1959, and in June, over my objection, 360 U. S. 925, was reset for the October Term 1959. It was then set for November 19, but was put over to February 23, 1960, when certiorari was granted in *Noto,* 361 U. S. 813. The argument in the October Term 1960 will be the third argument. I have found no appellate case in the history of the Court that has been carried on the active docket so many consecutive Terms or argued so often. Ten hours' argument time here will have been given to it alone. *Noto* admittedly involves the same issue as *Scales.* It has already been here two successive Terms and this order will make the third, placing it next to the unprecedented position occupied by *Scales.*

Likewise the *Communist Party* case, No. 537, has been argued here on the merits once before.[1] This case seeks

[1] *Communist Party* v. *Control Board,* 351 U. S. 115 (1956).

registration of the Communist Party under the Internal Security Act which was passed by the Congress in 1950. Four years ago this Court had full argument on it and remanded it to the Board for reconsideration of its factual determinations. I dissented from this action. 351 U. S., at 125.

Nor do the briefs in these cases raise any overlapping *constitutional* issues. As I read them, the only interrelation would be the effect on the Smith Act of § 4 (f) of the Internal Security Act.[2] Although Noto and the Communist Party have the same counsel, he has not pointed out any such overlapping or interrelation whatever, nor indicated in any way that the arguments should be set together. No such request has been made. In fact, by motion he has asked that the printed record used here on the previous argument in the *Communist Party* case be used again, as supplemented by the certified record made on remand. We have granted the petition for certiorari as well as this motion. This paves the way for argument in the case this Term. Available time could be had in late March to hear all three cases by merely switching other cases to the six-hour argument period of *Scales* and *Noto* now set for February 23. I think that this would be entirely appropriate. It would give the Communist Party some 60 days in which to prepare its briefs. This is ample time, since the issues in its case are the same as when the case was here before, the record for the most part is identical, and the lawyers who argued it then are handling the case again. Although in regular course the *Communist Party* case would not be reached until next Term, there is ample precedent for advancing the same and setting it in March. Likewise, if the argu-

[2] Sec. 4 (f). "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. . . ."

ment in the *Scales, Noto,* and *Communist Party* cases were set in March it would leave three months before our adjournment in which to prepare the opinions. This appears to me more than ample, since the cases have been argued and considered here before.

But whether the *Communist Party* case is advanced or not, I think we should hear *Scales* and *Noto* this Term. Noto has the same counsel in his case as does the Communist Party in its, and in the argument of *Noto* counsel will certainly cover in detail his position on § 4 (f). Six hours are assigned to these cases this month. If the Party's position conflicts with *Scales* and *Noto,* he could present both positions, just as he would do next October in any event. In fact, as I have said, the interpretation of § 4 (f) is a subsidiary point in the *Communist Party* case, being covered in its brief by only three paragraphs, while it may be decisive in the *Scales* and *Noto* cases. Any overlap would not reach the constitutionality of either the Smith Act or the Internal Security Act.

For these reasons I dissent.

FEBRUARY 17, 1960.

Miscellaneous Order.

No. —. CHESSMAN *v.* DICKSON, WARDEN. The motion for leave to file a petition for writ of habeas corpus is denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Rosalie S. Asher* for petitioner.

FEBRUARY 23, 1960.

Miscellaneous Orders.

No. 639, Misc. CONNOLLY *v.* SETTLE, WARDEN; and

No. 664, Misc. HIAN *v.* SETTLE, WARDEN. Motions for leave to file petitions for writs of habeas corpus and for other relief denied.

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. Upon the suggestion of the defendants, the Metropolitan Sanitary District of Greater Chicago is substituted as a party defendant in these cases in the place of the Sanitary District of Chicago. *Grenville Beardsley,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, *Lawrence J. Fenlon, Peter G. Kuh, George A. Lane, Joseph B. Fleming, Joseph H. Pleck* and *Thomas M. Thomas* for defendants.

No. 2, Original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.;
No. 4, Original. NEW YORK *v.* ILLINOIS ET AL.; and
No. 12, Original. ILLINOIS *v.* MICHIGAN ET AL. The motion of the United States for leave to intervene is granted and the parties are allowed 45 days within which to file responses to such petition of intervention. *Solicitor General Rankin, Assistant Attorney General Morton, David R. Warner* and *Walter Kiechel, Jr.* for the United States. Consent of the State of Illinois and the Metropolitan Sanitary District of Greater Chicago to intervention by the United States was filed by *Grenville Beardsley,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, *Lawrence J. Fenlon, Peter G. Kuh, George A. Lane, Joseph B. Fleming, Joseph H. Pleck* and *Thomas M. Thomas.* Consent of the States of Wisconsin, Minnesota, Ohio, Pennsylvania, Michigan and New York to intervention by the United States was filed by *John W. Reynolds,* Attorney General of Wisconsin, and *Roy Tulane,* Assistant Attorney General; *Miles Lord,* Attorney General of Minnesota, and *Raymond A. Haik,* Special Assistant Attorney General; *Mark*

McElroy, Attorney General of Ohio, and *Jay Flowers,* Assistant Attorney General; *Anne X. Alpern,* Attorney General of Pennsylvania, and *Lois G. Forer,* Deputy Attorney General; *Paul L. Adams,* Attorney General of Michigan, *Samuel J. Torina,* Solicitor General, and *Nicholas V. Olds,* Assistant Attorney General; *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, *Richard H. Shepp,* Assistant Attorney General, and *Randall J. LeBoeuf, Jr.,* Special Assistant Attorney General; and *Herbert H. Naujoks,* Special Assistant to the Attorneys General.

No. 345, Misc. HARRIS *v.* NEW YORK ET AL.;

No. 526, Misc. CARPENTER *v.* COCHRAN, DIRECTOR, DIVISION OF CORRECTIONS;

No. 533, Misc. TAYLOR *v.* TAYLOR, WARDEN;

No. 548, Misc. IN RE HEATH ET AL.; and

No. 631, Misc. GRAY *v.* REID, SUPERINTENDENT, DISTRICT OF COLUMBIA JAIL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 644, Misc. THRASH *v.* SACKS, WARDEN; and

No. 649, Misc. COLLINS *v.* DICKSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 402, Misc. BARMORE *v.* MILES ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 514, Misc. TAYLOR *v.* GRUBB, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted.

No. 565. UNITED STATES *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. ET AL. Appeal from the Supreme Court of Kansas. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. *Harry L. Hobson* for appellees. Reported below: 185 Kan. 274, 341 P. 2d 1002.

Certiorari Granted. (*See also No. 111, Misc., ante, p. 537.*)

No. 409. BOYNTON *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari granted. *Martin A. Martin, Clarence W. Newsome, Thurgood Marshall, Constance Baker Motley* and *Jack Greenberg* for petitioner. *A. S. Harrison, Jr.,* Attorney General of Virginia, and *R. D. McIlwaine III,* Assistant Attorney General, for respondent.

No. 631. POLITES *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *Geo. W. Crockett, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 272 F. 2d 709.

No. 603. KNETSCH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *W. Lee McLane, Jr.* and *Nola M. McLane* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 272 F. 2d 200.

No. 605. UNITED STATES *v.* HOUGHAM ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. *W. E. James* for respondents. Reported below: 270 F. 2d 290.

No. 552, Misc. Rogers *v.* Richmond, Warden. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. Case transferred to the appellate docket. *Louis H. Pollak* for petitioner. *Abraham S. Ullman* and *Arthur T. Gorman* for respondent. Reported below: 271 F. 2d 364.

No. 255, Misc. McGrath et al. *v.* Rhay, Superintendent of Washington State Penitentiary. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Washington granted. Case transferred to the appellate docket. Petitioners *pro se*. *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent. Reported below: 54 Wash. 2d 508, 342 P. 2d 607.

No. 650, Misc. Irvin *v.* Dowd, Warden. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. Case transferred to the appellate docket. *James D. Lopp, Theodore Lockyear, Jr.* and *James D. Nafe* for petitioner. *Edwin K. Steers,* Attorney General of Indiana, and *Richard M. Givan,* Assistant Attorney General, for respondent. Reported below: 271 F. 2d 552.

Certiorari Denied. (See also No. 581, ante, p. 536; No. 594, ante, p. 537; No. 389, Misc., ante, p. 538; and Misc. Nos. 644 and 649, supra.)

No. 523. AB Electrolux *v.* National Gas Appliance Corp. C. A. 7th Cir. Certiorari denied. *Kenneth F. Burgess* and *Walter J. Cummings, Jr.* for petitioner. *John J. Kelly, Jr., George G. Kelly* and *Francis B. Stine* for respondent. Reported below: 270 F. 2d 472.

No. 457. CASTIEL *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO. Supreme Court of California. Certiorari denied. *Harry P. Glassman* for petitioner. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

No. 534. NATIONAL THEATRES CORP. *v.* BERTHA BUILDING CORP. C. A. 2d Cir. Certiorari denied. *Frederick W. R. Pride* and *John F. Caskey* for petitioner. *Boris Kostelanetz* and *Eugene Gressman* for respondent. Reported below: 269 F. 2d 785.

No. 572. GREGORY *v.* CAMPBELL, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin, Edward J. Calihan, Jr.* and *Maurice J. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: —— F. 2d ——.

No. 583. TOMLINSON FLEET CORP. *v.* HERBST. C. A. 6th Cir. Certiorari denied. *Lawrence C. Spieth* for petitioner. *J. Harold Traverse* for respondent. Reported below: 268 F. 2d 642.

No. 588. VALLESKEY ET AL. *v.* NELSON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Acting Assistant Attorney General Heffron, Robert N. Anderson* and *Carolyn R. Just* for respondent. Reported below: 271 F. 2d 6.

No. 596. STEWART, EXECUTOR, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George H. Koster* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Helen A. Buckley* for the United States. Reported below: 270 F. 2d 894.

No. 597. MONTALVO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry G. Singer* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 271 F. 2d 922.

No. 599. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Lucas T. Clarkston* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 271 F. 2d 434.

No. 600. HODGE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Clyde W. Atkinson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 271 F. 2d 52.

No. 601. HORTON & HORTON, INC., *v.* THE ROBERT E. HOPKINS ET AL. C. A. 5th Cir. Certiorari denied. *Robert Eikel* for petitioner. *Warner Pyne* and *Sweeney J. Doehring* for respondents. *Solicitor General Rankin* for the United States. Reported below: 269 F. 2d 914.

No. 602. HARMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Robert G. Doumar* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 272 F. 2d 478.

No. 606. RICHFIELD OIL CORP. *v.* KARSEAL CORPORATION. C. A. 9th Cir. Certiorari denied. *William W. Alsup, Warren M. Christopher* and *William J. De Martini* for petitioner. *Thomas G. Baggot* for respondent. Reported below: 271 F. 2d 709.

No. 604. MURRELL ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *Sam E. Murrell, Sam E. Murrell, Jr.* and *Robert G. Murrell* for petitioners. *Solicitor General Rankin* for the United States, *William D. Jones, Jr.* for Youngblood, and *Stephen R. Magyar* for Magyar et al., respondents. Reported below: 269 F. 2d 458.

No. 607. CURTIS, TRUSTEE IN BANKRUPTCY, *v.* BAKER ET AL., DOING BUSINESS AS BAKER, MCKENZIE & HIGHTOWER. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Joseph H. Hinshaw* and *Oswell G. Treadway* for respondents. Reported below: See 21 Ill. App. 2d 196, 157 N. E. 2d 773.

No. 608. MONTFORD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 272 F. 2d 395.

No. 610. DELEGAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ralph L. Crawford* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 271 F. 2d 279.

No. 611. MATTHIES *v.* SEYMOUR MANUFACTURING CO. ET AL. C. A. 2d Cir. Certiorari denied. *Dean Acheson* and *Stanley L. Temko* for petitioner. *James Wm. Moore, William H. Timbers, David Goldstein, Barry H. Garfinkel, John F. Spindler* and *John K. Holbrook* for respondents. Reported below: 270 F. 2d 365, 271 F. 2d 740.

No. 609. ILLINOIS EX REL. HACKLER *v.* LOHMAN, SHERIFF. Supreme Court of Illinois. Certiorari denied. *Henry H. Koven* for petitioner. Reported below: 17 Ill. 2d 78, 160 N. E. 2d 792.

No. 612. CLIFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 271 F. 2d 126.

No. 613. THE DEUTSCH COMPANY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Leon M. Cooper* for petitioner. *Solicitor General Rankin, Stuart Rothman, Thomas J. McDermott* and *Dominick L. Manoli* for respondent. Reported below: 265 F. 2d 473.

No. 614. STRICKER *v.* MORGAN ET AL. C. A. 5th Cir. Certiorari denied. *Gerard H. Brandon* and *Edwin Leland Richardson* for petitioner. *W. H. Talbot* for respondents. Reported below: 268 F. 2d 882.

No. 615. BRADFORD *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. Reported below: 272 F. 2d 396.

No. 624. VAUGHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ralph L. Crawford* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 270 F. 2d 953.

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No. 616. BRIDGES *v.* FORBES, DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. *Fred Crane* for petitioner. *John R. Connolly* for Alaska Housing Authority, intervenor. Reported below: 269 F. 2d 703.

No. 619. MASON & DIXON LINES, INC., *v.* GENERAL ELECTRIC CO. C. A. 4th Cir. Certiorari denied. *William B. Poff* for petitioner. *J. H. Doughty* for respondent. Reported below: 270 F. 2d 780, 272 F. 2d 624.

No. 623. TINNERMAN PRODUCTS, INC., *v.* PRESTOLE CORPORATION. C. A. 6th Cir. Certiorari denied. *Albert R. Teare* and *Jerome F. Kramer* for petitioner. *John A. Blair* for respondent. Reported below: 271 F. 2d 146.

No. 626. FIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *L. Donald Jaffin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 271 F. 2d 883.

No. 633. WRIGHT *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Melvin Edward Schaengold* for petitioner.

No. 634. BRASIER *v.* CITY OF TULSA, OKLAHOMA. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Charles E. Norman, Finis Smith* and *Darven L. Brown* for respondent. Reported below: 268 F. 2d 558.

No. 635. SLUSARZ *v.* CYGAN. Supreme Judicial Court of Massachusetts. Certiorari denied.

No. 636. BRAWNER *v.* BRAWNER. Supreme Court of Missouri. Certiorari denied. *Joseph Langworthy* for petitioner. *John S. Marsalek* for respondent. Reported below: 327 S. W. 2d 808.

No. 625. AERONAUTICAL RADIO, INC., ET AL. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Donald C. Beelar, Herbert J. Miller, Jr., Joseph DuCoeur* and *John E. Stephen* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, John L. Fitzgerald, Max D. Paglin* and *Ruth V. Reel* for the United States. Reported below: 106 U. S. App. D. C. 304, 272 F. 2d 533.

No. 627. MONDAY *v.* UNITED STATES. Court of Claims. Certiorari denied. *David M. Klinedinst* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: —— Ct. Cl. ——.

No. 629. SOCIETE COTONNIERE DU TONKIN *v.* UNITED STATES. Court of Claims. Certiorari denied. *William T. Griffin, Herbert Burstein* and *Richard J. Cronan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, 171 F. Supp. 951.

No. 630. IVES, FORMERLY ISENSTEIN, *v.* FRANKE, SECRETARY OF THE NAVY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles H. Mayer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *David L. Rose* for respondent. Reported below: 106 U. S. App. D. C. 203, 271 F. 2d 469.

No. 646. MOON ET AL. *v.* CABOT SHOPS, INC., ET AL. C. A. 9th Cir. Certiorari denied. *Philip Subkow* for petitioners. *Herbert W. Kenway* for respondents. Reported below: 270 F. 2d 539.

No. 638. DEL CASTILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jose del Castillo* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 272 F. 2d 326.

No. 639. HAGY *v.* NORFOLK & WESTERN RAILWAY CO. Supreme Court of Appeals of Virginia. Certiorari denied. *Israel Steingold* for petitioner. *Leonard G. Muse* for respondent. Reported below: 201 Va. 183, 110 S. E. 2d 177.

No. 643. LOUISIANA & ARKANSAS RAILWAY CO. *v.* MULLINS. Court of Civil Appeals of Texas, 6th Supreme Judicial District. Certiorari denied. *O. O. Touchstone, Jos. R. Brown* and *Grover Sellers* for petitioner. *Franklin Jones* for respondent. Reported below: 326 S. W. 2d 263.

No. 586. STEIER *v.* NEW YORK STATE EDUCATION COMMISSIONER ET AL. The motion for leave to proceed on a typewritten petition is granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Charles A. Brind* for the Commissioner of Education, and *Seymour B. Quel* for the New York City Board of Higher Education et al., respondents. Reported below: 271 F. 2d 13.

No. 587. WILLIAMS *v.* SAHLI, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Geo. W. Crockett, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for respondent. Reported below: 271 F. 2d 228.

No. 590. CLAPPER *v.* ORIGINAL TRACTOR CAB CO., INC., ET AL.; and

No. 617. ORIGINAL TRACTOR CAB CO., INC., ET AL. *v.* CLAPPER. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these applications. *Thomas E. Scofield* for Clapper. *J. Preston Swecker* and *William L. Mathis* for Original Tractor Cab Co., Inc., et al. Reported below: 270 F. 2d 616.

No. 80, Misc. BUCK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent. Reported below: 6 App. Div. 2d 528, 179 N. Y. S. 2d 1007.

No. 191, Misc. BATTICE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Ann Thacher Clarke* for petitioner. *Daniel V. Sullivan* and *Walter E. Dillon* for respondent. Reported below: 5 N. Y. 2d 946, 156 N. E. 2d 920, 6 N. Y. 2d 882, 160 N. E. 2d 129.

No. 238, Misc. MINNESOTA EX REL. REDENBAUGH, ALIAS HAMILTON, *v.* RIGG, WARDEN. Supreme Court of Minnesota. Certiorari denied. *Simon A. Weisman* for petitioner. *Miles Lord,* Attorney General of Minnesota, and *Charles E. Houston,* Solicitor General, for respondent. Reported below: 255 Minn. 281, 96 N. W. 2d 555.

No. 352, Misc. JACKSON *v.* CLEMMER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 414, Misc. CAREY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 171 Cal. App. 2d 531, 340 P. 2d 1048.

No. 289, Misc. In re Williams. Court of Criminal Appeals of Oklahoma. Certiorari denied. Petitioner *pro se*. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Sam H. Lattimore,* Assistant Attorney General, for respondent. Reported below: 341 P. 2d 652.

No. 347, Misc. King *v.* Carmichael et al. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Andrew J. Transue* for respondents. Reported below: 268 F. 2d 305.

No. 373, Misc. Cooper *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.

No. 383, Misc. Beltowski *v.* Minnesota. Supreme Court of Minnesota. Certiorari denied.

No. 392, Misc. Kirksey *v.* Clemmer et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for respondents.

No. 401, Misc. Daniel *v.* United States. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States.

No. 435, Misc. Nelson *v.* Warden, Maryland Penitentiary. Court of Appeals of Maryland. Certiorari denied.

No. 418, Misc. ADAME *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 420, Misc. KELLEY *v.* CLEMMER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for respondent.

No. 424, Misc. FREEZE *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Supreme Court of Appeals of Virginia. Certiorari denied. *William Alfred Hall, Jr.* for petitioner. *A. S. Harrison, Jr.*, Attorney General of Virginia, and *Thomas M. Miller*, Assistant Attorney General, for respondent.

No. 431, Misc. MCNUTT *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 440, Misc. POLLOCK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Nancy Carley* for petitioner.

No. 447, Misc. LINDEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Arlo E. Smith* and *Albert W. Harris, Jr.*, Deputy Attorneys General, for respondent.

No. 458, Misc. STEWART *v.* OHIO. Court of Appeals of Ohio, Cuyahoga County. Certiorari denied. Petitioner *pro se*. *Mark McElroy*, Attorney General of Ohio, and *Aubrey A. Wendt*, Assistant Attorney General, for respondent.

No. 511, Misc. PARSONS *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 462, Misc. JACKSON *v.* UNITED STATES CIVIL SERVICE COMMISSIONERS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *David L. Rose* for respondents.

No. 463, Misc. PENNSYLVANIA EX REL. BURGE *v.* MARONEY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 470, Misc. JOHN *v.* GIBSON, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 270 F. 2d 36.

No. 498, Misc. DARDEN *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 501, Misc. JOHNSON *v.* MARTIN, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 509, Misc. RAGAN *v.* MADIGAN, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Ryan, Harold H. Greene* and *David Rubin* for respondent.

No. 516, Misc. WHITE *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 544, Misc. RISH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 272 F. 2d 60.

No. 564, Misc. KESSLER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 473, Misc. BORGES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Albert J. Ahern, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 106 U. S. App. D. C. 139, 270 F. 2d 332.

No. 475, Misc. KOMINSKI *v.* DELAWARE. Supreme Court of Delaware. Certiorari denied. Petitioner *pro se*. *Clement C. Wood,* Chief Deputy Attorney General of Delaware, for respondent. Reported below: 51 Del. 163, 154 A. 2d 691.

No. 479, Misc. SMITH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 524, Misc. MISENHEIMER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Hyman Nussbaum* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 106 U. S. App. D. C. 220, 271 F. 2d 486.

No. 530, Misc. JUDY *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 220 Md. 670, 155 A. 2d 68.

No. 531, Misc. INGRAM *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied.

No. 534, Misc. STAVELY *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 538, Misc. FLORES *v.* ELLIS, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 560, Misc. GREEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 17 Ill. 2d 35, 160 N. E. 2d 814.

No. 566, Misc. BAYS *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 159 N. E. 2d 393.

No. 570, Misc. THOMPSON ET AL. *v.* COLORADO. Supreme Court of Colorado. Certiorari 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. Reported below: 139 Colo. 15, 336 P. 2d 93.

No. 585, Misc. PENNSYLVANIA EX REL. DANDY *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 397 Pa. 312, 155 A. 2d 197.

No. 627, Misc. CUOMO *v.* LAVALLEE, 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, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondent. Reported below: 9 App. Div. 2d 707, 191 N. Y. S. 2d 556.

No. 632, Misc. JORDAN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 221 Md. 134, 156 A. 2d 453.

No. 567, Misc. PERRONI *v.* ILLINOIS. Circuit Court of Logan County, Illinois. Certiorari denied.

No. 437, Misc. SCHIEBELHUT ET AL. *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit and other relief denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 480, Misc. TOMKALSKI *v.* MARTIN, WARDEN. Court of Appeals of New York. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

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No. 357. LARSEN *v.* IDAHO, *ante*, p. 882;

No. 547. SMITH ET AL. *v.* TENNESSEE, *ante*, p. 930;

No. 553. LAGLORIA OIL & GAS CO. ET AL. *v.* SCOFIELD, FORMERLY COLLECTOR OF INTERNAL REVENUE, *ante*, p. 933;

No. 562. DICKSON, WARDEN, *v.* CARMEN, *ante*, p. 934;

No. 577. SHAVIN *v.* UNITED STATES, *ante*, p. 934; and

No. 325, Misc. SPAMPINATO ET UX. *v.* M. BREGER & CO. INC. ET AL., *ante*, p. 944. Petitions for rehearing denied.

No. 440. AMERICAN SECURIT CO. *v.* SHATTERPROOF GLASS CORP., *ante*, p. 902. The motion of Smith, Bucklin and Associates, Inc., for leave to file brief, as *amicus curiae*, in support of petition for rehearing denied. Petition for rehearing denied.

No. 472. RAUCH ET AL. *v.* STOCKINGER ET AL., *ante*, p. 913. Motion for leave to file petition for rehearing denied.

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1. *Supreme Court—Motion of Solicitor General to vacate second federal conviction for same criminal conduct.*—In case where double jeopardy was sole question presented, based on separate convictions in two different federal district courts for the same criminal conduct, this Court granted Solicitor General's motion to vacate second conviction without passing on question of double jeopardy. Petite v. United States, p. 529.

2. *Supreme Court—Petition for certiorari—Application for stay—Reasons for denial.*—English v. Cunningham (memorandum of FRANKFURTER, J.), p. 905.

3. *Supreme Court — Further postponement of cases involving validity of Smith Act and Internal Security Act.*—Scales v. United States (opinion of CLARK, J.), p. 953.

4. *Supreme Court — Certiorari — Dismissal as improvidently granted.*—Mitchell v. Oregon Frozen Foods Co., p. 231.

5. *Courts of Appeals — Untimely notice of appeal — Excusable neglect.*—Under Federal Rules of Criminal Procedure, filing of notice of appeal after expiration of time prescribed in Rule 37 (a) (2) did not confer jurisdiction on Court of Appeals, even though District Court, proceeding under Rule 45 (b), found that late filing resulted from "excusable neglect." United States v. Robinson, p. 220.

PROCEDURE—Continued.

6. *Courts of Appeals—Reversal of criminal conviction—Change of judgment — New trial instead of acquittal.* — The fact that, after reversing conviction, Court of Appeals originally ordered judgment of acquittal did not deprive it of power under 28 U. S. C. § 2106 to amend that direction and order new trial. Forman v. United States, p. 416.

PUBLIC UTILITIES. See **Jurisdiction**, 1.

PUBLIC VESSELS ACT. See **Admiralty**, 3.

RAILROADS. See **Employers' Liability Act**, 1–3; **Interstate Commerce Commission**; **Transportation.**

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1. Mr. Justice Reed (retired) and Mr. Justice Burton (retired) designated to perform judicial duties on United States Court of Appeals for the District of Columbia Circuit, p. 801.

2. Mr. Justice Reed (retired) designated to perform judicial duties on Court of Claims, p. 891.

TAFT-HARTLEY ACT. See **Labor**, 3–4.

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1. *Income taxes—Failure to file declaration of estimated income tax—Consequences.*—Under Internal Revenue Code of 1939, failure of taxpayer to file declaration of estimated income tax subjects him to addition to tax prescribed by § 294 (d) (1) (A) but not also to additional tax prescribed by § 294 (d) (2) for filing a "substantial underestimate." Commissioner v. Acker, p. 87.

2. *Income tax — Deficiency — 90-day notice — Waiver.* — Under § 272 (a) (1) of Internal Revenue Code of 1939, failure of Commissioner to send taxpayer 90-day notice of deficiency did not bar action to collect such deficiency when taxpayer had filed waiver under § 272 (d). United States v. Price, p. 304.

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1. *"At any time."*—Internal Revenue Code of 1939, § 272 (d). United States v. Price, p. 304.

2. *"Bargain collectively."* — National Labor Relations Act, § 8 (b) (3). Labor Board v. Insurance Agents' Union, p. 477.

3. *"Case or controversy."*—Constitution, Art. III. Steelworkers v. United States, p. 39.

WORDS—Continued.

4. *"Excusable neglect."*—Rule 45 (b), Federal Rules of Criminal Procedure. United States v. Robinson, p. 220.

5. *"Good faith."*—National Labor Relations Act, § 8 (d). Labor Board v. Insurance Agents' Union, p. 477.

6. *"In the course of his employment."*—Jones Act. Braen v. Pfeifer Transportation Co., p. 129.

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8. *"Land and naval Forces."*—Constitution, Art. I, § 8, cl. 14. Kinsella v. Singleton, p. 234; Grisham v. Hagan, p. 278; McElroy v. Guagliardo, p. 281.

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